U.S. Fish & Wildlife Service

National Environmental Policy Act

Draft Reference Handbook

The U.S. Fish and Wildlife Service (Service) updated our draft National Environmental Policy Act (NEPA) Reference Handbook in 2018 to reflect recent NEPA streamlining directives, including Secretary's Order 3355 and the associated implementing memoranda from the Deputy Secretary. Although other aspects of the draft Handbook were not peer-reviewed or updated in 2018, the Handbook contains original source documents and as such remains an available resource for Service personnel.

Fish and Wildlife Service NEPA Reference Handbook

Table of Contents

INTRODUCTION

- **Purpose of Handbook**
- **Glossary**
- **Acronyms and Abbreviations**

RELATED LEGISLATIVE AUTHORITIES

- **National Environmental Policy Act of 1969, as amended**
- **Section 309 of the Clean Air Act of 1970, as amended**
- **Section 4(f) of the Department of Transportation Act of 1966, as amended**
- **Title 41 of the Fixing America's Surface Transportation Act**

RELATED EXECUTIVE ORDERS

- **Executive Order 12114, Environmental Effects Abroad of Major Federal Actions, January 4, 1979**
- **Executive Order 11988, Floodplain Management May 24, 1977**
- **Executive Order 11990, Protection of Wetlands, May 24, 1977**
- **Executive Order 12898, Environmental Justice, February 11, 1994**
- **Executive Order 13807 Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects**

CEQ NEPA REGULATIONS and GUIDANCE

- **Council on Environmental Quality's Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act (40 CFR 1500-1508, July 1986)**
- **Council on Environmental Quality's Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations (46 FR `18026, March 23, 1981)**
- **Council on Environmental Quality's Guidance Regarding NEPA Regulations (49 FR 34236, July 28, 1983)**
- **Council on Environmental Quality's Designation of non-Federal Agencies to be Cooperating Agencies in Implementing the procedural Requirements of the National Environmental Policy Act (40 CFR 1508.5, July 28, 1999)**
- **Council on Environmental Quality's Cooperating Agencies in Implementing the procedural requirements of the National Environmental Policy Act, January 30, 2002**
- **M-13-18 - One Federal Decision Framework for the Environmental Review and Authorization Process for Major Infrastructure Projects under Executive Order 13807 (March 20, 2018)**
- **Memorandum of Understanding Implementing One Federal Decision Under Executive Order 13807, signed April 9, 2018**

DEPARTMENT OF THE INTERIOR SECRETARIAL ORDERS, NEPA PROCEDURES AND GUIDANCE

- **Department of the Interior National Environmental Policy Act Procedures (43 CFR 46)**
- **Draft NEPA - Policy and Responsibilities (550 FW 1) and Compliance Guidance (550 FW 2)**
- **"Procedures for Approving and Filing Environmental Impact Statements," Department of the Interior, Environmental Statement Memorandum ESM98-2**
- **"EIS Filing Address Information for EPA," Department of the Interior, Environmental Statement Memorandum ESM00-2**
- **Handbook on Departmental review of Section 4(f) Evaluations, February 2002**
- **"Section 4(f) of the Department of the Transportation Act," Department of the Interior, Environmental Review Memorandum ERM94-4**
- **"Interventions in Proceedings of the Federal Energy Regulatory Commission (FERC)," Department of the Interior, Environmental Review Memorandum ERM99-2**
- **"Departmental Participation in Hydroelectric Power Licensing by the Federal Energy Regulatory Commission (FERC)," Department of the Interior, Environmental Review Memorandum ERM00-2**
- **Secretarial Order 3355 "Streamlining National Environmental Policy Act Reviews and Implementation of Executive Order 13807, "Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects"**
- **Additional Direction for Implementing Secretary's Order 3355, April 27, 2018**
- **NEPA Document Clearance Process, April 27, 2018**
- **Compiling Contemporaneous Decision Files, April 27, 2018**
- **ERM 10-09 Entering Information into the Department National Environmental Policy Act (NEPA) and Permit Tracking Database, April 30, 2018**
- **Standardized Intra-Department Procedures Replacing Individual Memoranda of Understanding for Bureaus Working as Cooperating Agencies, June 11, 2018**
- **Reporting Costs Associated with Developing Environmental Impact Statements, July 23, 2018**
- **Additional Direction for Implementing Secretary's Order 3355 Regarding Environmental Assessments, August 6, 2018**

FISH AND WILDLIFE SERVICE NEPA GUIDANCE

- **Service Memorandum from Deputy Director to the Service Directorate regarding "The Fish and Wildlife Service and the National Environmental Policy Act," April 6, 1993**
- **Documenting and Implementing Decisions, Fish and Wildlife Service Manual (550 FW 3)**
- **Service NEPA Procedures in Departmental manual (516 DM6, Appendix 1) published in the Federal Register Vol. 62, No. 11, January 16, 1997**
- **Interagency Coordination, Environmental Responsibilities, Fish and Wildlife Service Manual (505 FW 1-5)**
- **National Environmental Policy Act Compliance Checklist, Director's Order No. 127, and Amendment 1, September 28, 2001**
- **"Proposed" National Environmental Policy Act – Policy and Responsibilities (550 FW 1) and Compliance Guidance (550 FW 2)**
- **Service Memorandum from the Deputy Director to the Service Directorate regarding implementation of Executive Order 13807 and Secretarial Order 3355.**

OTHER REFERENCES CITED

The following references are cited for your information, but are not included in full text in the NEPA Reference Handbook. To obtain copies of these please contact the Washington Office Environmental Coordinator at 703/358-2183.

1. **CEQ. "Considering Cumulative Effects Under the National Environmental Policy Act," dated January 1997.**
2. **CEQ. "Memorandum to Heads of Agencies on the Application of the National Environmental Policy Act to Proposed Federal Actions in the United States with Transboundary Effects," dated July 1, 1997.**
3. **CEQ. "Incorporating Biodiversity Considerations into Environmental Impact Analysis Under the National Environmental Policy Act," dated January 1993.**
4. **Department of the Interior. Environmental Memoranda (selected)**

   - **ESM94-3 Number of Review Copies of Environmental Statements Required by Other Federal and Federal-State Agencies**
   - **ESM94-5 Environmental Impacts on Groundwater**
   - **ESM94-6 Nationwide Inventory of Potential Wild and Scenic Rivers**
   - **ESM94-7 Prime and Unique Agricultural Lands**
   - **ESM94-8 Time Periods for Review of a Draft EIS**
   - **ESM94-9 Federal and Federal-State Agency NEPA Contacts**
   - **ESM94-10 Federal and Federal-State Agencies with Jurisdiction by Law or Special Expertise on Environmental Quality Issues**
   - **ESM94-11 Federal and Federal-State Offices for Receiving and Commenting on Other Agencies - Environmental Documents**
   - **ESM94-13 U.S. Public Health Service**
   - **ESM94-14 Other Environmental Review and Consultation Requirements**
   - **ESM94-15 National Environmental Policy Act; Pollution Prevention**
   - **ESM94-16 Procedures for Review and Approval of Bureau NEPA Appendices (516 DM 6), Handbooks, Categorical Exclusions, and Other Procedures**
   - **ESM95-3 Filing Guidance for Environmental Impact Statements**
   - **ESM96-3 Quarterly Report of Environmental Impact Statements**
   - **ESM97-2 Application of NEPA to Proposed Federal Actions in the United States with Transboundary Effects**
   - **ESM97-3 NEPA Compliance in Emergency Situations**
   - **ESM98-3 Procedures for Intra-Departmental Review of National Environmental Policy Act Compliance Documents Prepared by Bureaus and Office**
   - **ESM99-2 Designation of Non-Federal Agencies to be Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act**
   - **ESM00-3 State and Local Agency Review of Environmental Statements**
   - **ESM00-4 Publication and Distribution of Department of the Interior National Environmental Policy Act (NEPA) Compliance Documents via Electronic Methods**
   - **ESM02-2 Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act**
   - **ERM94-2 Procedures for Reviewing Project and Environmental Reports Prepared by or for Non-Federal Agencies**
   - **ERM94-3 Interim Guidance on Referrals to CEQ of Proposed Federal Actions Found to be Environmentally Unsatisfactory**
   - **ERM94-7 Request for Copies of Non-Federal Review Documents**
   - **ERM99-2 Interventions in Proceedings of the Federal Energy Regulatory Commission (FERC)**
   - **ECM94-2 Compliance with Underground Storage Tank Requirements**
   - **ECM95-3 National Environmental Policy Act (NEPA) Responsibilities Under the Departmental Environmental Justice Policy**
   - **ECM97-2 Departmental Responsibilities for Indian Trust Resources and Indian Sacred Sites on Federal Lands**
   - **ECM98-2 CEQ Environmental Justice Guidance under the NEPA**

5. Department of the Interior. Memorandum from Associate Solicitor, Division of General Law to Distribution List, regarding "Federal Advisory Committee Act (FACA)", dated March 4, 1996.
6. Department of the Interior. Memorandum from Assistant Solicitor to Director, OEPC, regarding "Applicability of Section 4(f) of the Department of Transportation Act to the Bowden National Fish Hatchery," dated December 24, 1975.
7. Department of the Interior. Letter from the Secretary of the Interior to the Secretary, Department of Transportation, regarding applicability of Section 4(f) to Department of the Interior Lands and Interests, dated June 25, 1980.
8. Fish and Wildlife Service. Manual, Refuge Planning, 602 FW 1-3.
9. Fish and Wildlife Service. Manual, Federal Aid Manual, 521, 522, and 523 FW.
10. Fish and Wildlife Service. Habitat Conservation Planning Handbook, November 1996.
11. Fish and Wildlife Service. Memorandum from Deputy Director to Regional Directors, Regarding "Guidance Document - Federal Highway Administrations Consideration of Wetlands in the Planning of Federal Aid Highways," dated October 1, 1990.
12. Fish and Wildlife Service. Memorandum from Acting Director to Service Directorate, Regarding "Role of Ecological Services and the Office of Human Resources in Environmental Justice," dated December 17, 1996.
13. Fish and Wildlife Service. Interagency Agreement Between National Park Service, Fish and Wildlife Service, Bureau of Land Management, and the Federal Aviation Administration Regarding Low-Level Flying Aircraft Over Natural Resource Areas, dated January 15, 1993.
14. Fish and Wildlife Service. NEPA Handbook, NEPA Policy and Internal Service Compliance, (30 AM 2-3).
15. Fish and Wildlife Service. NEPA Guidance to States Participating in the Federal Aid Program
16. Fish and Wildlife Service. Memorandum from Acting Director to Regional Directors, Regarding "Partners for Fish and Wildlife Program and NEPA Compliance," dated November 21, 2002.
17. Fish and Wildlife Service. Agreement Between the U.S. Fish and Wildlife Service and the U.S. Army Corps of Engineers for Conducting Fish and Wildlife Coordination Act Activities, January 22, 2003.
18. Fish and Wildlife Service. Memorandum of Agreement Between the U.S. Fish and Wildlife Service and the U.S. Army Corps of Engineers, January 22, 2003.
19. Fish and Wildlife Service. Partnership Agreement for Water Resources and Fish and Wildlife. U.S. Fish and Wildlife Service and U.S. Army Corps of Engineers, January 22, 2003.

Purpose of the NEPA Reference Handbook

The purpose of the NEPA Reference Handbook, as authorized in 505 FW1.7 and 550 FW 1, is to provide Fish and Wildlife Service personnel with full texts of various NEPA authorities, selected NEPA-related authorities, and NEPA-related checklists. The Handbook includes documents cited in Service NEPA guidance and Departmental procedures and memoranda. The Handbook is an accompanying document to the Service NEPA guidelines.

NEPA GLOSSARY

Affected Environment - A description of the existing environment to be affected by the proposed action (40 CFR 1502.15).

Alternative - A reasonable way to fix the identified problem or satisfy the stated need (40 CFR 1502.4).

Categorical Exclusion (CX)-A category of actions that do not individually or cumulatively have a significant effect on the human environment and have been found to have no such effect in procedures adopted by a Federal agency pursuant to NEPA (40 CFR 1508.4).

Council on Environmental Quality (CEQ) - Established under Title II of NEPA to develop Federal agency-wide policy and regulations for implementing the procedural provisions of NEPA, resolve interagency disagreements concerning proposed major Federal actions, and to ensure that Federal agency programs and procedures are in compliance with NEPA.

Cumulative Effect - The incremental environmental impact or effect of the proposed action, together with impacts of past, present, and reasonably foreseeable future actions, regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative effects can result from individually minor but collectively significant actions taking place over a period of time (40 CFR 1508.7).

Environmental Consequences - Environmental effects of project alternatives, including the proposed action, any adverse environmental effects which cannot be avoided, the relationship between short-term uses of the human environment, and any irreversible or irretrievable commitments of resources which would be involved if the proposal should be implemented (40 CFR 1502.16).

Environmental Action Statement (EAS) - A Service-required document prepared to improve the Service's administrative record for categorically excluded actions that may be controversial, emergency actions under CEQ's NEPA regulations (40 CFR 1506.1 1), decisions based on EAs to prepare an EIS, and any decision where improved documentation of the administrative record is desirable, and to facilitate internal program review and final approval when a FONSI is to be signed at the FWS-WO and FWS-RO level (550 FW ')).

Environmental Impact Statement (EIS) - A detailed written statement required by section 102(2)(C) of NEPA, analyzing the environmental impacts of a proposed action, adverse effects of the project that cannot be avoided, alternative courses of action, short-term uses of the enviromnent versus the maintenance and enhancement of long-term productivity, and any irreversible and irretrievable commitment of resources (40 CFR 1508.1 1).

Environmental Assessment (EA) - A concise public document, prepared in compliance with NEPA, that briefly discusses the purpose and need for an action, alternatives to such action, and provides sufficient evidence and analysis of impacts to determine whether to prepare an environmental impact statement or finding of no significant impact (40 CFR 1508.9).

Finding of No Significant Impact (FONSI) - A document prepared in compliance with NEPA, supported by an environmental assessment, that analyzes whether a Federal action will have no significant effect on the human environment and for which an environmental impact statement, therefore, will not be prepared 40 CFR 1508.13).

Human Environment - Includes the natural and physical environment and the relationship of people with the environment (40 CFR 1508.14).

Impact (Effect) - A direct result of an action which occurs at the same time and place; or an indirect result of an action which occurs later in time or in a different place and is reasonably foreseeable; or the cumulative results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency or person undertakes such other actions (40 CFR 1508.8).

Lead Agency - The agency or agencies responsible for preparing the environmental impact statement (40 CFR 1508.16).

Major Federal Action - Actions with effects that may be major and which are potentially subject to Federal control and responsibility (40 CFR 1508.18).

Mitigation - Planning actions taken to avoid an impact altogether to minimize the degree or magnitude of the impact, reduce the impact over time, rectify the impact, or compensate for the impact (40 CFR 1508.20)

National Environmental Policy Act of 1969 (NEPA) -Requires all agencies, including the Service, to examine the environmental impacts of their actions, incorporate environmental information, and utilize public participation in the planning and implementation of all actions. Federal agencies must integrate NEPA with other planning requirements and prepare appropriate NEPA documents to facilitate better environmental decision making. NEPA requires Federal agencies to review and comment on Federal agency environmental plans/documents when the agency has jurisdiction by law or special expertise with respect to any environmental impacts involved. (42 U.S.C. 4321-4327) (40 CFR 1500-1508).

Notice of Intent (NOI) - A notice that an environmental impact statement will be prepared and considered (40 CFR 1508.22).

No Action Alternative - The alternative where current conditions and trends are projected into the future without another proposed action (40 CFR 1502.14(d)).

Proposed Action - A plan that contains sufficient details about the intended actions to be taken, or that will result, to allow alternatives to be developed and its environmental impacts analyzed (40 CFR 1508.23).
Record of Decision (ROD) - A concise public record of decision prepared by the Federal agency, pursuant to NEPA. that contains a statement of the decision, identification of all alternatives considered, identification of the environmentally preferable alternative, a statement as to whether all practical means to avoid or minimize environmental harm from the alternative selected have been adopted (and if not, why they were not), and a summary of monitoring and enforcement where applicable for any mitigation (40 CFR 1505.2).

Relationship of Short-Term Uses and Long-Term Productivity - The balance or trade-off between short-term uses and long-term productivity need to be defined in relation to the proposed activity in question. Each resource, of necessity, has to be provided with its own definitions of short- term and long-term (40 CFR 1502.16).

Scope - The range of actions, alternatives, and impacts to be considered in an environmental impact statement (40 CFR 1508.25).

Scoping - An early and open process for determining the extent and variety of issues to be addressed and for identifying the significant issues related to a proposed action (40 CFR 1501.7).

Significant - Use in NEPA requires consideration of both context and intensity (40 CFR 1508.27):

> Context - significance of an action must be analyzed in its current and proposed short-and long-term effects on the whole of a given resource (e.g.-affected region) Intensity - Refers to the severity of the effect

Tiering - The coverage of general matters in broader environmental impact statements with subsequent narrower statements of environmental analysis, incorporating by reference, the general discussions and concentrating on specific issues (40 CFR 1508.28).

Unavoidable Adverse Effects - Effects that can not be avoided due to constraints in alternatives. These effects do not have to be avoided by the planning agency, but they must be disclosed, discussed, and mitigated, if possible (40 CFR 1500.2(e).

ABBREVIATIONS AND ACRONYMS

AD-ES	Assistant Director - Ecological Services
BLM	Bureau of Land Management
BR	Bureau of Reclamation
CEQ	Council on Environmental Quality
CERCLA	Comprehensive Environmental Response, Compensation and Liability Act of 1980
CG	U.S. Coast Guard
Corps	U.S. Army Corps of Engineers
CX	Categorical Exclusion
DHC	Division of Habitat Conservation
Director	Director, U.S. Fish and Wildlife Service
D-J	Dingell-Johnson Act (Federal Aid in Sport Fish Restoration Act)
DOI or Department	Department of Interior
DOT	Department of Transportation
EA	Environmental Assessment
EC	Environmental Coordination
ED	Environmental Document
EIS	Environmental Impact Statement
EO	Executive Order
EPA	Environmental Protection Agency
ER	Environmental Review
ES	Ecological Services
ESA	Endangered Species Act
FAA	Federal Aviation Administration
FERC	Federal Energy Regulatory Commission
FHWA	Federal Highway Administration
FONSI	Finding of No Significant Impact
FWCA	Fish and Wildlife Coordination Act
ES Transmittal	ES Environmental Review Distribution Transmittal
MOA	Memorandum of Agreement
MOU	Memorandum of Understanding
MMPA	Marine Mammal Protection Act
NEPA	National Environmental Policy Act
NEPA Regulations	CEQ Regulations for Implementing the Procedural Provisions of NEPA
NOA	Notice of Availability
NOI	Notice of Intent
NPS	National Park Service
OEA	Office of Environmental Affairs (DOI)
P-R	Pittman-Robertson Act (Federal Aid in Wildlife Restoration Act)
PNRS	Preliminary Natural Resources Survey
REC	Regional Environmental Coordinator (Service)
REO	Regional Environmental Officer (DOI)

Secretary	Secretary of the Interior
Service	U.S. Fish and Wildlife Service
SOW	Scope of Work
WO	Washington Office

The National Environmental Policy Act of 1969

The National Environmental Policy Act of 1969, as amended

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

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

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

Purpose

Sec. 2 [42 USC § 4321].

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

TITLE I

CONGRESSIONAL DECLARATION OF NATIONAL ENVIRONMENTAL POLICY

Sec. 101 [42 USC § 4331].

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

(b) In order to carry out the policy set forth in this Act, it is the continuing responsibility of the Federal Government to use all practicable means, 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 irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

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

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

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

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

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

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

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

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(F) recognize the worldwide and long-range character of environmental problems and,

where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

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

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

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

Sec. 103 [42 USC § 4333].

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

Sec. 104 [42 USC § 4334].

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

Sec. 105 [42 USC § 4335].

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

TITLE II

COUNCIL ON ENVIRONMENTAL QUALITY

Sec. 201 [42 USC § 4341].

The President shall transmit to the Congress annually beginning July 1, 1970, an Environmental Quality Report (hereinafter referred to as the "report") which shall set forth (1) the status and condition of the major natural, manmade, or altered environmental classes of the Nation, including, but not limited to, the air, the aquatic, including marine, estuarine, and fresh water, and the terrestrial environment, including, but not limited to, the forest, dryland, wetland, range, urban, suburban an rural environment; (2) current and foreseeable trends in the quality, management and utilization of such environments and the effects of those trends on the social, economic, and other requirements of the Nation; (3) the adequacy of available natural resources for fulfilling human and economic requirements of the Nation

in the light of expected population pressures; (4) a review of the programs and activities (including regulatory activities) of the Federal Government, the State and local governments, and nongovernmental entities or individuals with particular reference to their effect on the environment and on the conservation, development and utilization of natural resources; and (5) a program for remedying the deficiencies of existing programs and activities, together with recommendations for legislation.

Sec. 202 [42 USC § 4342].

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

Sec. 203 [42 USC § 4343].

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

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

Sec. 204 [42 USC § 4344].

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

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

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

3. to review and appraise the various programs and activities of the Federal Government in the light of the policy set forth in title I of this Act for the purpose of determining the extent to which such programs and activities are contributing to the achievement

of such policy, and to make recommendations to the President with respect thereto;

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

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

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

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

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

Sec. 205 [42 USC § 4345].

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

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

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

Sec. 206 [42 USC § 4346].

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

Sec. 207 [42 USC § 4346a].

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

Sec. 208 [42 USC § 4346b].

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

Sec. 209 [42 USC § 4347].

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

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

42 USC § 4372.

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

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

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

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

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

2. assisting the Federal agencies and departments in appraising the effectiveness of existing and proposed facilities, programs, policies, and activities of the Federal Government, and those specific major projects designated by the President which

do not require individual project authorization by Congress, which affect environmental quality;

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

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

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

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

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

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

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

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

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

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

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

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

42 USC § 4375.

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

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

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

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

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

Office of Federal Activities

Section 309 - Clean Air Act

(a) The Administrator shall review and comment in writing on the environmental impact of any matter relating to duties and responsibilites granted pursuant to this Act or other provisions of the authority of the Administrator, contained in any (1) legislation proposed by any Federal department or agency, (2) newly authorized Federal projects for construction and any major Federal agency action (other than a project for construction) to which Section 102(2)(C) of Public Law 91-190[*] applies, and (3) proposed regulations published by any department or agency of the Federal government. Such written comment shall be made public at the conclusion of any such review.

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

---

[*] NEPA (42 USC 4332(2)(C) et seq.)

Section 4(f) of the DOT ACT

Section 4(f) fo the Department of Transportation Act (80 Stat. 931; Public Law 89-670) as amended in Section 18 of the Federal Aid Highway Act of 1968 (82 Stat. 815; Public Law 90-495).

A(f) It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites. The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. After the effective date of the Federal-Aid Highway Act of 1968, the Secretary shall not approve any program or project which requires the use of any publicly owned land from fowl refuge of national, State, or local significance as determined by the Federal, State, or local officials having jurisdiction thereof, or any land from an historic site of national, State, or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use.@

Section 4(f) is Codified in:

23 U.S.C. 138 and 49 U.S.C. 163 (f)

42 USC CHAPTER 55, SUBCHAPTER IV: FEDERAL PERMITTING IMPROVEMENT

From Title 42—THE PUBLIC HEALTH AND WELFARE
CHAPTER 55—NATIONAL ENVIRONMENTAL POLICY

SUBCHAPTER IV—FEDERAL PERMITTING IMPROVEMENT

§4370m. Definitions

In this subchapter:

(1) Agency

The term "agency" has the meaning given the term in section 551 of title 5.

(2) Agency CERPO

The term "agency CERPO" means the chief environmental review and permitting officer of an agency, as designated by the head of the agency under section 4370m–1(b)(2)(A)(iii)(I) of this title.

(3) Authorization

The term "authorization" means any license, permit, approval, finding, determination, or other administrative decision issued by an agency that is required or authorized under Federal law in order to site, construct, reconstruct, or commence operations of a covered project administered by a Federal agency or, in the case of a State that chooses to participate in the environmental review and authorization process in accordance with section 4370m–2(c)(3)(A) of this title, a State agency.

(4) Cooperating agency

The term "cooperating agency" means any agency with—

(A) jurisdiction under Federal law; or

(B) special expertise as described in section 1501.6 of title 40, Code of Federal Regulations (as in effect on December 4, 2015).

(5) Council

The term "Council" means the Federal Infrastructure Permitting Improvement Steering Council [1] established under section 4370m–1(a) of this title.

(6) Covered project

(A) In general

The term "covered project" means any activity in the United States that requires authorization or environmental review by a Federal agency involving construction of infrastructure for renewable or conventional energy production, electricity transmission, surface transportation, aviation, ports and waterways, water resource projects, broadband, pipelines, manufacturing, or any other sector as determined by a majority vote of the Council that—

(i)(I) is subject to NEPA;

(II) is likely to require a total investment of more than $200,000,000; and

(III) does not qualify for abbreviated authorization or environmental review processes under any applicable law; or

(ii) is subject to NEPA and the size and complexity of which, in the opinion of the Council, make the project likely to benefit from enhanced oversight and coordination, including a project likely to require—

(I) authorization from or environmental review involving more than 2 Federal agencies; or

(II) the preparation of an environmental impact statement under NEPA.

(B) Exclusion

The term "covered project" does not include—

(i) any project subject to section 139 of title 23; or

(ii) any project subject to section 2348 of title 33.

(7) Dashboard

The term "Dashboard" means the Permitting Dashboard required under section 4370m–2(b) of this title.

(8) Environmental assessment

The term "environmental assessment" means a concise public document for which a Federal agency is responsible under section 1508.9 of title 40, Code of Federal Regulations (or successor regulations).

(9) Environmental document

(A) In general

The term "environmental document" means an environmental assessment, finding of no significant impact, notice of intent, environmental impact statement, or record of decision.

(B) Inclusions

The term "environmental document" includes—

(i) any document that is a supplement to a document described in subparagraph (A); and

(ii) a document prepared pursuant to a court order.

(10) Environmental impact statement

The term "environmental impact statement" means the detailed written statement required under section 102(2)(C) of NEPA [42 U.S.C. 4332(2)(C)].

(11) Environmental review

The term "environmental review" means the agency procedures and processes for applying a categorical exclusion or for preparing an environmental assessment, an environmental impact statement, or other document required under NEPA.

(12) Executive Director

The term "Executive Director" means the Executive Director appointed by the President under section 4370m–1(b)(1)(A) of this title.

(13) Facilitating agency

The term "facilitating agency" means the agency that receives the initial notification from the project sponsor required under section 4370m–2(a) of this title.

(14) Inventory

The term "inventory" means the inventory of covered projects established by the Executive Director under section 4370m–1(c)(1)(A) of this title.

(15) Lead agency

The term "lead agency" means the agency with principal responsibility for an environmental review of a covered project under NEPA and parts 1500 through 1508 of title 40, Code of Federal Regulations (or successor regulations).

(16) NEPA

The term "NEPA" means the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.).

(17) Participating agency

The term "participating agency" means an agency participating in an environmental review or authorization for a covered project in accordance with section 4370m–2 of this title.

(18) Project sponsor

The term "project sponsor" means an entity, including any private, public, or public-private entity, seeking an authorization for a covered project.

(Pub. L. 114–94, div. D, title XLI, §41001, Dec. 4, 2015, 129 Stat. 1741.)

References in Text

The National Environmental Policy Act of 1969 or NEPA, referred to in pars. (6)(A), (11), and (15) and defined in (16), is Pub. L. 91–190, Jan. 1, 1970, 83 Stat. 852, which is classified generally to this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 4321 of this title and Tables.

Codification

Section was enacted as part of the Fixing America's Surface Transportation Act, also known as the FAST Act, and not as part of the National Environmental Policy Act of 1969 which comprises this chapter.

Savings Clause

Pub. L. 114–94, div. A, title XI, §11503(b), Dec. 4, 2015, 129 Stat. 1692, provided that: "Except as expressly provided in section 41003(f) [42 U.S.C. 4370m–2(f)] and subsection (o) of section 139 of title 23, United States Code, the requirements and other provisions of title 41 of this Act [probably means title XLI of div. D of Pub. L. 114–94, 42 U.S.C. 4370m et seq.] shall not apply to—

"(1) programs administered now and in the future by the Department of Transportation or its operating administrations under title 23, 46, or 49, United States Code, including direct loan and loan

guarantee programs, or other Federal statutes or programs or projects administered by an agency pursuant to their authority under title 49, United States Code; or

"(2) any project subject to section 2045 of the Water Resources Development Act of 2007 (33 U.S.C. 2348)."

Placement in United States Code

Pub. L. 114–94, div. D, title XLI, §41014, Dec. 4, 2015, 129 Stat. 1762, provided that: "The Office of the Law Revision Counsel is directed to place sections 41001 through 41013 of this title in chapter 55 of title 42, United States Code, as subchapter IV."

Ex. Ord. No. 13766. Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects

Ex. Ord. No. 13766, Jan. 24, 2017, 82 F.R. 8657, provided:

By the authority vested in me as President by the Constitution and the laws of the United States of America, I hereby direct as follows:

Section 1. *Purpose*. Infrastructure investment strengthens our economic platform, makes America more competitive, creates millions of jobs, increases wages for American workers, and reduces the costs of goods and services for American families and consumers. Too often, infrastructure projects in the United States have been routinely and excessively delayed by agency processes and procedures. These delays have increased project costs and blocked the American people from the full benefits of increased infrastructure investments, which are important to allowing Americans to compete and win on the world economic stage. Federal infrastructure decisions should be accomplished with maximum efficiency and effectiveness, while also respecting property rights and protecting public safety and the environment. To that end, it is the policy of the executive branch to streamline and expedite, in a manner consistent with law, environmental reviews and approvals for all infrastructure projects, especially projects that are a high priority for the Nation, such as improving the U.S. electric grid and telecommunications systems and repairing and upgrading critical port facilities, airports, pipelines, bridges, and highways.

Sec. 2. *Identification of High Priority Infrastructure Projects*. With respect to infrastructure projects for which Federal reviews and approvals are required, upon request by the Governor of a State, or the head of any executive department or agency (agency), or on his or her own initiative, the Chairman of the White House Council on Environmental Quality (CEQ) shall, within 30 days after a request is made, decide whether an infrastructure project qualifies as a "high priority" infrastructure project. This determination shall be made after consideration of the project's importance to the general welfare, value to the Nation, environmental benefits, and such other factors as the Chairman deems relevant.

Sec. 3. *Deadlines*. With respect to any project designated as a high priority under section 2 of this order, the Chairman of the CEQ shall coordinate with the head of the relevant agency to establish, in a manner consistent with law, expedited procedures and deadlines for completion of environmental reviews and approvals for such projects. All agencies shall give highest priority to completing such reviews and approvals by the established deadlines using all necessary and appropriate means. With respect to deadlines established consistent with this section that are not met, the head of the relevant agency shall provide a written explanation to the Chairman explaining the causes for the delay and providing concrete actions taken by the agency to complete such reviews and approvals as expeditiously as possible.

Sec. 4. *General Provisions*. (a) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(b) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(c) All actions taken pursuant to this order shall be consistent with requirements and authorities to protect intelligence and law enforcement sources and methods. Nothing in this order shall be interpreted to supersede measures established under authority of law to protect the security and integrity of specific activities and associations that are in direct support of intelligence and law enforcement operations.

(d) 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, or entities, its officers, employees, or agents, or any other person.

Donald J. Trump.

Ex. Ord. No. 13807. Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects

Ex. Ord. No. 13807, Aug. 15, 2017, 82 F.R. 40463, provided:

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to ensure that the Federal environmental review and permitting process for infrastructure projects is coordinated, predictable, and transparent, it is hereby ordered as follows:

SECTION 1. *Purpose*. America needs increased infrastructure investment to strengthen our economy, enhance our competitiveness in world trade, create jobs and increase wages for our workers, and reduce the costs of goods and services for our families. The poor condition of America's infrastructure has been estimated to cost a typical American household thousands of dollars each year. Inefficiencies in current infrastructure project decisions, including management of environmental reviews and permit decisions or authorizations, have delayed infrastructure investments, increased project costs, and blocked the American people from enjoying improved infrastructure that would benefit our economy, society, and environment. More efficient and effective Federal infrastructure decisions can transform our economy, so the Federal Government, as a whole, must change the way it processes environmental reviews and authorization decisions.

SEC. 2. *Policy*. It is the policy of the Federal Government to:

(a) safeguard our communities and maintain a healthy environment;

(b) ensure that Federal authorities make informed decisions concerning the environmental impacts of infrastructure projects;

(c) develop infrastructure in an environmentally sensitive manner;

(d) provide transparency and accountability to the public regarding environmental review and authorization decisions;

(e) be good stewards of public funds, including those used to develop infrastructure projects, and avoid duplicative and wasteful processes;

(f) conduct environmental reviews and authorization processes in a coordinated, consistent, predictable, and timely manner in order to give public and private investors the confidence necessary to make funding decisions for new infrastructure projects;

(g) speak with a coordinated voice when conducting environmental reviews and making authorization decisions; and

(h) make timely decisions with the goal of completing all Federal environmental reviews and authorization decisions for major infrastructure projects within 2 years.

SEC. 3. *Definitions*. The terms of this order shall be applied consistently with those defined under 42 U.S.C. 4370m and implementing guidance to the maximum extent possible. The following definitions shall specifically apply:

(a) "Authorization" means any license, permit, approval, finding, determination, or other administrative decision issued by a Federal department or agency (agency) that is required or authorized under Federal law in order to site, construct, reconstruct, or commence operations of an infrastructure project, including any authorization under 42 U.S.C. 4370m(3).

(b) "CAP Goals" means Federal Government Priority Goals established by the Government Performance and Results Act (GPRA) Modernization Act of 2010, Public Law 111–352, 124 Stat. 3866, and commonly referred to as Cross-Agency Priority (CAP) Goals.

(c) "Federal Permitting Improvement Steering Council" or "FPISC" means the entity established under 42 U.S.C. 4370m–1.

(d) "Infrastructure project" means a project to develop the public and private physical assets that are designed to provide or support services to the general public in the following sectors: surface transportation, including roadways, bridges, railroads, and transit; aviation; ports, including navigational channels; water resources projects; energy production and generation, including from fossil, renewable, nuclear, and hydro sources; electricity transmission; broadband Internet; pipelines; stormwater and sewer infrastructure; drinking water infrastructure; and other sectors as may be determined by the FPISC.

(e) "Major infrastructure project" means an infrastructure project for which multiple authorizations by Federal agencies will be required to proceed with construction, the lead Federal agency has determined that it will prepare an environmental impact statement (EIS) under the National Environmental Policy Act (NEPA), 42 U.S.C. 4321 *et seq*., and the project sponsor has identified the reasonable availability of funds sufficient to complete the project.

(f) "Permitting timetable" means an environmental review and authorization schedule, or other equivalent schedule, for a project or group of projects that identifies milestones—including intermediate and final completion dates for action by each agency on any Federal environmental review or authorization required for a project or group of projects—that is prepared by the lead Federal agency in consultation with all cooperating and participating agencies.

SEC. 4. *Agency Performance Accountability*. Federal agencies should follow transparent and coordinated processes for conducting environmental reviews and making authorization decisions. These processes must include early and open coordination among Federal, State, tribal, and local agencies and early engagement with the public. Holding Federal agencies accountable for their progress on implementing

the policy set forth in section 2 of this order should, among other things, produce measurably better environmental outcomes with respect to infrastructure development.

(a) *Performance Priority Goals.*

(i) *CAP Goal*. A CAP Goal is a Federal tool for accelerating progress in priority areas that require active collaboration among multiple agencies to overcome organizational barriers and to achieve better performance than one agency could achieve on its own. Within 180 days of the date of this order, the Director of the Office of Management and Budget (OMB), in consultation with the FPISC, shall establish a CAP Goal on Infrastructure Permitting Modernization so that, where permitted by law:

(A) Federal environmental reviews and authorization processes for infrastructure projects are consistent, coordinated, and predictable; and

(B) the time for the Federal Government's processing of environmental reviews and authorization decisions for new major infrastructure projects should be reduced to not more than an average of approximately 2 years, measured from the date of the publication of a notice of intent to prepare an environmental impact statement or other benchmark deemed appropriate by the Director of OMB.

(ii) *Agency Goals*. All Federal agencies with environmental review, authorization, or consultation responsibilities for infrastructure projects shall modify their Strategic Plans and Annual Performance Plans under the GPRA Modernization Act of 2010 to include agency performance goals related to the completion of environmental reviews and authorizations for infrastructure projects consistent with the new CAP Goal on Infrastructure Permitting Modernization. The agencies shall integrate the achievement of these performance goals into appropriate agency personnel performance plans, such as those of the agency Chief Environmental Review and Permitting Officers (CERPOs) or other appropriate officials, consistent with guidance to be provided by OMB, in consultation with the Office of Personnel Management. Progress on these goals shall be reviewed and analyzed by agency leadership, pursuant to the GPRA Modernization Act of 2010.

(b) *Accountability*. Within 180 days of the establishment of the CAP Goal on Infrastructure Permitting Modernization, as described in subsection (a) of this section, or such longer period of time as determined by the Director of OMB, OMB, in consultation with the FPISC, shall issue guidance for establishing a performance accountability system to facilitate achievement of the CAP Goal.

(i) *Tracking of Major Infrastructure Projects*. The performance accountability system shall track each major infrastructure project. The performance accountability system shall include, at a minimum, assessments of the agency's performance with respect to each of the following areas, as applicable:

(A) whether major infrastructure projects are processed using the "One Federal Decision" mechanism, as described in subsection 5(b) of this order;

(B) whether major infrastructure projects have a permitting timetable;

(C) whether major infrastructure projects follow an effective process that automatically elevates instances in which permitting timetable milestones are missed or extended, or are anticipated to be missed or extended, to appropriate senior agency officials;

(D) whether agencies are meeting the established milestones in the permitting timetable;

(E) the time it takes to complete the processing of environmental reviews and authorizations for each major infrastructure project; and

(F) the costs of the environmental reviews and authorizations for each major infrastructure project.

(ii) *Scoring*. The accountability system shall include a scoring mechanism that shall follow, at a minimum, the following procedures:

(A) agencies will submit information to OMB, consistent with existing reporting mechanisms to the maximum extent possible, on the assessment areas described in subsection (b)(i) of this section;

(B) at least once per quarter, OMB will produce a scorecard of agency performance and overall progress toward achieving CAP Goal targets;

(C) where an agency's inability to meet a permitting timetable milestone results in a significant delay of the project timeline, after consulting with the project sponsor and relevant agencies, agencies will submit (based on OMB guidance) an estimate of the delay's costs to the project; and

(D) the Director of OMB will consider each agency's performance during budget formulation and determine whether appropriate penalties, including those authorized at 23 U.S.C. 139(h)(7) and 33 U.S.C. 2348(h)(5), must or should be imposed, to the extent required or permitted by law, for those that significantly fail to meet a permitting timetable milestone or in other situations deemed appropriate by the Director of OMB after considering the causes of any poor performance.

(iii) *Best Practices*. Agencies shall implement the techniques and strategies the FPISC annually identifies as best practices pursuant to 42 U.S.C. 4370m–1(c)(2)(B), as appropriate. The performance accountability system shall track and score agencies on the incorporation and implementation of appropriate best practices for all infrastructure projects, including the implementation of such best practices at an agency's field level.

Sec. 5. *Process Enhancements*. In furtherance of the policy described in section 2 of this order, Federal agencies shall follow a more unified environmental review and authorization process.

(a) *Processing of Major Infrastructure Projects*. In processing environmental reviews and authorizations for major infrastructure projects, Federal agencies shall:

(i) use "One Federal Decision" described in subsection (b) of this section;

(ii) develop and follow a permitting timetable, which shall be reviewed and updated at least quarterly by the lead Federal agency in consultation with Federal cooperating and participating agencies; and

(iii) follow an effective process that automatically elevates instances where a permitting timetable milestone is missed or extended, or is anticipated to be missed or extended, to appropriate senior agency officials of the lead Federal agency and the cooperating and participating Federal agency or agencies to which the milestone applies.

(b) *One Federal Decision.*

(i) Each major infrastructure project shall have a lead Federal agency, which shall be responsible for navigating the project through the Federal environmental review and authorization process, including the identification of a primary Federal point of contact at each Federal agency. All Federal cooperating and participating agencies shall identify points of contact for each project, cooperate with the lead Federal agency point of contact, and respond to all reasonable requests for information from the lead Federal agency in a timely manner.

(ii) With respect to the applicability of NEPA to a major infrastructure project, the Federal lead, cooperating, and participating agencies for each major infrastructure project shall all record any individual agency decision in one Record of Decision (ROD), which shall be coordinated by the lead Federal agency unless the project sponsor requests that agencies issue separate NEPA documents, the NEPA obligations of a cooperating or participating agency have already been satisfied, or the lead Federal agency determines that a single ROD would not best promote completion of the project's environmental review and authorization process. The Federal lead, cooperating, and participating agencies shall all agree to a permitting timetable that includes the completion dates for the ROD and the federally required authorizations for the project.

(iii) All Federal authorization decisions for the construction of a major infrastructure project shall be completed within 90 days of the issuance of a ROD by the lead Federal agency, provided that the final EIS includes an adequate level of detail to inform agency decisions pursuant to their specific statutory authority and requirements. The lead Federal agency may extend the 90-day deadline if the lead Federal agency determines that Federal law prohibits the agency from issuing its approval or permit within the 90-day period, the project sponsor requests that the permit or approval follow a different timeline, or the lead Federal agency determines that an extension would better promote completion of the project's environmental review and authorization process.

(iv) The Council on Environmental Quality (CEQ) and OMB shall develop the framework for implementing One Federal Decision, in consultation with the FPISC.

(A) The framework should be consistent with the model processes established under 42 U.S.C. 4370m–2, 23 U.S.C. 139, 33 U.S.C. 2348, the 2015 "Red Book" (officially entitled "Synchronizing Environmental Reviews for Transportation and Other Infrastructure Projects"), and CEQ guidance on efficient and timely environmental reviews under NEPA.

(B) The framework shall also include guidance on the development of permitting timetables by the lead Federal agencies, in collaboration with Federal cooperating and participating agencies. Permitting timetables shall identify estimated intermediate and final completion dates for all environmental reviews and authorizations that are reasonably anticipated as being needed for a project, including the process for granting extensions of any established dates. The guidance shall specify that lead Federal agencies need not include the estimated intermediate and final completion dates of any such reviews or authorizations until the design of a project has sufficiently advanced so that they can be developed. In such cases, the guidance shall instruct lead Federal agencies to estimate when the project's design will be advanced enough to determine such dates. The timelines shall account for any federally required decisions or permits that are assumed by, or delegated to, State, tribal, or local agencies and the extent to which any approval or permit to be issued by a Federal agency is dependent upon the issuance of such a decision or permit.

(C) CEQ and OMB shall also develop guidance for applying One Federal Decision whenever the lead agency is a State, tribal, or local agency exercising an assignment or delegation of an agency's NEPA responsibilities.

(c) *Dashboard*. All projects subject to 23 U.S.C. 139 and "covered projects" under 42 U.S.C. 4370m shall be tracked on the Dashboard established under 42 U.S.C. 4370m–2(b). Other projects or classes of projects subject to special environmental review and authorization streamlining processes similar to those referenced in this subsection may also be tracked on the Dashboard at the discretion of the FPISC

Executive Director. The dates for milestones of all projects tracked on the Dashboard shall be updated monthly, or on another appropriate timeline as may be determined by the FPISC Executive Director.

(d) *Executive Order 13766*. For purposes of implementing Executive Order 13766 of January 24, 2017 (Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects), all infrastructure projects that meet the criteria for, and are subject to, 23 U.S.C. 139, 33 U.S.C. 2348, or 42 U.S.C. 4370m–4370m–12 shall qualify as high priority projects under Executive Order 13766. Other projects or classes of projects subject to special environmental review and authorization streamlining processes, similar to those referenced in this subsection as may be determined by the FPISC Executive Director in consultation with OMB and CEQ, shall also qualify as high priority infrastructure projects under Executive Order 13766. The CEQ Chairman's responsibilities under sections 2 and 3 of Executive Order 13766 shall be satisfied by referring the project to the FPISC Executive Director, the Secretary of Transportation, or the Assistant Secretary of the Army for Civil Works, as appropriate.

(e) *Council on Environmental Quality.*

(i) *Directives*. Within 30 days of the date of this order, the CEQ shall develop an initial list of actions it will take to enhance and modernize the Federal environmental review and authorization process. Such actions should include issuing such regulations, guidance, and directives as CEQ may deem necessary to:

(A) ensure optimal interagency coordination of environmental review and authorization decisions, including by providing for an expanded role and authorities for lead agencies, more clearly defined responsibilities for cooperating and participating agencies, and Government-wide applicability of NEPA decisions and analyses;

(B) ensure that environmental reviews and authorization decisions involving multiple agencies are conducted in a manner that is concurrent, synchronized, timely, and efficient;

(C) provide for agency use, to the maximum extent permitted by law, of environmental studies, analysis, and decisions conducted in support of earlier Federal, State, tribal, or local environmental reviews or authorization decisions; and

(D) ensure that agencies apply NEPA in a manner that reduces unnecessary burdens and delays as much as possible, including by using CEQ's authority to interpret NEPA to simplify and accelerate the NEPA review process.

(ii) *Dispute Resolution*. Except where dispute resolution processes are otherwise provided for in law, including under 42 U.S.C. 4370m–2, or by Executive Order or other Presidential directive, upon request of a lead Federal agency, cooperating agency, or participating agency, CEQ may mediate interagency disputes arising between Federal agencies concerning Federal environmental review or authorization decisions for any infrastructure project pertaining to any environmental law, regulation, order or policy, and shall facilitate resolution of any conflicting positions of the relevant agencies.

(iii) *Agency Procedures*. CEQ shall form and lead an interagency working group, consisting of the Director of OMB, agency CERPOs, and such other representatives of agencies as CEQ deems appropriate. The working group shall review the NEPA implementing regulations and other environmental review and authorization processing policies of agencies that are members of the FPISC to identify impediments to efficient and effective environmental reviews and authorizations for infrastructure projects. The working group shall also identify those agencies that require an action plan to address identified impediments. Based on this review, agencies shall develop action plans that set forth the actions they will take and timelines for completing those actions, and they shall submit those action plans to CEQ and OMB for comment. Each agency's action plan shall, at a minimum, establish procedures for a regular review and update of categorical exclusions, where appropriate.

(f) *Federal Permitting Improvement Steering Council.*

(i) *Organizational Support*. Unless otherwise determined by the Director of OMB, the General Services Administration (GSA) shall provide necessary administrative and organizational support to the FPISC, including personnel, procurement, and budget support. The GSA Administrator, or the head of another agency designated by the Director of OMB, may delegate any authority to the FPISC Executive Director necessary for the operation and administration of the FPISC and the Office of the Executive Director, and the Executive Director may redelegate these authorities, as appropriate.

(ii) *Additional Duties*. In addition to the duties and responsibilities charged to the FPISC Executive Director under 42 U.S.C. 4370m–4370m–12 and this order, the FPISC Executive Director may, upon request of a FPISC member agency or a project sponsor, work with the lead agency or any cooperating and participating agencies to facilitate the environmental review and authorization process for any infrastructure project regardless of whether the project is a "covered project" under 42 U.S.C. 4370m, including by resolving disputes and promoting early coordination. The FPISC Executive Director, the Director of OMB, or the Chairman of CEQ may establish any appropriate policies or procedures concerning the FPISC Executive Director's facilitation of the environmental review and authorization

process under this subsection. Agencies must cooperate with the FPISC Executive Director with respect to the implementation of these additional duties.

(g) *Energy Corridors*. The Departments of the Interior and Agriculture, as appropriate, shall be the lead agencies for facilitating the identification and designation of energy right-of-way corridors on Federal lands for Government-wide expedited environmental review for the development of energy infrastructure projects.

(h) The Department of the Interior shall provide to OMB a strategy and recommendations for a multi-agency reorganization effort that would further the aims of this order. OMB, in consultation with the Department of the Interior, shall coordinate with the heads of other agencies affected to incorporate the strategy, as appropriate, into the comprehensive reorganization plan developed under Executive Order 13781 of March 13, 2017 (Comprehensive Plan for Reorganizing the Executive Branch).

SEC. 6. Executive Order 13690 of January 30, 2015 (Establishing a Federal Flood Risk Management Standard and a Process for Further Soliciting and Considering Stakeholder Input), is revoked.

SEC. 7. *General Provisions*. (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department, agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) 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, or entities, its officers, employees, or agents, or any other person.

DONALD J. TRUMP.

[1] *So in original. Probably should be "Federal Permitting Improvement Steering Council".*

§4370m–1. Federal Permitting Improvement Council

(a) Establishment

There is established the Federal Permitting Improvement Steering Council.

(b) Composition

(1) Chair

The Executive Director shall—

(A) be appointed by the President; and

(B) serve as Chair of the Council.

(2) Council members

(A) In general

(i) Designation by head of agency

Each individual listed in subparagraph (B) shall designate a member of the agency in which the individual serves to serve on the Council.

(ii) Qualifications

A councilmem-ber [1] described in clause (i) shall hold a position in the agency of deputy secretary (or the equivalent) or higher.

(iii) Support

(I) In general

Consistent with guidance provided by the Director of the Office of Management and Budget, each individual listed in subparagraph (B) shall designate 1 or more appropriate members of the agency in which the individual serves to serve as an agency CERPO.

(II) Reporting

In carrying out the duties of the agency CERPO under this subchapter, an agency CERPO shall report directly to a deputy secretary (or the equivalent) or higher.

(B) Heads of agencies

The individuals that shall each designate a councilmember under this subparagraph are as follows:

(i) The Secretary of Agriculture.

(ii) The Secretary of the Army.

(iii) The Secretary of Commerce.
(iv) The Secretary of the Interior.
(v) The Secretary of Energy.
(vi) The Secretary of Transportation.
(vii) The Secretary of Defense.
(viii) The Administrator of the Environmental Protection Agency.
(ix) The Chairman of the Federal Energy Regulatory Commission.
(x) The Chairman of the Nuclear Regulatory Commission.
(xi) The Secretary of Homeland Security.
(xii) The Secretary of Housing and Urban Development.
(xiii) The Chairman of the Advisory Council on Historic Preservation.
(xiv) Any other head of a Federal agency that the Executive Director may invite to participate as a member of the Council.

(3) Additional members

In addition to the members listed in paragraphs (1) and (2), the Chairman of the Council on Environmental Quality and the Director of the Office of Management and Budget shall also be members of the Council.

(c) Duties

(1) Executive Director

(A) Inventory development

The Executive Director, in consultation with the Council, shall—
(i) not later than 180 days after December 4, 2015, establish an inventory of covered projects that are pending the environmental review or authorization of the head of any Federal agency;
(ii)(I) categorize the projects in the inventory as appropriate, based on sector and project type; and
(II) for each category, identify the types of environmental reviews and authorizations most commonly involved; and
(iii) add a covered project to the inventory after receiving a notice described in section 4370m–2(a)(1) of this title.

(B) Facilitating agency designation

The Executive Director, in consultation with the Council, shall—
(i) designate a facilitating agency for each category of covered projects described in subparagraph (A)(ii); and
(ii) publish the list of designated facilitating agencies for each category of projects in the inventory on the Dashboard in an easily accessible format.

(C) Performance schedules

(i) In general

Not later than 1 year after December 4, 2015, the Executive Director, in consultation with the Council, shall develop recommended performance schedules, including intermediate and final completion dates, for environmental reviews and authorizations most commonly required for each category of covered projects described in subparagraph (A)(ii).

(ii) Requirements

(I) In general

The performance schedules shall reflect employment of the use of the most efficient applicable processes, including the alignment of Federal reviews of projects and reduction of permitting and project delivery time.

(II) Limit

(aa) In general

The final completion dates in any performance schedule for the completion of an environmental review or authorization under clause (i) shall not exceed the average time to complete an environmental review or authorization for a project within that category.

(bb) Calculation of average time

The average time referred to in item (aa) shall be calculated on the basis of data from the preceding 2 calendar years and shall run from the period beginning on the date on which the Executive Director must make a specific entry for the project on the Dashboard under section 4370m–2(b)(2) of this title (except that, for projects initiated before that duty takes effect, the period beginning on the date of filing of a completed application), and ending on the date of the issuance of a record of decision or other final agency action on the review or authorization.

(cc) Completion date

Each performance schedule shall specify that any decision by an agency on an environmental review or authorization must be issued not later than 180 days after the date on which all information needed to

complete the review or authorization (including any hearing that an agency holds on the matter) is in the possession of the agency.

(iii) Review and revision

Not later than 2 years after the date on which the performance schedules are established under this subparagraph, and not less frequently than once every 2 years thereafter, the Executive Director, in consultation with the Council, shall review and revise the performance schedules.

(D) Guidance

The Executive Director, in consultation with the Council, may recommend to the Director of the Office of Management and Budget or to the Council on Environmental Quality, as appropriate, that guidance be issued as necessary for agencies—

(i) to carry out responsibilities under this subchapter; and

(ii) to effectuate the adoption by agencies of the best practices and recommendations of the Council described in paragraph (2).

(2) Council

(A) Recommendations

(i) In general

The Council shall make recommendations to the Executive Director with respect to the designations under paragraph (1)(B) and the performance schedules under paragraph (1)(C).

(ii) Update

The Council may update the recommendations described in clause (i).

(B) Best practices

Not later than 1 year after December 4, 2015, and not less frequently than annually thereafter, the Council shall issue recommendations on the best practices for—

(i) enhancing early stakeholder engagement, including fully considering and, as appropriate, incorporating recommendations provided in public comments on any proposed covered project;

(ii) ensuring timely decisions regarding environmental reviews and authorizations, including through the development of performance metrics;

(iii) improving coordination between Federal and non-Federal governmental entities, including through the development of common data standards and terminology across agencies;

(iv) increasing transparency;

(v) reducing information collection requirements and other administrative burdens on agencies, project sponsors, and other interested parties;

(vi) developing and making available to applicants appropriate geographic information systems and other tools;

(vii) creating and distributing training materials useful to Federal, State, tribal, and local permitting officials; and

(viii) addressing other aspects of infrastructure permitting, as determined by the Council.

(C) Meetings

The Council shall meet not less frequently than annually with groups or individuals representing State, tribal, and local governments that are engaged in the infrastructure permitting process.

(3) Agency CERPOs

An agency CERPO shall—

(A) advise the respective agency councilmember on matters related to environmental reviews and authorizations;

(B) provide technical support, when requested to facilitate efficient and timely processes for environmental reviews and authorizations for covered projects under the jurisdictional responsibility of the agency, including supporting timely identification and resolution of potential disputes within the agency or between the agency and other Federal agencies;

(C) analyze agency environmental review and authorization processes, policies, and authorities and make recommendations to the respective agency councilmember for ways to standardize, simplify, and improve the efficiency of the processes, policies, and authorities, including by implementing guidance issued under paragraph (1)(D) and other best practices, including the use of information technology and geographic information system tools within the agency and across agencies, to the extent consistent with existing law; and

(D) review and develop training programs for agency staff that support and conduct environmental reviews or authorizations.

(d) Administrative support

The Director of the Office of Management and Budget shall designate a Federal agency, other than an agency that carries out or provides support only for projects that are not covered projects, to provide administrative support for the

Executive Director, and the designated agency shall, as reasonably necessary, provide support and staff to enable the Executive Director to fulfill the duties of the Executive Director under this subchapter.

(Pub. L. 114–94, div. D, title XLI, §41002, Dec. 4, 2015, 129 Stat. 1743.)

CODIFICATION

Section was enacted as part of the Fixing America's Surface Transportation Act, also known as the FAST Act, and not as part of the National Environmental Policy Act of 1969 which comprises this chapter.

[1] *So in original.*

§4370m–2. Permitting process improvement

(a) Project initiation and designation of participating agencies

(1) Notice

(A) In general

A project sponsor of a covered project shall submit to the Executive Director and the facilitating agency notice of the initiation of a proposed covered project.

(B) Default designation

If, at the time of submission of the notice under subparagraph (A), the Executive Director has not designated a facilitating agency under section 4370m–1(c)(1)(B) of this title for the categories of projects noticed, the agency that receives the notice under subparagraph (A) shall be designated as the facilitating agency.

(C) Contents

Each notice described in subparagraph (A) shall include—

(i) a statement of the purposes and objectives of the proposed project;

(ii) a concise description, including the general location of the proposed project and a summary of geospatial information, if available, illustrating the project area and the locations, if any, of environmental, cultural, and historic resources;

(iii) a statement regarding the technical and financial ability of the project sponsor to construct the proposed project;

(iv) a statement of any Federal financing, environmental reviews, and authorizations anticipated to be required to complete the proposed project; and

(v) an assessment that the proposed project meets the definition of a covered project under section 4370m of this title and a statement of reasons supporting the assessment.

(2) Invitation

(A) In general

Not later than 45 days after the date on which the Executive Director must make a specific entry for the project on the Dashboard under subsection (b)(2)(A), the facilitating agency or lead agency, as applicable, shall—

(i) identify all Federal and non-Federal agencies and governmental entities likely to have financing, environmental review, authorization, or other responsibilities with respect to the proposed project; and

(ii) invite all Federal agencies identified under clause (i) to become a participating agency or a cooperating agency, as appropriate, in the environmental review and authorization management process described in section 4370m–4 of this title.

(B) Deadlines

Each invitation made under subparagraph (A) shall include a deadline for a response to be submitted to the facilitating or lead agency, as applicable.

(3) Participating and cooperating agencies

(A) In general

An agency invited under paragraph (2) shall be designated as a participating or cooperating agency for a covered project, unless the agency informs the facilitating or lead agency, as applicable, in writing before the deadline under paragraph (2)(B) that the agency—

(i) has no jurisdiction or authority with respect to the proposed project; or

(ii) does not intend to exercise authority related to, or submit comments on, the proposed project.

(B) Changed circumstances

On request and a showing of changed circumstances, the Executive Director may designate an agency that has opted out under subparagraph (A)(ii) to be a participating or cooperating agency, as appropriate.

(4) Effect of designation

The designation described in paragraph (3) shall not—

(A) give the participating agency authority or jurisdiction over the covered project; or

(B) expand any jurisdiction or authority a cooperating agency may have over the proposed project.

(5) Lead agency designation

(A) In general

On establishment of the lead agency, the lead agency shall assume the responsibilities of the facilitating agency under this subchapter.

(B) Redesignation of facilitating agency

If the lead agency assumes the responsibilities of the facilitating agency under subparagraph (A), the facilitating agency may be designated as a cooperative or participating agency.

(6) Change of facilitating or lead agency

(A) In general

On the request of a participating agency or project sponsor, the Executive Director may designate a different agency as the facilitating or lead agency, as applicable, for a covered project, if the facilitating or lead agency or the Executive Director receives new information regarding the scope or nature of a covered project that indicates that the project should be placed in a different category under section 4370m–1(c)(1)(B) of this title.

(B) Resolution of dispute

The Chairman of the Council on Environmental Quality shall resolve any dispute over designation of a facilitating or lead agency for a particular covered project.

(b) Permitting dashboard

(1) Requirement to maintain

(A) In general

The Executive Director, in coordination with the Administrator of General Services, shall maintain an online database to be known as the "Permitting Dashboard" to track the status of Federal environmental reviews and authorizations for any covered project in the inventory described in section 4370m–1(c)(1)(A) of this title.

(B) Specific and searchable entry

The Dashboard shall include a specific and searchable entry for each covered project.

(2) Additions

(A) In general

(i) Existing projects

Not later than 14 days after the date on which the Executive Director adds a project to the inventory under section 4370m–1(c)(1)(A) of this title, the Executive Director shall create a specific entry on the Dashboard for the covered project.

(ii) New projects

Not later than 14 days after the date on which the Executive Director receives a notice under subsection (a)(1), the Executive Director shall create a specific entry on the Dashboard for the covered project, unless the Executive Director, facilitating agency, or lead agency, as applicable, determines that the project is not a covered project.

(B) Explanation

If the facilitating agency or lead agency, as applicable, determines that the project is not a covered project, the project sponsor may submit a further explanation as to why the project is a covered project not later than 14 days after the date of the determination under subparagraph (A).

(C) Final determination

Not later than 14 days after receiving an explanation described in subparagraph (B), the Executive Director shall—

(i) make a final and conclusive determination as to whether the project is a covered project; and

(ii) if the Executive Director determines that the project is a covered project, create a specific entry on the Dashboard for the covered project.

(3) Postings by agencies

(A) In general

For each covered project added to the Dashboard under paragraph (2), the facilitating or lead agency, as applicable, and each cooperating and participating agency shall post to the Dashboard—

(i) a hyperlink that directs to a website that contains, to the extent consistent with applicable law—

(I) the notification submitted under subsection (a)(1);

(II)(aa) where practicable, the application and supporting documents, if applicable, that have been submitted by a project sponsor for any required environmental review or authorization; or

(bb) a notice explaining how the public may obtain access to such documents;

(III) a description of any Federal agency action taken or decision made that materially affects the status of a covered project;

(IV) any significant document that supports the action or decision described in subclause (III); and

(V) a description of the status of any litigation to which the agency is a party that is directly related to the project, including, if practicable, any judicial document made available on an electronic docket maintained by a Federal, State, or local court; and

(ii) any document described in clause (i) that is not available by hyperlink on another website.

(B) Deadline

The information described in subparagraph (A) shall be posted to the website made available by hyperlink on the Dashboard not later than 5 business days after the date on which the Federal agency receives the information.

(4) Postings by the Executive Director

The Executive Director shall publish to the Dashboard—

(A) the permitting timetable established under subparagraph (A) or (C) of subsection (c)(2);

(B) the status of the compliance of each agency with the permitting timetable;

(C) any modifications of the permitting timetable;

(D) an explanation of each modification described in subparagraph (C); and

(E) any memorandum of understanding established under subsection (c)(3)(B).

(c) Coordination and timetables

(1) Coordinated project plan

(A) In general

Not later than 60 days after the date on which the Executive Director must make a specific entry for the project on the Dashboard under subsection (b)(2)(A), the facilitating or lead agency, as applicable, in consultation with each coordinating and participating agency, shall establish a concise plan for coordinating public and agency participation in, and completion of, any required Federal environmental review and authorization for the project.

(B) Required information

The Coordinated Project Plan shall include the following information and be updated by the facilitating or lead agency, as applicable, at least once per quarter:

(i) A list of, and roles and responsibilities for, all entities with environmental review or authorization responsibility for the project.

(ii) A permitting timetable, as described in paragraph (2), setting forth a comprehensive schedule of dates by which all environmental reviews and authorizations, and to the maximum extent practicable, State permits, reviews and approvals must be made.

(iii) A discussion of potential avoidance, minimization, and mitigation strategies, if required by applicable law and known.

(iv) Plans and a schedule for public and tribal outreach and coordination, to the extent required by applicable law.

(C) Memorandum of understanding

The coordinated project plan described in subparagraph (A) may be incorporated into a memorandum of understanding.

(2) Permitting timetable

(A) Establishment

As part of the coordination project plan under paragraph (1), the facilitating or lead agency, as applicable, in consultation with each cooperating and participating agency, the project sponsor, and any State in which the project is located, and, subject to subparagraph (C), with the concurrence of each cooperating agency, shall establish a permitting timetable that includes intermediate and final completion dates for action by each participating agency on any Federal environmental review or authorization required for the project.

(B) Factors for consideration

In establishing the permitting timetable under subparagraph (A), the facilitating or lead agency shall follow the performance schedules established under section 4370m–1(c)(1)(C) of this title, but may vary the timetable based on relevant factors, including—

(i) the size and complexity of the covered project;

(ii) the resources available to each participating agency;

(iii) the regional or national economic significance of the project;

(iv) the sensitivity of the natural or historic resources that may be affected by the project;

(v) the financing plan for the project; and

(vi) the extent to which similar projects in geographic proximity to the project were recently subject to environmental review or similar procedures under State law.

(C) Dispute resolution

(i) In general

The Executive Director, in consultation with appropriate agency CERPOs and the project sponsor, shall, as necessary, mediate any disputes regarding the permitting timetable referred to under subparagraph (A).

(ii) Disputes

If a dispute remains unresolved 30 days after the date on which the dispute was submitted to the Executive Director, the Director of the Office of Management and Budget, in consultation with the Chairman of the Council on Environmental Quality, shall facilitate a resolution of the dispute and direct the agencies party to the dispute to resolve the dispute by the end of the 60-day period beginning on the date of submission of the dispute to the Executive Director.

(iii) Final resolution

Any action taken by the Director of the Office of Management and Budget in the resolution of a dispute under clause (ii) shall—

(I) be final and conclusive; and

(II) not be subject to judicial review.

(D) Modification after approval

(i) In general

The facilitating or lead agency, as applicable, may modify a permitting timetable established under subparagraph (A) only if—

(I) the facilitating or lead agency, as applicable, and the affected cooperating agencies, after consultation with the participating agencies and the project sponsor, agree to a different completion date;

(II) the facilitating agency or lead agency, as applicable, or the affected cooperating agency provides a written justification for the modification; and

(III) in the case of a modification that would necessitate an extension of a final completion date under a permitting timetable established under subparagraph (A) to a date more than 30 days after the final completion date originally established under subparagraph (A), the facilitating or lead agency submits a request to modify the permitting timetable to the Executive Director, who shall consult with the project sponsor and make a determination on the record, based on consideration of the relevant factors described under subparagraph (B), whether to grant the facilitating or lead agency, as applicable, authority to make such modification.

(ii) Completion date

A completion date in the permitting timetable may not be modified within 30 days of the completion date.

(iii) Limitation on length of modifications

(I) In general

Except as provided in subclause (II), the total length of all modifications to a permitting timetable authorized or made under this subparagraph, other than for reasons outside the control of Federal, State, local, or tribal governments, may not extend the permitting timetable for a period of time greater than half of the amount of time from the establishment of the permitting timetable under subparagraph (A) to the last final completion date originally established under subparagraph (A).

(II) Additional extensions

The Director of the Office of Management and Budget, after consultation with the project sponsor, may permit the Executive Director to authorize additional extensions of a permitting timetable beyond the limit prescribed by subclause (I). In such a case, the Director of the Office of Management and Budget shall transmit, not later than 5 days after making a determination to permit an authorization of extension under this subclause, a report to Congress explaining why such modification is required. Such report shall explain to Congress with specificity why the original permitting timetable and the modifications authorized by the Executive Director failed to be adequate. The lead or facilitating agency, as applicable, shall transmit to Congress, the Director of the Office of Management and Budget, and the Executive Director a supplemental report on progress toward the final completion date each year thereafter, until the permit review is completed or the project sponsor withdraws its notice or application or other request to which this subchapter applies under section 4370m–9 of this title.

(iv) Limitation on judicial review

The following shall not be subject to judicial review:

(I) A determination by the Executive Director under clause (i)(III).

(II) A determination under clause (iii)(II) by the Director of the Office of Management and Budget to permit the Executive Director to authorize extensions of a permitting timetable.

(E) Consistency with other time periods

A permitting timetable established under subparagraph (A) shall be consistent with any other relevant time periods established under Federal law and shall not prevent any cooperating or participating agency from discharging any obligation under Federal law in connection with the project.

(F) Conforming to permitting timetables

(i) In general

Each Federal agency shall conform to the completion dates set forth in the permitting timetable established under subparagraph (A), or with any completion date modified under subparagraph (D).

(ii) Failure to conform

If a Federal agency fails to conform with a completion date for agency action on a covered project or is at significant risk of failing to conform with such a completion date, the agency shall—

(I) promptly submit to the Executive Director for publication on the Dashboard an explanation of the specific reasons for failing or significantly risking failing to conform to the completion date and a proposal for an alternative completion date;

(II) in consultation with the facilitating or lead agency, as applicable, establish an alternative completion date; and

(III) each month thereafter until the agency has taken final action on the delayed authorization or review, submit to the Executive Director for posting on the Dashboard a status report describing any agency activity related to the project.

(G) Abandonment of covered project

(i) In general

If the facilitating or lead agency, as applicable, has a reasonable basis to doubt the continuing technical or financial ability of the project sponsor to construct the covered project, the facilitating or lead agency may request the project sponsor provide an updated statement regarding the ability of the project sponsor to complete the project.

(ii) Failure to respond

If the project sponsor fails to respond to a request described in clause (i) by the date that is 30 days after receiving the request, the lead or facilitating agency, as applicable, shall notify the Executive Director, who shall publish an appropriate notice on the Dashboard.

(iii) Publication to Dashboard

On publication of a notice under clause (ii), the completion dates in the permitting timetable shall be tolled and agencies shall be relieved of the obligation to comply with subparagraph (F) until such time as the project sponsor submits to the facilitating or lead agency, as applicable, an updated statement regarding the technical and financial ability of the project sponsor to construct the project.

(3) Cooperating State, local, or tribal governments

(A) State authority

If the Federal environmental review is being implemented within the boundaries of a State, the State, consistent with State law, may choose to participate in the environmental review and authorization process under this subsection and to make subject to the process all State agencies that—

(i) have jurisdiction over the covered project;

(ii) are required to conduct or issue a review, analysis, opinion, or statement for the covered project; or

(iii) are required to make a determination on issuing a permit, license, or other approval or decision for the covered project.

(B) Coordination

To the maximum extent practicable under applicable law, the facilitating or lead agency, as applicable, shall coordinate the Federal environmental review and authorization processes under this subsection with any State, local, or tribal agency responsible for conducting any separate review or authorization of the covered project to ensure timely and efficient completion of environmental reviews and authorizations.

(C) Memorandum of understanding

(i) In general

Any coordination plan between the facilitating or lead agency, as applicable, and any State, local, or tribal agency shall, to the maximum extent practicable, be included in a memorandum of understanding.

(ii) Submission to Executive Director

The facilitating or lead agency, as applicable, shall submit to the Executive Director each memorandum of understanding described in clause (i).

(D) Applicability

The requirements under this subchapter shall only apply to a State or an authorization issued by a State if the State has chosen to participate in the environmental review and authorization process pursuant to this paragraph.

(d) Early consultation

The facilitating or lead agency, as applicable, shall provide an expeditious process for project sponsors to confer with each cooperating and participating agency involved and, not later than 60 days after the date on which the project sponsor submits a request under this subsection, to have each such agency provide to the project sponsor information concerning—

(1) the availability of information and tools, including pre-application toolkits, to facilitate early planning efforts;
(2) key issues of concern to each agency and to the public; and
(3) issues that must be addressed before an environmental review or authorization can be completed.

(e) Cooperating agency

(1) In general

A lead agency may designate a participating agency as a cooperating agency in accordance with part 1501 of title 40, Code of Federal Regulations (or successor regulations).

(2) Effect on other designation

The designation described in paragraph (1) shall not affect any designation under subsection (a)(3).

(3) Limitation on designation

Any agency not designated as a participating agency under subsection (a)(3) shall not be designated as a cooperating agency under paragraph (1).

(f) Reporting status of other projects on Dashboard

(1) In general

On request of the Executive Director, the Secretary and the Secretary of the Army shall use best efforts to provide information for inclusion on the Dashboard on projects subject to section 139 of title 23 and section 2348 of title 33 likely to require—

(A) a total investment of more than $200,000,000; and
(B) an environmental impact statement under NEPA.

(2) Effect of inclusion on Dashboard

Inclusion on the Dashboard of information regarding projects subject to section 139 of title 23 or section 2348 of title 33 shall not subject those projects to any requirements of this subchapter.

(Pub. L. 114–94, div. D, title XLI, §41003, Dec. 4, 2015, 129 Stat. 1747.)

References in Text

NEPA, referred to in subsec. (f)(1)(B), means the National Environmental Policy Act of 1969, Pub. L. 91–190, Jan. 1, 1970, 83 Stat. 852, which is classified generally to this chapter. See section 4370m(16) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 4321 of this title and Tables.

Codification

Section was enacted as part of the Fixing America's Surface Transportation Act, also known as the FAST Act, and not as part of the National Environmental Policy Act of 1969 which comprises this chapter.

§4370m–3. Interstate compacts

(a) In general

The consent of Congress is given for 3 or more contiguous States to enter into an interstate compact establishing regional infrastructure development agencies to facilitate authorization and review of covered projects, under State law or in the exercise of delegated permitting authority described under section 4370m–5 of this title, that will advance infrastructure development, production, and generation within the States that are parties to the compact.

(b) Regional infrastructure

For the purpose of this subchapter, a regional infrastructure development agency referred to in subsection (a) shall have the same authorities and responsibilities of a State agency.

(Pub. L. 114–94, div. D, title XLI, §41004, Dec. 4, 2015, 129 Stat. 1755.)

Codification

Section was enacted as part of the Fixing America's Surface Transportation Act, also known as the FAST Act, and not as part of the National Environmental Policy Act of 1969 which comprises this chapter.

§4370m–4. Coordination of required reviews

(a) Concurrent reviews

To integrate environmental reviews and authorizations, each agency shall, to the maximum extent practicable—

(1) carry out the obligations of the agency with respect to a covered project under any other applicable law concurrently, and in conjunction with, other environmental reviews and authorizations being conducted by other cooperating or participating agencies, including environmental reviews and authorizations required under NEPA, unless the agency determines that doing so would impair the ability of the agency to carry out the statutory obligations of the agency; and

(2) formulate and implement administrative, policy, and procedural mechanisms to enable the agency to ensure completion of the environmental review process in a timely, coordinated, and environmentally responsible manner.

(b) Adoption, incorporation by reference, and use of documents

(1) [1] State environmental documents; supplemental documents

(A) Use of existing documents

(i) In general

On the request of a project sponsor, a lead agency shall consider and, as appropriate, adopt or incorporate by reference, the analysis and documentation that has been prepared for a covered project under State laws and procedures as the documentation, or part of the documentation, required to complete an environmental review for the covered project, if the analysis and documentation were, as determined by the lead agency in consultation with the Council on Environmental Quality, prepared under circumstances that allowed for opportunities for public participation and consideration of alternatives, environmental consequences, and other required analyses that are substantially equivalent to what would have been available had the documents and analysis been prepared by a Federal agency pursuant to NEPA.

(ii) Guidance by CEQ

The Council on Environmental Quality may issue guidance to carry out this subsection.

(B) NEPA obligations

An environmental document adopted under subparagraph (A) or a document that includes documentation incorporated under subparagraph (A) may serve as the documentation required for an environmental review or a supplemental environmental review required to be prepared by a lead agency under NEPA.

(C) Supplementation of State documents

If the lead agency adopts or incorporates analysis and documentation described in subparagraph (A), the lead agency shall prepare and publish a supplemental document if the lead agency determines that during the period after preparation of the analysis and documentation and before the adoption or incorporation—

(i) a significant change has been made to the covered project that is relevant for purposes of environmental review of the project; or

(ii) there has been a significant circumstance or new information has emerged that is relevant to the environmental review for the covered project.

(D) Comments

If a lead agency prepares and publishes a supplemental document under subparagraph (C), the lead agency shall solicit comments from other agencies and the public on the supplemental document for a period of not more than 45 days, beginning on the date on which the supplemental document is published, unless—

(i) the lead agency, the project sponsor, and any cooperating agency agree to a longer deadline; or

(ii) the lead agency extends the deadline for good cause.

(E) Notice of outcome of environmental review

A lead agency shall issue a record of decision or finding of no significant impact, as appropriate, based on the document adopted under subparagraph (A) and any supplemental document prepared under subparagraph (C).

(c) Alternatives analysis

(1) Participation

(A) In general

As early as practicable during the environmental review, but not later than the commencement of scoping for a project requiring the preparation of an environmental impact statement, the lead agency shall engage the cooperating agencies and the public to determine the range of reasonable alternatives to be considered for a covered project.

(B) Determination

The determination under subparagraph (A) shall be completed not later than the completion of scoping.

(2) Range of alternatives

(A) In general

Following participation under paragraph (1) and subject to subparagraph (B), the lead agency shall determine the range of reasonable alternatives for consideration in any document that the lead agency is responsible for preparing for the covered project.

(B) Alternatives required by law

In determining the range of alternatives under subparagraph (A), the lead agency shall include all alternatives required to be considered by law.

(3) Methodologies

(A) In general

The lead agency shall determine, in collaboration with each cooperating agency at appropriate times during the environmental review, the methodologies to be used and the level of detail required in the analysis of each alternative for a covered project.

(B) Environmental review

A cooperating agency shall use the methodologies referred to in subparagraph (A) when conducting any required environmental review, to the extent consistent with existing law.

(4) Preferred alternative

With the concurrence of the cooperating agencies with jurisdiction under Federal law and at the discretion of the lead agency, the preferred alternative for a project, after being identified, may be developed to a higher level of detail than other alternatives to facilitate the development of mitigation measures or concurrent compliance with other applicable laws if the lead agency determines that the development of the higher level of detail will not prevent—

(A) the lead agency from making an impartial decision as to whether to accept another alternative that is being considered in the environmental review; and

(B) the public from commenting on the preferred and other alternatives.

(d) Environmental review comments

(1) Comments on draft environmental impact statement

For comments by an agency or the public on a draft environmental impact statement, the lead agency shall establish a comment period of not less than 45 days and not more than 60 days after the date on which a notice announcing availability of the environmental impact statement is published in the Federal Register, unless—

(A) the lead agency, the project sponsor, and any cooperating agency agree to a longer deadline; or

(B) the lead agency, in consultation with each cooperating agency, extends the deadline for good cause.

(2) Other review and comment periods

For all other review or comment periods in the environmental review process described in parts 1500 through 1508 of title 40, Code of Federal Regulations (or successor regulations), the lead agency shall establish a comment period of not more than 45 days after the date on which the materials on which comment is requested are made available, unless—

(A) the lead agency, the project sponsor, and any cooperating agency agree to a longer deadline; or

(B) the lead agency extends the deadline for good cause.

(e) Issue identification and resolution

(1) Cooperation

The lead agency and each cooperating and participating agency shall work cooperatively in accordance with this section to identify and resolve issues that could delay completion of an environmental review or an authorization required for the project under applicable law or result in the denial of any approval under applicable law.

(2) Lead agency responsibilities

(A) In general

The lead agency shall make information available to each cooperating and participating agency and project sponsor as early as practicable in the environmental review regarding the environmental, historic, and socioeconomic resources located within the project area and the general locations of the alternatives under consideration.

(B) Sources of information

The information described in subparagraph (A) may be based on existing data sources, including geographic information systems mapping.

(3) Cooperating and participating agency responsibilities

Each cooperating and participating agency shall—

(A) identify, as early as practicable, any issues of concern regarding any potential environmental impacts of the covered project, including any issues that could substantially delay or prevent an agency from completing any

environmental review or authorization required for the project; and

(B) communicate any issues described in subparagraph (A) to the project sponsor.

(f) Categories of projects

The authorities granted under this section may be exercised for an individual covered project or a category of covered projects.

(Pub. L. 114–94, div. D, title XLI, §41005, Dec. 4, 2015, 129 Stat. 1755.)

References in Text

NEPA, referred to in subsecs. (a)(1) and (b)(1)(A)(i), (B), means the National Environmental Policy Act of 1969, Pub. L. 91–190, Jan. 1, 1970, 83 Stat. 852, which is classified generally to this chapter. See section 4370m(16) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 4321 of this title and Tables.

Codification

Section was enacted as part of the Fixing America's Surface Transportation Act, also known as the FAST Act, and not as part of the National Environmental Policy Act of 1969 which comprises this chapter.

[1] *So in original. No par. (2) has been enacted.*

§4370m–5. Delegated State permitting programs

(a) In general

If a Federal statute permits a Federal agency to delegate to or otherwise authorize a State to issue or otherwise administer a permit program in lieu of the Federal agency, the Federal agency with authority to carry out the statute shall—

(1) on publication by the Council of best practices under section 4370m–1(c)(2)(B) of this title, initiate a national process, with public participation, to determine whether and the extent to which any of the best practices are generally applicable on a delegation- or authorization-wide basis to permitting under the statute; and

(2) not later than 2 years after December 4, 2015, make model recommendations for State modifications of the applicable permit program to reflect the best practices described in section 4370m–1(c)(2)(B) of this title, as appropriate.

(b) Best practices

Lead and cooperating agencies may share with State, tribal, and local authorities best practices involved in review of covered projects and invite input from State, tribal, and local authorities regarding best practices.

(Pub. L. 114–94, div. D, title XLI, §41006, Dec. 4, 2015, 129 Stat. 1758.)

Codification

Section was enacted as part of the Fixing America's Surface Transportation Act, also known as the FAST Act, and not as part of the National Environmental Policy Act of 1969 which comprises this chapter.

§4370m–6. Litigation, judicial review, and savings provision

(a) Limitations on claims

(1) In general

Notwithstanding any other provision of law, a claim arising under Federal law seeking judicial review of any authorization issued by a Federal agency for a covered project shall be barred unless—

(A) the action is filed not later than 2 years after the date of publication in the Federal Register of the final record of decision or approval or denial of a permit, unless a shorter time is specified in the Federal law under which judicial review is allowed; and

(B) in the case of an action pertaining to an environmental review conducted under NEPA—

(i) the action is filed by a party that submitted a comment during the environmental review; and

(ii) any commenter filed a sufficiently detailed comment so as to put the lead agency on notice of the issue on which the party seeks judicial review, or the lead agency did not provide a reasonable opportunity for such a comment on that issue.

(2) New information

(A) In general

The head of a lead agency or participating agency shall consider new information received after the close of a comment period if the information satisfies the requirements under regulations implementing NEPA.

(B) Separate action

If Federal law requires the preparation of a supplemental environmental impact statement or other supplemental environmental document, the preparation of such document shall be considered a separate final agency action and the deadline for filing a claim for judicial review of the agency action shall be 2 years after the date on which a notice announcing the final agency action is published in the Federal Register, unless a shorter time is specified in the Federal law under which judicial review is allowed.

(3) Rule of construction

Nothing in this subsection creates a right to judicial review or places any limit on filing a claim that a person has violated the terms of an authorization.

(b) Preliminary injunctive relief

In addition to considering any other applicable equitable factors, in any action seeking a temporary restraining order or preliminary injunction against an agency or a project sponsor in connection with review or authorization of a covered project, the court shall—

(1) consider the potential effects on public health, safety, and the environment, and the potential for significant negative effects on jobs resulting from an order or injunction; and

(2) not presume that the harms described in paragraph (1) are reparable.

(c) Judicial review

Except as provided in subsection (a), nothing in this subchapter affects the reviewability of any final Federal agency action in a court of competent jurisdiction.

(d) Savings clause

Nothing in this subchapter—

(1) supersedes, amends, or modifies any Federal statute or affects the responsibility of any Federal officer to comply with or enforce any statute; or

(2) creates a presumption that a covered project will be approved or favorably reviewed by any agency.

(e) Limitations

Nothing in this section preempts, limits, or interferes with—

(1) any practice of seeking, considering, or responding to public comment; or

(2) any power, jurisdiction, responsibility, or authority that a Federal, State, or local governmental agency, metropolitan planning organization, Indian tribe, or project sponsor has with respect to carrying out a project or any other provisions of law applicable to any project, plan, or program.

(Pub. L. 114–94, div. D, title XLI, §41007, Dec. 4, 2015, 129 Stat. 1758.)

References in Text

NEPA, referred to in subsec. (a)(1)(B), (2)(A), means the National Environmental Policy Act of 1969, Pub. L. 91–190, Jan. 1, 1970, 83 Stat. 852, which is classified generally to this chapter. See section 4370m(16) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 4321 of this title and Tables.

Codification

Section was enacted as part of the Fixing America's Surface Transportation Act, also known as the FAST Act, and not as part of the National Environmental Policy Act of 1969 which comprises this chapter.

§4370m–7. Reports

(a) Report to Congress

(1) In general

Not later than April 15 of each year for 10 years beginning on December 4, 2015, the Executive Director shall submit to Congress a report detailing the progress accomplished under this subchapter during the previous fiscal year.

(2) Contents

The report described in paragraph (1) shall assess the performance of each participating agency and lead agency based on the best practices described in section 4370m–1(c)(2)(B) of this title, including—

(A) agency progress in making improvements consistent with those best practices; and

(B) agency compliance with the performance schedules established under section 4370m–1(c)(1)(C) of this title.

(3) Opportunity to include comments

Each councilmember, with input from the respective agency CERPO, shall have the opportunity to include comments concerning the performance of the agency in the report described in paragraph (1).

(b) Comptroller general report

Not later than 3 years after December 4, 2015, the Comptroller General of the United States shall submit to Congress a report that describes—

(1) agency progress in making improvements consistent with the best practices issued under section 4370m–1(c)(2)(B) of this title; and

(2) agency compliance with the performance schedules established under section 4370m–1(c)(1)(C) of this title.

(Pub. L. 114–94, div. D, title XLI, §41008, Dec. 4, 2015, 129 Stat. 1760.)

Codification

Section was enacted as part of the Fixing America's Surface Transportation Act, also known as the FAST Act, and not as part of the National Environmental Policy Act of 1969 which comprises this chapter.

§4370m–8. Funding for governance, oversight, and processing of environmental reviews and permits

(a) In general

The heads of agencies listed in section 4370m–1(b)(2)(B) of this title, with the guidance of the Director of the Office of Management and Budget and in consultation with the Executive Director, may, after public notice and opportunity for comment, issue regulations establishing a fee structure for project proponents to reimburse the United States for reasonable costs incurred in conducting environmental reviews and authorizations for covered projects.

(b) Reasonable costs

As used in this section, the term "reasonable costs" shall include costs to implement the requirements and authorities required under sections 4370m–1 and 4370m–2 of this title, including the costs to agencies and the costs of operating the Council.

(c) Fee structure

The fee structure established under subsection (a) shall—

(1) be developed in consultation with affected project proponents, industries, and other stakeholders;

(2) exclude parties for which the fee would impose an undue financial burden or is otherwise determined to be inappropriate; and

(3) be established in a manner that ensures that the aggregate amount of fees collected for a fiscal year is estimated not to exceed 20 percent of the total estimated costs for the fiscal year for the resources allocated for the conduct of the environmental reviews and authorizations covered by this subchapter, as determined by the Director of the Office of Management and Budget.

(d) Environmental Review and Permitting Improvement Fund

(1) In general

All amounts collected pursuant to this section shall be deposited into a separate fund in the Treasury of the United States to be known as the "Environmental Review Improvement Fund" (referred to in this section as the "Fund").

(2) Availability

Amounts in the Fund shall be available to the Executive Director, without appropriation or fiscal year limitation, solely for the purposes of administering, implementing, and enforcing this subchapter, including the expenses of the Council.

(3) Transfer

The Executive Director, with the approval of the Director of the Office of Management and Budget, may transfer amounts in the Fund to other agencies to facilitate timely and efficient environmental reviews and authorizations for proposed covered projects.

(e) Effect on permitting

The regulations adopted pursuant to subsection (a) shall ensure that the use of funds accepted under subsection (d) will not impact impartial decision-making with respect to environmental reviews or authorizations, either substantively or procedurally.

(f) Transfer of appropriated funds

(1) In general

The heads of agencies listed in section 4370m–1(b)(2)(B) of this title shall have the authority to transfer, in accordance with section 1535 of title 31, funds appropriated to those agencies and not otherwise obligated to other affected Federal agencies for the purpose of implementing the provisions of this subchapter.

(2) Limitation

Appropriations under title 23 and appropriations for the civil works program of the Army Corps of Engineers shall not be available for transfer under paragraph (1).

(Pub. L. 114–94, div. D, title XLI, §41009, Dec. 4, 2015, 129 Stat. 1760.)

Codification

Section was enacted as part of the Fixing America's Surface Transportation Act, also known as the FAST Act, and not as part of the National Environmental Policy Act of 1969 which comprises this chapter.

§4370m–9. Application

This subchapter applies to any covered project for which—

(1) a notice is filed under section 4370m–2(a)(1) of this title; or

(2) an application or other request for a Federal authorization is pending before a Federal agency 90 days after December 4, 2015.

(Pub. L. 114–94, div. D, title XLI, §41010, Dec. 4, 2015, 129 Stat. 1761.)

Codification

Section was enacted as part of the Fixing America's Surface Transportation Act, also known as the FAST Act, and not as part of the National Environmental Policy Act of 1969 which comprises this chapter.

§4370m–10. GAO report

Not later than 3 years after December 4, 2015, the Comptroller General of the United States shall submit to Congress a report that includes an analysis of whether the provisions of this subchapter could be adapted to streamline the Federal permitting process for smaller projects that are not covered projects.

(Pub. L. 114–94, div. D, title XLI, §41011, Dec. 4, 2015, 129 Stat. 1761.)

Codification

Section was enacted as part of the Fixing America's Surface Transportation Act, also known as the FAST Act, and not as part of the National Environmental Policy Act of 1969 which comprises this chapter.

§4370m–11. Savings provision

Nothing in this subchapter amends the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.).

(Pub. L. 114–94, div. D, title XLI, §41012, Dec. 4, 2015, 129 Stat. 1761.)

References in Text

The National Environmental Policy Act of 1969, referred to in text, is Pub. L. 91–190, Jan. 1, 1970, 83 Stat. 852, which is classified generally to this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 4321 of this title and Tables.

Codification

Section was enacted as part of the Fixing America's Surface Transportation Act, also known as the FAST Act, and not as part of the National Environmental Policy Act of 1969 which comprises this chapter.

§4370m–12. Sunset

This subchapter shall terminate 7 years after December 4, 2015.

(Pub. L. 114–94, div. D, title XLI, §41013, Dec. 4, 2015, 129 Stat. 1761.)

Codification

Section was enacted as part of the Fixing America's Surface Transportation Act, also known as the FAST Act, and not as part of the National Environmental Policy Act of 1969 which comprises this chapter.

Executive Order 12114 of January 4,1979

Environmental Effects Abroad of Major Federal Actions

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. and 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.

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 decision makers 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 an 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 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)(i);

(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(a), 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 Sec 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. Exemptions 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.

Sec. 3.

3-2. Rights of Action. This Order is solely for the purpose of establishing internal procedures for Federal agencies to 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. Mufti-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.

The White House.
January 4,1979

[FR Doc. 79-869
Filed 1-5-79; 3:38 pm]

EXECUTIVE ORDER 11988

FLOODPLAIN MANAGEMENT

HISTORY: May 24, 1977; 42 FR 26951, 3 CFR, 1977 Comp., p. 117; Amended by Executive Order 12148, July 20, 1979; 44 FR 43239, 3 CFR, 1979 Comp., p. 412

[EDITOR'S NOTE: Executive Order 12148 --Federal Emergency Management, July 20, 1979, substituted "Director of the Federal Emergency Management Agency" for "Federal Insurance Administration" in Section 2(d).]

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 requests 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 l, 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 Director of the Federal Emergency Management Agency, 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 l 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 l969, as amended.

/s/JIMMY CARTER
THE WHITE HOUSE
May 24, 1977

Office of the White House Press Secretary May 24, 1977

THE WHITE HOUSE

EXECUTIVE ORDER 11990
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 the destruction, loss or degradation of wetlands, and to preserve and enhance natural and beneficial values of wetlands in carrying out the agency's responsibilities (1) acquiring, managing, and disposing of Federal lands and facilities; and (2) providing Federally undertaken, financed, or assisted construction and improvement; 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

Sec. 2. (a) In furtherance of Section 101(b)(3) of the National Environmental Policy Act of 1969 (42 U.S.C. 4331(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 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 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 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 on 102(2)(C) of the National Environmental Policy Act of 1969, as amended.

Sec. 3. 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 wetlands, whether the proposed action is in accord with this Order.

Sec. 4. When Federally-owned wetlands or portions of wetlands are proposed for load, easement, 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. 5. 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) 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, channelizing, filling, diking, impounding, and related activities and any structures or facilities begun or authorized after the effective date of this Order.

(c) 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 2 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 305 and 306 of the Disaster Relief Act of 1974 (88 Stat. 148, 42 U.S.C. 5145 and 5146).

Sec.10 To the extent the provisions of Sections 2 and 5 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, it the applicant has also assumed, with respect to such projects, all of the responsibilities for environmental review, decision imaking, and action pursuant to the National Environmental Policy Act of 1969, as amended.

Jimmy Carter

The White House

May 24, 1977

Title: Executive Order 12898: Env. Justice for Minority Populations
Author: The White House
Date: Feb 11, 1994

THE WHITE HOUSE
Office of the Press Secretary

For Immediate Release
February 11, 1994

EXECUTIVE ORDER
12898
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.

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.

a. 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.

b. 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.

c. Within 10 months of the date of this order, each Federal agency shall provide the Working Group with its proposed environmental justice strategy.

d. 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.

e. 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.

f. 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.

1. 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.

2. Environmental human health analyses, whenever practicable and appropriate, shall identify multiple and cumulative exposures.

3. 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.

1. 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.

2. 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.

3. 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.

4. 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.

WILLIAM J. CLINTON

THE WHITE HOUSE,
February 11, 1994.

Federal Register
Vol. 82, No. 163
Thursday, August 24, 2017

Presidential Documents

Title 3—

The President

Executive Order 13807 of August 15, 2017

Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to ensure that the Federal environmental review and permitting process for infrastructure projects is coordinated, predictable, and transparent, it is hereby ordered as follows:

Section 1. *Purpose.* America needs increased infrastructure investment to strengthen our economy, enhance our competitiveness in world trade, create jobs and increase wages for our workers, and reduce the costs of goods and services for our families. The poor condition of America's infrastructure has been estimated to cost a typical American household thousands of dollars each year. Inefficiencies in current infrastructure project decisions, including management of environmental reviews and permit decisions or authorizations, have delayed infrastructure investments, increased project costs, and blocked the American people from enjoying improved infrastructure that would benefit our economy, society, and environment. More efficient and effective Federal infrastructure decisions can transform our economy, so the Federal Government, as a whole, must change the way it processes environmental reviews and authorization decisions.

Sec. 2. *Policy.* It is the policy of the Federal Government to:

(a) safeguard our communities and maintain a healthy environment;

(b) ensure that Federal authorities make informed decisions concerning the environmental impacts of infrastructure projects;

(c) develop infrastructure in an environmentally sensitive manner;

(d) provide transparency and accountability to the public regarding environmental review and authorization decisions;

(e) be good stewards of public funds, including those used to develop infrastructure projects, and avoid duplicative and wasteful processes;

(f) conduct environmental reviews and authorization processes in a coordinated, consistent, predictable, and timely manner in order to give public and private investors the confidence necessary to make funding decisions for new infrastructure projects;

(g) speak with a coordinated voice when conducting environmental reviews and making authorization decisions; and

(h) make timely decisions with the goal of completing all Federal environmental reviews and authorization decisions for major infrastructure projects within 2 years.

Sec. 3. *Definitions.* The terms of this order shall be applied consistently with those defined under 42 U.S.C. 4370m and implementing guidance to the maximum extent possible. The following definitions shall specifically apply:

(a) ''Authorization'' means any license, permit, approval, finding, determination, or other administrative decision issued by a Federal department or agency (agency) that is required or authorized under Federal law in

order to site, construct, reconstruct, or commence operations of an infrastructure project, including any authorization under 42 U.S.C. 4370m(3).

(b) ''CAP Goals'' means Federal Government Priority Goals established by the Government Performance and Results Act (GPRA) Modernization Act of 2010, Public Law 111–352, 124 Stat. 3866, and commonly referred to as Cross-Agency Priority (CAP) Goals.

(c) ''Federal Permitting Improvement Steering Council'' or ''FPISC'' means the entity established under 42 U.S.C. 4370m–1.

(d) ''Infrastructure project'' means a project to develop the public and private physical assets that are designed to provide or support services to the general public in the following sectors: surface transportation, including roadways, bridges, railroads, and transit; aviation; ports, including navigational channels; water resources projects; energy production and generation, including from fossil, renewable, nuclear, and hydro sources; electricity transmission; broadband Internet; pipelines; stormwater and sewer infrastructure; drinking water infrastructure; and other sectors as may be determined by the FPISC.

(e) ''Major infrastructure project'' means an infrastructure project for which multiple authorizations by Federal agencies will be required to proceed with construction, the lead Federal agency has determined that it will prepare an environmental impact statement (EIS) under the National Environmental Policy Act (NEPA), 42 U.S.C. 4321 *et seq.,* and the project sponsor has identified the reasonable availability of funds sufficient to complete the project.

(f) ''Permitting timetable'' means an environmental review and authorization schedule, or other equivalent schedule, for a project or group of projects that identifies milestones—including intermediate and final completion dates for action by each agency on any Federal environmental review or authorization required for a project or group of projects—that is prepared by the lead Federal agency in consultation with all cooperating and participating agencies.

Sec. 4. *Agency Performance Accountability.* Federal agencies should follow transparent and coordinated processes for conducting environmental reviews and making authorization decisions. These processes must include early and open coordination among Federal, State, tribal, and local agencies and early engagement with the public. Holding Federal agencies accountable for their progress on implementing the policy set forth in section 2 of this order should, among other things, produce measurably better environmental outcomes with respect to infrastructure development.

(a) *Performance Priority Goals.*

(i) *CAP Goal.* A CAP Goal is a Federal tool for accelerating progress in priority areas that require active collaboration among multiple agencies to overcome organizational barriers and to achieve better performance than one agency could achieve on its own. Within 180 days of the date of this order, the Director of the Office of Management and Budget (OMB), in consultation with the FPISC, shall establish a CAP Goal on Infrastructure Permitting Modernization so that, where permitted by law:

(A) Federal environmental reviews and authorization processes for infrastructure projects are consistent, coordinated, and predictable; and

(B) the time for the Federal Government's processing of environmental reviews and authorization decisions for new major infrastructure projects should be reduced to not more than an average of approximately 2 years, measured from the date of the publication of a notice of intent to prepare an environmental impact statement or other benchmark deemed appropriate by the Director of OMB.

(ii) *Agency Goals.* All Federal agencies with environmental review, authorization, or consultation responsibilities for infrastructure projects shall modify their Strategic Plans and Annual Performance Plans under the

GPRA Modernization Act of 2010 to include agency performance goals related to the completion of environmental reviews and authorizations for infrastructure projects consistent with the new CAP Goal on Infrastructure Permitting Modernization. The agencies shall integrate the achievement of these performance goals into appropriate agency personnel performance plans, such as those of the agency Chief Environmental Review and Permitting Officers (CERPOs) or other appropriate officials, consistent with guidance to be provided by OMB, in consultation with the Office of Personnel Management. Progress on these goals shall be reviewed and analyzed by agency leadership, pursuant to the GPRA Modernization Act of 2010.

(b) *Accountability.* Within 180 days of the establishment of the CAP Goal on Infrastructure Permitting Modernization, as described in subsection (a) of this section, or such longer period of time as determined by the Director of OMB, OMB, in consultation with the FPISC, shall issue guidance for establishing a performance accountability system to facilitate achievement of the CAP Goal.

(i) *Tracking of Major Infrastructure Projects.* The performance accountability system shall track each major infrastructure project. The performance accountability system shall include, at a minimum, assessments of the agency's performance with respect to each of the following areas, as applicable:

(A) whether major infrastructure projects are processed using the ''One Federal Decision'' mechanism, as described in subsection 5(b) of this order;

(B) whether major infrastructure projects have a permitting timetable;

(C) whether major infrastructure projects follow an effective process that automatically elevates instances in which permitting timetable milestones are missed or extended, or are anticipated to be missed or extended, to appropriate senior agency officials;

(D) whether agencies are meeting the established milestones in the permitting timetable;

(E) the time it takes to complete the processing of environmental reviews and authorizations for each major infrastructure project; and

(F) the costs of the environmental reviews and authorizations for each major infrastructure project.

(ii) *Scoring.* The accountability system shall include a scoring mechanism that shall follow, at a minimum, the following procedures:

(A) agencies will submit information to OMB, consistent with existing reporting mechanisms to the maximum extent possible, on the assessment areas described in subsection (b)(i) of this section;

(B) at least once per quarter, OMB will produce a scorecard of agency performance and overall progress toward achieving CAP Goal targets;

(C) where an agency's inability to meet a permitting timetable milestone results in a significant delay of the project timeline, after consulting with the project sponsor and relevant agencies, agencies will submit (based on OMB guidance) an estimate of the delay's costs to the project; and

(D) the Director of OMB will consider each agency's performance during budget formulation and determine whether appropriate penalties, including those authorized at 23 U.S.C. 139(h)(7) and 33 U.S.C. 2348(h)(5), must or should be imposed, to the extent required or permitted by law, for those that significantly fail to meet a permitting timetable milestone or in other situations deemed appropriate by the Director of OMB after considering the causes of any poor performance.

(iii) *Best Practices.* Agencies shall implement the techniques and strategies the FPISC annually identifies as best practices pursuant to 42 U.S.C. 4370m–1(c)(2)(B), as appropriate. The performance accountability system

shall track and score agencies on the incorporation and implementation of appropriate best practices for all infrastructure projects, including the implementation of such best practices at an agency's field level.

Sec. 5. *Process Enhancements.* In furtherance of the policy described in section 2 of this order, Federal agencies shall follow a more unified environmental review and authorization process.

(a) *Processing of Major Infrastructure Projects.* In processing environmental reviews and authorizations for major infrastructure projects, Federal agencies shall:

(i) use ''One Federal Decision'' described in subsection (b) of this section;

(ii) develop and follow a permitting timetable, which shall be reviewed and updated at least quarterly by the lead Federal agency in consultation with Federal cooperating and participating agencies; and

(iii) follow an effective process that automatically elevates instances where a permitting timetable milestone is missed or extended, or is anticipated to be missed or extended, to appropriate senior agency officials of the lead Federal agency and the cooperating and participating Federal agency or agencies to which the milestone applies.

(b) *One Federal Decision.*

(i) Each major infrastructure project shall have a lead Federal agency, which shall be responsible for navigating the project through the Federal environmental review and authorization process, including the identification of a primary Federal point of contact at each Federal agency. All Federal cooperating and participating agencies shall identify points of contact for each project, cooperate with the lead Federal agency point of contact, and respond to all reasonable requests for information from the lead Federal agency in a timely manner.

(ii) With respect to the applicability of NEPA to a major infrastructure project, the Federal lead, cooperating, and participating agencies for each major infrastructure project shall all record any individual agency decision in one Record of Decision (ROD), which shall be coordinated by the lead Federal agency unless the project sponsor requests that agencies issue separate NEPA documents, the NEPA obligations of a cooperating or participating agency have already been satisfied, or the lead Federal agency determines that a single ROD would not best promote completion of the project's environmental review and authorization process. The Federal lead, cooperating, and participating agencies shall all agree to a permitting timetable that includes the completion dates for the ROD and the federally required authorizations for the project.

(iii) All Federal authorization decisions for the construction of a major infrastructure project shall be completed within 90 days of the issuance of a ROD by the lead Federal agency, provided that the final EIS includes an adequate level of detail to inform agency decisions pursuant to their specific statutory authority and requirements. The lead Federal agency may extend the 90-day deadline if the lead Federal agency determines that Federal law prohibits the agency from issuing its approval or permit within the 90-day period, the project sponsor requests that the permit or approval follow a different timeline, or the lead Federal agency determines that an extension would better promote completion of the project's environmental review and authorization process.

(iv) The Council on Environmental Quality (CEQ) and OMB shall develop the framework for implementing One Federal Decision, in consultation with the FPISC.

(A) The framework should be consistent with the model processes established under 42 U.S.C. 4370m–2, 23 U.S.C. 139, 33 U.S.C. 2348, the 2015 ''Red Book'' (officially entitled ''Synchronizing Environmental Reviews for Transportation and Other Infrastructure Projects''), and CEQ guidance on efficient and timely environmental reviews under NEPA.

(B) The framework shall also include guidance on the development of permitting timetables by the lead Federal agencies, in collaboration with Federal cooperating and participating agencies. Permitting timetables shall identify estimated intermediate and final completion dates for all environmental reviews and authorizations that are reasonably anticipated as being needed for a project, including the process for granting extensions of any established dates. The guidance shall specify that lead Federal agencies need not include the estimated intermediate and final completion dates of any such reviews or authorizations until the design of a project has sufficiently advanced so that they can be developed. In such cases, the guidance shall instruct lead Federal agencies to estimate when the project's design will be advanced enough to determine such dates. The timelines shall account for any federally required decisions or permits that are assumed by, or delegated to, State, tribal, or local agencies and the extent to which any approval or permit to be issued by a Federal agency is dependent upon the issuance of such a decision or permit.

(C) CEQ and OMB shall also develop guidance for applying One Federal Decision whenever the lead agency is a State, tribal, or local agency exercising an assignment or delegation of an agency's NEPA responsibilities.

(c) *Dashboard.* All projects subject to 23 U.S.C. 139 and ''covered projects'' under 42 U.S.C. 4370m shall be tracked on the Dashboard established under 42 U.S.C. 4370m–2(b). Other projects or classes of projects subject to special environmental review and authorization streamlining processes similar to those referenced in this subsection may also be tracked on the Dashboard at the discretion of the FPISC Executive Director. The dates for milestones of all projects tracked on the Dashboard shall be updated monthly, or on another appropriate timeline as may be determined by the FPISC Executive Director.

(d) *Executive Order 13766.* For purposes of implementing Executive Order 13766 of January 24, 2017 (Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects), all infrastructure projects that meet the criteria for, and are subject to, 23 U.S.C. 139, 33 U.S.C. 2348, or 42 U.S.C. 4370m–4370m–12 shall qualify as high priority projects under Executive Order 13766. Other projects or classes of projects subject to special environmental review and authorization streamlining processes, similar to those referenced in this subsection as may be determined by the FPISC Executive Director in consultation with OMB and CEQ, shall also qualify as high priority infrastructure projects under Executive Order 13766. The CEQ Chairman's responsibilities under sections 2 and 3 of Executive Order 13766 shall be satisfied by referring the project to the FPISC Executive Director, the Secretary of Transportation, or the Assistant Secretary of the Army for Civil Works, as appropriate.

(e) *Council on Environmental Quality.*

(i) *Directives.* Within 30 days of the date of this order, the CEQ shall develop an initial list of actions it will take to enhance and modernize the Federal environmental review and authorization process. Such actions should include issuing such regulations, guidance, and directives as CEQ may deem necessary to:

(A) ensure optimal interagency coordination of environmental review and authorization decisions, including by providing for an expanded role and authorities for lead agencies, more clearly defined responsibilities for cooperating and participating agencies, and Government-wide applicability of NEPA decisions and analyses;

(B) ensure that environmental reviews and authorization decisions involving multiple agencies are conducted in a manner that is concurrent, synchronized, timely, and efficient;

(C) provide for agency use, to the maximum extent permitted by law, of environmental studies, analysis, and decisions conducted in support

of earlier Federal, State, tribal, or local environmental reviews or authorization decisions; and

(D) ensure that agencies apply NEPA in a manner that reduces unnecessary burdens and delays as much as possible, including by using CEQ's authority to interpret NEPA to simplify and accelerate the NEPA review process.

(ii) *Dispute Resolution.* Except where dispute resolution processes are otherwise provided for in law, including under 42 U.S.C. 4370m–2, or by Executive Order or other Presidential directive, upon request of a lead Federal agency, cooperating agency, or participating agency, CEQ may mediate interagency disputes arising between Federal agencies concerning Federal environmental review or authorization decisions for any infrastructure project pertaining to any environmental law, regulation, order or policy, and shall facilitate resolution of any conflicting positions of the relevant agencies.

(iii) *Agency Procedures.* CEQ shall form and lead an interagency working group, consisting of the Director of OMB, agency CERPOs, and such other representatives of agencies as CEQ deems appropriate. The working group shall review the NEPA implementing regulations and other environmental review and authorization processing policies of agencies that are members of the FPISC to identify impediments to efficient and effective environmental reviews and authorizations for infrastructure projects. The working group shall also identify those agencies that require an action plan to address identified impediments. Based on this review, agencies shall develop action plans that set forth the actions they will take and timelines for completing those actions, and they shall submit those action plans to CEQ and OMB for comment. Each agency's action plan shall, at a minimum, establish procedures for a regular review and update of categorical exclusions, where appropriate.

(f) *Federal Permitting Improvement Steering Council.*

(i) *Organizational Support.* Unless otherwise determined by the Director of OMB, the General Services Administration (GSA) shall provide necessary administrative and organizational support to the FPISC, including personnel, procurement, and budget support. The GSA Administrator, or the head of another agency designated by the Director of OMB, may delegate any authority to the FPISC Executive Director necessary for the operation and administration of the FPISC and the Office of the Executive Director, and the Executive Director may redelegate these authorities, as appropriate.

(ii) *Additional Duties.* In addition to the duties and responsibilities charged to the FPISC Executive Director under 42 U.S.C. 4370m–4370m–12 and this order, the FPISC Executive Director may, upon request of a FPISC member agency or a project sponsor, work with the lead agency or any cooperating and participating agencies to facilitate the environmental review and authorization process for any infrastructure project regardless of whether the project is a ''covered project'' under 42 U.S.C. 4370m, including by resolving disputes and promoting early coordination. The FPISC Executive Director, the Director of OMB, or the Chairman of CEQ may establish any appropriate policies or procedures concerning the FPISC Executive Director's facilitation of the environmental review and authorization process under this subsection. Agencies must cooperate with the FPISC Executive Director with respect to the implementation of these additional duties.

(g) *Energy Corridors.* The Departments of the Interior and Agriculture, as appropriate, shall be the lead agencies for facilitating the identification and designation of energy right-of-way corridors on Federal lands for Government-wide expedited environmental review for the development of energy infrastructure projects.

(h) The Department of the Interior shall provide to OMB a strategy and recommendations for a multi-agency reorganization effort that would further

the aims of this order. OMB, in consultation with the Department of the Interior, shall coordinate with the heads of other agencies affected to incorporate the strategy, as appropriate, into the comprehensive reorganization plan developed under Executive Order 13781 of March 13, 2017 (Comprehensive Plan for Reorganizing the Executive Branch).

Sec. 6. Executive Order 13690 of January 30, 2015 (Establishing a Federal Flood Risk Management Standard and a Process for Further Soliciting and Considering Stakeholder Input), is revoked.

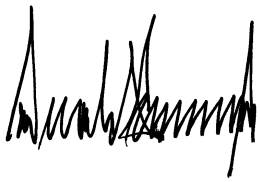
Sec. 7. *General Provisions.* (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department, agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) 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, or entities, its officers, employees, or agents, or any other person.



THE WHITE HOUSE,
August 15, 2017.

[FR Doc. 2017–18134
Filed 8–23–17; 11:15 am]
Billing code 3295–F7–P

Index to 40 CFR 1500

1500 Purpose, Policy, and Mandate
1501 NEPA and Agency Planning
1502 Environmental Impact Statement
1503 Commenting
1504 Predecision Referrals to the Council of Proposed Federal Actions Determined to be Environmentally Unsatisfactory
1505 NEPA and Agency Decisionmaking
1506 Other Requirements of NEPA
1507 Agency Compliance
1508 Terminology and Index

PART 1500--PURPOSE, POLICY, AND MANDATE

Sec. 1500.1 Purpose.
1500.2 Policy.
1500.3 Mandate.
1500.4 Reducing paperwork.
1500.5 Reducing delay.
1500.6 Agency authority.

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

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

Sec. 1500.1 Purpose.

(a) The National Environmental Policy Act (NEPA) is our basic national charter for protection of the environment. 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.

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).

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

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.

PART 1501--NEPA AND AGENCY PLANNING

Sec. 1501.1 Purpose.
1501.2 Apply NEPA early in the process.
1501.3 When to prepare an environmental assessment.
1501.4 Whether to prepare an environmental impact statement.
1501.5 Lead agencies.
1501.6 Cooperating agencies.
1501.7 Scoping.
1501.8 Time limits.

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

Source: 43 FR 55992, Nov. 29, 1978, unless otherwise noted.

Sec. 1501.1 Purpose.

The purposes of this part include:

(a) Integrating the NEPA process into early planning to insure appropriate consideration of NEPA's policies and to eliminate delay.

(b) Emphasizing cooperative consultation among agencies before the environmental impact statement is prepared rather than submission of adversary comments on a completed document.

(c) Providing for the swift and fair resolution of lead agency disputes.

(d) Identifying at an early stage the significant environmental issues deserving of study 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. 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 action.
2. A detailed statement of why each potential lead agency should or should not be the lead agency under the criteria specified in paragraph (c) of this section.

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

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

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.
1502.2 Implementation.
1502.3 Statutory requirements for statements.
1502.4 Major Federal actions requiring the preparation of environmental impact statements.
1502.5 Timing.
1502.6 Interdisciplinary preparation.
1502.7 Page limits.
1502.8 Writing.
1502.9 Draft, final, and supplemental statements.
1502.10 Recommended format.
1502.11 Cover sheet.
1502.12 Summary.
1502.13 Purpose and need.
1502.14 Alternatives including the proposed action.
1502.15 Affected environment.
1502.16 Environmental consequences.
1502.17 List of preparers.
1502.18 Appendix.
1502.19 Circulation of the environmental impact statement.
1502.20 Tiering.
1502.21 Incorporation by reference.
1502.22 Incomplete or unavailable information.
1502.23 Cost-benefit analysis.
1502.24 Methodology and scientific accuracy.
1502.25 Environmental review and consultation requirements.

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

Source: 43 FR 55994, Nov. 29, 1978, unless otherwise noted.

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.

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.

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 included in the proposed action or alternatives.

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.

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

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

PART 1503--
COMMENTING

Sec. 1503.1 Inviting comments.
1503.2 Duty to comment.
1503.3 Specificity of comments.
1503.4 Response to comments.

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

Source: 43 FR 55997, Nov. 29, 1978, unless otherwise noted.

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.
4. Make factual corrections.
5. Explain why the comments do not warrant further agency response, citing the sources, authorities, or reasons which support the agency's position and, if appropriate, indicate those circumstances which would trigger agency reappraisal or further response.

(b) All substantive comments received on the draft statement (or summaries thereof where the response has been exceptionally voluminous), should be attached to the final statement whether or not the comment is thought to merit individual discussion by the agency in the text of the statement.

(c) If changes in response to comments are minor and are confined to the responses described in paragraphs (a)(4) and (5) of this section, agencies may write them on errata sheets and attach them to the statement instead of rewriting the draft statement. In such cases only the comments, the responses, and the changes and not the final statement need be circulated (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.
1504.2 Criteria for referral.
1504.3 Procedure for referrals and response.

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

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

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).

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

PART 1505--NEPA AND AGENCY DECISIONMAKING

Sec. 1505.1 Agency decisionmaking procedures.
1505.2 Record of decision in cases requiring environmental impact statements.
1505.3 Implementing the decision.

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

Source: 43 FR 55999, Nov. 29, 1978, unless otherwise noted.

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.

PART 1506--OTHER REQUIREMENTS OF NEPA

Sec. 1506.1 Limitations on actions during NEPA process.
1506.2 Elimination of duplication with State and local procedures.
1506.3 Adoption.
1506.4 Combining documents.
1506.5 Agency responsibility.
1506.6 Public involvement.
1506.7 Further guidance.
1506.8 Proposals for legislation.
1506.9 Filing requirements.
1506.10 Timing of agency action.
1506.11 Emergencies.
1506.12 Effective date.

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

Source: 43 FR 56000, Nov. 29, 1978, unless otherwise noted.

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 the Administration.

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.

5. In all cases the agency shall mail notice to those who have requested it on an individual action.

6. 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.

7. 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:

8. Substantial environmental controversy concerning the proposed action or substantial interest in holding the hearing.

9. 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:

10. Research activities;
11. Meetings and conferences related to NEPA; and
12. 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:

13. There need not be a scoping process.

14. 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 Environmental Protection Agency, attention Office of Federal Activities (A-104), 401 M Street SW., 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 Sec. 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:

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

16. 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.

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

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.
1507.2 Agency capability to comply.
1507.3 Agency procedures.

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

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

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

Sec. 1508.1 Terminology.
1508.2 Act.
1508.3 Affecting.
1508.4 Categorical exclusion.
1508.5 Cooperating agency.
1508.6 Council.
1508.7 Cumulative impact.
1508.8 Effects.
1508.9 Environmental assessment.
1508.10 Environmental document.
1508.11 Environmental impact statement.
1508.12 Federal agency.
1508.13 Finding of no significant impact.
1508.14 Human environment.
1508.15 Jurisdiction by law.
1508.16 Lead agency.
1508.17 Legislation.
1508.18 Major Federal action.
1508.19 Matter.
1508.20 Mitigation.
1508.21 NEPA process.
1508.22 Notice of intent.
1508.23 Proposal.
1508.24 Referring agency.
1508.25 Scope.
1508.26 Special expertise.
1508.27 Significantly.
1508.28 Tiering.

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

Source: 43 FR 56003, Nov. 29, 1978, unless otherwise noted.

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 consequencies together, such as common timing or geography. An agency may wish to analyze these actions in the same impact statement. It should do so when the best way to assess adequately the combined impacts of similar actions or reasonable alternatives to such actions is to treat them in a single impact statement.

(b) Alternatives, which include:

1. No action alternative.

2. Other reasonable courses of actions.

3. Mitigation measures (not in the proposed action).

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

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.

Index

Act 1508.2
Action 1508.18, 1508.25
Action-forcing 1500.1, 1502.1
Adoption .....1500.4(n), 1500.5(h), 1506.3
Affected Environment .....1502.10(f), 1502.15
Affecting 1502.3, 1508.3
Agency Authority 1500.6
Agency Capability ..... 1501.2(a), 1507.2
Agency Procedures 1505.1, 1507.3
Agency Responsibility 1506.5
Alternatives ..... 1501.2(c), 1502.2, 1502.10(e), 1502.14, 1505.1(e), 1505.2, 1507.2(d), 1508.25(b)
Appendices..... 1502.10(k), 1502.18, 1502.24
Applicant ..... 1501.2(d)(1), 1501.4(b), 1501.8(a), 1502.19(b), 1503.1(a)(3), 1504.3(e), 1506.1(d), 1506.5(a), 1506.5(b)
Apply NEPA Early in the Process 1501.2
Categorical Exclusion ..... 1500.4(p), 1500.5(k), 1501.4(a), 1507.3(b), 1508.4
Circulating of Environmental Impact Statement 1502.19, 1506.3
Classified Information .....1507.3(c)
Clean Air Act ..... 1504.1, 1508.19(a)
Combining Documents ..... 15004.4(o), 1500.5(i), 1506.4
Commenting .....1502.19, 1503.1, 1503.2, 1503.3, 1503.4, 1506.6(f)
Consultation Requirement .....1500.4(k) 1500.5(g), 1501.7(a)(6), 1502.25
Context .....1508.27(a)
Cooperating Agency ..... 1500.5(b), 1501.1(b) 1501.5(c), 1501.5(f), 1501.6, 1503.1(a)(1), 1503.2, 1503.3, 1506.3(c), 1506.5(a), 1508.5
Cost Benefit 1502.23
Council on Environmental Quality .....1500.3 1501.5(e), 1501.5(f), 1501.6(c), 1502.9(c)(4), 1504.1, 1504.2, 1504.3, 1506.6(f), 1506.9, 1506.10(e), 1506.11, 1507.3, 1508.6, 1508.24
Cover Sheet ..... 1502.10(a), 1502.11
Cumulative Impact ..... 1508.7, 1508.25(a), 1508.25(c)
Decisionmaking 1505.1, 1506.1
Decision points .....1505.1(b)
Dependent .....1508.25(a)
Draft Environmental Impact Statement .....1502.9(a)
Early Application of NEPA 1501.2
Economic Effects 1508.8
Effective Date 1506.12
Effects 1502.16, 1508.8
Emergencies 1506.11
Endangered Species Act ..... 1502.25, 1508.27(b)(9)
Energy .....1502.16(e)
Environmental Assessment..... 1501.3, 1501.4(b), 1501.4(c), 1501.7(b)(3), 1506.2(b)(4), 1506.5(b), 1508.4, 1508.9. 1508.10, 1508.13
Environmental Consequences .....1502.10(g), 1502.16
Environmental Consultation Requirements .....1500.4(k), 1500.5(g), 1501.7(a)(6), 1502.25, 1503.3(c)
Environmental Documents 1508.10
Environmental Impact Statement .....1500.4 1501.4(c), 1501.7, 1501.3, 1502.1, 1502.2, 1502.3, 1502.4, 1502.5, 1502.6, 1502.7, 1502.8, 1502.9, 1502.10, 1502.11, 1502.12, 1502.13, 1502.14, 1502.15, 1502.16, 1502. 17, 1502.18, 1502.19, 1502.20, 1502.21,1502.22, 1502.23, 1502.24, 1502.25, 1506.2(b)(4), 1506.3, 1506.8, 1508.11
Environmental Protection Agency .....1502.11(f), 1506.9, 1506.10, 1508.19(a)
Environmental Review Requirements ..... 1500.4(k), 1500.5(g), 1501.7(a)(6), 1502.25, 1503.3(c)
Expediter .....1501.8(b)(2)
Federal Agency 1508.12
Filing 1506.9
Final Environmental Impact Statement .....1502.9(b),

1503.1, 1503.4(b)
Finding of No Significant Impact .....1500.3, 1500.4(q), 1500.5(1), 1501.4(e), 1508.13
Fish and Wildlife Coordination Act 1502.25
Format for Environmental Impact Statement 1502.10
Freedom of Information Act .....1506.6(f)
Further Guidance 1506.7
Generic ..1502.4(c)(2)
General Services Administration .....1506.8(b)(5)
Geographic .....1502.4(c)(1)
Graphics 1502.8
Handbook .....1506.7(a)
Housing and Community Development Act 1506.12, 1508.12
Human Environment 1502.3, 1502.22, 1508.14
Impacts ..... 1508.8, 1508.25(c)
Implementing the Decision 1505.3
Incomplete or Unavailable Information 1502.22
Incorporation by Reference .....1500.4(j), 1502.21
Index .....1502.10(j)
Indian Tribes .....1501.2(d)(2), 1501.7(a)(1), 1502.15(c), 1503.1(a)(3)(ii), 1506.6(b)(3)(ii), 1508.5, 1508.12
Intensity .....1508.27(b)
Interdisciplinary Preparation 1502.6, 1502.17
Interim Actions 1506.1
Joint Lead Agency .....1501.5(b), 1506.2
Judicial Review 1500.3
Jurisdiction by Law 1508.15
Lead Agency .....1500.5(c), 1501.1(c), 1501.5, 1501.6, 1501.7, 1501.8, 1504.3, 1506.2(b)(4), 1506.8(a), 1506.10(e), 1508.16
Legislation .....155.5(j), 1502.3, 1506.8, 1508.17, 1508.18(a)
Limitation on Action During NEPA Action 1506.1
List of Preparers .....1502.10(h), 1502.17
Local or State ..... 1500.4(n), 1500.5(h), 1501.2(d)(2), 1501.5(b), 1501.5(d), 1501.7(a)(1), 1501.8(c), 1502.16(c), 1503.1(a)(2), 1506.2(b), 1506.6(b)(3), 1508.5, 1508.12, 1508.18
Major Federal Action 1502.3, 1508.18
State and Local ..... 1500.4(n), 1500.5(h) 1501.2(d)(2), 1501.5(b),
Mandate .1500.3
Matter 1504.1, 1504.2, 1504.3, 1508.19
Methodology 1502.24
Mitigation .....1502.14(h), 1502.16(h), 1503.3(d), 1505.2(c), 1505.3, 1508.20
Monitoring ..... 1505.2(c), 1505.3
National Historic Preservation Act 1502.25
National Register of Historic Places .....1508.27(b)
Natural or Depletable Resource Requirements ..... 1502.16(f)
Need for Action .....1502.10(d), 1502.13
NEPA Process 1508.21
Non-Federal Sponsor .....1501.2(d)
Notice of Intent .....1501.7, 1507.3(e), 1508.22
OMB Circular A-95 .....1503.1(a)(2)(iii), 1505.2, 1506(b)(3)(i)
102 Monitor .....1506(b)(2), 1506.7(c)
Ongoing Activities 1506.12
Page Limits .....1500.4(a), 1501.7(b), 1502.7
Planning .....1500.5(a), 1501.2(b), 1502.4(a), 1508.18
Policy .....1500.2, 1502.4(b), 1508.18(a)
Program Environmental Impact Statement .....1500.4(i), 1502.4, 1502.20, 1508.18
Programs .....1502.4, 1508.18(b)
Projects 1508.18
Proposal 1502.4, 1502.5, 1506.8, 1508.23
Proposed Action .....1502.10(e), 1502.14, 1506.2(c)
Public Health and Welfare 1504.1
Public Involvement .....1501.4(e), 1503.1(a)(3), 1506.6
Purpose 1500.1, 1501.1, 1502.1, 1504.1
Purpose of Action .....1502.10(d), 150.13
Record of Decision 1505.2, 1506.1
Referrals .....1504.1, 1504.2, 1504.3, 1506.3(d)
Referring Agency 1504.1, 1504.2, 1504.3
Response to Comments 1503.4
Rural Electrification Administration .....1506.1(d)
Scientific Accuracy 1502.24
Scope .....1502.4(a), 1502.9(a), 1508.25
Scoping ..... 1500.4(b), 1501.1(d), 1501.4(d), 1501.7, 1502.9(a), 1506.8(a),
Significantly 1502.3, 1508.27
Similar 1508.25
Small Business Associations .....1506.6(b)(3)(vi)
Social Effects 1508.8
Special Expertise 1508.26
Specificity of Comments 1500.14, 1503.3
State and AreawideClearinghouses .....1501.4(e)(2), 1503.1(a)(2)(iii), 1506.6(b)(3)(i) 1501.5(d), 1501.7(a)(1), 1501.8(c), 1502.16(c),

1503.1(a)(2), 1506.2(b),
1506.6(b)(3), 1508.5,
1508.12, 1508.18
State and Local Fiscal
Assistance .....1508.18(a)
Summary .....1500.4(h), 1502.10(b), 1502.12
Supplements to Environmental
Impact Statements .....1502.9(c)
Table of Contents .....1502.10(c)
Technological Developments .....1502.4(c)(3)
Terminology 1508.1
Tiering ..... 1500.4(i), 1502.4(d), 1502.20, 1508.28

Time Limits .....1500.5(e), 1501.1(e),
1501.7(b)(2), 1501.8
Timing 1502.4, 1502.5, 1506.10
Treaties 1508.17
When to Prepare an Environmental
Impact Statement 1501.3
Wild and Scenic Rivers Act .....1506.8(b)(ii)
Writing 1502.8

NEPA's Forty Most Asked Questions

1. Range of Alternatives.
2. Alternatives Outside the Capability of Applicant or Jurisdiction of Agency.
3. No-Action Alternative.
4. Agency's Preferred Alternative.
5. Proposed Action v. Preferred Alternative.
6. Environmentally Preferable Alternative.
7. Difference Between Sections of EIS on Alternatives and Environmental Consequences.
8. Early Application of NEPA.
9. Applicant Who Needs Other Permits.
10. Limitations on Action During 30-Day Review Period for Final EIS.
11. Limitations on Actions by an Applicant During EIS Process.
12. Effective Date and Enforceability of the Regulations.
13. Use of Scoping Before Notice of Intent to Prepare EIS.
14. Rights and Responsibilities of Lead and Cooperating Agencies.
15. Commenting Responsibilities of EPA.
16. Third Party Contracts.
17. Disclosure Statement to Avoid Conflict of Interest.
18. Uncertainties About Indirect Effects of A Proposal.
19. Mitigation Measures.
20. Worst Case Analysis. [Withdrawn.]
21. Combining Environmental and Planning Documents.
22. State and Federal Agencies as Joint Lead Agencies.
23. Conflicts of Federal Proposal With Land Use Plans, Policies or Controls.
24. Environmental Impact Statements on Policies, Plans or Programs.

25. Appendices and Incorporation by Reference.

26. Index and Keyword Index in EISs.

27. List of Preparers.

28. Advance or Xerox Copies of EIS.

29. Responses to Comments.

30. Adoption of EISs.

31. Application of Regulations to Independent Regulatory Agencies.

32. Supplements to Old EISs.

33. Referrals.

34. Records of Decision.

35. Time Required for the NEPA Process.

36. Environmental Assessments (EA).

37. Findings of No Significant Impact (FONSI).

38. Public Availability of EAs v. FONSIs.

39. Mitigation Measures Imposed in EAs and FONSIs.

40. Propriety of Issuing EA When Mitigation Reduces Impacts.

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

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

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

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

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

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

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

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

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

A. Section 1502.14(d) requires the alternatives analysis in the EIS to "include the alternative of no action." There are two distinct interpretations of "no action" that must be considered, depending on the nature of the proposal being evaluated. The first situation might involve an action such as updating a land management plan where ongoing programs initiated under existing legislation and regulations will continue, even as new plans are developed. In these cases "no action" is "no change" from current management direction or level of management intensity. To construct an alternative that is based on no management at all would be a useless academic exercise. Therefore, the "no action" alternative may be thought of in terms of continuing with the present course of action until that action is changed. Consequently, projected impacts of alternative management schemes would be compared in the EIS to those impacts projected for the existing plan. In this case, alternatives would include management plans of both greater and lesser intensity, especially greater and lesser levels of resource development.

The second interpretation of "no action" is illustrated in instances involving federal decisions on proposals for projects. "No action" in such cases would mean the proposed activity would not take place, and the resulting environmental effects from taking no action would be compared with the effects of permitting the proposed activity or an alternative activity to go forward.

Where a choice of "no action" by the agency would result in predictable actions by others, this consequence of the "no action" alternative should be included in the analysis. For example, if denial of permission to build a railroad to a facility would lead to construction of a road and increased truck traffic, the EIS should analyze this consequence of the "no action" alternative.

In light of the above, it is difficult to think of a situation where it would not be appropriate to address a "no action" alternative. Accordingly, the regulations require the analysis of the no action alternative even if the agency is under a court order or legislative command to act. This analysis provides a benchmark, enabling decisionmakers to compare the magnitude of environmental effects of the action alternatives. It is also an example of a reasonable alternative outside the jurisdiction of the agency which must be analyzed. Section 1502.14(c). See Question 2 above. Inclusion of such an analysis in the EIS is necessary to inform the Congress, the public, and the President as intended by NEPA. Section 1500.1(a).

4a. **Agency's Preferred Alternative.** What is the "agency's preferred alternative"?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The "environmental consequences" section should be devoted largely to a scientific analysis of the direct and indirect environmental effects of the proposed action and of each of the alternatives. It forms the analytic basis for the concise comparison in the "alternatives" section.

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

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

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

Federal agencies are required by Section 1507.3(b) to develop procedures to carry out Section 1501.2(d). The procedures should include an "outreach program", such as a means for prospective applicants to conduct pre-application consultations with the lead and cooperating agencies. Applicants need to find out, in advance of project planning, what environmental studies or other information will be required, and what mitigation requirements are likely, in connecton with the later federal NEPA process. Agencies should designate staff to advise potential applicants of the agency's NEPA information requirements and should publicize their pre-application procedures and information requirements in newsletters or other media used by potential applicants.

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

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

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

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

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

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

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

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

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

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

Until the agency issues its Record of Decision, no action by an agency or an applicant concerning the proposal shall be taken which would have an adverse environmental impact or limit the choice of reasonable alternatives. Section 1506.1(a). But this does not preclude

preliminary planning or design work which is needed to support an application for permits or assistance. Section 1506.1(d).

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

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

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

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

A. The federal agency must notify the applicant that the agency will take strong affirmative steps to insure that the objectives and procedures of NEPA are fulfilled. Section 1506.1(b). These steps could include seeking injunctive measures under NEPA, or the use of sanctions available under either the agency's permitting authority or statutes setting forth the agency's statutory mission. For example, the agency might advise an applicant that if it takes such action the agency will not process its application.

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

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

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

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

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

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

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

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

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

A. Yes. Scoping can be a useful tool for discovering alternatives to a proposal, or significant impacts that may have been overlooked. In cases where an environmental assessment is being prepared to help an agency decide whether to prepare an EIS, useful information might result from early participation by other agencies and the public in a scoping process.

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

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

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

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

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

Cooperating agencies must assume responsibility for the development of information and the preparation of environmental analyses at the request of the lead agency. Section 1501.6(b)(3). Cooperating agencies are now required by Section 1501.6 to devote staff resources that were normally primarily used to critique or comment on the Draft EIS after its

preparation, much earlier in the NEPA process -- primarily at the scoping and Draft EIS preparation stages. If a cooperating agency determines that its resource limitations preclude any involvement, or the degree of involvement (amount of work) requested by the lead agency, it must so inform the lead agency in writing and submit a copy of this correspondence to the Council. Section 1501.6(c).

In other words, the potential cooperating agency must decide early if it is able to devote any of its resources to a particular proposal. For this reason the regulation states that an agency may reply to a request for cooperation that "other program commitments preclude any involvement or the degree of involvement requested in the action that is the subject of the environmental impact statement." (Emphasis added). The regulation refers to the "action," rather than to the EIS, to clarify that the agency is taking itself out of all phases of the federal action, not just draft EIS preparation. This means that the agency has determined that it cannot be involved in the later stages of EIS review and comment, as well as decisionmaking on the proposed action. For this reason, cooperating agencies with jurisdiction by law (those which have permitting or other approval authority) cannot opt out entirely of the duty to cooperate on the EIS. See also Question 15, relating specifically to the responsibility of EPA.

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

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

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

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

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

A. Cooperating agencies (i.e., agencies with jurisdiction by law or special expertise) and agencies that are authorized to develop or enforce environmental standards, must comment on environmental impact statements within their jurisdiction, expertise or authority. Sections 1503.2, 1508.5. If a cooperating agency is satisfied that its views are adequately reflected in the environmental impact statement, it should simply comment accordingly. Conversely, if the cooperating agency determines that a draft EIS is incomplete, inadequate or inaccurate, or it has other comments, it should promptly make such comments, conforming to the requirements of specificity in section 1503.3.

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

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

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

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

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

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

on the NPDES permit application. The "third party contract" method under EPA's NEPA procedures is purely voluntary, though most applicants have found it helpful in expediting compliance with NEPA.

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

17a. **Disclosure Statement to Avoid Conflict of Interest.** If an EIS is prepared with the assistance of a consulting firm, the firm must execute a disclosure statement. What criteria must the firm follow in determining whether it has any "financial or other interest in the outcome of the project" which would cause a conflict of interest?

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

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

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

A. Yes.

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

A. The EIS must identify all the indirect effects that are known, and make a good faith effort to explain the effects that are not known but are "reasonably foreseeable." Section 1508.8(b). In the example, if there is total uncertainty about the identity of future land owners or the nature of future land uses, then of course, the agency is not required to engage in speculation

or contemplation about their future plans. But, in the ordinary course of business, people do make judgments based upon reasonably foreseeable occurrences. It will often be possible to consider the likely purchasers and the development trends in that area or similar areas in recent years; or the likelihood that the land will be used for an energy project, shopping center, subdivision, farm or factory. The agency has the responsibility to make an informed judgment, and to estimate future impacts on that basis, especially if trends are ascertainable or potential purchasers have made themselves known. The agency cannot ignore these uncertain, but probable, effects of its decisions.

19a. **Mitigation Measures.** What is the scope of mitigation measures that must be discussed?

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

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

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

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

20. Worst Case Analysis. [Withdrawn.]

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

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

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

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

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

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

22. **State and Federal Agencies as Joint Lead Agencies.** May state and federal agencies

serve as joint lead agencies? If so, how do they resolve law, policy and resource conflicts under NEPA and the relevant state environmental policy act? How do they resolve differences in perspective where, for example, national and local needs may differ?

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

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

Because there may be differences in perspective as well as conflicts among [46 FR 18033] federal, state and local goals for resources management, the Council has advised participating agencies to adopt a flexible, cooperative approach. The joint EIS should reflect all of their interests and missions, clearly identified as such. The final document would then indicate how state and local interests have been accommodated, or would identify conflicts in goals (e.g., how a hydroelectric project, which might induce second home development, would require new land use controls). The EIS must contain a complete discussion of scope and purpose of the proposal, alternatives, and impacts so that the discussion is adequate to meet the needs of local, state and federal decisionmakers.

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

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

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

A. The term "land use plans," includes all types of formally adopted documents for land use planning, zoning and related regulatory requirements. Local general plans are included, even though they are subject to future change. Proposed plans should also be addressed if they have been formally proposed by the appropriate government body in a written form, and are

being actively pursued by officials of the jurisdiction. Staged plans, which must go through phases of development such as the Water Resources Council's Level A, B and C planning process should also be included even though they are incomplete.

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

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

A. After identifying any potential land use conflicts, the decisionmaker must weigh the significance of the conflicts, among all the other environmental and non-environmental factors that must be considered in reaching a rational and balanced decision. Unless precluded by other law from causing or contributing to any inconsistency with the land use plans, policies or controls, the decisionmaker retains the authority to go forward with the proposal, despite the potential conflict. In the Record of Decision, the decisionmaker must explain what the decision was, how it was made, and what mitigation measures are being imposed to lessen adverse environmental impacts of the proposal, among the other requirements of Section 1505.2. This provision would require the decisionmaker to explain any decision to override land use plans, policies or controls for the area.

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

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

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

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

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

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

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

A. The body of the EIS should be a succinct statement of all the information on environmental impacts and alternatives that the decisionmaker and the public need, in order to make the decision and to ascertain that every significant factor has been examined. The EIS must explain or summarize methodologies of research and modeling, and the results of research that may have been conducted to analyze impacts and alternatives.

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

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

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

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

The appendix must be complete and available at the time the EIS is filed. Five copies of the appendix must be sent to EPA with five copies of the EIS for filing. If the appendix is too bulky to be circulated, it instead must be placed in conveniently accessible locations or

furnished directly to commentors upon request. If it is not circulated with the EIS, the Notice of Availability published by EPA must so state, giving a telephone number to enable potential commentors to locate or request copies of the appendix promptly.

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

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

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

A. The EIS index should have a level of detail sufficient to focus on areas of the EIS of reasonable interest to any reader. It cannot be restricted to the most important topics. On the other hand, it need not identify every conceivable term or phrase in the EIS. If an agency believes that the reader is reasonably likely to be interested in a topic, it should be included.

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

A. No. A keyword index is a relatively short list of descriptive terms that identifies the key concepts or subject areas in a document. For example it could consist of 20 terms which describe the most significant aspects of an EIS that a future researcher would need: type of proposal, type of impacts, type of environment, geographical area, sampling or 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. **List of Preparers.** If a consultant is used in preparing an EIS, must the list of preparers identify members of the consulting firm as well as the agency NEPA staff who were primarily responsible?

A. Section 1502.17 requires identification of the names and qualifications of persons who were primarily responsible for preparing the EIS or significant background papers, including basic components of the statement. This means that members of a consulting firm preparing material that is to become part of the EIS must be identified. The EIS should identify these

individuals even though the consultant's contribution may have been modified by the agency.

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

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

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

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

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

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

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

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

An agency is not under an obligation to issue a lengthy reiteration of its methodology for any portion of an EIS if the only comment addressing the methodology is a simple complaint that the EIS methodology is inadequate. But agencies must respond to comments, however brief, which are specific in their criticism of agency methodology. For example, if a commentor on an EIS said that an agency's air quality dispersion analysis or methodology was inadequate, and the agency had included a discussion of that analysis in the EIS, little if anything need be

added in response to such a comment. However, if the 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. 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 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 on a proposal for a pumped storage power facility might suggest that the applicant's proposed alternative should be enhanced by the addition of certain reasonable mitigation measures, including the purchase and setaside of a wildlife preserve to substitute for the tract to be destroyed by the project. The modified alternative including the additional mitigation measures should be discussed by the agency in the final EIS.

A third slightly different possibility is that a comment on a draft EIS will raise an alternative which is a minor variation of one of the alternatives discussed in the draft EIS, but this variation was not given any consideration by the agency. In such a case, the agency should develop and evaluate the new alternative, if it is reasonable, in the final EIS. If it is qualitatively within the spectrum of alternatives that were discussed in the draft, a supplemental draft will not be needed. For example, a 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 supplemental EIS would have to be prepared. The agency could fulfill its obligation by addressing that specific alternative in the final EIS.

As another example, an EIS on an urban housing project may analyze the alternatives of

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

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

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

A cooperating agency with jurisidiction by law (e.g., an agency with independent legal responsibilities with respect to the proposal) has an independent legal obligation to comply with NEPA. Therefore, if the cooperating agency determines that the EIS is wrong or inadequate, it must prepare a supplement to the EIS, replacing or adding any needed information, and must circulate the supplement as a draft for public and agency review and comment. A final supplemental EIS would be required before the agency could take action. The adopted portions of the lead agency EIS should be circulated with the supplement. Section 1506.3(b). A cooperating agency with jurisdiction by law will have to prepare its own Record of Decision for its action, in which it must explain how it reached its conclusions. Each agency should explain how and why its conclusions differ, if that is the case, from those of other agencies which issued their Records of Decision earlier.

An agency that did not cooperate in preparation of an EIS may also adopt an EIS or portion thereof. But this would arise only in rare instances, because an agency adopting an EIS for use in its own decision normally would have been a cooperating agency. If the proposed action for which the EIS was prepared is substantially the same as the proposed action of the adopting agency, the EIS may be adopted as long as it is recirculated as a final EIS and the agency announces what it is doing. This would be followed by the 30-day review period and issuance of a Record of Decision by the adopting agency. If the proposed action by the adopting agency is not substantially the same as that in [46 FR 18036] the EIS (i.e., if an EIS on one action is being adapted for use in a decision on another action), the EIS would be treated as a draft and circulated for the normal public comment period and other procedures. Section 1506.3(b).

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

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

1507.3.

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

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

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

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

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

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

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

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

A. No, except for cases where agencies provide an internal appeal procedure which permits simultaneous filing of the final EIS and the record of decision (ROD). Section 1506.10(b)(2). Otherwise, as stated above, the process is a pre-decision referral process. Referrals must be made within 25 days after the notice of availability of the final EIS, whereas the final decision (ROD) may not be made or filed until after 30 days from the notice of availability of

the EIS. Sections 1504.3(b), 1506.10(b). If a lead agency has granted an extension of time for another agency to take action on a referral, the ROD may not be issued until the extension has expired.

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

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

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

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

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

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

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

The Record of Decision must also state whether all practicable mitigation measures have been adopted, and if not, why not. Section 1505.2(c). The Record of Decision must identify the mitigation measures and monitoring and enforcement programs that have been selected and plainly indicate that they are adopted as part of the agency's decision. If the proposed

action is the issuance of a permit or other approval, the specific details of the mitigation measures shall then be included as appropriate conditions in whatever grants, permits, funding or other approvals are being made by the federal agency. Section 1505.3 (a), (b). If the proposal is to be carried out by the [46 FR 18037] federal agency itself, the Record of Decision should delineate the mitigation and monitoring measures in sufficient detail to constitute an enforceable commitment, or incorporate by reference the portions of the EIS that do so.

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

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

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

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

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

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

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

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

preparation of an EIS when one is necessary. Section 1508.9(a).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

If a proposal appears to have adverse effects which would be significant, and certain mitigation measures are then developed during the scoping or EA stages, the existence of

such possible mitigation does not obviate the need for an EIS. Therefore, if scoping or the EA identifies certain mitigation possibilities without altering the nature of the overall proposal itself, the agency should continue the EIS process and submit the proposal, and the potential mitigation, for public and agency review and comment. This is essential to ensure that the final decision is based on all the relevant factors and that the full NEPA process will result in enforceable mitigation measures through the Record of Decision.

In some instances, where the proposal itself so integrates mitigation from the beginning that it is impossible to define the proposal without including the mitigation, the agency may then rely on the mitigation measures in determining that the overall effects would not be significant (e.g., where an application for a permit for a small hydro dam is based on a binding commitment to build fish ladders, to permit adequate down stream flow, and to replace any lost wetlands, wildlife habitat and recreational potential). In those instances, agencies should make the FONSI and EA available for 30 days of public comment before taking action. Section 1501.4(e)(2).

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

[This memorandum was published in the Federal Register and appears at 48 Fed. Reg. 34263 (1983). Ed. Note]

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 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 [48 FR 34264]a 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) 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 signficantly 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(b)). 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".(5) 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 signifcant 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

1. **Environmental Law Institute, NEPA In Action Environmental Offices in Nineteen Federal Agencies, A Report To the Council on Environmental Quality, October 1981.**
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.**
5. **46 FR 18026 (1981).**
6. **684 F.2d 1041 (1st Cir. 1982).**
7. **Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 551 (1978).**
8. **Monarch Chemical Works, Inc. v. Exon, 466 F.Supp. 639, 650 (1979), quoting Carolina Environmental Study Group v. U.S., 510 F.2d 796, 801 (1975).**
9. **Preamble, FR, Vol. 43, No. 230, p. 55984, 11/29/78.**
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).

13. California v. Block, 18 ERC 1149 (1982).

a[48 FR 34264] indicates that the subsequent text may be cited to 48 Fed. Reg. 34264 (1983). Ed. Note.

EXECUTIVE OFFICE OF THE PRESIDENT
COUNCIL ON ENVIRONMENTAL QUALITY
WASHINGTON, D.C. 20503

July 28, 1999

MEMORANDUM FOR HEADS OF FEDERAL AGENCIES

FROM: GEORGE T. FRAMPTON, JR. GTF Jr.
Acting Chair

SUBJECT: DESIGNATION OF NON-FEDERAL AGENCIES TO BE COOPERATING AGENCIES IN IMPLEMENTING THE PROCEDURAL REQUIREMENTS OF THE NATIONAL ENVIRONMENTAL POLICY ACT

The purpose of this Memorandum is to urge agencies to more actively solicit in the future the participation of state, tribal and local governments as "cooperating agencies" in implementing the environmental impact statement process under the National Environmental Policy Act (NEPA). 40 C.F.R. §1508.5. As soon as practicable, but no later than the scoping process, federal agency officials should identify state, tribal and local government agencies which have jurisdiction by law and or special expertise with respect to reasonable alternatives or significant environmental, social or economic impacts association with a proposed action that requires the preparation of an environmental impact statement[1]. The federal agency should then determine whether such non-federal agencies are interested in assuming the responsibilities of becoming a cooperating agency under 40 C.F.R. §1501.6. Where invited tribal, state, or local agencies choose not to become cooperators in the NEPA process, they may still be identified as an internal party on the distribution list, if they so desire.

[1] While CEQ has not attempted to identify every state, tribal and local government agencies with jurisdiction by law or special expertise (nor do we propose to do so), agencies may wish to refer to Appendix II to the CEQ regulations, "Federal and Federal-State Agencies with Jurisdiction by Law or Special Expertise on Environmental Quality Issues", Vol. 49 *Federal Register*,. No. 247, 49754-49778 (December 21, 1984), for guidance as to the types of actions and expertise that are relevant in determining appropriate cooperating agencies. Please contact CEQ for copies, if needed.

The benefits of granting cooperating agency status include disclosure of relevant information early in the analytical process, receipt of technical expertise and staff support, avoidance of duplication with state, tribal and local procedures, and establishment of a mechanism for addressing intergovernmental issues. If a non-federal agency agrees to become a cooperating agency, agencies are encouraged to document (e.g., in a memorandum of agreement) their specific expectations, roles and responsibilities, including such issues as preparation of analysis, schedules, availability of pre-decisional information and other issues. Cooperating agencies are normally expected to use their own funds for routine activities, but to the extent available funds permit, the lead agency should fund or include in its budget requests funding for major activities or analyses that it requests from cooperating agencies. 40 C.F.R. §1501.6(b)(5).

Agencies are reminded that cooperating agency status neither enlarges nor diminishes the decisionmaking authority of either federal or non-federal entities. However, cooperating agency relationships with state, tribal and local agencies help to achieve the direction set forth in NEPA to work with other levels of government "to 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." Considering NEPA's mandate and the authority granted in federal regulation to allow for cooperating agency status for state, tribal and local agencies, cooperator status for appropriate non-federal agencies should be routinely solicited.

Recycled Paper

EXECUTIVE OFFICE OF THE PRESIDENT
COUNCIL ON ENVIRONMENTAL QUALITY
WASHINGTON, D.C. 20503

January 30, 2002

MEMORANDUM FOR THE HEADS OF FEDERAL AGENCIES

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.[1] 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.[2] 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.[3] 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

[1] Cooperating agency status under NEPA is not equivalent to other requirements calling for an agency to engage another governmental entity in a consultation or coordination process (e.g., Endangered Species Act section 7, National Historic Preservation Act section 106). Agencies are urged to integrate NEPA requirements with other environmental review and consultation requirements (40 C.F.R. § 1500.2(c)); and reminded that not establishing or ending cooperating agency status does not satisfy or end those other requirements.

[2] Memorandum for Heads of Federal Agencies, Subject: Designation of Non-Federal Agencies to be Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act, dated July 28, 1999; Memorandum for Federal NEPA Liaisons, Federal, State, and Local Officials and Other Persons Involved in the NEPA Process, Subject: Questions and Answers About the NEPA Regulations (NEPA's Forty Most Asked Questions), dated March 16, 1981, published at 46 Fed. Reg. 18026 (Mar. 23, 1981), as amended.

[3] E.g., *The National Environmental Policy Act – A Study of its Effectiveness After Twenty-Five Years*, CEQ, January 1997

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 Horst G. Greczmiel, Associate Director for NEPA Oversight at 202-395-5750, Horst_Greczmiel@ceq.eop.gov, or 202-456-0753 (fax).

###

Factors for Determining Whether to Invite, Decline or End Cooperating Agency Status

1. Jurisdiction by law (40 C.F.R. § 1508.15) – for example, agencies with the authority to grant permits for implementing the action [federal agencies shall be a cooperating agency (1501.6); non-federal agencies may be invited (40 C.F.R. § 1508.5)]:

- Does the agency have the authority to approve a proposal or a portion of a proposal?
- Does the agency have the authority to veto a proposal or a portion of a proposal?
- Does the agency have the authority to finance a proposal or a portion of a proposal?

2. Special expertise (40 C.F.R. § 1508.26) – cooperating agency status for specific purposes linked to special expertise requires more than an interest in a proposed action [federal and non-federal agencies may be requested (40 C.F.R. §§ 1501.6 & 1508.5)]:

- Does the cooperating agency have the expertise needed to help the lead agency meet a statutory responsibility?
- Does the cooperating agency have the expertise developed to carry out an agency mission?
- Does the cooperating agency have the related program expertise or experience?
- Does the cooperating agency have the expertise regarding the proposed actions' relationship to the objectives of regional, State and local land use plans, policies and controls (1502.16(c))?

3. Do the agencies understand what cooperating agency status means and can they legally enter into an agreement to be a cooperating agency?

4. Can the cooperating agency participate during scoping and/or throughout the preparation of the analysis and documentation as necessary and meet milestones established for completing the process?

5. Can the cooperating agency, in a timely manner, aid in:

- identifying significant environmental issues [including aspects of the human environment (40 C.F.R. § 1508.14), including natural, social, economic, energy, urban quality, historic and cultural issues (40 C.F.R. § 1502.16)]?
- eliminating minor issues from further study?
- identifying issues previously the subject of environmental review or study?
- identifying the proposed actions' relationship to the objectives of regional, State and local land use plans, policies and controls (1502.16(c))?

(40 C.F.R. §§ 1501.1(d) and 1501.7)

6. Can the cooperating agency assist in preparing portions of the review and analysis and resolving significant environmental issues to support scheduling and critical milestones?

8. CA unwilling or unable to accept the lead agency's decisionmaking authority regarding the scope of the analysis, including authority to define the purpose and need for the proposed action or to develop information/analysis of alternatives they favor and disfavor.
9. Agency unable or unwilling to provide data and rationale underlying the analyses or assessment of alternatives.
10. Agency releases predecisional information (including working drafts) in a manner that undermines or circumvents the agreement to work cooperatively before publishing draft or final analyses and documents.
11. Agency consistently misrepresents the process or the findings presented in the analysis and documentation.
12. Other. Identify the other:

Environmental Assessments:

	Total
Number of EAs started during the reporting period	
Number of EAs involving potential CAs	
Number of EAs where agencies were invited to participate	
Number of EAs where agencies requested CA status	
Number of EAs where a CA status was not initiated or was ended for the reasons identified	
Number of EAs involving CAs begun and ongoing during the reporting period	
Number of EAs involving CAs begun and completed during the reporting period	

Sample Report to the Council on Environmental Quality
on Cooperating Agency (CA) Status
March 1, 2002 to August 31, 2002

I. Environmental Impact Statements:

	1.	2.	etc.
EIS	**(Title of EIS)**		
Potential CA	**(Name of potential CA)**		
Invited CA	**(Name of potential CA and basis – identify the jurisdiction by law or special expertise)**		
Agency Requesting CA Status	**(Name of potential CA and basis – identify the jurisdiction by law or special expertise)**		
CAs	**(Name of CA engaged in the EIS)**		
CA Status not Initiated or Ended	**(e.g., name of agency – reason status was not initiated or was ended – see examples listed below**		
Status of EIS	**(e.g., begun on mm/dd/yy; DEIS published mm/dd/yy; FEIS published mm/dd/yy; ROD published mm/dd/yy)**		

Examples of reasons CA status was not initiated or why it ended:

1. Lack of special expertise – identify the expertise sought by the lead agency and/or offered by the potential cooperating agency).
2. State, Tribal or local entity lacks authority to enter into an agreement to be a CA.
3. Potential CA unable to agree to participate during scoping and/or throughout the preparation of the analysis and documentation as necessary and meet milestones established for completing the process.
4. Potential or active CA unable or unwilling to identify significant issues, eliminate minor issues, identify issues previously studied, or identify conflicts with the objectives of regional, State and local land use plans, policies and controls in a timely manner.
5. Potential or active CA unable or unwilling to assist in preparing portions of the review and analysis and resolving significant environmental issues in a timely manner.
6. Potential or active CA unable or unwilling to provide resources to support scheduling and critical milestones.
7. Agency unable or unwilling to consistently participate in meetings or respond in a timely fashion after adequate time for review of documents, issues and analyses.

7. Can the cooperating agency provide resources to support scheduling and critical milestones such as:

- personnel? Consider all forms of assistance (e.g., data gathering; surveying; compilation; research.
- expertise? This includes technical or subject matter expertise.
- funding? Examples include funding for personnel, travel and studies. Normally, the cooperating agency will provide the funding; to the extent available funds permit, the lead agency shall fund or include in budget requests funding for an analyses the lead agency requests from cooperating agencies. Alternatives to travel, such as telephonic or video conferencing, should be considered especially when funding constrains participation.
- models and databases? Consider consistency and compatibility with lead and other cooperating agencies' methodologies.
- facilities, equipment and other services? This type of support is especially relevant for smaller governmental entities with limited budgets.

8. Does the agency provide adequate lead-time for review and do the other agencies provide adequate time for review of documents, issues and analyses? For example, are either the lead or cooperating agencies unable or unwilling to consistently participate in meetings in a timely fashion after adequate time for review of documents, issues and analyses?

9. Can the cooperating agency(s) accept the lead agency's final decisionmaking authority regarding the scope of the analysis, including authority to define the purpose and need for the proposed action? For example, is an agency unable or unwilling to develop information/analysis of alternatives they favor and disfavor?

10. Are the agency(s) able and willing to provide data and rationale underlying the analyses or assessment of alternatives?

11. Does the agency release predecisional information (including working drafts) in a manner that undermines or circumvents the agreement to work cooperatively before publishing draft or final analyses and documents? Disagreeing with the published draft or final analysis should not be a ground for ending cooperating status. Agencies must be alert to situations where state law requires release of information.

12. Does the agency consistently misrepresent the process or the findings presented in the analysis and documentation?

The factors provided for extending cooperating agency status are not intended to be all-inclusive. Moreover, satisfying all the factors is not required and satisfying one may be sufficient. Each determination should be made on a case-by-case basis considering all relevant information and factors.

Executive Office of the President
Office of Management and Budget

Executive Office of the President
Council on Environmental Quality

March 20, 2018

M-18-13

MEMORANDUM FOR HEADS OF FEDERAL DEPARTMENTS AND AGENCIES

FROM: Mick Mulvaney
Director
Office of Management and Budget

Mary Neumayr
Chief of Staff
Council on Environmental Quality

SUBJECT: One Federal Decision Framework for the Environmental Review and Authorization Process for Major Infrastructure Projects under Executive Order 13807

The Office of Management and Budget (OMB) and the Council on Environmental Quality (CEQ), in consultation with the Federal Permitting Improvement Steering Council (Permitting Council),[1] are issuing this guidance[2] for agencies to carry out responsibilities under Executive Order (E.O.) 13807, which requires Federal agencies to process environmental reviews and authorization decisions for "major infrastructure projects" as One Federal Decision (OFD).[3] Section 5 of E.O. 13807 directs all Federal agencies with environmental review, authorization, or consultation responsibilities for major infrastructure projects to develop a single Environmental Impact Statement (EIS) for such projects, sign a single Record of Decision (ROD) and issue all necessary authorizations within 90 days thereafter, subject to limited exceptions. E.O. 13807 sets a government-wide goal of reducing, to two years, the average time

[1] The Permitting Council was created by Title 41 of the Fixing America's Surface Transportation Act (FAST-41 Act), 42 U.S.C. §§ 4370m *et seq.*

[2] Federal agencies should implement this Memorandum consistent with applicable law. This Memorandum 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.

[3] E.O. 13807 of August 15, 2017, "Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects," 82 Fed. Reg. 40,463 (Aug. 24, 2017). Unless otherwise indicated, terms are used herein as defined in E.O. 13807.

for each agency to complete the required environmental reviews and authorization decisions for major infrastructure projects, as measured from the date of publication of a notice of intent (NOI) to prepare an EIS.[4]

To implement the OFD framework, each Federal agency with responsibility to conduct environmental reviews or make authorization decisions with respect to major infrastructure projects[5] should enter into, and from time to time revise and improve, a Memorandum of Understanding for Implementation of One Federal Decision (MOU), as set forth in Appendix A hereto. This MOU outlines the roles and responsibilities for agencies, and the process by which they should jointly and cooperatively process environmental reviews and make authorization decisions for major infrastructure projects.

As reflected in the attached MOU, an essential element of the OFD framework is the development of a schedule, referred to herein as the "Permitting Timetable," that includes key milestones critical to completion of the environmental review and issuance of a ROD. The Permitting Timetable should account for any federally-required decisions or authorizations, including those that are assumed by, or delegated to, State, tribal, or local agencies, and are a prerequisite to the issuance of a decision or authorization by a Federal agency. The Permitting Timetable should provide a complete picture of the environmental review and authorization requirements for a project, and give specific focus to those reviews and authorizations that are complex, require extensive coordination, or might significantly extend the overall project review schedule. Cooperating agencies that are required by law to develop schedules for environmental review or authorization processes should transmit a summary of such schedules to the lead agency for integration into the Permitting Timetable.

When developing the Permitting Timetable, lead Federal agencies need not include the estimated intermediate and final completion dates of any reviews or authorizations until the design of the project has sufficiently advanced so that those dates can be determined. In such cases, lead agencies should estimate when the project's design will be advanced enough to determine such dates, and establish estimated milestones accordingly.

---

[4] E.O. 13807 was effective August 15, 2017. Accordingly, its two-year goal is applicable to environmental reviews of major infrastructure projects for which an NOI was published after August 15, 2017. If the lead agency determines that it must reissue, revise, or withdraw the NOI due to a substantial change in the project proposal or delay by the project proponent, the two-year timeframe will start with publication of the reissued or revised NOI.

[5] Sec. 3 of E.O. 13807 defines a "major infrastructure project" as "an infrastructure project for which multiple authorizations by Federal agencies will be required to proceed with construction, the lead Federal agency has determined that it will prepare an environmental impact statement (EIS) under the National Environmental Policy Act (NEPA), 42 U.S.C. 4321 *et seq*., and the project sponsor has identified the reasonable availability of funds sufficient to complete the project." 82 Fed. Reg. at 40,464. The "reasonable availability of funds" criterion of E.O. 13807 ensures that agencies are expending resources on the environmental review and authorization of project proposals that are likely to have the necessary funds to be constructed in the event that a build option is selected. Public and private funds shall be considered "reasonably available" whether or not they are contingent on completion of environmental reviews and issuance of necessary authorizations for the project. The burden of demonstrating the reasonable availability of funds is on the project sponsor. Project sponsors may meet this burden by submitting a finance plan showing the estimated costs of the project and the available sources from which the project sponsor anticipates meeting the costs. Agencies shall facilitate project sponsors' demonstration of the reasonable availability of funds.

To ensure timely completion of the environmental review and issuance of necessary authorizations, OMB and CEQ recommend the Permitting Timetable for major infrastructure projects provide for environmental review according to the following schedule:

1) Formal scoping and preparation of a Draft EIS (DEIS) within 14 months, beginning on the date of publication of the NOI to publish an EIS and ending on the date of the Notice of Availability of the DEIS;[6]
2) Completion of the formal public comment period and development of the Final EIS (FEIS) within eight months of the date of the Notice of Availability of the DEIS; and
3) Publication of the final ROD within two months of the publication of the Notice of Availability of the FEIS.[7]

While the actual schedule for any given project may vary based upon the circumstances of the project and applicable law, agencies should endeavor to meet the two-year goal established in E.O. 13807.

Consistent with E.O. 13807, agencies should, if necessary for the implementation of OFD, develop procedures and appropriate policies, including by reviewing and revising their existing NEPA procedures. In addition, the Permitting Council should support implementation of the OFD policy and should recommend any needed revisions to the CEQ/OMB Memorandum M-17-14 on "Guidance to Federal Agencies Regarding the Environmental Review and Authorization Processes for Infrastructure Projects,"[8] including its Appendix B. In consultation with the interagency working group established under Section 5(e) of E.O. 13807, CEQ and OMB will review and, if necessary, recommend changes to ensure the effectiveness of each agency's policies in implementing OFD.

Agencies should also ensure that they have an efficient process for the elevation and resolution of issues consistent with the process set forth in the attached MOU. For environmental review and authorization issues that cannot be resolved at an interagency level, agencies should follow the dispute resolution process provided by law for the environmental review and authorization processes for such projects, if any. CEQ will mediate disputes where other dispute resolution process is provided for by law.[9] In addition, OMB will have final interpretative authority regarding this guidance and the MOU adopted hereunder.

---

[6] The Federal Energy Regulatory Commission and other agencies identified by OMB and CEQ that have procedures that provide for publication of the NOI substantially in advance of filing of the project application may comply with OFD by starting the two-year schedule from the date on which an application is filed.

[7] Where Federal law allows for one or more agencies to issue a combined FEIS/ROD, nothing in the OFD framework precludes the use of that authority.

[8] Memorandum for Heads of Federal Department and Agencies titled "Guidance to Federal Agencies Regarding the Environmental Review and Authorization Process for Infrastructure Projects" (Jan. 13, 2017) *available at* https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2017/m-17-14.pdf.

[9] FAST-41 Act covered projects should follow the dispute resolution procedures provided by the statute and related OMB-CEQ Guidance. *See* Memorandum for Heads of Federal Department and Agencies titled "Guidance to Federal Agencies Regarding the Environmental Review and Authorization Process for Infrastructure Projects" (Jan. 13, 2017).

Appendix A

MEMORANDUM OF UNDERSTANDING
IMPLEMENTING ONE FEDERAL DECISION UNDER
EXECUTIVE ORDER 13807

I. Introduction

The undersigned Federal agencies (agencies) enter into this Memorandum of Understanding (MOU) to establish a cooperative relationship for the timely processing of environmental reviews and authorization decisions for proposed major infrastructure projects under the One Federal Decision (OFD) policy established in Executive Order (E.O.) 13807.[1] E.O. 13807 requires the Office of Management and Budget (OMB) and the Council on Environmental Quality (CEQ), in consultation with the Federal Permitting Improvement Steering Council (Permitting Council), to develop a framework for implementation of the Executive Order. On March 20, 2018, OMB and CEQ issued an OMB/CEQ Memorandum to Heads of Federal Departments and Agencies titled "One Federal Decision Framework for the Environmental Review and Authorization Process for Major Infrastructure Projects under Executive Order 13807" (OFD Framework) pursuant to which agencies enter into this MOU. The agencies accordingly agree to work together to implement OFD as set forth in this MOU.

II. Background

Under the OFD approach established in E.O. 13807, Federal agencies with a role in the environmental review and permitting process for a major infrastructure project are directed to develop an environmental review and authorization decision schedule for that project. For each major infrastructure project, agencies will work together to develop a single Permitting Timetable for the necessary environmental review and authorization decisions, prepare a single environmental impact statement (EIS), sign a single record of decision (ROD), and issue all necessary authorization decisions within 90 days of issuance of the ROD, subject to limited exceptions.[2] E.O. 13807 sets a goal for agencies of reducing the time for completing environmental reviews and authorization decisions to an agency average of not more than two years from publication of a Notice of Intent (NOI) to prepare an EIS. The purposes of this MOU are to:

[1] E.O. 13807 defines a "major infrastructure project" as "an infrastructure project for which multiple authorizations by Federal agencies will be required to proceed with construction, the lead Federal agency has determined that it will prepare an Environmental Impact Statement (EIS) under the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 *et seq*., and the project sponsor has identified the reasonable availability of funds sufficient to complete the project." E.O. 13807 of August 15, 2017, "Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects," 82 Fed. Reg. 40,463, 40,464 (Aug. 24, 2017). The funding criterion of E.O. 13807 ensures that agencies are expending resources on the environmental review and authorization of project proposals that are likely to be constructed. Public and private funds shall be considered "reasonably available" whether or not they are contingent on completion of environmental reviews and issuance of necessary authorizations for the project.

[2] All references to days in this MOU are to calendar days unless otherwise indicated.

- provide a more predictable, transparent and timely Federal review and authorization process for delivering major infrastructure projects;

- establish standard operating procedures for how the Federal Government will make concurrent and synchronized reviews for major infrastructure projects; and

- eliminate duplication of effort among agencies, improve the efficiency of project delivery, make better-informed decisions and promote good environmental, community and economic outcomes.

III. Definitions

Terms used herein have the definitions assigned to them in E.O. 13807 and 40 C.F.R. Parts 1500-1508.

IV. Authorities

Section 5(a) of E.O. 13807 directs Federal agencies to implement an OFD policy in accordance with the framework developed by OMB and CEQ under Section 5(b) of the Executive Order. Section 5(e) of the Executive Order authorizes CEQ to issue such regulations, guidance, and directives to Federal agencies as it may deem appropriate to further the goals of the order. Other authorities for agencies to enter into this MOU include NEPA, Title 41 of the Fixing America's Surface Transportation Act, 42 U.S.C. §§ 4370m *et seq.* (FAST-41) and the specific authorities of each agency.

V. General Agreements

The lead agency will decide whether a project sponsor has identified the reasonable availability of funds, and whether the project otherwise meets the definition of "major infrastructure project" under E.O. 13807, and is therefore subject to OFD. The lead agency's decision shall be determinative for purposes of this MOU.

This MOU sets forth the agreement of the signatory agencies through which they will jointly and cooperatively process environmental reviews and make authorization decisions for major infrastructure projects, to the extent consistent with applicable law.

A. Two-year goal. Agencies will undertake to meet the goal set forth in E.O. 13807 of reducing the time to two years for each agency to complete all environmental reviews and authorization decisions for major infrastructure projects starting from the date the NOI is published to issuance of a ROD, except as provided in the OFD Framework. To help achieve this goal, agencies commit to cooperate, communicate, share information, and resolve conflicts that could prevent meeting milestones.

B. Agency Implementation of OFD. Agencies will develop appropriate policies to ensure the use and efficient implementation of OFD for major infrastructure projects. Within 90 days, each agency will transmit to CEQ and OMB a plan to facilitate the efficient implementation of OFD.

C. Communication. Agencies will actively participate in environmental reviews and authorization processes for major infrastructure projects, and communicate with one another, as well as project applicants and sponsors, in an effective and structured manner that starts early and continues throughout the review process. This active communication should provide all agencies with the opportunity to identify concerns, raise potential issues early in the review process, and identify solutions.[3]

D. Concurrent Reviews. Agencies will carry out their obligations with respect to the environmental review and authorization decisions for a major infrastructure project concurrently, and in conjunction with the review performed by the lead agency under NEPA, to the extent consistent with applicable law.

E. Permitting Timetable. Agencies will work together to meet the milestones, including the intermediate and final completion dates of any reviews or authorization decisions, of the Permitting Timetable established pursuant to this MOU.

F. Commitment to Process Enhancements. Agencies will work individually and collectively, as appropriate, to:

1. identify and remove process impediments to implementing OFD;

2. implement best practices that will result in more efficient reviews;

3. develop and implement appropriate programmatic agreements with respect to project reviews where multiple major infrastructure projects present common issues;

4. as appropriate, update, develop and adopt internal procedures, including amendments to their NEPA implementing procedures, to implement their responsibilities under E.O. 13807 and the OFD Framework, including through the E.O. 13807 Sec. 5(e)(iii) working group process; and

5. work together to revise and improve this MOU from time to time, as needed, including through prompt notification of any changes to agency Chief Environmental Review and Permitting Officers (CERPOs)[4] or other key personnel.

G. Cooperating Agency for FERC Proceedings.

1. Each agency whose authorization is required, or which otherwise has jurisdiction by law, for a major infrastructure project with respect to which FERC is lead agency under NEPA and which is the subject of a FERC proceeding will, upon the request of FERC, participate as a cooperating agency under Section VI. Other agencies may

[3] Predecisional documents prepared by FERC or submitted to FERC in FERC proceedings are to be treated as confidential. Such documents may not be released, including release requested under the Freedom of Information Act or other applicable law, without prior authorization from FERC. FERC regulations prohibit the disclosure of "the nature and time of any proposed action by the Commission" and limit the disclosure of interagency communications. 18 C.F.R. §§ 3c.2(b), 388.107(e).

[4] Agency CERPOs are designated by agency heads pursuant to 42 U.S.C. § 4370m-1(b)(2)(A)(iii)(I).

participate as cooperating agencies with respect to such projects at FERC's invitation, as provided in 40 C.F.R. 1501.6.

2. Under 40 C.F.R. 1501.6, agencies may decline any such FERC invitation only if the agency has no jurisdiction by law. Agencies that decline to be cooperating agencies at FERC's invitation agree not to join the FERC proceeding as an intervenor.

3. An agency's participation as a cooperating agency under this subsection shall not impede such agency's ability to submit comments to the FERC docket for the relevant proceeding, nor impede the agency's ability to defend any mandatory conditions in court proceedings.

VI. Determination of Lead and Cooperating Agencies

A. Determination of Lead and Cooperating Agencies. Lead and cooperating agencies will be determined as soon as practicable and in accordance with 40 C.F.R. 1501.5 and 1501.6. Each potential lead or cooperating agency will, as soon as practicable, designate a point of contact (Project POC), which may be the agency CERPO, to represent the agency in interagency consultations about that project. In any case where the lead agency is disputed:

1. The Project POC for the agency that receives the first substantial contact with the project sponsor (originating agency) will notify the Project POCs for the other potential cooperating and lead agencies of the dispute regarding lead agency determination.

2. The Project POC of the notified agencies will have 10 business days to object. If a notified agency Project POC objects to the selection of lead agency, then the originating agency will convene a meeting with all other notified agency Project POCs to occur no later than 15 business days after responses have been received. During the meeting, the agencies will agree on an agency to be the lead agency.

3. If agencies cannot agree, then the originating agency CERPO will follow the procedures for lead agency determination by CEQ pursuant to 40 C.F.R. 1501.5.

4. Co-lead agencies may designate one of the co-lead agencies to be "lead agency" for purposes of this MOU and of the OFD Framework.

VII. Permitting Timetable

A. Development of Permitting Timetable.

1. The lead agency, in consultation with the project sponsor and cooperating and participating agencies,[5] will develop a Permitting Timetable that identifies the actions and associated milestones for applicable environmental reviews and authorizations.

[5] For purposes of this MOU, "participating agency" shall have the meaning set forth in FAST-41 or such other law as may apply to the lead agency's authorization of the project.

The Permitting Timetable will be developed as soon as practicable after the project is sufficiently advanced to allow the determination of relevant milestones and generally before publication of an NOI. To the maximum extent practicable and permitted by law, the Permitting Timetable will establish a schedule of no more than two years from NOI to publication of a single ROD that will provide for the completion of all required authorization decisions.

2. After consultation with all cooperating and participating agencies, the lead agency will transmit to each cooperating agency a proposed Permitting Timetable for comment. If no agency CERPO or Project POC objects in writing to the proposal within 10 business days, the proposal will be the Permitting Timetable for the project. To the extent an agency objects to a proposed milestone, such agency will communicate its objection and the basis for the objection to the lead agency in writing within 10 business days. If the objecting agency has authorization responsibility for the project, such agency will also include an alternative proposed milestone which will comport with the two-year OFD schedule, unless special circumstances or applicable law make the two-year schedule impracticable.

3. With respect to cooperating agencies with authorization decision responsibilities, if the lead agency cannot reconcile the alternative proposed milestone with other proposed Permitting Timetable milestones, the lead agency will elevate the issue to an appropriate senior official of the cooperating agency for timely resolution. After an opportunity to resolve the issue, the lead agency will issue the Permitting Timetable.

4. All agencies will comply with the milestones set forth in the Permitting Timetable to the maximum extent practicable and permitted by law.

B. <u>Contents of Permitting Timetable</u>.

1. The Permitting Timetable for major infrastructure projects should include the environmental review and authorization milestones specified in Appendix B of the CEQ/OMB Memorandum on "Guidance to Federal Agencies Regarding the Environmental Review and Authorization Processes for Infrastructure Projects," as amended. The lead agency may also include any other appropriate milestones in the Permitting Timetable that the lead agency deems appropriate, are requested by the project sponsor, or are requested by a cooperating or participating agency.

2. The lead agency will design the Permitting Timetable so that it has adequate time to accept and consider public, cooperating agency, and participating agency comments and input, and conduct any appropriate alternatives analysis or impact assessments.

3. The Permitting Timetable will account for intermediate and final completion dates for any environmental review or authorization required for the project. The Permitting Timetable should include estimated milestones for the project sponsor to develop and submit complete applications and any other information required for Federal authorization of the project, including required authorization decisions by non-

Federal entities. In such cases, lead agencies will estimate when the project's design will be advanced enough to determine such dates, and establish estimated milestones accordingly.

C. Modifications and Updates.

1. Following consultations with cooperating agencies, the lead agency will update, and as necessary modify, the Permitting Timetable at least quarterly. A modified Permitting Timetable will be transmitted to each cooperating and participating agency Project POC and to the project sponsor.

2. With respect to the modification of milestones concerning actions by cooperating agencies with authorization decision responsibilities, lead agencies may modify such milestones following the procedures contained in Section VII.A.

3. If the lead agency receives a written request from the project sponsor to suspend or cancel the environmental review and authorization process, or otherwise determines that the project sponsor has suspended or cancelled the project, the lead agency will document the request and modify the Permitting Table accordingly.

D. Publication. A copy of the Permitting Timetable and any modifications will be made available to the public online, including, as appropriate and practicable, through the Federal Permitting Dashboard.

VIII. Agency Roles and Responsibilities

A. Lead Agencies.

1. The lead agency is responsible for organizing the Federal environmental review and authorization processes for a proposed project, including assigning a management official to lead the environmental review process and identifying a primary Federal point of contact at each cooperating or participating agency for the project.

2. After a lead agency has been designated, that agency will be responsible for requesting cooperation from other Federal agencies that have jurisdiction by law or special expertise (as determined by the lead agency under 40 C.F.R. 1501.6) on any environmental issue that should be addressed in the EIS. To the fullest extent possible and at the earliest time practicable, the lead agency should seek the cooperation of State, tribal or local agencies of similar qualifications in accordance with 40 C.F.R. 1506.2. The lead agency should also identify and invite participating agencies.

3. The lead agency will prepare a single EIS for the project in coordination with the other Federal cooperating agencies with authorization decision responsibilities and will ensure that the final EIS (FEIS) includes an adequate level of detail to inform

decisions by all agencies with review or authorization decision responsibilities for the proposed project.

4. The lead agency will inform cooperating agencies regarding new material information and changes related to the project.

5. The lead agency is responsible for developing the Purpose and Need, identifying the range of alternatives to be analyzed, identifying the preferred alternative and determining whether to develop the preferred alternative to a higher level of detail.

6. The lead agency will provide the cooperating agencies the opportunity to review and contribute to all relevant substantive phases of the EIS preparation in conformity with the Concurrence Points set forth in Section XI.

7. The lead agency is responsible for preparing and publishing a single ROD for all Federal agencies with authorization responsibility for the project to support any necessary authorization decisions. The ROD will incorporate the decisions of each such agency, unless an exception to a single ROD is met as set forth in Section XIII or where Federal law provides for the lead agency to issue a combined FEIS/ROD.

8. The lead agency will maintain a consolidated project file of the information assembled and utilized by the Federal cooperating agencies as the basis for their environmental reviews under NEPA.

B. Cooperating Agencies.

1. Cooperating agencies with authorization decision responsibilities will coordinate and synchronize their authorization reviews with the lead agency's development of the FEIS and issuance of the ROD.

2. Agencies with authorization decision responsibilities will participate as cooperating agencies when invited by the lead agency, consistent with 40 C.F.R. 1501.6. Agencies without authorization decision responsibilities may participate as cooperating agencies whenever invited by the lead agency.

3. At the request of the lead agency, cooperating agencies will make available personnel and/or expertise to the lead agency, to the extent practicable.

4. Cooperating agencies will be responsible for identifying any information necessary to complete application review and authorizations in accordance with the Permitting Timetable, as well as the means of obtaining such information.

5. Cooperating agencies will ensure that any issues that may delay the Permitting Timetable are promptly brought to the attention of the lead agency.

6. Each cooperating agency should limit its comments to those issues that are within that agency's areas of special expertise or jurisdiction.

7. Each cooperating agency will be responsible for making its respective authorization decisions, and will maintain the administrative record associated with such decisions and provide such information as the lead agency may request for the consolidated project file.

C. Participating Agencies. Participating agencies will complete their reviews and provide any necessary input in compliance with the requests of the lead agency.

D. State, Local, and Tribal Agencies. Lead agencies may invite any relevant State, local or tribal agency with Federal authorization decision responsibilities for a major infrastructure project to be a cooperating agency. Lead agencies will seek to secure such State, local or tribal agency's commitment to comply with the Permitting Timetable and such other obligations of a cooperating agency under this MOU as the lead agency may deem appropriate and necessary for the project, if necessary by the execution of a separate written agreement with such agency.

E. CERPOs.

1. Each agency CERPO will help oversee the implementation of this MOU and E.O. 13807 at that agency.

2. Each agency CERPO should be informed of all major infrastructure projects for which that agency is either a lead agency or cooperating agency, and of the Permitting Timetables for such projects.

3. Each agency CERPO should help agency leadership ensure the prioritization of resources at that agency to comply with applicable Permitting Timetables.

IX. Preliminary Project Planning

A. Preapplication Procedures and Prescoping. After a lead agency is determined, the lead agency should begin prescoping, including through using any applicable preapplication procedures at that agency. The lead agency should also identify and begin discussions with potential cooperating and participating agencies and the project sponsor to identify potentially significant environmental issues, the community and stakeholders affected, the extent of the analysis needed, and the time required to complete environmental review and authorization decision processes. The lead agency will complete its prescoping process as expeditiously as possible.

B. Preliminary Planning. During prescoping, or as soon as practicable, the lead agency, in consultation with the cooperating agencies and the project sponsor, may develop a preliminary project plan that will establish how agencies will work together to process the environmental review and authorization decisions for the project. Plans and timetables developed for FAST-41 projects may serve as preliminary project plans. The plan may include:

- A Permitting Timetable;
- A project-specific framework for all agencies' reviews, analyses and decisions;
- Specific areas of responsibilities and roles of all involved agencies;
- Identification of the significant issues and concerns that affect the environmental review and authorizations needed for the project;
- A stakeholder, public and tribal outreach and engagement plan;
- Requirements for complete applications for respective authorizations, and an identification of the earliest possible stage when the application could be submitted;
- Procedures for integration of environmental review and authorization processes with the goal of meeting milestones in the Permitting Timetable; and
- Potential avoidance, minimization, and mitigation strategies.

C. Programmatic Coordination Plan. A preliminary project plan for an individual project may be established separately from any programmatic coordination plan, or it may incorporate one or more programmatic coordination plans established by the lead agency to govern coordination with one or more agencies.

X. Notice of Intent

A. Timing of Publication. The lead agency will publish the NOI as soon as practicable after determining (1) that a project is a major infrastructure project; and (2) after consultation with cooperating agencies, that the project proposal is sufficiently developed to permit scoping and meaningful public comment. The publication of the NOI should not be unreasonably delayed.

B. Revision or Withdrawal. If the lead agency determines that the NOI must be revised, supplemented, corrected, reissued, or withdrawn, the lead agency will transmit the proposed change to all cooperating and participating agencies and to the project sponsor, and modify the Permitting Timetable accordingly, before publishing a new NOI. The modified Permitting Timetable will reflect the date of the new NOI as the new start date for purposes of the two-year OFD schedule.

XI. Scoping and Concurrence Points

A. Scoping.

1. The scoping process should be an open process for determining the scope of issues to be addressed in the EIS, identifying the significant issues related to the proposed project and engaging stakeholders and the public. Lead agencies should determine the level and form of public engagement on a case-by-case basis, taking into account factors such as the overall size and complexity of the project.

2. Agencies will use the NEPA scoping process to agree on the relevant analyses, studies and engineering design that will be needed in order for each agency to be able to sign a single ROD and for all the authorization decisions to be issued within 90 days after the ROD is signed.

3. Agencies will consult and seek to agree on the best use and relevance of prior developed information, such as information developed during a planning process.

B. Requirement of Coordination.

1. The OFD policy integrates the requirements of all Federal agencies with authorization decision responsibilities. The undersigned agencies commit to implementing the OFD process early in project development to avoid schedule delays. The environmental review process will be conducted concurrently with the applicable authorization decision processes, and, as such, the lead agency should obtain a written concurrence from all cooperating agencies whose authorization is required for the project at three key milestones: 1) Purpose and Need, 2) Alternatives To Be Carried Forward for Evaluation, and 3) the Preferred Alternative. Lead agencies, in consultation with the relevant cooperating agencies with applicable authorization decision responsibilities, have discretion to add other concurrence points as necessary to meet project specific circumstances.

2. The lead agency will request written concurrence on each concurrence point from all cooperating agencies whose authorization is required for the project. "Concurrence" for purposes of this MOU means confirmation by the agency that the information is sufficient for that stage, and the environmental review process may proceed to the next stage of the NEPA process, as set forth in the lead agency's request for written concurrence. Each applicable cooperating agency will either confirm its concurrence or inform the lead agency that it cannot yet concur. A non-concurring agency will undertake to resolve the issue and provide the requested concurrence, and will if necessary elevate the issue pursuant to Section XII. Cooperating agency Project POCs will respond to the lead agency's request for concurrence within 10 business days. Failure to respond within 10 business days may be treated as concurrence, at the discretion of the lead agency.

3. With respect to cooperating agencies whose authorization is not required for the project, comments should be considered by the lead agency and reflected in the environmental analysis and/or project planning, as appropriate.

C. Specific Concurrent Points.

1. Concurrence Point #1: Purpose and Need.

   (a) The concurrence point will generally occur early in the NEPA review process, prior to issuance of an NOI. The Purpose and Need statement is the foundation for the NEPA alternatives analysis. Cooperating agencies with authorization decision responsibilities for a project will review the lead agency's Purpose and Need statement and determine if it meets their NEPA obligations.

2. Concurrence Point #2: Alternatives to be Carried Forward for Evaluation.

(a) This concurrence point identifies the alternatives to be carried forward for analysis in the EIS. Concurrence should be sought as early as possible and prior to detailed analysis in the draft EIS (DEIS). Concurrence should be obtained prior to presenting the results of alternatives screening to the public. In order to fulfill the needs of other agencies' authorities, there may be alternatives that require analysis beyond what is necessary for the lead agency.

3. Concurrence Point #3 - Preferred Alternative.

(a) A preferred alternative should be identified in the DEIS and must be identified in the FEIS. A final decision is identified in the ROD. Before a preferred alternative is identified in a DEIS or FEIS, the lead agency will request written concurrence on the preferred alternative from all agencies whose authorization is required for the project, and will explain in such request the rationale for its selection. An agency's concurrence on a preferred alternative identified in the DEIS will also serve as concurrence for that preferred alternative in the FEIS, unless there is a material change in the preferred alternative from DEIS to FEIS.

D. Changed Circumstances. If after concurrence, the lead agency determines that changes to the Purpose and Need, Alternatives, or the Preferred Alternative are necessary, then the lead agency and cooperating agencies with authorization decision responsibilities will review such changes to determine if concurrence should be revisited.

XII. Elevation of Delays and Dispute Resolution

A. Any issue or dispute that arises between or among agencies during the OFD process will be addressed expeditiously to avoid delay.

B. Agencies will implement this section consistent with any dispute resolution process established in an applicable law, regulation, or legally binding agreement to the maximum extent permitted by law.

C. Agencies will seek to resolve issues or disputes at the earliest possible time at the project level through staff who have day-to-day involvement in the project.

D. Agencies will notify their CERPOs of any instance where a dispute is to be elevated. Where appropriate, agencies will also consult with the project sponsor, and its input should also be considered.

E. If a dispute between agencies causes a milestone to be missed or extended, or the lead agency anticipates that a Permitting Timetable milestone will be missed or will need to be extended, then the dispute should be elevated to an official designated by the relevant agency for resolution. Such elevation should take place as soon as practicable after the lead agency becomes aware of the dispute or potential missed milestone. Disputes that do not impact the ability of an agency to meet a milestone may be elevated as appropriate

F. Once elevated to the designated official, if no resolution has been reached at the end of 30 days after the relevant milestone date or extension date, then the relevant agencies will elevate the dispute to senior agency leadership for resolution.

XIII. Exceptions

A. The lead agency will grant exceptions to the single EIS and single ROD requirement of E.O. 13807 when:

   1. the project sponsor requests that the agencies issue separate NEPA documents;

   2. the NEPA obligations of a cooperating or participating agency have already been satisfied; or

   3. the lead agency determines that one ROD would not promote efficient completion of the project's environmental review and authorization process.

B. The lead agency may grant an exception to the single ROD requirement of E.O. 13807 when Federal law provides for the lead agency to issue a combined FEIS/ROD and cooperating agencies are not authorized to issue a combined FEIS/ROD. When a lead agency elects to grant such an exception, the agencies not authorized to issue a combined FEIS/ROD will issue a joint ROD or other appropriate decision document as soon as practicable, consistent with applicable law and the Permitting Timetable.

C. FERC will grant an exception to the single ROD requirement of E.O. 13807 when the FERC licensing order serves as the ROD. In such situations, the agencies not authorized to issue a combined FEIS/ROD will issue a joint ROD or other appropriate decision document as soon as practicable, consistent with applicable law and the Permitting Timetable.

D. The lead agency may also extend the 90-day deadline for any authorization required for a project in the following circumstances:

   1. when applicable law prohibits an agency from issuing its approval or permit within the 90-day period;

   2. the project sponsor requests that the permit decision or approval follow a different timeline; or

   3. an extension would better promote completion of the project’s environmental review and authorization process.

E. The lead agency may terminate the coordinated development of the single EIS and/or single ROD under OFD upon request of the project sponsor, changed circumstances, or if the project sponsor fails to respond timely to lead agency requests.

XIV. Miscellaneous Provisions

A. Agencies may enter into appropriate agreements as necessary to implement OFD, including agreements on a program- and project-specific basis. Any such agreements will be consistent with this MOU, E.O. 13807, the OFD Framework, and Federal law.

B. Nothing contained in this MOU is intended to or should be construed to limit or affect the authority or legal responsibilities of the undersigned agencies, or binds the undersigned agencies to perform actions beyond their respective authorities.

C. Nothing in this MOU shall be construed to impair or otherwise adversely affect:

1. the authority granted by law to an executive department or agency, or the head thereof; or

2. the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

D. Nothing in this MOU is intended to, or should, be construed to restrict the agencies from participating in similar activities or arrangements with other public or private entities, organizations, or individuals.

E. Independent agency staff will comply with this MOU to the maximum extent practicable, consistent with such agency's status as an independent agency, statutory requirements, and such agency's regulations and procedures.[6]

F. The mission requirements, funding, personnel, and other priorities of the undersigned agencies may affect their ability to fully implement all the provisions identified in this MOU.

G. This MOU shall be implemented consistent with applicable law and subject to the availability of appropriations.

H. Specific activities that involve the transfer of money, services, or property between or among the undersigned agencies may require execution of separate agreements or contracts.

I. This MOU 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.

J. This MOU may be modified and amended, or terminated, by written agreement among the undersigned agencies.

[6] For purposes of this MOU, "independent agency" means an independent regulatory agency as defined in 44 U.S.C. § 3502(5).

K. Additional Federal agencies may become parties to this MOU by signing an addendum to the MOU.

L. This MOU is effective on March 21, 2018.

MEMORANDUM OF UNDERSTANDING
IMPLEMENTING ONE FEDERAL DECISION UNDER
EXECUTIVE ORDER 13807

I. Introduction

The undersigned Federal agencies (agencies) enter into this Memorandum of Understanding (MOU) to establish a cooperative relationship for the timely processing of environmental reviews and authorization decisions for proposed major infrastructure projects under the One Federal Decision (OFD) policy established in Executive Order (E.O.) 13807.[1] E.O. 13807 requires the Office of Management and Budget (OMB) and the Council on Environmental Quality (CEQ), in consultation with the Federal Permitting Improvement Steering Council (Permitting Council), to develop a framework for implementation of the Executive Order. On March 20, 2018, OMB and CEQ issued an OMB/CEQ Memorandum to Heads of Federal Departments and Agencies titled "One Federal Decision Framework for the Environmental Review and Authorization Process for Major Infrastructure Projects under Executive Order 13807" (OFD Framework) pursuant to which agencies enter into this MOU. The agencies accordingly agree to work together to implement OFD as set forth in this MOU.

II. Background

Under the OFD approach established in E.O. 13807, Federal agencies with a role in the environmental review and permitting process for a major infrastructure project are directed to develop an environmental review and authorization decision schedule for that project. For each major infrastructure project, agencies will work together to develop a single Permitting Timetable for the necessary environmental review and authorization decisions, prepare a single environmental impact statement (EIS), sign a single record of decision (ROD), and issue all necessary authorization decisions within 90 days of issuance of the ROD, subject to limited exceptions.[2] E.O. 13807 sets a goal for agencies of reducing the time for completing environmental reviews and authorization decisions to an agency average of not more than two years from publication of a Notice of Intent (NOI) to prepare an EIS. The purposes of this MOU are to:

- provide a more predictable, transparent and timely Federal review and authorization process for delivering major infrastructure projects;

[1] E.O. 13807 defines a "major infrastructure project" as "an infrastructure project for which multiple authorizations by Federal agencies will be required to proceed with construction, the lead Federal agency has determined that it will prepare an Environmental Impact Statement (EIS) under the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 *et seq*., and the project sponsor has identified the reasonable availability of funds sufficient to complete the project." E.O. 13807 of August 15, 2017, "Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects," 82 Fed. Reg. 40,463, 40,464 (Aug. 24, 2017). The funding criterion of E.O. 13807 ensures that agencies are expending resources on the environmental review and authorization of project proposals that are likely to be constructed. Public and private funds shall be considered "reasonably available" whether or not they are contingent on completion of environmental reviews and issuance of necessary authorizations for the project.

[2] All references to days in this MOU are to calendar days unless otherwise indicated.

- establish standard operating procedures for how the Federal Government will make concurrent and synchronized reviews for major infrastructure projects; and

- eliminate duplication of effort among agencies, improve the efficiency of project delivery, make better-informed decisions and promote good environmental, community and economic outcomes.

III. Definitions

Terms used herein have the definitions assigned to them in E.O. 13807 and 40 C.F.R. Parts 1500-1508.

IV. Authorities

Section 5(a) of E.O. 13807 directs Federal agencies to implement an OFD policy in accordance with the framework developed by OMB and CEQ under Section 5(b) of the Executive Order. Section 5(e) of the Executive Order authorizes CEQ to issue such regulations, guidance, and directives to Federal agencies as it may deem appropriate to further the goals of the order. Other authorities for agencies to enter into this MOU include NEPA, Title 41 of the Fixing America's Surface Transportation Act, 42 U.S.C. §§ 4370m *et seq.* (FAST-41) and the specific authorities of each agency.

V. General Agreements

The lead agency will decide whether a project sponsor has identified the reasonable availability of funds, and whether the project otherwise meets the definition of "major infrastructure project" under E.O. 13807, and is therefore subject to OFD. The lead agency's decision shall be determinative for purposes of this MOU.

This MOU sets forth the agreement of the signatory agencies through which they will jointly and cooperatively process environmental reviews and make authorization decisions for major infrastructure projects, to the extent consistent with applicable law.

A. Two-year goal. Agencies will undertake to meet the goal set forth in E.O. 13807 of reducing the time to two years for each agency to complete all environmental reviews and authorization decisions for major infrastructure projects starting from the date the NOI is published to issuance of a ROD, except as provided in the OFD Framework. To help achieve this goal, agencies commit to cooperate, communicate, share information, and resolve conflicts that could prevent meeting milestones.

B. Agency Implementation of OFD. Agencies will develop appropriate policies to ensure the use and efficient implementation of OFD for major infrastructure projects. Within 90 days, each agency will transmit to CEQ and OMB a plan to facilitate the efficient implementation of OFD.

C. Communication. Agencies will actively participate in environmental reviews and authorization processes for major infrastructure projects, and communicate with one

another, as well as project applicants and sponsors, in an effective and structured manner that starts early and continues throughout the review process. This active communication should provide all agencies with the opportunity to identify concerns, raise potential issues early in the review process, and identify solutions.[3]

D. Concurrent Reviews. Agencies will carry out their obligations with respect to the environmental review and authorization decisions for a major infrastructure project concurrently, and in conjunction with the review performed by the lead agency under NEPA, to the extent consistent with applicable law.

E. Permitting Timetable. Agencies will work together to meet the milestones, including the intermediate and final completion dates of any reviews or authorization decisions, of the Permitting Timetable established pursuant to this MOU.

F. Commitment to Process Enhancements. Agencies will work individually and collectively, as appropriate, to:

1. identify and remove process impediments to implementing OFD;

2. implement best practices that will result in more efficient reviews;

3. develop and implement appropriate programmatic agreements with respect to project reviews where multiple major infrastructure projects present common issues;

4. as appropriate, update, develop and adopt internal procedures, including amendments to their NEPA implementing procedures, to implement their responsibilities under E.O. 13807 and the OFD Framework, including through the E.O. 13807 Sec. 5(e)(iii) working group process; and

5. work together to revise and improve this MOU from time to time, as needed, including through prompt notification of any changes to agency Chief Environmental Review and Permitting Officers (CERPOs)[4] or other key personnel.

G. Cooperating Agency for FERC Proceedings.

1. Each agency whose authorization is required, or which otherwise has jurisdiction by law, for a major infrastructure project with respect to which FERC is lead agency under NEPA and which is the subject of a FERC proceeding will, upon the request of FERC, participate as a cooperating agency under Section VI. Other agencies may participate as cooperating agencies with respect to such projects at FERC's invitation, as provided in 40 C.F.R. 1501.6.

---

[3] Predecisional documents prepared by FERC or submitted to FERC in FERC proceedings are to be treated as confidential. Such documents may not be released, including release requested under the Freedom of Information Act or other applicable law, without prior authorization from FERC. FERC regulations prohibit the disclosure of "the nature and time of any proposed action by the Commission" and limit the disclosure of interagency communications. 18 C.F.R. §§ 3c.2(b), 388.107(e).

[4] Agency CERPOs are designated by agency heads pursuant to 42 U.S.C. § 4370m-1(b)(2)(A)(iii)(I).

2. Under 40 C.F.R. 1501.6, agencies may decline any such FERC invitation only if the agency has no jurisdiction by law. Agencies that decline to be cooperating agencies at FERC's invitation agree not to join the FERC proceeding as an intervenor.

3. An agency's participation as a cooperating agency under this subsection shall not impede such agency's ability to submit comments to the FERC docket for the relevant proceeding, nor impede the agency's ability to defend any mandatory conditions in court proceedings.

VI. Determination of Lead and Cooperating Agencies

A. Determination of Lead and Cooperating Agencies. Lead and cooperating agencies will be determined as soon as practicable and in accordance with 40 C.F.R. 1501.5 and 1501.6. Each potential lead or cooperating agency will, as soon as practicable, designate a point of contact (Project POC), which may be the agency CERPO, to represent the agency in interagency consultations about that project. In any case where the lead agency is disputed:

1. The Project POC for the agency that receives the first substantial contact with the project sponsor (originating agency) will notify the Project POCs for the other potential cooperating and lead agencies of the dispute regarding lead agency determination.

2. The Project POC of the notified agencies will have 10 business days to object. If a notified agency Project POC objects to the selection of lead agency, then the originating agency will convene a meeting with all other notified agency Project POCs to occur no later than 15 business days after responses have been received. During the meeting, the agencies will agree on an agency to be the lead agency.

3. If agencies cannot agree, then the originating agency CERPO will follow the procedures for lead agency determination by CEQ pursuant to 40 C.F.R. 1501.5.

4. Co-lead agencies may designate one of the co-lead agencies to be "lead agency" for purposes of this MOU and of the OFD Framework.

VII. Permitting Timetable

A. Development of Permitting Timetable.

1. The lead agency, in consultation with the project sponsor and cooperating and participating agencies,[5] will develop a Permitting Timetable that identifies the actions and associated milestones for applicable environmental reviews and authorizations. The Permitting Timetable will be developed as soon as practicable after the project is sufficiently advanced to allow the determination of relevant milestones and generally before publication of an NOI. To the maximum extent practicable and permitted by

[5] For purposes of this MOU, "participating agency" shall have the meaning set forth in FAST-41 or such other law as may apply to the lead agency's authorization of the project.

law, the Permitting Timetable will establish a schedule of no more than two years from NOI to publication of a single ROD that will provide for the completion of all required authorization decisions.

2. After consultation with all cooperating and participating agencies, the lead agency will transmit to each cooperating agency a proposed Permitting Timetable for comment. If no agency CERPO or Project POC objects in writing to the proposal within 10 business days, the proposal will be the Permitting Timetable for the project. To the extent an agency objects to a proposed milestone, such agency will communicate its objection and the basis for the objection to the lead agency in writing within 10 business days. If the objecting agency has authorization responsibility for the project, such agency will also include an alternative proposed milestone which will comport with the two-year OFD schedule, unless special circumstances or applicable law make the two-year schedule impracticable.

3. With respect to cooperating agencies with authorization decision responsibilities, if the lead agency cannot reconcile the alternative proposed milestone with other proposed Permitting Timetable milestones, the lead agency will elevate the issue to an appropriate senior official of the cooperating agency for timely resolution. After an opportunity to resolve the issue, the lead agency will issue the Permitting Timetable.

4. All agencies will comply with the milestones set forth in the Permitting Timetable to the maximum extent practicable and permitted by law.

B. Contents of Permitting Timetable.

1. The Permitting Timetable for major infrastructure projects should include the environmental review and authorization milestones specified in Appendix B of the CEQ/OMB Memorandum on "Guidance to Federal Agencies Regarding the Environmental Review and Authorization Processes for Infrastructure Projects," as amended. The lead agency may also include any other appropriate milestones in the Permitting Timetable that the lead agency deems appropriate, are requested by the project sponsor, or are requested by a cooperating or participating agency.

2. The lead agency will design the Permitting Timetable so that it has adequate time to accept and consider public, cooperating agency, and participating agency comments and input, and conduct any appropriate alternatives analysis or impact assessments.

3. The Permitting Timetable will account for intermediate and final completion dates for any environmental review or authorization required for the project. The Permitting Timetable should include estimated milestones for the project sponsor to develop and submit complete applications and any other information required for Federal authorization of the project, including required authorization decisions by non-Federal entities. In such cases, lead agencies will estimate when the project's design will be advanced enough to determine such dates, and establish estimated milestones accordingly.

C. Modifications and Updates.

1. Following consultations with cooperating agencies, the lead agency will update, and as necessary modify, the Permitting Timetable at least quarterly. A modified Permitting Timetable will be transmitted to each cooperating and participating agency Project POC and to the project sponsor.

2. With respect to the modification of milestones concerning actions by cooperating agencies with authorization decision responsibilities, lead agencies may modify such milestones following the procedures contained in Section VII.A.

3. If the lead agency receives a written request from the project sponsor to suspend or cancel the environmental review and authorization process, or otherwise determines that the project sponsor has suspended or cancelled the project, the lead agency will document the request and modify the Permitting Table accordingly.

D. Publication. A copy of the Permitting Timetable and any modifications will be made available to the public online, including, as appropriate and practicable, through the Federal Permitting Dashboard.

VIII. Agency Roles and Responsibilities

A. Lead Agencies.

1. The lead agency is responsible for organizing the Federal environmental review and authorization processes for a proposed project, including assigning a management official to lead the environmental review process and identifying a primary Federal point of contact at each cooperating or participating agency for the project.

2. After a lead agency has been designated, that agency will be responsible for requesting cooperation from other Federal agencies that have jurisdiction by law or special expertise (as determined by the lead agency under 40 C.F.R. 1501.6) on any environmental issue that should be addressed in the EIS. To the fullest extent possible and at the earliest time practicable, the lead agency should seek the cooperation of State, tribal or local agencies of similar qualifications in accordance with 40 C.F.R. 1506.2. The lead agency should also identify and invite participating agencies.

3. The lead agency will prepare a single EIS for the project in coordination with the other Federal cooperating agencies with authorization decision responsibilities and will ensure that the final EIS (FEIS) includes an adequate level of detail to inform decisions by all agencies with review or authorization decision responsibilities for the proposed project.

4. The lead agency will inform cooperating agencies regarding new material information and changes related to the project.

5. The lead agency is responsible for developing the Purpose and Need, identifying the range of alternatives to be analyzed, identifying the preferred alternative and determining whether to develop the preferred alternative to a higher level of detail.

6. The lead agency will provide the cooperating agencies the opportunity to review and contribute to all relevant substantive phases of the EIS preparation in conformity with the Concurrence Points set forth in Section XI.

7. The lead agency is responsible for preparing and publishing a single ROD for all Federal agencies with authorization responsibility for the project to support any necessary authorization decisions. The ROD will incorporate the decisions of each such agency, unless an exception to a single ROD is met as set forth in Section XIII or where Federal law provides for the lead agency to issue a combined FEIS/ROD.

8. The lead agency will maintain a consolidated project file of the information assembled and utilized by the Federal cooperating agencies as the basis for their environmental reviews under NEPA.

B. Cooperating Agencies.

1. Cooperating agencies with authorization decision responsibilities will coordinate and synchronize their authorization reviews with the lead agency's development of the FEIS and issuance of the ROD.

2. Agencies with authorization decision responsibilities will participate as cooperating agencies when invited by the lead agency, consistent with 40 C.F.R. 1501.6. Agencies without authorization decision responsibilities may participate as cooperating agencies whenever invited by the lead agency.

3. At the request of the lead agency, cooperating agencies will make available personnel and/or expertise to the lead agency, to the extent practicable.

4. Cooperating agencies will be responsible for identifying any information necessary to complete application review and authorizations in accordance with the Permitting Timetable, as well as the means of obtaining such information.

5. Cooperating agencies will ensure that any issues that may delay the Permitting Timetable are promptly brought to the attention of the lead agency.

6. Each cooperating agency should limit its comments to those issues that are within that agency's areas of special expertise or jurisdiction.
7. Each cooperating agency will be responsible for making its respective authorization decisions, and will maintain the administrative record associated with such decisions and provide such information as the lead agency may request for the consolidated project file.

C. Participating Agencies. Participating agencies will complete their reviews and provide any necessary input in compliance with the requests of the lead agency.

D. State, Local, and Tribal Agencies. Lead agencies may invite any relevant State, local or tribal agency with Federal authorization decision responsibilities for a major infrastructure project to be a cooperating agency. Lead agencies will seek to secure such State, local or tribal agency's commitment to comply with the Permitting Timetable and such other obligations of a cooperating agency under this MOU as the lead agency may deem appropriate and necessary for the project, if necessary by the execution of a separate written agreement with such agency.

E. CERPOs.

1. Each agency CERPO will help oversee the implementation of this MOU and E.O. 13807 at that agency.

2. Each agency CERPO should be informed of all major infrastructure projects for which that agency is either a lead agency or cooperating agency, and of the Permitting Timetables for such projects.

3. Each agency CERPO should help agency leadership ensure the prioritization of resources at that agency to comply with applicable Permitting Timetables.

IX. Preliminary Project Planning

A. Preapplication Procedures and Prescoping. After a lead agency is determined, the lead agency should begin prescoping, including through using any applicable preapplication procedures at that agency. The lead agency should also identify and begin discussions with potential cooperating and participating agencies and the project sponsor to identify potentially significant environmental issues, the community and stakeholders affected, the extent of the analysis needed, and the time required to complete environmental review and authorization decision processes. The lead agency will complete its prescoping process as expeditiously as possible.

B. Preliminary Planning. During prescoping, or as soon as practicable, the lead agency, in consultation with the cooperating agencies and the project sponsor, may develop a preliminary project plan that will establish how agencies will work together to process the environmental review and authorization decisions for the project. Plans and timetables developed for FAST-41 projects may serve as preliminary project plans. The plan may include:

- A Permitting Timetable;
- A project-specific framework for all agencies' reviews, analyses and decisions;
- Specific areas of responsibilities and roles of all involved agencies;
- Identification of the significant issues and concerns that affect the environmental review and authorizations needed for the project;

- A stakeholder, public and tribal outreach and engagement plan;
- Requirements for complete applications for respective authorizations, and an identification of the earliest possible stage when the application could be submitted;
- Procedures for integration of environmental review and authorization processes with the goal of meeting milestones in the Permitting Timetable; and
- Potential avoidance, minimization, and mitigation strategies.

C. Programmatic Coordination Plan. A preliminary project plan for an individual project may be established separately from any programmatic coordination plan, or it may incorporate one or more programmatic coordination plans established by the lead agency to govern coordination with one or more agencies.

X. Notice of Intent

A. Timing of Publication. The lead agency will publish the NOI as soon as practicable after determining (1) that a project is a major infrastructure project; and (2) after consultation with cooperating agencies, that the project proposal is sufficiently developed to permit scoping and meaningful public comment. The publication of the NOI should not be unreasonably delayed.

B. Revision or Withdrawal. If the lead agency determines that the NOI must be revised, supplemented, corrected, reissued, or withdrawn, the lead agency will transmit the proposed change to all cooperating and participating agencies and to the project sponsor, and modify the Permitting Timetable accordingly, before publishing a new NOI. The modified Permitting Timetable will reflect the date of the new NOI as the new start date for purposes of the two-year OFD schedule.

XI. Scoping and Concurrence Points

A. Scoping.

1. The scoping process should be an open process for determining the scope of issues to be addressed in the EIS, identifying the significant issues related to the proposed project and engaging stakeholders and the public. Lead agencies should determine the level and form of public engagement on a case-by-case basis, taking into account factors such as the overall size and complexity of the project.

2. Agencies will use the NEPA scoping process to agree on the relevant analyses, studies and engineering design that will be needed in order for each agency to be able to sign a single ROD and for all the authorization decisions to be issued within 90 days after the ROD is signed.

3. Agencies will consult and seek to agree on the best use and relevance of prior developed information, such as information developed during a planning process.

B. Requirement of Coordination.

1. The OFD policy integrates the requirements of all Federal agencies with authorization decision responsibilities. The undersigned agencies commit to implementing the OFD process early in project development to avoid schedule delays. The environmental review process will be conducted concurrently with the applicable authorization decision processes, and, as such, the lead agency should obtain a written concurrence from all cooperating agencies whose authorization is required for the project at three key milestones: 1) Purpose and Need, 2) Alternatives To Be Carried Forward for Evaluation, and 3) the Preferred Alternative. Lead agencies, in consultation with the relevant cooperating agencies with applicable authorization decision responsibilities, have discretion to add other concurrence points as necessary to meet project specific circumstances.

2. The lead agency will request written concurrence on each concurrence point from all cooperating agencies whose authorization is required for the project. "Concurrence" for purposes of this MOU means confirmation by the agency that the information is sufficient for that stage, and the environmental review process may proceed to the next stage of the NEPA process, as set forth in the lead agency's request for written concurrence. Each applicable cooperating agency will either confirm its concurrence or inform the lead agency that it cannot yet concur. A non-concurring agency will undertake to resolve the issue and provide the requested concurrence, and will if necessary elevate the issue pursuant to Section XII. Cooperating agency Project POCs will respond to the lead agency's request for concurrence within 10 business days. Failure to respond within 10 business days may be treated as concurrence, at the discretion of the lead agency.

3. With respect to cooperating agencies whose authorization is not required for the project, comments should be considered by the lead agency and reflected in the environmental analysis and/or project planning, as appropriate.

C. Specific Concurrent Points.

1. Concurrence Point #1: Purpose and Need.

   (a) The concurrence point will generally occur early in the NEPA review process, prior to issuance of an NOI. The Purpose and Need statement is the foundation for the NEPA alternatives analysis. Cooperating agencies with authorization decision responsibilities for a project will review the lead agency's Purpose and Need statement and determine if it meets their NEPA obligations.

2. Concurrence Point #2: Alternatives to be Carried Forward for Evaluation.

   (a) This concurrence point identifies the alternatives to be carried forward for analysis in the EIS. Concurrence should be sought as early as possible and prior to detailed analysis in the draft EIS (DEIS). Concurrence should be obtained prior to presenting the results of alternatives screening to the public. In order to fulfill the needs of other agencies' authorities, there may be alternatives that require analysis beyond what is necessary for the lead agency.

3. Concurrence Point #3 - Preferred Alternative.

   (a) A preferred alternative should be identified in the DEIS and must be identified in the FEIS. A final decision is identified in the ROD. Before a preferred alternative is identified in a DEIS or FEIS, the lead agency will request written concurrence on the preferred alternative from all agencies whose authorization is required for the project, and will explain in such request the rationale for its selection. An agency's concurrence on a preferred alternative identified in the DEIS will also serve as concurrence for that preferred alternative in the FEIS, unless there is a material change in the preferred alternative from DEIS to FEIS.

D. Changed Circumstances. If after concurrence, the lead agency determines that changes to the Purpose and Need, Alternatives, or the Preferred Alternative are necessary, then the lead agency and cooperating agencies with authorization decision responsibilities will review such changes to determine if concurrence should be revisited.

XII. Elevation of Delays and Dispute Resolution

A. Any issue or dispute that arises between or among agencies during the OFD process will be addressed expeditiously to avoid delay.

B. Agencies will implement this section consistent with any dispute resolution process established in an applicable law, regulation, or legally binding agreement to the maximum extent permitted by law.

C. Agencies will seek to resolve issues or disputes at the earliest possible time at the project level through staff who have day-to-day involvement in the project.

D. Agencies will notify their CERPOs of any instance where a dispute is to be elevated. Where appropriate, agencies will also consult with the project sponsor, and its input should also be considered.

E. If a dispute between agencies causes a milestone to be missed or extended, or the lead agency anticipates that a Permitting Timetable milestone will be missed or will need to be extended, then the dispute should be elevated to an official designated by the relevant agency for resolution. Such elevation should take place as soon as practicable after the lead agency becomes aware of the dispute or potential missed milestone. Disputes that do not impact the ability of an agency to meet a milestone may be elevated as appropriate

F. Once elevated to the designated official, if no resolution has been reached at the end of 30 days after the relevant milestone date or extension date, then the relevant agencies will elevate the dispute to senior agency leadership for resolution.

XIII. Exceptions

A. The lead agency will grant exceptions to the single EIS and single ROD requirement of E.O. 13807 when:

   1. the project sponsor requests that the agencies issue separate NEPA documents;

   2. the NEPA obligations of a cooperating or participating agency have already been satisfied; or

   3. the lead agency determines that one ROD would not promote efficient completion of the project's environmental review and authorization process.

B. The lead agency may grant an exception to the single ROD requirement of E.O. 13807 when Federal law provides for the lead agency to issue a combined FEIS/ROD and cooperating agencies are not authorized to issue a combined FEIS/ROD. When a lead agency elects to grant such an exception, the agencies not authorized to issue a combined FEIS/ROD will issue a joint ROD or other appropriate decision document as soon as practicable, consistent with applicable law and the Permitting Timetable.

C. FERC will grant an exception to the single ROD requirement of E.O. 13807 when the FERC licensing order serves as the ROD. In such situations, the agencies not authorized to issue a combined FEIS/ROD will issue a joint ROD or other appropriate decision document as soon as practicable, consistent with applicable law and the Permitting Timetable.

D. The lead agency may also extend the 90-day deadline for any authorization required for a project in the following circumstances:

   1. when applicable law prohibits an agency from issuing its approval or permit within the 90-day period;

   2. the project sponsor requests that the permit decision or approval follow a different timeline; or

   3. an extension would better promote completion of the project’s environmental review and authorization process.

E. The lead agency may terminate the coordinated development of the single EIS and/or single ROD under OFD upon request of the project sponsor, changed circumstances, or if the project sponsor fails to respond timely to lead agency requests.

XIV. Miscellaneous Provisions

A. Agencies may enter into appropriate agreements as necessary to implement OFD, including agreements on a program- and project-specific basis. Any such agreements will be consistent with this MOU, E.O. 13807, the OFD Framework, and Federal law.

B. Nothing contained in this MOU is intended to or should be construed to limit or affect the authority or legal responsibilities of the undersigned agencies, or binds the undersigned agencies to perform actions beyond their respective authorities.

C. Nothing in this MOU shall be construed to impair or otherwise adversely affect:

1. the authority granted by law to an executive department or agency, or the head thereof; or

2. the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

D. Nothing in this MOU is intended to, or should, be construed to restrict the agencies from participating in similar activities or arrangements with other public or private entities, organizations, or individuals.

E. Independent agency staff will comply with this MOU to the maximum extent practicable, consistent with such agency's status as an independent agency, statutory requirements, and such agency's regulations and procedures.[6]

F. The mission requirements, funding, personnel, and other priorities of the undersigned agencies may affect their ability to fully implement all the provisions identified in this MOU.

G. This MOU shall be implemented consistent with applicable law and subject to the availability of appropriations.

H. Specific activities that involve the transfer of money, services, or property between or among the undersigned agencies may require execution of separate agreements or contracts.

I. This MOU 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.

J. This MOU may be modified and amended, or terminated, by written agreement among the undersigned agencies.

K. Additional Federal agencies may become parties to this MOU by signing an addendum to the MOU.

L. This MOU is effective on April 10, 2018.

[6] For purposes of this MOU, "independent agency" means an independent regulatory agency as defined in 44 U.S.C. § 3502(5).

Department of the Interior

By: _____ Date: 9APR18

Name: Ryan Zinke

Title: Secretary

Department of Agriculture

By: Sonny Perdue

Name: Sonny Perdue

Title: Secretary

Date: April 9, 2018

Department of Commerce

By: Wilbur L. Ross, Jr. Date: April 9, 2018

Name: Wilbur L. Ross, Jr.

Title: Secretary

Department of Housing and Urban Development

By: _____ Date: 4-9-18

Name: Dr. Benjamin S. Carson, Sr., M.D.

Title: Secretary

Department of Transportation

By: E. L. Chao

Name: Elaine L. Chao

Title: Secretary

Date: 4/9/18

Department of Energy

By: Rick Perry

Date: 4/9/18

Name: Rick Perry

Title: Secretary

Department of Homeland Security

By: _____ Date: 4/9/18

Name: Kirstjen M. Nielsen

Title: Secretary

U.S. Army Corps of Engineers

By: Mark T. Esper Date: 4-9-18
Name: Mark T. Esper
Title: Secretary

Environmental Protection Agency

By: _____ Date: 4-9-18

Name: Scott Pruitt

Title: Administrator

Federal Energy Regulatory Commission

By: _____

Name: Kevin J. McIntyre

Title: Chairman

Date: 3/21/2018

Advisory Council on Historic Preservation

By: John M. Fowler Date: 3/21/18

Name: John M. Fowler

Title: Executive Director

Federal Permitting Improvement Steering Council

By: Angela C

Date: April 9, 2018

Name: Angela Colamaria

Title: Acting Executive Director

§ 45.74 Has OMB approved the information collection provisions of this subpart?

Yes. This rule contains provisions that would collect information from the public. It therefore requires approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq.* (PRA). According to the PRA, a Federal agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number that indicates OMB approval. OMB has reviewed the information collection in this rule and approved it under OMB control number 1094–0001.

PART 46—IMPLEMENTATION OF THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969

Subpart A—General Information

Sec.
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 alternatives.

AUTHORITY: 42 U.S.C. 4321 *et seq.* (The National Environmental Policy Act of 1969, as amended); Executive Order 11514, (Protection and Enhancement of Environmental Quality (March 5, 1970, as amended by Executive Order 11991, May 24, 1977)); 40 CFR parts 1500–1508 (43 FR 55978) (National Environmental Policy Act, Implementation of Procedural Provisions).

SOURCE: 73 FR 61314, Oct. 15, 2008, unless otherwise noted.

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.

(c) 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 a series of 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 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 bureaus 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 proposal 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 to be imposed 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 *new* 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 purpose 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 proposed 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 of Indian sacred sites on Federal lands 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, assignment 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 concerning 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) Public involvement in the environmental assessment 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 solicit 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.

(1) The bureau must consider comments that are timely received, whether specifically solicited or not.

(2) Although scoping is not required, the bureau may apply a scoping process to an environmental assessment.

(b) Publication of a ''draft'' environmental assessment is not required. Bureaus may seek comments on an environmental assessment if they determine it to be appropriate, such as when the level of public interest or the uncertainty of effects warrants, and may revise environmental assessments based on comments received without need of initiating another comment period.

(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 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.

(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 result that no further action is taken on the proposal.

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.

§ 46.415 Environmental impact statement content, alternatives, circulation and filing requirements.

The Responsible Official may use any environmental impact statement format and design as long as the statement is in accordance with 40 CFR 1502.10.

(a) *Contents*. The environmental impact statement shall disclose:

(1) A statement of the purpose and need for the action;

(2) A description of the proposed action;

(3) The environmental impact of the proposed action;

(4) A brief description of the affected environment;

(5) Any adverse environmental effects which cannot be avoided should the proposal be implemented;

(6) Alternatives to the proposed action;

(7) The relationship between local short-term uses of the human environment and the maintenance and enhancement of long-term productivity;

(8) Any irreversible or irretrievable commitments of resources which would be involved in the proposed action should it be implemented; and

(9) The process used to coordinate with other Federal agencies, State, tribal and local governments, and persons or organizations who may be interested or affected, and the results thereof.

(b) *Alternatives*. The environmental impact statement shall document the examination of the range of alternatives (paragraph 46.420(c)). The range of alternatives includes those reasonable alternatives (paragraph 46.420(b)) that meet the purpose and need of the proposed action, and address one or more significant issues (40 CFR 1501.7(a)(2–3)) related to the proposed action. Since an alternative may be developed to address more than one significant issue, no specific number of alternatives is required or prescribed. In addition to the requirements in 40 CFR 1502.14, the Responsible Official has an option to use the following procedures to develop and analyze alternatives.

(1) The analysis of the effects of the no-action alternative may be documented by contrasting the current condition and expected future condition should the proposed action not be undertaken with the impacts of the proposed action and any reasonable alternatives.

(2) The Responsible Official may collaborate with those persons or organization that may be interested or affected to modify a proposed action and alternative(s) under consideration prior to issuing a draft environmental impact statement. In such cases the Responsible Official may consider these 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.

Department of the Interior
Departmental Manual

Effective Date: 9/1/09
Series: Environmental Quality Programs
Part 516: National Environmental Policy Act of 1969
Chapter 1: Protection and Enhancement of Environmental Quality

Originating Office: Office of Environmental Policy and Compliance

516 DM 1

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).

(l) 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 ElSs 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.

Department of the Interior
Departmental Manual

Effective Date: 9/1/09
Series: Environmental Quality Programs
Part 516: National Environmental Policy Act of 1969
Chapter 2: Relationship to Decision Making

Originating Office: Office of Environmental Policy and Compliance

516 DM 2

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.

Department of the Interior
Departmental Manual

Effective Date: 9/1/09
Series: Environmental Quality Programs
Part 516: National Environmental Policy Act of 1969
Chapter 3: Managing the NEPA Process

Originating Office: Office of Environmental Policy and Compliance

516 DM 3

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).

(6) Office of Surface Mining (Chapter 13).

(7) Bureau of Reclamation (Chapter 14).

(8) Minerals Management Service (Chapter 15).

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/.

Department of the Interior
Departmental Manual

Effective Date: 9/1/09
Series: Environmental Quality Programs
Part 516: National Environmental Policy Act of 1969
Chapter 4: Review of Environmental Impact Statements and Project Proposals Prepared by Other Federal Agencies

Originating Office: Office of Environmental Policy and Compliance

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, or 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 capsulate 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 1504.2), 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.

Department of the Interior
Departmental Manual

Effective Date: 5/27/04
Series: Environmental Quality Programs
Part 516: National Environmental Policy Act of 1969
Chapter 8: Managing the NEPA Process--U.S. Fish and Wildlife Service

Originating Office: U.S. Fish and Wildlife Service

---

516 DM 8

8.1 **Purpose**. This Chapter provides supplementary requirements for implementing provisions of 516 DM 1 through 6 within the Department's U.S. Fish and Wildlife Service. This Chapter is referenced in 516 DM 6.5.

8.2 **NEPA Responsibility**.

A. The Director is responsible for NEPA compliance for U.S. Fish and Wildlife Service (Service) activities, including approving recommendations to the Assistant Secretary (FW) for proposed referrals to the Council on Environmental Quality (CEQ) of other agency actions under 40 CFR 1504.

B. Each Assistant Director (Refuges and Wildlife, Fisheries, International Affairs, External Affairs, and Ecological Services) is responsible for general guidance and compliance in their respective areas of responsibility.

C. The Assistant Director for Ecological Services has been delegated oversight responsibility for Service NEPA compliance.

D. The Division of Habitat Conservation (DHC--Washington), which reports to the Assistant Director for Ecological Services, is responsible for internal control of the environmental review and analysis of documents prepared by other agencies and environmental statements prepared by the various Service Divisions. This office is also responsible for preparing Service NEPA procedures, guidelines, and instructions, and for supplying technical assistance and specialized training in NEPA compliance, in cooperation with the Service Office of Training and Education, to Service entities. The Washington Office Environmental Coordinator, who reports to DHC, provides staff assistance on NEPA matters to the Director, Assistant Directors, and their divisions and offices, and serves as the Service NEPA liaison to the CEQ, the Department's Office of Environmental Policy and Compliance (OEPC), and NEPA liaisons in other Federal agencies, in accordance with 516 DM 6.2.

E. Each Regional Director is responsible for NEPA compliance in his/her area of responsibility. The Regional Director should ensure that Service decisionmakers in his/her area

of responsibility contact affected Federal agencies and State, tribal and local governments when initiating an action subject to an EA or EIS. An individual in each Regional Office, named by title and reporting to the Assistant Regional Director for Ecological Services, other appropriate Assistant Regional Director, or the Regional Director, will have NEPA coordination duties with all program areas at the Regional level similar to those of the Washington Office Environmental Coordinator, in accordance with 516 DM 6.2.

8.3 **General Service Guidance**. Service guidance on internal NEPA matters is found in 30 AM 2-3 (organizational structure and internal NEPA compliance), 550 FW1-3 (in preparation), 550 FW 3 (documenting and implementing Service decisions on Service actions), and 550 FW 1-2 (replacement to 30 AM 2-3 in preparation). These guidance documents encourage Service participation as a cooperating agency with other Federal agencies, encourage early coordination with other agencies and the public to resolve issues in a timely manner, and provide techniques for streamlining the NEPA process and integrating the NEPA process with other Service programs, environmental laws, and Executive orders. Some Service programs have additional NEPA compliance information related to specific program planning and decisionmaking activities. Service program guidance on NEPA matters must be consistent with the Service Manual on NEPA guidance and Departmental NEPA procedures. For example, additional NEPA guidance is found in the Federal Aid Handbook (521-523 FW), refuge planning guidance (602 FW 1-3), Handbook for Habitat Conservation Planning and Incidental Take Processing, and North American Wetlands Conservation Act Grant Application Instructions.

8.4 **Guidance to Applicants**.

A. Service Permits. The Service has responsibility for issuing permits to Federal and State agencies and private parties for actions which would involve certain wildlife species and/or use of Service-administered lands. When applicable, the Service may require permit applicants to provide additional information on the proposal and on its environmental effects as may be necessary to satisfy the Service's requirements to comply with NEPA, other Federal laws, and Executive orders.

(1) Permits for the Taking, Possession, Transportation, Sale, Purchase, Barter, Exportation, or Importation of Certain Wildlife Species. The Code of Federal Regulations, Part 13, Title 50 (50 CFR 13) contains regulations for General Permit Procedures. Section 13.3 lists types of permits and the pertinent Parts of 50 CFR. These include: Importation, Exportation, and Transportation of Wildlife (Part 14); Exotic Wild Bird Conservation (Part 15); Injurious Wildlife (Part 16); Endangered and Threatened Wildlife and Plants (Part 17); Marine Mammals (Part 18); Migratory Bird Hunting (Part 20); Migratory Bird Permits (Part 21); Eagle Permits (Part 22); Endangered Species Convention (Part 23); and Importation and Exportation of Plants (Part 24). Potential permit applicants should request information from the appropriate Regional Director, or the Office of Management Authority, U.S. Fish and Wildlife Service, Department of the Interior, Washington, DC 20240, as outlined in the applicable regulation.

(2) Federal Lands Managed by the Service. Service lands are administered under the National Wildlife Refuge System Administration Act of 1966 (16 U.S.C. 668dd-668ee), the Refuge Recreation Act of 1962 (16 U.S.C. 460k-460k-4), and the Alaska National Interest Lands

Conservation Act of 1980 (16 U.S.C. 410hh-3233, 43 U.S.C. 1602-1784). Inherent in these acts is the requirement that only those uses that are compatible with the purposes of the refuge system unit may be allowed on Service lands. The Service also complies with Executive Order 12996, signed March 25, 1996, entitled "Management and General Public Use of the National Wildlife Refuge System." This Executive Order identifies general public uses that will be given priority consideration in refuge planning and management, subject to meeting the compatibility requirement and if adequate funding is available to administer the use. Detailed procedures regarding comprehensive management planning and integration with NEPA are found in the Service Manual (602 FW 1-3). Reference to this and other National Wildlife Refuge System requirements are found in the Code of Federal Regulations, Title 50 parts 25-29, 31-36, 60, and 70-71. Under these regulations, these protections are extended to all Service-administered lands, including the National Fish Hatchery System.

B. Federal Assistance to States, Local or Private Entities.

(1) Federal Assistance Programs. The Service administers financial assistance (grants and/or cooperative agreements) to State, local, and private entities under the Anadromous Fish Conservation Act (CFDA #15.600); North American Wetlands Conservation Act; Fish and Wildlife Act of 1956; Migratory Bird Conservation Act; Food Security Act of 1985; Food, Agriculture, Conservation and Trade Act of 1990; Partnerships for Wildlife Act of 1992; and Consolidated Farm and Rural Development Act. The Service administers financial assistance to States under the Sport Fish Restoration Act (CFDA #15.605), Wildlife Restoration Act (CFDA #15.611), Endangered Species Act (CFDA #15.612 and 15.615), Coastal Wetlands Planning Protection and Restoration Act (CFDA #15.614), and Clean Vessel Act of 1992 (CFDA #15.616).

(2) Program Information and NEPA Compliance. Information on how State, local, and private entities may request funds and assist the Service in NEPA compliance relative to the Anadromous Fish Conservation Act may be obtained through the Division of Fish and Wildlife Management Assistance, U.S. Fish and Wildlife Service, Department of the Interior, Arlington Square Building, Room 840, Washington, D.C. 20240. Similar information regarding the North American Wetlands Conservation Act may be obtained through the North American Waterfowl and Wetlands Office, U.S. Fish and Wildlife Service, Department of the Interior, Arlington Square Building, Room 110, Washington, D.C. 20240. All other requests for information on how funds may be obtained and guidance on how to assist the Service in NEPA compliance may be obtained through the Chief, Division of Federal Aid, U.S. Fish and Wildlife Service, Department of the Interior, Arlington Square Building, Room 140, Washington, D.C. 20240.

8.5 **Categorical Exclusions**. Categorical exclusions are classes of actions which do not individually or cumulatively have a significant effect on the human environment. Categorical exclusions are not the equivalent of statutory exemptions. If exceptions to categorical exclusions apply, under 516 DM 2, Appendix 2 of the Departmental Manual, the Departmental categorical exclusions cannot be used. In addition to the actions listed in the Departmental categorical exclusions outlined in Appendix 1 of 516 DM 2, the following Service actions are designated categorical exclusions unless the action is an exception to the categorical exclusion.

A. General.

(1) Changes or amendments to an approved action when such changes have no or minor potential environmental impact.

(2) Personnel training, environmental interpretation, public safety efforts, and other educational activities, which do not involve new construction or major additions to existing facilities.

(3) The issuance and modification of procedures, including manuals, orders, guidelines, and field instructions, when the impacts are limited to administrative effects.

(4) The acquisition of real property obtained either through discretionary acts or when acquired by law, whether by way of condemnation, donation, escheat, right-of-entry, escrow, exchange, lapses, purchase, or transfer and that will be under the jurisdiction or control of the United States. Such acquisition of real property shall be in accordance with 602 DM 2 and the Service's procedures, when the acquisition is from a willing seller, continuance of or minor modification to the existing land use is planned, and the acquisition planning process has been performed in coordination with the affected public.

B. Resource Management. Prior to carrying out these actions, the Service should coordinate with affected Federal agencies and State, tribal, and local governments.

(1) Research, inventory, and information collection activities directly related to the conservation of fish and wildlife resources which involve negligible animal mortality or habitat destruction, no introduction of contaminants, or no introduction of organisms not indigenous to the affected ecosystem.

(2) The operation, maintenance, and management of existing facilities and routine recurring management activities and improvements, including renovations and replacements which result in no or only minor changes in the use, and have no or negligible environmental effects on-site or in the vicinity of the site.

(3) The construction of new, or the addition of, small structures or improvements, including structures and improvements for the restoration of wetland, riparian, instream, or native habitats, which result in no or only minor changes in the use of the affected local area. The following are examples of activities that may be included.

(a) The installation of fences.

(b) The construction of small water control structures.

(c) The planting of seeds or seedlings and other minor revegetation actions.

(d) The construction of small berms or dikes.

(e) The development of limited access for routine maintenance and management purposes.

(4) The use of prescribed burning for habitat improvement purposes, when conducted in accordance with local and State ordinances and laws.

(5) Fire management activities, including prevention and restoration measures, when conducted in accordance with Departmental and Service procedures.

(6) The reintroduction or supplementation (e.g., stocking) of native, formerly native, or established species into suitable habitat within their historic or established range, where no or negligible environmental disturbances are anticipated.

(7) Minor changes in the amounts or types of public use on Service or State-managed lands, in accordance with existing regulations, management plans, and procedures.

(8) Consultation and technical assistance activities directly related to the conservation of fish and wildlife resources.

(9) Minor changes in existing master plans, comprehensive conservation plans, or operations, when no or minor effects are anticipated. Examples could include minor changes in the type and location of compatible public use activities and land management practices.

(10) The issuance of new or revised site, unit, or activity-specific management plans for public use, land use, or other management activities when only minor changes are planned. Examples could include an amended public use plan or fire management plan.

(11) Natural resource damage assessment restoration plans, prepared under sections 107, 111, and 122(j) of the Comprehensive Environmental Response Compensation and Liability Act (CERCLA); section 311(f)(4) of the Clean Water Act; and the Oil Pollution Act; when only minor or negligible change in the use of the affected areas is planned.

C. Permit and Regulatory Functions.

(1) The issuance, denial, suspension, and revocation of permits for activities involving fish, wildlife, or plants regulated under 50 CFR Chapter 1, Subsection B, when such permits cause no or negligible environmental disturbance. These permits involve endangered and threatened species, species listed under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), marine mammals, exotic birds, migratory birds, eagles, and injurious wildlife.

(2) The issuance of ESA section 10(a)(1)(B) "low-effect" incidental take permits that, individually or cumulatively, have a minor or negligible effect on the species covered in the habitat conservation plan.

(3) The issuance of special regulations for public use of Service-managed land, which maintain essentially the permitted level of use and do not continue a level of use that has resulted in adverse environmental effects.

(4) The issuance or reissuance of permits for limited additional use of an existing right-of-way for underground or above ground power, telephone, or pipelines, where no new structures (i.e., facilities) or major improvement to those facilities are required; and for permitting a new right-of-way, where no or negligible environmental disturbances are anticipated.

(5) The issuance or reissuance of special use permits for the administration of specialized uses, including agricultural uses, or other economic uses for management purposes, when such uses are compatible, contribute to the purposes of the refuge system unit, and result in no or negligible environmental effects.

(6) The denial of special use permit applications, either initially or when permits are reviewed for renewal, when the proposed action is determined not compatible with the purposes of the refuge system unit.

(7) Activities directly related to the enforcement of fish and wildlife laws, not included in 516 DM 2, Appendix 1.4. These activities include:

(a) Assessment of civil penalties.

(b) Forfeiture of property seized or subject to forfeiture.

(c) The issuance or reissuance of rules, procedures, standards, and permits for the designation of ports, inspection, clearance, marking, and license requirements pertaining to wildlife and wildlife products, and for the humane and healthful transportation of wildlife.

(8) Actions where the Service has concurrence or coapproval with another agency and the action is a categorical exclusion for that agency. This would normally involve one Federal action or connected actions where the Service is a cooperating agency.

D. Recovery Plans. Issuance of recovery plans under section 4(f) of the ESA.

E. Financial Assistance.

(1) State, local, or private financial assistance (grants and/or cooperative agreements), including State planning grants and private land restorations, where the environmental effects are minor or negligible.

(2) Grants for categorically excluded actions in paragraphs A, B, and C, above; and categorically excluded actions in Appendix 1 of 516 DM 2.

8.6 **Actions Normally Requiring an EA**.

A. Proposals to establish most new refuges and fish hatcheries; and most additions and rehabilitations to existing installations.

B. Any habitat conservation plan that does not meet the definition of "low-effect" in the Section 10(a)(1)(B) Handbook.

C. If, for any of the above proposals, the EA determines that the proposal is a major Federal action significantly affecting the quality of the human environment, an EIS will be prepared. The determination to prepare an EIS will be made by a notice of intent in the Federal Register and by other appropriate means to notify the affected public.

8.7 **Major Actions Normally Requiring an EIS**.

A. The following Service proposals, when determined to be a major Federal action significantly affecting the quality of the human environment, will normally require the preparation of an EIS.

(1) Major proposals establishing new refuge system units, fish hatcheries, or major additions to existing installations, which involve substantive conflicts over existing State and local land use, significant controversy over the environmental effects of the proposal, or the remediation of major on-site sources of contamination.

(2) Master or comprehensive conservation plans for major new installations, or for established installations, where major new developments or substantial changes in management practices are proposed.

B. If, for any of the above proposals it is initially determined that the proposal is not a major Federal action significantly affecting the quality of the human environment, an EA will be prepared and handled in accordance with 40 CFR 1501.4(e)(2). If the EA subsequently indicates the proposed action will cause significant impacts, an EIS will be prepared.

5/27/04 #3618
Replaces 3/18/80 #3511

FWS

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240

OCT 6 1998

PEP - ENVIRONMENTAL STATEMENT MEMORANDUM NO. ESM98-2

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 (EIS) 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 516 DM 4.22. It replaces ESM95-2.

2. Delegated EISs

A delegated EIS is one for which the decision authority on the proposed action rests by delegation with 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. 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 in writing setting forth its reasons for the non-concurrence. When the determination is unclear, OEPC will advise the bureau in an effort to assist the bureau in making the determination.

d. Bureaus will make this determination no later than the filing of a Notice of Intent (NOI) and/or the conducting of scoping meetings.

e. OEPC will use the Quarterly Report of Environmental Impact Statements (ESM96-3) to track the notification process.

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 and the date of its transmittal. The OEPC will assign the document a DOI control number and log it. 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.

b. Before calling for a DOI control number, determine the exact status of the printing job. If the documents are printed and mailed or awaiting mailing from the printer, request a number. If the documents are printed and in transit back to the bureau for mailing, wait until the documents are ready for mailing to request a control number. If the document has not yet been given to the printer, do not request a control number.

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 notice must be consistent with the time period for review in EPA's notice of availability. The time period for review is also governed by ESM94-8. Five (5) copies of the EIS are required by EPA. The EPA will not accept the EIS without the DOI control number.

d. Concurrent with the filing of an EIS with EPA, bureaus are to distribute the document to Federal agencies with jurisdiction by law or special expertise and to State and local agencies, including Indian Tribes, that 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, and four (4) copies to OEPC. In addition, OEPC will be furnished a copy of the transmittal letter to EPA and the bureau Federal Register notice.

e. Circulation to Interior bureaus will take place in accordance with ESM98-3.

f. Circulation to other Federal and State agencies is governed by ESM94-3.

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 are encouraged to consult early with OEPC in scheduling and preparing these documents to avoid delays in their approval. The OEPC is available for guidance and associated review of 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 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. This can be by telephone.

d. Where adequate, early consultation and coordination is not achieved with OEPC, bureaus will transmit proposed EISs to OEPC for review and approval. This should be done concurrently with any bureau headquarters review. Bureaus should allow at least 2 weeks for OEPC's review, comment, and approval. In such cases, bureaus 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 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
five (5) printed copies of the EIS.

The transmittal letter, upon signature by the Director of OEPC, is the official document

signifying AS/PMB approval. After signature, a bureau may hand carry it and five (5) 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 are to distribute the document to Federal agencies with jurisdiction by law or special expertise and to State and local agencies, including Indian Tribes, that 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 four (4) copies to OEPC for its distribution and files.

h. Circulation to Interior bureaus will take place in accordance with ESM98-3.

i. Circulation to other Federal and State agencies is governed by ESM94-3.

Attachments

Attachment 1

To: Director, Office of Environmental Policy and Compliance
Department of the Interior, MS 2340 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 PEP Environmental Statement Memorandum ESM 98-2, 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

Note:	This attachment may be updated as necessary without re-issuing the entire ESM.

Revision by
Terry Martin (OEPC)
3/22/00

Attachment 2

US Environmental Protection Agency
Office of Federal Activities
EIS Filing Section
Mail Code 2252-A, ~~Room 7241~~
~~Ariel Rios Building (South Oval Lobby)~~ 401 M ST., SW
~~1200 Pennsylvania Avenue~~
Washington, D.C. 20460 ~~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 five (5) copies of a (*draft/final*) environmental impact statement for (*title of proposal*). This statement was prepared by the (*bureau*).

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

Note: If you are hand delivering your EIS, you will make your delivery to:

US Environmental Protection Agency
Office of Federal Activities
EIS Filing Section
Mail Code 2252-A, Room 7241
Ariel Rios Building (South Oval Lobby)
1200 Pennsylvania Avenue
Washington, D.C. 20460

Please check in with the building guard and call the EIS Filing Section on 202-564-2400.

Note:

1. This attachment may be updated as necessary without re-issuing the entire ESM.
2. The date of this attachment is March 23, 2000.

Revison by
Terry Martin (OEPC)
10/19/99.

Attachment 3

DEPARTMENT OF THE INTERIOR
(*BUREAU*)

Notice of Availability of (*Draft/Final*) Environmental Impact Statement

AGENCY: (*Bureau*), Department of the Interior

ACTION: Notice of availability of a (*draft/final*) environmental impact statement (EIS) for the proposed (*title*)

*DATE: 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*). Please submit Internet comments as an ASCII file 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*). Finally, you may hand-deliver comments to (*office street address*). Our practice is to make comments, including names and home addresses of respondents, available for public review during regular business hours. Individual respondents may request that we withhold their home address from the record, which we will honor to the extent allowable by law. There also may be circumstances in which we would withhold from the record a respondent's identity, as allowable by law. If you wish us to withhold your name and/or address, you must state this prominently at the beginning of your comment. ~~However, we will not consider anonymous comments.~~ We will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public inspection in their entirety.[1]

FOR FURTHER INFORMATION CONTACT: (*office and address*)

SUPPLEMENTAL INFORMATION: A limited number of individual copies of the EIS may be obtained from (*the above contact or wherever*).

---

[1]This recommended text has its source in Alliance for the Wild Rockies, et al. v. Department of the Interior, et al., Civil No. 98-2912 (D.D.C., June 23, 1999). Its use is recommended by SOL memorandum dated August 20, 1999, and transmitted to NEPA contacts by OEPC memorandum dated September 10, 1999.

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.*)

_____
Date

_____
Willie R. Taylor
Director, Office of Environmental
Policy and Compliance

* Include only for draft EIS
** Include if appropriate to this notice

Note:
1. This attachment may be updated as necessary without re-issuing the entire ESM.
2. The date of this attachment is October 18, 1999.

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240

FEB 24 2000

PEP - ENVIRONMENTAL STATEMENT MEMORANDUM NO. ESM00-2

To: Heads of Bureaus and Offices

From: Willie R. Taylor, Director
Office of Environmental Policy and Compliance

Subject: EIS Filing Address Information for EPA

The Environmental Protection Agency's Office of Federal Activities has recently revised its mailing and hand delivery address for environmental impact statements.

The address is now:

US Environmental Protection Agency
Office of Federal Activities
EIS Filing Section
Mail Code 2252-A, Room 7241
Ariel Rios Building (South Oval Lobby)
1200 Pennsylvania Avenue, NW
Washington, DC 20460

If hand delivery is made, please check in with the building guard and call the EIS Filing Section on 202-564-2400 for verification and an escort to the filing office.

This information is currently located on the Internet at: **http://es.epa.gov/oeca/ofa/fileadmi.html**. It is recommended that bureaus check Internet sites periodically to see if the addresses are still valid. OEPC will issue notices of Internet site changes as it becomes aware of them. Internet site changes must be made in ink and dated on the ESM.

Please circulate this information to all within your bureau who routinely file EISs with EPA.

This memorandum replaces ESM96-2, dated March 21, 1996.

3/28/00

HANDBOOK ON

DEPARTMENTAL REVIEW OF

SECTION 4(f) EVALUATIONS

Department of the Interior
National Park Service
U.S. Fish and Wildlife Service
Office of Environmental Policy and Compliance
Washington, DC 20240

February 2002

TABLE OF CONTENTS

PURPOSE 4
SECTION 4(f) DEFINED 4
STATUTORY MANDATE 4
REGULATORY DEFINITION 4
ADMINISTRATIVE BACKGROUND 5
NATIONAL ENVIRONMENTAL POLICY ACT AND SECTION 4(f) 5
PERTINENT LEGISLATION 6
SECTION 4(f) PROPERTIES UNDER THE DEPARTMENT'S JURISDICTION 7
ACCEPTED SECTION 4(f) PROPERTIES 7
PROPERTIES TO WHICH SECTION 4(f) MAY APPLY 9
Private Lands 9
Public School Property 9
Private School Property 9
Fairgrounds 9
Public Open Space 9
State Game Lands 9
Wetlands Easements 10
Floodplains 10
Projects Involving Highway Rights-of-Way Temporarily Used for Park Purposes 10
National Forest Lands 10
Wild and Scenic Rivers 10
SECTION 4(f)/SECTION 106 INVOLVEMENTS 10
ORGANIZATION AND CONTENT OF DEPARTMENTAL COMMENT LETTERS 11
COMMON LETTER CONTENT 11
Addressee 11
Project Identification 12
GENERAL COMMENTS 12
Segmentation 12
Scoping and Early Coordination 12
Maps and Graphics 13
SECTION 4(f) EVALUATION COMMENTS 13
General Comments 13
Specific Comments 13
Preliminary Section 4(f) Documents 13
Alternatives and Their Impacts on Section 4(f) Lands 14

Measures to Minimize Harm to Section 4(f) Lands 14
Park and Recreation Areas 15
Replacement of Section 4(f) Lands 15
Monetary Compensation for Use of Section 4(f) Lands Not Involving Land and Water Conservation Fund Moneys 16
Constructive Use 16
Projects Involving Section 6(f) of the LWCF Act 16
Lands Acquired Under Section 7 of the LWCF Act 18
Lands Under the Urban Park and Recreation Recovery Act of 1978 19
Lands Under the Railroad Revitalization and Regulatory Reform Act of 1976 19
Landscaping and Scenic Enhancement 19
Noise Abatement Measures 19
Safety and Access 19
Project Design 20
Historic and Archeological Properties 20
ENVIRONMENTAL STATEMENT COMMENTS 20
General Comments 21
Project Description 21
Probable Impact of the Proposed Action on the Environment 21
Channelization 22
Floodplains and Wetlands 22
Adverse Impacts That Cannot Be Avoided 22
Alternatives 22
Irreversible and Irretrievable Commitment of Resources 23
Minimizing Harm to the Environment 23
FISH AND WILDLIFE COORDINATION ACT COMMENTS 23
HOW TO ADDRESS COMMENTS OF OTHER DEPARTMENTAL BUREAUS23
SUMMARY COMMENTS 24
Content of Section 4(f) Evaluation Comments 24
Content of Summary Comments 24
Full Concurrence with Both Provisos of Section 4(f) 24
Concurrence with Only the First Proviso 24
Objection to Section 4(f) Approval 25
Lack of Section 4(f) Information in the Document 25
APPENDICES
APPENDIX A. Andrus Letter on Section 4(f) Properties 28
APPENDIX B. List of Acronyms Used in This Handbook 34
APPENDIX C. FHWA Letter to OEPC on Disagreements Between DOT and Interior 36
APPENDIX D. Letter to FHWA Regional Administrators on Constructive Use 39

PURPOSE

This handbook provides guidance in the review of and the preparation of Interior Department comments on Section 4(f) evaluations prepared by the U.S. Department of Transportation (DOT) and its modal administrations. The main modal administrations in DOT are the Federal Highway Administration (FHWA), the Federal Aviation Administration (FAA), the U.S. Coast Guard (USCG), the Federal Railroad Administration (FRA), and the Federal Transit Administration (FTA) (formerly the Urban Mass Transit Administration). Section 4(f) of the Department of Transportation Act of 1966 provides significant authority to the Secretary of the Interior to seek the protection of public (federal and non-federal) recreational lands, including parks and wildlife refuges, in the planning of DOT proposals.

SECTION 4(f) DEFINED

STATUTORY MANDATE: Section 4(f) of the Department of Transportation Act, as amended, now resides in the United States Code at 49 U.S.C. 303. It states:

> Sec. 303. Policy on lands, wildlife and waterfowl refuges, and historic sites
>
> (a) It is the policy of the United States Government that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites.
>
> (b) The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the states, in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of lands crossed by transportation activities or facilities.
>
> (c) The Secretary may approve a transportation program or project (other than any project for a park road or parkway under Section 204 of Title 23) 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 -
>
> (1) there is no prudent and feasible alternative to using that land; and
>
> (2) 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.

REGULATORY DEFINITION: The DOT regulations in the Code of Federal Regulations, at 23 CFR 771.107(e), define "Section 4(f)" as follows:

> Section 4(f) refers to 49 U.S.C. 303 and 23 U.S.C. 138.

The following footnote was given, and it is repeated here for historical information to support the common use of the term "Section 4(f)."

> Section 4(f), which protected certain public lands and all historic sites, technically was repealed in 1983 when it was codified, without substantive change, as 49 U.S.C. 303. This regulation continues to refer to section 4(f) because it would create needless confusion to do otherwise; the policies section 4(f) engendered are widely referred to as "section 4(f)" matters. A provision with the same meaning is found at 23 U.S.C. 138 and applies only to FHWA actions.

ADMINISTRATIVE BACKGROUND

NATIONAL ENVIRONMENTAL POLICY ACT AND SECTION 4(f): With the exception of those laws and regulations that apply solely to DOT, this handbook may also apply to documents prepared by other federal agencies. This handbook also applies to the review of environmental impact statements (EISs) and environmental assessments (EAs) that may be included with Section 4(f) evaluations. Review of and comment on an EIS or EA/Section 4(f) evaluation should be in accord with instructions in the Department of the Interior (Interior) Manual, Part 516, Chapter 7 (516 DM 7).

The contents of an EIS or EA/Section 4(f) evaluation should comply with the provisions of the National Environmental Policy Act (NEPA) (PL 91-190, as amended) Council on Environmental Quality (CEQ) Regulations (40 CFR Parts 1500–1508), Section 4(f) of the Department of Transportation Act (49 U.S.C. 303), and the combined regulations of the FHWA and the FTA (23 CFR 771.101–771.137). Also applicable are the DOT Section 4(f) Policy Paper (revised June 7, 1989), the Department of the Interior Environmental Review Memorandum No. ERM94-4 (see appendix A), the Guidance on the Preparation and Processing of Environmental and Section 4(f) Documents (October 30, 1987), the FRA's Procedures for Considering Environmental Impacts (May 26, 1999), and the FAA's Airport Environmental Handbook (FAA Order 5050.4A, October 8, 1985). Copies of these documents are available on the Internet at the DOT Web site: http://www.dot.gov, which offers both DOT and modal administration search capabilities to locate the appropriate documents. The reader should remain current on the location of these documents because Internet addresses, as well as the information available at the addresses, can be updated periodically.

Interior's Office of Environmental Policy and Compliance (OEPC) manages the review and commenting process through its environmental review system. This system includes assignment of lead bureaus, reviewing bureaus, and review schedules. CEQ regulations cite two instances when an agency should review and comment on an EIS: jurisdiction by law or special expertise. The regulations are binding on all federal agencies.

The National Park Service (NPS) usually serves as Interior's lead bureau for preparing the Department's comments on projects that may affect units of the National Park System, other public park and recreation resources, historic and archeological properties, and unique natural areas. Because these resources may have important fish and wildlife resources, the Fish and Wildlife Service (FWS) should provide to the NPS, as appropriate, its views related to NEPA compliance, the Fish and Wildlife Coordination Act (FWCA), the Endangered Species Act (ESA), and other laws and executive orders.

The FWS is usually designated as lead bureau for projects involving fish and wildlife refuges, dedicated wetlands, and similar areas. However, because refuges often involve recreational uses and values, the NPS should provide its views to the FWS on Section 4(f) issues involving refuges.

When the Bureau of Land Management (BLM), the Bureau of Reclamation (BR), or the Bureau of Indian Affairs (BIA) is made the lead bureau for a project involving Section 4(f) lands under its direct jurisdiction, the bureau should actively solicit the views of the FWS and the NPS if they have not already been provided. As a practical matter, however, these three bureaus are seldom involved in Section 4(f) matters and are very rarely named lead bureau.

Some Section 4(f) reviews involve lands and areas of interest to more than one Interior bureau—for example, a park and a refuge, or a refuge and a historic site. The lead bureau in these cases must ensure that the views of all bureaus are considered for incorporation in the Department's comments. The lead bureau must also perform its lead role *even if it has no comments of its own*. Sometimes intra-Departmental conflicts arise. These conflicts must be resolved before a Departmental letter is finalized. The following general procedures apply:

- The field level official of the lead bureau resolves conflicts through inter-bureau discussions. If unsuccessful, then,
- OEPC's regional environmental officer resolves conflicts through regional level coordination. If unsuccessful, then,
- The lead (or any other) bureau refers the case to OEPC headquarters through its Washington office.

The OEPC is always available for informal consultations at any stage of the process. Attempts at resolution should be documented in the package sent to the OEPC. The OEPC's distribution memorandum and the comments of other Interior bureaus must be on hand when the Departmental letter of comment is prepared. If the comments of any bureau are not on hand, the bureau should be contacted by telephone and the call documented. *Original bureau comments must accompany the draft Departmental comments through the process for final review and signature by the OEPC.*

<u>PERTINENT LEGISLATION</u>: Reviewers should be aware of and know how to locate and apply

information on pertinent legislation and regulations such as (but not limited to) the following:

- National Historic Preservation Act of 1966, as amended, and its implementing regulations at 36 CFR 800, revised on June 17, 1999;
- Fish and Wildlife Coordination Act 16 U.S.C. 661-667;
- Endangered Species Act and implementing regulations for interagency consultation at 50 CFR 402;
- National Environmental Policy Act and implementing regulations at 40 CFR 1500-1508; and
- Department of Transportation Act and implementing regulations at 23 CFR 771.

SECTION 4(f) PROPERTIES UNDER THE DEPARTMENT'S JURISDICTION

ACCEPTED SECTION 4(f) PROPERTIES: It is important that reviewers familiarize themselves with Interior Department Environmental Review Memorandum ERM94-4 containing the Secretary of the Interior's letter of June 20, 1980, to the Secretary of Transportation (see appendix A). The Secretary's letter details Interior's jurisdiction in Section 4(f) matters. The letter declares that Interior jurisdiction extends to any public park, recreation area, or wildlife and waterfowl refuge within the scope of the Department's statutory responsibilities and that these responsibilities extend to certain state or locally owned parks, recreation areas, or wildlife and waterfowl refuges. In addition, the Department's jurisdiction extends to sites that the Department determines to be of national, state, or local historic significance, regardless of ownership under the National Historic Preservation Act.

Accordingly, Interior has declared the following listed lands as being significant parks, recreation areas, wildlife and waterfowl refuges, and historic sites, and has stated its opinion that Section 4(f) applies to them for any use by DOT. The following list was developed consistent with the advice of the Department of the Interior's solicitor. However, the list may not be exhaustive, and there may be other areas that have been inadvertently omitted or that may need to be evaluated on a case-by-case basis. The DOT Section 4(f) Policy Paper (revised June 7, 1989) must also be consulted in these matters. Issues where the Department may still be in conflict with DOT should be brought to the attention of the OEPC and the solicitor's office as necessary for final decision.

- Lands of the National Park System.
- National Park Service "Affiliated Areas."
- Lands of the National Wildlife Refuge System.
- Lands of the National Fish Hatchery System.
- Lands acquired for mitigation purposes pursuant to the authority of the Fish and Wildlife Coordination Act, including general plan lands under Section 3(b) of that act.
- Lands under the jurisdiction of the Bureau of Reclamation that are administered as parks, recreation areas, wildlife refuges, or historic sites.

- Lands under the jurisdiction of the Bureau of Land Management that are administered for recreation, cultural, and wildlife purposes.
- Indian lands held in trust by Interior as parks, recreation areas, wildlife refuges, or historic sites.
- Local and state lands, and interests therein, and certain federal lands under lease to the states, acquired or developed in whole or in part with moneys from the Land and Water Conservation Fund (LWCF).
- Recreation areas and facilities developed or improved, in whole or in part, with grants under the Urban Park and Recreation Recovery Act of 1978 (Title 10 of PL 95-625).
- State lands and interests therein acquired or developed or improved with federal grants for fish and wildlife conservation, restoration, or management such as the Federal Aid in Sport Fish Restoration Act of 1950 (Dingell-Johnson Act), the Federal Aid in Wildlife Restoration Act of 1937 (Pittman-Robertson Act), and the Anadromous Fish Act of 1965.
- Federal surplus real property that has been deeded to state and local governments for park, recreation, wildlife, and historic purposes.
- Abandoned railroad rights-of-way acquired by state and local governments for recreational or conservation uses under Section 809(b) of the Railroad Revitalization and Regulatory Reform Act of 1976.
- Properties listed on or eligible for inclusion in the National Register of Historic Places.
- Areas publicly owned in fee, less than fee, lease, or otherwise, that receive de facto use as park, recreation, or refuge lands. De facto use is determined on a case-by-case basis by the Interior bureau having statutory or program jurisdiction over or interest in the land in question. In the case of Indian trust lands, such determination will be made in consultation with the appropriate tribal officials. De facto use may also include publicly owned lands or interest therein proposed or under study for inclusion in the National Wild and Scenic Rivers System, the National Trails System, or the National Wilderness Preservation System, or as critical habitat for endangered or threatened species. Early coordination with Interior about the applicability of Section 4(f) is especially important whenever lands administered by the Bureau of Reclamation or the Bureau of Land Management, or Indian trust lands administered by the Bureau of Indian Affairs**,** are affected by DOT projects.

All of the lands listed above may also contain significant, but presently unknown or undesignated, historic or archeological sites or properties that fall under the protection of Section 4(f). This matter will be determined on a case-by-case basis by the administering bureau/tribal officials in consultation with the state historic preservation officer (SHPO) (or others with historical expertise). Coordination of this matter with Interior is, therefore, essential. Such coordination with respect to Section 4(f) should be undertaken in addition to (although it may be concurrent with) any coordination that may be required under Section 106 of the National Historic Preservation Act. It should be noted, however, that each law is independent of the other.

PROPERTIES TO WHICH SECTION 4(f) MAY APPLY: For some other properties, Interior

has no direct or program jurisdiction; for others, Interior and DOT disagree as to the applicability of Section 4(f). In general, Interior believes these properties should receive Section 4(f) protection. Surface waters associated with these lands are also subject to Section 4(f). DOT, however, does not recognize historic sites of state and local significance as automatically falling under the protection of Section 4(f), unless such sites are also on or eligible for the National Register. The responsible DOT official may, at his or her discretion, apply Section 4(f) to such historic sites, but this is not mandatory. Such application of Section 4(f) may require further discussion among the NPS, the OEPC, the Office of the Solicitor, and the SHPO.

The following are some common 4(f) problem areas that reviewers have encountered. The list is not all-inclusive. Such problems should be resolved on a case-by-case basis, with frequent reference to the DOT Section 4(f) Policy Paper:

Private Lands: Private lands leased by governmental entities and operated as community parks and recreation areas may fall under the protection of Section 4(f). Factors such as lease conditions, significance, and use of the area must be considered in determining the application of 4(f). At the very least, reviewers should recommend special attention for such areas and request Section 4(f) consideration by DOT.

Public School Property: Public school property serving only as a recreation area for a school is not covered by Section 4(f). However, an area that is open to general public use, and that serves the recreational needs of the community as well as the school, is covered by Section 4(f), if it is found to be significant by the officials having responsibility for providing recreation opportunities to the community.

Private School Property: Private school property that receives public financial assistance in return for public recreational use of that property may be subject to Section 4(f). Applicability depends on conditions of the lease and other circumstances. Therefore, all the necessary facts with appropriate analysis must be assembled for any private school case in which Section 4(f) may be applicable.

Fairgrounds: Fairgrounds or portions of them that are open to the general public as a community park, recreation area, or similar area are generally considered to be under Section 4(f) protection.

Public Open Space: Public open spaces will fall under the protection of Section 4(f) when they are part of a park or recreation area, a historic site, or a wildlife area and local park and recreation officials have determined them to be significant.

State Game Lands: Interior believes that all state lands and interests therein acquired or developed or improved for fish and wildlife conservation, restoration, or management with grants under the Pittman-Robertson Act, the Dingell-Johnson Act, Section 6 of the Endangered Species Act of 1973, or the Anadromous Fish Act of 1965 (including, but not limited to, state fish hatcheries, state wildlife conservation areas, and state game lands) are protected by Section

4(f). However, the final decision on applicability lies with DOT. In making its determination, DOT will rely on the official having jurisdiction over the lands to identify the kinds of activities and functions that take place. The FWS will normally be Interior's lead bureau for these involvements.

Wetlands Easements: Wetlands easements lands are acquired pursuant to the Act of March 16, 1934, as amended, 48 Stat. 451, 16 U.S.C. 718 (1970), and administered by the FWS. Interior considers wetlands easements protected under Section 4(f). The FWS will normally be the lead for these involvements.

Floodplains: Floodplains are not 4(f) areas unless otherwise designated as park and recreation lands or wildlife refuges under other authority.

Projects Involving Highway Rights-of-Way Temporarily Used for Park Purposes: These lands should include sufficient documentation to show that the affected parkland is within the highway right-of-way. The deed and accompanying maps drawn at the time the right-of-way was acquired will usually provide satisfactory evidence. If the deed is not available and the exact boundary cannot be determined from existing records, the highway agency should carry out sufficient design work to address the parkland taking and involvement, including an on-the-ground finding to support the fact that no parkland will be taken outside the designated right-of-way. Measures to minimize harm in such cases should include removal or relocation of facilities that may be involved, fencing, noise abatement, landscaping, and access. Measures should be coordinated with and approved by the park authority, and implemented at project expense. Evidence to that effect should be included in the final statement.

National Forest Lands: Usually Interior does not involve itself in national forest/4(f) matters after the Forest Service (FS) makes a decision that Section 4(f) is not applicable to national forest lands that are affected by transportation projects. However, Interior should make an independent evaluation of the park, recreational, or refuge values of the area in question, and as appropriate request DOT and the FS to reevaluate their position.

Wild and Scenic Rivers: In general, rivers under study for designation as wild and scenic rivers are not subject to Section 4(f), but publicly owned parks, recreation areas, refuges, and historic sites within their corridors would be. Publicly owned waters of designated wild and scenic rivers are protected by 4(f). Publicly owned lands within immediate proximity of such rivers may be protected by 4(f). Refer to the DOT Section 4(f) Policy Paper (revised June 7, 1989).

SECTION 4(f)/SECTION 106 INVOLVEMENTS

Environmental statement/Section 4(f) evaluations should document actions taken to preserve and enhance districts, sites, buildings, structures, and objects of historical, archeological, architectural, or cultural significance. Reviewers should, therefore, familiarize themselves with Section 106 of the National Historic Preservation Act as it pertains to these properties.

Section 4(f) requires a more rigorous level of consideration for historic properties than does Section 106. Section 106 requires only that effects on historic properties be considered and that the SHPO or the tribal historic preservation officer, as well as the Advisory Council on Historic Preservation (ACHP) if necessary, be afforded the opportunity to comment. Section 4(f), in contrast, requires that historic properties be used only if there is no feasible and prudent alternative.

Although transportation agencies often contend that Section 4(f) and Section 106 compliance duplicate each other, we do not agree. We do, however, favor concurrent compliance and processing under both laws. Field reviewers should recommend (during early coordination) the circulation of a draft environmental document (EA/EIS) with a combined preliminary Section 106 case report/Section 4(f) evaluation. When an EA/EIS is not required, the combined 106/4(f) document will suffice. Such draft documents must discuss proposed mitigation, and may include a *proposed* memorandum of agreement (MOA). The SHPO and Interior will then make their *independent* comments on the combined document. The final EIS or the final 4(f)/106 documentation would then include DOT's 4(f) approval determination and an executed MOA, or otherwise indicate disposition of the case.

A rather special case is presented by archeological sites, some of which are significant only or primarily because they contain information that can be fully extracted through a data recovery program. Recently revised regulations of the ACHP have resulted in changes to the Section 106 process so that when a site is excavated, the effect on the site is considered adverse without exception. The FHWA's procedures for considering impacts to archeological sites and the relationship to Section 106 are generally described at 23 CFR 771.135.

ORGANIZATION AND CONTENT OF DEPARTMENTAL COMMENT LETTERS

The following sections provide a standard format for Section 4(f) letters and EIS/4(f) letters. It is advisable to use this format so as to ensure that all 4(f) considerations are accounted for and processed.

COMMON LETTER CONTENT: The content of a Departmental letter of comment on environmental statement/Section 4(f) evaluations may have several major sections: general comments, Section 4(f) evaluation comments, environmental statement comments, Fish and Wildlife Coordination Act comments, and summary comments. Sections dealing with other specific laws, such as Section 6(f) of the Land and Water Conservation Fund Act, the Fish and Wildlife Coordination Act, or the Endangered Species Act, should be added if applicable.

Addressee: The letter must be addressed to the appropriate federal official, with a copy to the state, local, or other sponsor (if any exists). The address should be on the first page at the upper left-hand corner of the letter. The OEPC control number should also appear at the upper left-hand corner of the letter under the Departmental seal. The second and succeeding pages of the

letter should carry a header with the name of the addressee, exactly as it is shown on the first page, flush with the left margin and the page number located to the right in the same header. The complimentary close, "Sincerely," should be two lines below the last line of the letter and slightly to the right of center. If the signatory is known, type the signatory's name five lines below the complimentary close, with title below the name. Material accompanying a letter should be identified in the text, with a notation at the end indicating an enclosure. When a copy of the letter is being sent to someone other than the addressee, note this fact at the lower left hand corner under the signature and include each recipient's full address(es).

Project Identification: Generally, the initial paragraph should read something like this: "This letter is in response to your recent request for the Department of the Interior's comments on the (type of document received) for the (include project identification exactly as it appears in the OEPC's distribution memorandum)."

Reviewers should independently check project identification. Reviewers should also check type of review—for example, do not identify the review as a draft environmental statement/Section 4(f) evaluation unless a 4(f) evaluation is actually included. The OEPC frequently distributes a draft EIS for Interior 4(f) comments when the DOT agency does not recognize a 4(f) involvement. These are referred to as having a potential 4(f) involvement. In these cases, cite the document only as a draft EIS. Always include the project name, the county, and the state. The name of the city or town may be included if appropriate.

GENERAL COMMENTS: This section may contain comments of a general nature, and any that occur throughout the document should be consolidated to avoid needless repetition. Some examples are segmentation, scoping, coordination, maps, and graphics. The Section 4(f) and EIS sections of the letter may also contain a "General" section if it is appropriate to those sections.

Segmentation: Segmentation refers to the subdivision of a large project into smaller projects. NEPA requires that actions covered by an environmental statement should have independent significance and must be broad enough in scope to avoid subdivision of the project and to ensure meaningful consideration of alternatives. Segmentation can result in a lessening of the severity of a project's impact. While reviewers should be alert to this problem, they should raise the issue only if they can substantiate it and only if it obviously affects the interests of Interior.

Scoping and Early Coordination: Scoping and early coordination at the beginning of the location study can assist in identifying park and recreation, natural, and cultural areas of significance; agency and public concerns; and the need for preparation of environmental statements. Reviewers should determine whether scoping and early coordination with park and recreation bureaus having jurisdiction over the Section 4(f) lands involved has occurred. They should also check the list of agencies that have been requested to review the draft environmental statement. If, for instance, the SHPO has been consulted, the SHPO's comments should be included in the statement.

Maps and Graphics: Some statements provide only small-scale maps and very little other graphic information about a proposed project and the land uses within the transportation corridor. Other statements have more extensive graphics such as current U.S. Geological Survey maps, aerial photographs, photo mosaics, and orthophoto maps. Property boundaries showing major land uses (i.e., farm lands, park areas, residential areas) are often superimposed on these maps and graphics. Width of right-of-way can be shown on these maps, including a general right-of-way taking of land for interchange areas or for specific areas where there would be need for extensive cuts or fills. Reviewers should encourage the use of well-labeled maps and graphics in environmental statements. When necessary, we can always request more detailed boundary and right-of-way maps for specific 4(f) areas, which are especially important to have when discussing measures to minimize harm to Section 4(f) lands.

SECTION 4(f) EVALUATION COMMENTS:

General Comments: The first paragraph under Section 4(f) may include general comments as to the adequacy or inadequacy of the Section 4(f) submission. These may include concerns of a general nature, such as involvement under Section 6(f) or Section 7 of the LWCF Act, controversy over FS lands, or conflicts with the Wild and Scenic Rivers Act, the National Trails Act, the Federal Surplus Property Act, and others. We may review projects for which the DOT agency does not recognize, or rejects outright, the application of Section 4(f). This section would be a good place to address our differences with DOT about the application of 4(f), the use of 4(f) lands, determinations of significance, and other matters that may be needed to address the document's compliance with the requirements of DOT's 4(f) regulations.

Specific Comments:

Preliminary Section 4(f) Documents: Interior's Section 4(f) comments are provided on a clearly identifiable Section 4(f) document that discusses alternatives and measures to minimize harm. This may appear in a combined environmental statement/Section 4(f) evaluation or as a separate Section 4(f) document circulated for review and comment. However, there are instances where only *preliminary* Section 4(f) comments may be appropriate. Preliminary 4(f) comments are provided to give the sponsor an early indication of Interior's thoughts about the Section 4(f) information and involvements associated with a proposed project. In cases of this nature, we should make clear that the comments provided are preliminary and do not represent the results of formal consultation by DOT with Interior, pursuant to the consultative requirements of Section 4(f), and that this requirement will be fulfilled only when the Secretary of the Interior comments on a Section 4(f) document that may be prepared and approved by DOT for circulation. Normally, preliminary comments are provided in two kinds of cases: the case of environmental statements that have no identifiable Section 4(f) involvements but that Interior believes may involve Section 4(f) lands, or the case where the sponsor specifically asks for preliminary Section 4(f) comments before the circulation of a Section 4(f) document.

Alternatives and Their Impacts on Section 4(f) Lands: Section 4(f) requires a finding that there

is *no* feasible and prudent *alternative to the proposed use of the 4(f) property*. We must make an initial determination in writing that we concur (or do not concur). If we do not concur, we must state why.

CEQ regulations, as well as DOT Section 4(f) regulations, require rigorous exploration and objective evaluation of alternative actions that would avoid all use of Section 4(f) areas and that would avoid some or all adverse environmental effects. Analysis of such alternatives, their costs, and the impacts on the 4(f) area should be included in draft NEPA documents. In addition to the general CEQ regulation, the reviewer should be familiar with the specific 4(f) requirements of 23 CFR 771 and other regulations of DOT's modal administrations. The reviewer should consider applying the *Overton Park* criteria (*Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1972)) to the analysis of alternatives, but in so doing should also reasonably apply the dictates of sound land use planning in accepting or rejecting alternatives. The criteria that the Supreme Court established in the *Overton Park* case stipulate that Section 4(f) lands are "…not to be lost unless there are truly unusual factors present…or…the cost of community disruption resulting from alternative routes reaches extraordinary magnitudes." If not satisfied with an analysis of alternatives, the reviewer should explain the reasons in detail or request additional information and data essential for comparing alternatives. Reviewers can always suggest alternatives of their own, for evaluation by the project proponent, and not confine their comments to the alternatives presented in the statement.

If, on the other hand, the reviewer is satisfied that all alternatives have been thoroughly examined by the sponsor and the federal agency and there is no feasible and prudent alternative to the taking of Section 4(f) lands, simply say: "We concur that there is no feasible and prudent alternative to the proposed use of (insert name of 4(f) area to be used)."

In dealing with alternatives, reviewers should avoid using the phrase "based on the information provided in the document." It is appropriate to use this phrase only in cases where we might have a thought about another alternative but are not prone to promote it for whatever reason. Unless this is the situation, this phrase should not be used. Also avoid using wording such as the "most" feasible and prudent alternative.

Measures to Minimize Harm to Section 4(f) Lands: The second phase of a 4(f) review is to ensure that all possible planning has been done to minimize harm to Section 4(f) lands. This is often the most important phase and the one where we can be most effective because of our special expertise in the protection and management of all types of 4(f) areas.

The following is a partial list of the kinds of measures that might be taken to minimize harm to Section 4(f) lands and properties:

- Replacement of the Section 4(f) lands to be taken or provision of compensation based on the market value of those lands.

- Horizontal and vertical alignment changes to reduce, if not eliminate, the 4(f) involvement.

- Elevated facility over the site (this may, however, increase aesthetic impacts).

- Depressed facility or tunnel through or under the site (this may increase costs, impacts on ground water, etc.).

- Reduction in the number of travel lanes, parking lanes, and so on, or reduction of median width (use of Jersey-type concrete barrier).

- Access improvement to 4(f) properties to help motorists and pedestrians.

- Access limitation, in some cases, to control induced development and other secondary effects.

- Landscaped buffer zones, noise barriers, and similar measures.

- Appropriate signing and marking of sites to increase public awareness (this may, however, produce aesthetic impacts or increase usage beyond carrying capacity).

- Sensitive aesthetic design of facilities to maintain and enhance ambiance—for instance, compatible architectural design, tinted concrete, special surface textures, stone or brick facings, use of weathering steel, prevention of rust staining on masonry surfaces, and graffiti prevention.

- Adaptive re-use of historic structures.

- Moving and adequate restoration of historic structures on appropriate new sites (this is usually a last-resort measure).

- Adequate recordation and curatorial care of demolished historic structures (this, too, is a last-resort measure).

- Coordination of construction with recreation activities to permit orderly transition and continual usage of Section 4(f) land and facilities.

- Various regulatory measures such as speed limits, traffic capacity limits, and limited access to adjacent lands.

Park and Recreation Areas: Reviewers are alerted that a general statement from the sponsor indicating that the sponsor will comply with all federal, state, and local standards and specifications to minimize harm is not acceptable. Also not acceptable is a statement that all

planning to minimize harm has been done because there is no feasible and prudent alternative. Reviewers should make sure that all possible site-specific planning has been done to identify and list the measures which will be undertaken, at project expense, to minimize harm to Section 4(f) areas.

Replacement of Section 4(f) Lands: Sponsors of transportation projects are responsible for minimizing harm to Section 4(f) lands. These lands may be replaced by the sponsor directly with lands of equivalent usefulness and location, but if monetary compensation is made (for areas not involving LWCF moneys), that compensation should be sufficient to replace the lost lands and improvements thereon. Compensation based on "fair market value" of land taken is not necessarily satisfactory because purchasing areas of reasonable equivalent usefulness and location may require paying more than the appraised value of lost lands.

Monetary Compensation for Use of Section 4(f) Lands Not Involving Land and Water Conservation Fund Moneys: If replacement lands are not available, monetary compensation equal to replacement value may be acceptable. This compensation should be earmarked for capital park and recreation purposes. The conversion of parklands to transportation uses without compensation, or the diversion of monetary compensation received to other uses, constitutes indirect subsidization of the transportation programs by recreation funds. The occurrence of either should give rise to serious reservation about the advisability of approving future federal grant applications for park and recreation purposes to the agency responsible. Reviewers should always keep in mind that from a strict 4(f) viewpoint, land replacement is simply one of the most logical methods to minimize harm.

Constructive Use: Constructive use occurs when transportation projects do not incorporate land from a Section 4(f) property but due to their proximity impacts are so severe that the protected activities, features, or attributes that qualify a resource for protection under Section 4(f) are substantially impaired. Constructive use remains a general issue between Interior and DOT because of its very subjective nature. However, the level, nature, and extent to which an area is constructively used should be subject to the expertise and determination of the agency responsible for management and administration of the parkland impacted by the constructive use. When constructive use is an issue in a particular project review, the reviewer is advised to consult 23 CFR 771.135(p); the DOT Section 4(f) Policy Paper; the October 5, 1987, FHWA letter from Eugene W. Cleckley to Bruce Blanchard (see appendix C); and the November 12, 1985, FHWA memorandum to regional FHWA administrators (see appendix D). These documents will provide background upon which to formulate comments on the review.

Projects Involving Section 6(f) of the LWCF Act: Section 6(f) provides, in part, that "…no property acquired or developed with assistance under this section shall, without the approval of the Secretary, be converted to other than public outdoor recreation uses. The Secretary shall approve such conversion only if he finds it to be in accord with the then existing comprehensive statewide outdoor recreation plan and only upon such conditions as he deems necessary to assure the substitution of other recreation properties of at least equal fair market value and reasonable

equivalent usefulness and location."

When a project results in a change in use of an LCWF-assisted park or recreation area, a determination has to be made, first by the state and ultimately by the NPS, as to whether a Section 6(f) involvement will result. If a Section 6(f) involvement will result and the NPS, under its delegated authority, is willing to consider approval of the conversion, then it is mandatory to acquire replacement land. *Only land will satisfy the provisions of Section 6(f). The value of new capital improvements or a reimbursement to the LCWF are not acceptable.* If the subject lands are considered part of the LWCF project scope, the NPS would generally consider a conversion of use to occur if one of the following actions were to be taken:

- Granting by the participant to another party either control or partial control of the land that would result in uses other than public outdoor recreation as approved by the NPS. Examples would be the construction and maintenance of a utility line, pipeline, irrigation ditch, road, or other similar facility, whether the intrusion is above or below ground level. A possible exception could occur if the participant, without relinquishing any control over the area, were to allow a non-owner to construct a subsurface water line, pipeline, underground utility, or similar facility that would not impair the present and future recreational use of the property and then to restore the surface area to its preconstruction condition.

- Constructing or installing structures or facilities by the project sponsor or others on lands considered within the project scope that would not be compatible with the existing outdoor recreation uses or would result in a nonrecreational use other than that acknowledged and approved by the NPS.

- Granting control or partial control of land for transportation rights-of-way, powerline rights-of-way, pipelines, sewer lines, and landfills, or for construction of structures such as fire stations, civic centers, libraries, indoor recreation facilities, communication towers, and tornado sirens.

The list above is not all-inclusive because other actions may also result in Section 6(f) involvement. The authority to determine whether a potential Section 6(f) involvement exists rests with the NPS, which administers the LWCF. As prerequisites for approval of any Section 6(f) conversion request, it should be determined that:

- All practical alternatives to the conversion have been evaluated and rejected on sound bases.

- The proposed replacement land is "…of reasonably equivalent usefulness and location."

- All necessary coordination with other federal agencies has been satisfactorily accomplished.

- The guidelines for environmental evaluation enumerated in LWCF Manual Part 650 have been completed and considered by the NPS during its review of the proposed 6(f) action. In cases where the proposed conversion arises from another federal action, final review of a state's proposal shall not occur until the region is assured that all environmental requirements related to that other action have been met.

- Clearinghouse review procedures set forth in LWCF Manual Part 66.1.ID have been adhered to if the proposed conversion and substitution constitute significant changes to the original LWCF project.

- The proposed conversion and substitution are in accord with a state comprehensive outdoor recreation plan.

It should be noted that Interior's policy on conflicts between grants-in-aid and transportation projects provides that not only the property actually developed or acquired with LWCF moneys, but the entire area identified in the project agreement, is subject to the requirements of the LWCF and the conditions of the project agreement. Further, Interior has established that when assistance is provided to only one of five entirely separate parks within a state park system, and this fact is clearly recognized in the grant project agreement, then an area being taken for highway construction from a park that received no assistance would not be subject to the provisions of Section 6(f) of the LWCF Act.

If we do not concur that the first proviso of Section 4(f) is satisfied (in other words, there are feasible and prudent alternatives to the proposed 4(f) use), then we could not concur in a 6(f) conversion either, and this should be so stated in our letter. If we *do* concur in the 4(f) taking, Interior would be willing to consider a conversion request, and 6(f) compliance becomes one (but not necessarily the only one) of the measures to minimize harm to the 4(f) area. In this case we should be helpful in stating *exactly* what would be required by Interior under 6(f). We should recommend that 6(f) details be worked out and that a full proposed replacement package be included in the final 4(f) document. Unless we foresee grave 6(f) problems, we should not make our 4(f) concurrence contingent upon 6(f) approval (tentative or otherwise); *final* 6(f) approval can be given *only after* 4(f) approval. Our 4(f) comments could be something like: "We have no objection to Section 4(f) approval, *provided that* all measures to minimize harm, including an acceptable Section 6(f) replacement package, as discussed above, are included in project plans."

Lands Acquired Under Section 7 of the LWCF Act: Unlike Section 6(f) of the Act, Section 7 has no requirement that land purchased by a federal agency with LWCF moneys under this section must continue to be used solely for outdoor recreation purposes. In such a situation, there is no legal necessity for reimbursement to the LWCF, or a replacement of the taken land, by either the administering agency or the agency preparing to use the land for other than recreation purposes.

Therefore, when a transportation project encroaches upon federal lands acquired under Section 7

of the LWCF, only the requirements of Section 4(f) apply. However, there is no reason we cannot use replacement land in this case if, in our view, that is appropriate. When Interior lands (NPS, BLM, FWS, BR, BIA) are involved, wording related to our follow-up action should follow the statement on our Section 4(f) position, for instance: "The Department of the Interior would be willing to consider a right-of-way permit application for this project upon receipt of notice of Section 4(f) approval." Or: "Because of our jurisdictional involvement, until the measures to minimize harm are mutually resolved, we do not concur with Section 4(f) approval and would defer acting on any right-of-way application." Or, with Section 6(f) involvements: "Upon receipt of notice of Section 4(f) approval by DOT, the NPS would be willing to consider a request for a conversion of use as required by Section 6(f) of the LWCF Act."

Lands Under the Urban Park and Recreation Recovery Act of 1978: Recreation areas and facilities developed or improved, in whole or part, with a grant under the Urban Park and Recreation Recovery Act of 1978 (Title 10 of PL 95-625) are subject to Section 1010 of the Act, which requires independent approval of the Secretary of the Interior for conversion to other than public recreation uses (see guidance above with respect to Section 6(f)).

Lands Under the Railroad Revitalization and Regulatory Reform Act of 1976: Abandoned railroad rights-of-way acquired by state and local governments for recreational or conservation uses with grants under Section 809(b) of the Railroad Revitalization and Regulatory Reform Act of 1976 require independent approval of conversion of use by the Secretary of the Interior (see guidance above on Section 6(f)).

Landscaping and Scenic Enhancement: Landscaping and scenic enhancement is a legitimate transportation project cost. A plan for landscaping and scenic enhancement should be developed jointly with and to the satisfaction of the agency having jurisdiction over affected Section 4(f) properties. The visual impact on Section 4(f) properties requires a professional value judgment. No one is better qualified to make this judgment than the land administrator who knows the historical, natural, recreational, and other environmental resource values that are to be preserved and protected.

Noise Abatement Measures: Noise abatement measures should be incorporated into projects when necessary to minimize harm to Section 4(f) lands. These may include planting special belts of trees and shrubs, building earthen berms or other noise barriers, building depressed roadways, and planting grass to reduce reflected noise. Noise abatement measures are especially important if affected Section 4(f) lands are used for passive recreation or for enjoyment as natural areas or historic sites. Reviewers might consider giving some advice about what constitutes an adverse noise impact on 4(f) lands.

Safety and Access: Project plans should include measures to protect the park user and the motorist. These measures may include fencing, pedestrian overpasses or underpasses, lights, traffic signals, and adequate vehicular (including bicycle) access to and from the park.

Project Design: Often highways are designed with wide median strips and require excessive right-of-way from Section 4(f) lands. In such situations, the amount of "take" can be reduced greatly in the Section 4(f) areas if the project uses a New Jersey-type concrete median barrier in lieu of a wide median strip. Use of such concrete barriers should be discussed as a measure to minimize harm to Section 4(f) lands.

Historic and Archeological Properties: Reviewers should keep in mind that the MOA concluded under the Section 106 consultation process by the DOT agency, the SHPO, and the ACHP is not a Section 4(f) document. The appearance of an MOA in a Section 4(f) document has historically been the exception rather than the rule.

Interior should independently review the measures to minimize harm for a historic site and express judgment about them. The measures to minimize harm may be only described in a Section 4(f) document with no reference to an MOA, or they may be identified in a proposed MOA. The reviewers should address the listed measures and comment accordingly.

An exception occurs when an NPS historic property is involved. Here we make Section 4(f) comments and become a signatory to the MOA in some cases. Hence reference to the MOA and the ACHP is acceptable. A number of measures to minimize harm to recreation resources discussed before, such as improved access, noise barriers, and landscaped buffer zones, may be applicable to historic sites. However, there are some specific measures to minimize harm that are unique to historic sites. These may include the following:

- Appropriate signing and marking of historic sites to increase public awareness. These measures may produce aesthetic impacts or increase usage beyond carrying capacity.

- Sensitive aesthetic design of facilities to maintain and enhance historic ambiance. Examples are compatible architectural design, tinted concrete, special surface textures, stone or brick facings, use of weathering steel, prevention of rust staining on masonry surfaces, and graffiti prevention.

- Adaptive re-use of historic structures, such as moving and adequate restoration of historic structures on appropriate new sites (usually a last-resort measure).

- Adequate recordation and curatorial care of demolished structures (again a last-resort measure).

<u>ENVIRONMENTAL STATEMENT COMMENTS</u>: This section is a consolidation of all bureau comments on the EIS, in addition to settlement by the lead bureau of any conflicting comments, recommendations, or positions. If lead bureau reviewers have doubts or questions, they should discuss the matter with the other reviewers who supplied the comments and enlist the assistance of the regional environmental officer as needed. *The lead bureau must provide this service even if it has no comments.* (See 516 DM 7.)

General Comments: This section of a Departmental letter contains Interior comments on the adequacy or inadequacy of the environmental statement with respect to the concerns of Interior in a general manner. General comments should be followed by detailed discussion of the specific shortcomings in the environmental statement and suggestions for improvements or areas where more information is needed.

Project Description: This section of the environmental statement should include a clear, concise description of the proposed project and its major design features. Especially important is information on the relationship of the project to resources of concern to Interior. The Departmental letter should request additional information when it is difficult or impossible to ascertain the extent of impacts of concern to Interior. This section need describe the environment only to the degree necessary to evaluate the impacts (with or without the project). In addition, the reviewers should be especially aware of those environmental attributes having potential recreation value, including the intangible qualities of aesthetics. Land use data should include acreage by farmland, wetlands, residential, commercial, public land, and type of use (recreation, school, etc.). Lands and waters supporting wildlife and fisheries should be identified, as should unique natural areas. Cultural resources should be identified, but care should be taken not to locate sites so precisely as to make them subject to vandalism.

Probable Impact of the Proposed Action on the Environment: This section should include the impact of the proposed project on ecological systems and use. Both primary and secondary significant consequences (e.g., changes in land use) should be analyzed. Other matters that should be discussed under this section include the following:

- Total acreage of right-of-way required for the project proposal and each of the alternatives, including a breakdown of farmland, wetlands, residential properties, recreational areas, and school property.

- Location of borrow/spoil areas. The selection, use, and restoration of borrow and spoil areas pose potentially adverse impacts. Our comments should note that borrow and spoil areas are the primary responsibility of the highway agency rather than the contractor, and that impacts resulting from development and use of borrow/spoil areas should be addressed in the environmental statement.

- Consultation with the SHPO for matters relating to historical, architectural, and archeological values, properties on the National Register of Historic Places, or properties in the process of being nominated to the Register.

- Impacts on local and regional general recreational values.

- Impacts on rare, endangered, or protected plant and animal species.

- Noise impacts—especially those on cultural and recreational resources.

- Effects on water resources, including location and area of impact and identification of stream channelization, channel changes, floodplains, and wetlands.

Channelization: This activity may affect life in the area of the stream to be channelized as well as the upstream and downstream ecosystem. Therefore, project alternatives passing through natural waters must be designed to maintain the functioning of the aquatic ecosystem that makes possible the continuance of a stream's water quality and prevention of flooding. The stream and its floodplain are an integral system that is designed to moderate the effects of flooding water and maintain high productivity in the stream proper. Disturbing the system inevitably results in a reduction of diversity of species and productivity.

Floodplains and Wetlands : Floodplains and wetlands are very valuable natural resources. They have great value as habitats for wildlife and as aquifer recharge areas. They also constitute natural floodwater absorbing areas. When confronted with inadequate information about projects involving floodplains and wetlands, reviewers should recommend that the statement include an evaluation of these areas in compliance with Presidential Executive Orders 11988 and 11990. These executive orders direct that special attention be given to floodplains and wetlands when planning the location of federally financed or supported new facilities such as highways.

Adverse Impacts That Cannot Be Avoided: These impacts may include water, air, or noise pollution, undesirable land use patterns, damage to wildlife systems, urban congestion, and threats to health. Water, air, or noise pollution should be discussed as they relate to Interior's interests. Although EPA has certain statutory responsibilities for air, water, and noise pollution, this does not mean that Interior should not tell other agencies when such pollution affects our program interests. While many Interior bureaus have certain in-house expertise, the Geological Survey is the recognized expert on ground and surface waters, the FWS on fish and wildlife resources, and the NPS on park, recreation, and cultural resources.

Alternatives: CEQ regulations require rigorous exploration and objective evaluation of alternative actions that might avoid some or all of the project's adverse environmental effects. The regulations further stipulate that sufficient analysis of such alternatives and their costs and impacts on the environment should accompany the proposed action through the agency review process in order not to foreclose prematurely options that have less detrimental effects. We should recommend further consideration of alternatives not discussed in the statement, and we should do this as early as possible in the process in order to be effective. There is no reason we have to confine our review to alternatives presented by the sponsor if we have sound reasons for suggesting others. Analysis of alternatives is especially important under Section 4(f), and Interior should always strive to make responsible and timely alternative recommendations to the DOT agency, rather than postponing any recommendation until the agency makes its final selection.

Irreversible and Irretrievable Commitment of Resources: In many statements, the only resources addressed are sand, gravel, concrete, other supplies, and human energy used in the highway construction. Curtailment of other uses of the environment is seldom given explicit treatment. Loss of flora, fauna, stream habitat, and wildlife habitat and changes in drainage patterns all represent commitments of resources that may not be reclaimed. Any land taken from a fish and wildlife refuge, state game area, public recreational area, or historic site becomes an irreversible and irretrievable commitment of resources and should be so identified in environmental statements.

Minimizing Harm to the Environment: Details of actions to minimize harm to the environment should be included in the statement. A general statement that the sponsor will comply with all federal, state, and local standards and specifications is not acceptable. Actions to minimize harm should be explained in detail. These may include control of air, water, and noise pollution; landscaping; and sign and billboard removal. We should consider recommending appropriate mitigation measures for the whole project, not just for 4(f) areas (note that for 4(f) areas our mitigation recommendations are essential). As lead bureau, the NPS will find that the FWS will probably have numerous mitigation recommendations for wetlands and other fish and wildlife values that it wants incorporated into the Departmental letter. NPS reviewers should be familiar with the FWS policy in this area so that they can properly evaluate the comments. (See *FWS Mitigation Policy* in the *Federal Register*, January 23, 1981, as amended.)

Multiple use and joint development programs should be recommended wherever they can be used to reduce impacts or enhance the environment.

Another mitigation measure that should be considered in our review is improving access to navigable water. Funds apportioned to the states may be used for construction of access ramps adjacent to bridges under construction, reconstruction, replacement, repair, or alteration on the federal-aid primary, secondary, and urban system highways.

FISH AND WILDLIFE COORDINATION ACT COMMENTS: Under provisions of the Fish and Wildlife Coordination Act, the FWS investigates and reports on projects affecting certain waters of the United States. Whenever federal permits are required for transportation project implementation, reviewers should make sure that the FWS's FWCA comments and a tentative position are received and included in the Departmental letter. Close coordination must be maintained with the appropriate FWS field office.

HOW TO ADDRESS COMMENTS OF OTHER DEPARTMENTAL BUREAUS: The comments of all Interior bureaus must be appropriately incorporated in the Departmental letter. We emphasize this so that, in a lead bureau role, a bureau develops a letter that reflects total Departmental concerns rather than just the items of interest to that bureau's programs. These comments can be used verbatim or edited. Major changes or deletions, however, must be discussed with the bureau supplying the comments and such discussion documented in the package sent forward.

Reviewers should avoid specific mention of each Interior agency in the Departmental letter because the comments belong to the Department. We usually write "The Department believes…" in a Departmental letter. However, when a comment is clearly related to a bureau and recognizing the bureau by name is important, the letter should do so. An example would be: "The FWS informs us that it will oppose the issuance of a USCG bridge permit pursuant to its responsibilities under the FWCA…."

Otherwise, if any bureau has major problems in its area of expertise, we should say something like: "Because of the above hydrologic problems, we recommend that you consult further with the USGS, which would be happy to provide technical assistance in the development of a mitigation plan for inclusion in the final statement…."

We must always send copies of all comments received with the proposed Departmental letter of comment so that OEPC's file will be complete. A "No Comment" phone call from another bureau constitutes its comment; make a record of this, including date, on a separate sheet and forward it with the package.

SUMMARY COMMENTS:

Content of Section 4(f) Evaluation Comments: Reviewers should keep in mind that Section 4(f) evaluation comments focus on

- Concurring or not concurring (with supporting evidence) with the agency's response to the first proviso of Section 4(f).
- Concurring or not concurring (with supporting evidence) with the agency's response to the second proviso of Section 4(f).

Content of Summary Comments: Based on our discussion of alternatives and measures to minimize harm under Section 4(f) evaluation comments, the text of the summary comments may include different scenarios, as follows:

- *Full Concurrence with Both Provisos of Section 4(f)*: On projects where we are in full concurrence with both provisos of Section 4(f), a simple sign-off sentence is recommended, such as: "The Department of the Interior has no objection to Section 4(f) approval of this project."

- *Concurrence with Only the First Proviso*: On projects where we concur only with the first proviso of Section 4(f) and have problems with the measures to minimize harm, the following situations may arise:

- In a situation where we recommend further investigation and consultation for resolution of suggested additional measures to minimize harm, and where we will accept whatever decision is reached among the parties involved, the summary comments can state: "The Department of the Interior has no objection to Section 4(f) approval of this project,

contingent upon resolution (among the FHWA, the state highway/transportation agency, and all other involved parties [cite by name]) and documentation in the final statement of the additional measures to minimize harm, as recommended under the Section 4(f) evaluation comments."

- In a situation where we have recommended additional measures to minimize harm about which we feel strongly, we can state: "The Department of the Interior has no objection to Section 4(f) approval of this project, *provided* the measures to minimize harm mentioned above are included in project plans and documented in the final statement." This should be followed with the standard technical assistance offer, such as: "Because this Department has a continuing interest in this project, we are willing to cooperate and coordinate with you on a technical assistance basis in further project evaluation and assessment. For matters pertaining to cultural and recreational resources, please contact (provide necessary contact person as well as mailing and telephone information)."

Objection to Section 4(f) Approval: On projects where we object to Section 4(f) approval, the Interior objection may take several forms, the most common of which are the following:

- Interior objects to the preferred alternative and indicates a preference for another or identifies and recommends further alternatives for study and evaluation. Measures to minimize harm can be discussed for our alternatives, or we can defer comments on measures to minimize harm pending the selection of a feasible and prudent alternative. We should urge field consultation among involved parties to select a feasible and prudent alternative and develop measures to minimize harm. Indicate that in order to resolve recreational and cultural resource issues mentioned above, we would be willing to provide expeditious review of any revised Section 4(f) documentation that may be circulated for review and comment.

- Interior concurs that there is no feasible and prudent alternative, yet it objects to the project because measures to minimize harm are grossly inadequate. Our summary comments might read: "The Department of the Interior does not concur with Section 4(f) approval of this project at this time. We would be pleased to reconsider this position upon receipt of revised material that includes adequate information and full discussion of measures to minimize harm as mentioned earlier in our Section 4(f) evaluation comments."

Lack of Section 4(f) Information in the Document: There may be occasions where a project's involvement with Section 4(f) lands/properties has been totally ignored by the project sponsor. The lack of Section 4(f) information in the statement, namely the absence of discussion of the provisos of Section 4(f), should be pointed out in our letter and a recommendation made that a Section 4(f) evaluation be prepared and circulated for review.

- Summary comments could be: "The Section 4(f) evaluation comments in this letter are

provided to give you an early indication of our thoughts about the Section 4(f) information and involvements. They do not represent the results of formal consultation by DOT with the Department of the Interior, pursuant to the consultative requirements of Section 4(f). Such requirements would be fulfilled only when the Office of the Secretary of the Interior comments separately on any Section 4(f) evaluation that may be prepared and approved by you for circulation." Follow this with the normal technical assistance paragraph.

- Another option may be appropriate to use in those few cases where we have no formal Section 4(f) evaluation but field-level consultations uncover the highway agency's preference for a particular alternative and we can concur that (1) there is no feasible and prudent alternative and (2) the measures to minimize harm are *totally* adequate. In the interest of efficiency, we then could sign off at this early stage. Our summary comments would normally state: "Usually we make preliminary Section 4(f) comments when commenting on Section 4(f) information in a draft environmental statement. However, for this case, we are willing to provide you with Section 4(f) comments that will satisfy the consultative requirements of Section 4(f) of the Department of Transportation Act. If a certain alternative is selected, we would concur that there is no feasible and prudent alternative to use of the Section 4(f) area for the proposed transportation project. In addition, contingent upon a commitment for the implementation of all proposed measures to minimize harm, we would concur that the second proviso of Section 4(f) will be satisfied. Accordingly, the Department of the Interior offers no objection to Section 4(f) approval of the alternative." The summary comments should also succinctly indicate any major non-Section 4(f) problems we have with the project, but they should not repeat minor criticisms of the environmental documentation.

The examples above are intended primarily as suggestions and are offered to assist the reviewer facing a unique situation for the first time. Reviewers are urged to continue to develop letters that are responsive to the specific conditions of each statement under review.

APPENDICES

A. Andrus letter of June 20, 1980, currently embodied in ERM94-4. Letter states what we believe constitute 4(f) properties.

B. Acronym list.

C. Letter from FHWA to OEPC dated October 5, 1987, explaining continuing areas of disagreement between DOT and Interior on various Section 4(f) issues.

D. Letter from FHWA's Office of Environmental Policy to FHWA regional administrators on constructive use.

APPENDIX A. ANDRUS LETTER ON SECTION 4(f) PROPERTIES

This memorandum has been electronically scanned from the original signed by Jonathan P. Deason on August 17, 1994.

PEP - ENVIRONMENTAL REVIEW MEMORANDUM NO. ERM94-4

To: Heads of Bureaus and Offices

From: Director, Office of Environmental Policy and Compliance

Subject: Section 4(f) of the Department of Transportation Act

The Secretary has identified, by the attached letter of June 20, 1980, to the Secretary of Transportation, those park and recreation areas, wildlife and waterfowl refuges and historic sites which are under Interior's direct and indirect jurisdiction and which are significant within the context of Section 4(f) of the DOT Act (49 U.S.C. 303, formerly 49 U.S.C. 1653 [f]).

This guidance should be provided to all Departmental officials who have land management or program responsibilities for those areas and resources to which Section 4 (f) would apply, in addition to those personnel who normally review DOT NEPA/4 (f) documents.

This memorandum replaces ER80-2.

Attachment

This letter has been electronically scanned from the original signed by Cecil D. Andrus on June 20, 1980.

United States Department of the Interior

Office of the Secretary
Washington, DC 20240

Honorable Neil Goldschmidt
Secretary
U.S. Department of Transportation
Washington, D.C. 20590

Dear Secretary Goldschmidt:

I am aware of your concerns to expedite the planning process for transportation projects. To the fullest extent we can, I want my Department to assist you in that effort.

It has been our observation, principally with highway projects, that certain delays can be traced to resolution of questions concerning (1) what constitutes land falling under the provisions of Section 4(f) of the DOT Act and (2) whether or not such land is significant within the meaning of Section 4(f).

In order to be helpful and to assist in expediting your transportation project-planning process, a list has been developed identifying areas pursuant to my jurisdictional responsibility as the Federal official for making determinations of significance in accordance with Section 4(f) of the DOT Act, 49 U.S.C. 1653(f). That responsibility is contained in the following provision:

"After August 23, 1968, the Secretary [of Transportation] shall not approve any program or project which requires the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance as determined by the Federal, State, or local officials having jurisdiction thereof, or any land from an historic site of national, State, or local significance as so determined by such officials unless . . . ."[emphasis added]

The Solicitor of this Department advises that our jurisdiction extends to any public park, recreation area, or wildlife and waterfowl refuge within the scope of the Department's statutory responsibilities and that these responsibilities extend to certain State or locally owned (in fee, less than fee, lease, easement, or otherwise) parks, recreation areas or wildlife and waterfowl refuges. In addition, the Department's jurisdiction extends to sites which the Department determines to be of national State, or local historic significance, regardless of ownership. See Stop H-3 Ass'n. v. Coleman 533 F2d 434, 441 (1976) Cert. denied 429 U.S. 999 (1976).

Jurisdiction to determine areas of national, State, or local historic significance includes any property "significant in American history, architecture, archeology, and culture." Id. at 441 note 13.

Accordingly, the Department of the Interior declares the following listed lands as being significant parks, recreation areas, wildlife and waterfowl refuges and historic sites and therefore Section 4(f) would be applicable to all for any Department of Transportation use. The list has been developed consistent with my Solicitor's advice. Moreover, this list may not be exhaustive and there may be other areas that have been inadvertently omitted or that may need to be evaluated on a case-by-case basis.

1. All lands or interests therein authorized, established, or administered as part of the National Park System.

2. All National Park Service "Affiliated Areas."

3. All lands or interests therein authorized, established, or administered as National Wildlife Monuments, or as part of the National Wildlife Refuge System, including Waterfowl Production Areas (wetland easements).

4. All lands or interests therein authorized, established, or administered as part of the National Fish Hatchery System.

5. All waters, lands, and interests therein acquired for mitigation purposes pursuant to the authority of the Fish and Wildlife Coordination Act (16 U.S.C. 661-667e). Such lands and waters are in many cases administered by other Federal agencies, notably the Corps of Engineers, or by State agencies, pursuant to general planning authority (Sec. 663(b)). They may not be made subject to transactions that would "defeat the initial purpose of their acquisition." (Sec. 663(d)).

6. All lands or interests therein under the jurisdiction of the Water and Power Resources Service which are administered or which receive de facto use as parks, recreation areas, wildlife refuges, or historic sites.

7. All lands or interests therein under the jurisdiction of the Bureau of Land Management which are administered or which receive de facto use as parks, natural areas, natural systems (e.g., flood plains, wetlands, or riparian habitat), environmental education areas, cultural and historic areas, areas of critical environmental concern, recreation areas, or wildlife refuges, or which meet wilderness criteria or are wilderness study areas.

8. All lands held in trust by this Department for the benefit of Indian Tribes which are administered by the Tribe as parks, recreation areas, wildlife refuges, or historic sites, or which receive similar de facto use.

9. All local and State lands, and interests therein, and certain Federal lands under lease to the States, acquired or developed in whole or in part with monies from the Land and Water Conservation Fund Act. Such lands, and interests therein, are also subject to Section 6(f) of the Act requiring independent approval of conversion of use by the Secretary of the Interior.

10. All recreation areas and facilities (as defined in Section 1004) developed or improved, in whole or in part, with a grant under the Urban Park and Recreation Recovery Act of 1978 (Title 10 of P.L. 95-625). Such recreation areas and facilities are also subject to Section 1010 of the Act which requires independent approval of the Secretary of the Interior (Heritage Conservation and Recreation Service) for a conversion to other than public recreation uses.

11. All State lands and interests therein acquired or developed or improved for fish and wildlife conservation, restoration, or management with grants under the Pittman-Robertson Act, the Dingell-Johnson Act, Section 6 of the Endangered Species Act of 1973, and/or the Anadromous Fish Act of 1965 (including, but not limited to, State fish hatcheries, State wildlife conservation areas, and State game lands). For most of these lands, conversion to a non-designated use requires independent approval by the Secretary of the Interior.

12. All Federal surplus real property which has been deeded to State and local governments for use and management as park demonstration areas, recreation areas, or wildlife conservation preserves and refuges, and all historic monuments and properties so deeded, under the Recreation Demonstration Act of 1942, or the Federal Property and Administrative Services Act of 1949, as amended. Most of these lands are also subject to independent approval of conversion of use by the Secretary of the Interior.

13. All abandoned railroad rights-of-way acquired by State and local governments for recreational and/or conservation uses with grants under Section 809(b) of the Railroad Revitalization and Regulatory Reform Act of 1976. Such lands are also subject to independent approval of conservation of use by the Secretary of the Interior.

14. All properties included in or eligible for inclusion in the National Register of Historic Places.

15. All areas publicly owned in fee, less than fee, lease, or otherwise, which receive de facto use as park, recreation, or refuge lands, and which are listed on the National Registry of Natural Landmarks[1], the National Registry of Environmental Landmarks[2], the World Heritage List (U.S. listings based on nominations by Secretary of the Interior[3]), or designated as Biosphere Reserves

---

[1]Program administered by Heritage Conservation and Recreation Service.

[2]Program administered by the National Park Service.

[3]Handled by Heritage Conservation and Recreation Service.

by the Secretary General, United Nations Educational, Scientific and Cultural Organization (after consultation with the Secretary of the Interior[4] and the Secretary of State).

De facto use, as mentioned above, will be determined on a case-by-case basis by the Interior bureau having statutory or program jurisdiction over or interest in the land in question. In the case of Indian trust lands, such determination will be made by us, in consultation with the appropriate Tribal officials. De facto use may also include publicly owned lands or interests therein proposed or under study for inclusion in the National Wild and Scenic Rivers System, the National Trails System, or the National Wilderness Preservation System, or as critical habitat for endangered or threatened species. Early coordination with this Department concerning applicability of Section 4(f) is especially important whenever lands administered by the Water and Power Resources Service or Bureau of Land Management, or whenever Indian trust lands (Tribal Officials/Bureau of Indian Affairs), are affected by DOT projects. Needless to say, such early coordination concerning other aspects of Section 4(f) is equally important when the lands and interest or our other bureaus are affected.

All of the above lands may also contain significant, but presently unknown or undesignated, historic or archeological sites or properties falling under the protection of Section 4(f). This will be determined on a case-by-case basis by the administering bureau/Tribal officials in consultation with the SHPO (and/or others with historical expertise). Coordination with this Department, therefore, is also essential in this matter. Such coordination with reference to Section 4(f) should be in addition to (although it may be concurrent with) any coordination that may be required under Section 106 of the National Historic Preservation Act. We would note however, that each is independent of the other.

You may be assured that we stand ready to provide timely technical assistance in the preparation of Section 4(f) documentation for projects involving our lands or interests in lands. You realize, of course, that this Department must make an independent and separate (1) judgment of the need for use of its lands, or interests in lands, by a Department of Transportation program or project, as well as (2) documented determination of project compatibility with the purpose for which the land was acquired (as authorized by Congress) and is being managed.

Also, any approval of conversion of use or of transfers of land is an action requiring our compliance with the National Environmental Policy Act. Such compliance with NEPA would be satisfied by an environmental document prepared by the lead agency and approved by the appropriate bureau(s) in this Department [reference: 40 CFR 1501.5 and .6]. Again, we stand ready to provide timely technical assistance in the preparation of such documents.

There are, of course, other Section 4(f) properties over which the Department of the Interior has no direct or program jurisdiction, which should continue to receive Section 4(f) protection. These include, but are not limited to, community and village parks and playgrounds; State,

---

[4]Handled by National Park Service.

county and regional park, recreation and refuge lands; school playgrounds open to general public use; State fairgrounds; and all properties determined to have State and local significant historic values, but which were determined not eligible for the National Register. This Department is committed to timely review of Section 4(f) statements prepared for such involvements.

I would appreciate it if you made the above information available to your operating administrations. Additionally, we hope you would instruct the Federal Highway Administration to have this letter included as an addendum to each State's Highway Action Plan, developed pursuant to 23 U.S.C. 109(h) and FHPM 7-7-1. Only with this broad distribution do we believe that the several administrative levels of a State highway agency will be cognizant of the contents of this letter and be able to work with you and us in expediting the planning process.

Thank you for your attention to this matter.

Sincerely,

CECIL D. ANDRUS

Secretary

cc:Council on Environmental Quality

APPENDIX B. LIST OF ACRONYMS USED IN THIS HANDBOOK

ACRONYM LIST

ACHP	Advisory Council on Historic Preservation
BIA	Bureau of Indian Affairs
BLM	Bureau of Land Management
BR	Bureau of Reclamation
CEQ	Council on Environmental Quality
DOI	Department of the Interior
DOT Act	Department of Transportation Act
DOT	U.S. Department of Transportation
EA	Environmental Assessment
EIS	Environmental Impact Statement
ER	Environmental Review System
ERM	Environmental Review Memorandum
ESA	Endangered Species Act
FAA	Federal Aviation Administration
FHWA	Federal Highway Administration
FRA	Federal Railroad Administration
FS	Forest Service
FTA	Federal Transit Administration
FWCA	Fish and Wildlife Coordination Act
FWS	Fish and Wildlife Service
LWCF	Land and Water Conservation Fund Act
MOA	Memorandum of Agreement
MOU	Memorandum of Understanding

NEPA	National Environmental Policy Act
NHPA	National Historic Preservation Act of 1966
NPS	National Park Service
NRHP	National Register of Historic Places
OEPC	Office of Environmental Policy and Compliance
REO	Regional Environmental Officer; OEPC
RRRRA	Railroad Revitalization and Regulatory Reform Act of 1976
SHPO	State Historic Preservation Officer
SOL	Office of the Solicitor; DOI
UPRRA	Urban Park and Recreation Recovery Act of 1978
USCG	U.S. Coast Guard

APPENDIX C. FHWA LETTER TO OEPC ON DISAGREEMENTS BETWEEN DOT AND INTERIOR

This letter has been electronically scanned from the original signed by Eugene W. Cleckley on October 5, 1987.

U.S. Department of Transportation
Federal Highway Administration
400 Seventh Street, S.W.
Washington, D.C. 20590

October 5, 1987

In Reply Refer To: HEV-11

Mr. Bruce Blanchard
Director, Office of Environmental
Project Review
U.S. Department of the Interior
Washington, D.C. 20240

Dear Mr. Blanchard:

Thank you for your constructive comments on our Section 4(f) Policy Paper. We have revised the policy paper (copy enclosed) to incorporate most of your comments. However, there are some major areas (constructive use, public parks and recreation areas, historic sites, archeological sites, late designation, wild and scenic rivers, joint development, and wildlife management areas) where we still disagree. The following is a summary of these areas.

Constructive Use - You stated you might consider the following as examples of constructive use: (1) where the proximity of a highway alters a habitat area in a wildlife refuge or interferes with the normal behavior of wildlife populations; (2) where a highway reduces the level of access to a park or recreation area; and (3) where a highway changes the character of the view from a historic district that is incompatible with the historic nature of the district. Your description of the threshold for constructive use of Section 4(f) resources contains terms such as alters, interferes, reduces, and changes. We agree that these types of impacts where they are sufficiently severe to substantially impair the resource would be a constructive use. However, standing alone, we view these terms as establishing a lower threshold than those generally found in case law. A number of court decisions, including Adler v. Lewis, 675 P.2d 1085 (9th Cir. 1982) (copy enclosed), have established "substantial impairment" as the threshold for

constructive use.

Public Parks and Recreation Areas - You stated that public housing and military recreation areas, even if they have some restrictions on the use of them, should be protected by Section 4(f). The Section 4(f) statute applies to "publicly owned land of a public park, recreation area, or wildlife and waterfowl refuge." We take this to mean that the land must be open to the entire public to be protected by Section 4(f). We agree with you that recreation areas associated with public housing and military bases do not need unrestricted public access to receive protection under Section 4(f). We have added a sentence to question 2.C. to clarify this point. The Federal Highway Administration strongly encourages the preservation of parks and recreation areas that are not open to the public at large. A statement to that effect has been added to the policy paper.

Historic Sites - You want to afford Section 4(f) protection to historic sites if they are not on or eligible for the National Register of Historic Places. Obviously, we cannot afford Section 4(f) protection to every site which is claimed historic by any individual. It has been a longstanding Department of Transportation Policy to apply Section 4(f) to all sites on or eligible for the National Register. In addition, our environmental regulation and this policy paper extend Section 4(f) protection to other historic sites based on an individual site-by-site review.

Archeological Sites - You want to afford Section 4(f) protection to archeological sites even if they are important chiefly because of what can be learned by data recovery and have minimal value for preservation in place. This position is contrary to our Section 4(f) regulation. This portion of our regulation was upheld in the Belmont case (Town of Belmont v. Dole, 755 F.2d 28 (lst Cir. 1985)).

Late Designation - You want to afford Section 4(f) protection to properties which are designated as significant historic sites even after acquisition for highway purposes. You base your position on a belief that such a situation would be the result of a totally inadequate effort to identify historic properties at the time of search. Our policy clearly states that, if the effort was not adequate (using the Section 106 requirements at the time of search), Section 4(f) would apply. Our policy does not seek to obtain any advantage because of inadequate resource identification, but rather to disqualify properties which did not meet the eligibility requirements at the time of search (for example, the property was not old enough).

Wild and Scenic Rivers - You stated that (1) all rivers now in the System have been designated for their recreational and park (conservation, etc.) values, (2) the primary use of all publicly owned lands within their boundaries is for Section 4(f) purposes, and (3) the officials having jurisdiction will certify that this is so if asked. We do not necessarily base application of Section 4(f) on titles or systems designation; instead, we base Section 4(f) application on actual function. If portions of the publicly owned lands are designated or function primarily for recreational purposes, then those portions would be subject to Section 4(f). We do not believe that publicly owned lands designated only for conservation values are recreational areas subject to Section 4(f).

Joint Development - You expressed a desire to apply Section 4(f) to park or recreation land reserved for highway right-of-way if the reserved land is managed and/or maintained with park or recreation funds. Section 4(f) application to publicly owned land is not based on the type of funds spent to manage or maintain that land. Public land reserved for highway right-of-way is considered highway right-of-way. Section 4(f) does not apply to either authorized or unauthorized temporary occupancy of highway right-of-way pending project development. Applying Section 4(f) to the temporary occupancy of this land would be a strong deterrent to State and local governments to permit such activities and would encourage these areas to be fenced off. We believe that temporary occupancy of highway right-of-way (reserved for future construction) for park or recreation should be encouraged by our Section 4(f) policy rather than discouraged.

Wildlife Management Areas (WMA) - You stated that Federal WMAs are part of the National Wildlife Refuge System and therefore are considered to be a refuge within the meaning of Section 4(f). We have revised the discussion on wildlife management areas to state that such areas would be protected by Section 4(f) where they perform the same functions as a refuge (i.e., protection of species). As explained in answer 2A, we would, of course, rely heavily on the views of the officials having jurisdiction over these areas in determining their function.

Enclosed is a copy of the Section 4(f) policy paper (along with a summary of your position). Since we included most of your comments, we felt that it would be counterproductive to send your memo intact to our field organization along with the Section 4(f) policy paper. Consequently, we summarized your position for the major areas on which we disagree. A copy is enclosed. We appreciate the assistance you have given us in finalizing our paper.

Sincerely yours,

EUGENE W. CLECKLEY

Chief, Environmental Operations Division

APPENDIX D. LETTER TO FHWA REGIONAL ADMINISTRATORS ON CONSTRUCTIVE USE

This memorandum has been electronically scanned from the original signed by Ali F. Sevin on November 12, 1985.

U.S. Department of Transportation
Federal Highway Administration

MEMORANDUM

Subject: Section 4(f) - Constructive Use

From: Director, Office of Environmental Policy
Washington, D.C. 20590

To: Regional Federal Highway Administrators
Regions 1-10, and Direct Federal Program Administrator

Concern has been expressed from several State highway agencies and from several Federal Highway Administration (FHWA) offices about the results of litigation on constructive use of Section 4(f) lands. The two most notable cases are I-CARE in Fort Worth, Texas, and H-3 in Hawaii

While each of these decisions represented major setbacks for the respective projects and may present formidable obstacles from the standpoint of nationwide precedent, we believe that FHWA can construct a defensible position on the proper application of the constructive use doctrine on future projects.

The first step in the defense is a recognition that a constructive use can occur. The second step is to establish a threshold or standard for determining when the constructive use occurs. The FHWA has determined that the threshold for constructive use is proximity impacts which substantially impair the function of a park, recreation area, or waterfowl or wildlife refuge, or substantially impair the historic integrity of a historic site.

Steps 3, 4, and 5 are project specific and should be applied whenever there is a likelihood that constructive use could occur or will be an issue on a project. The third step is to identify the functions, activities, and qualities of the Section 4(f) resource which may be sensitive to proximity impacts. The, fourth step is to analyze the proximity impacts on the Section 4(f) resource. Impacts (such as noise, water runoff, etc.) which can be quantified, should be quantified. Other proximity impacts (such as visual intrusion) which lend themselves to qualitative analysis should be qualified. The fifth step is to determine whether these impacts

substantially impair the function of the Section 4(f) resource or the historic integrity of a historic site. This determination on impairment should, of course, be coordinated with the public agency which owns the park, recreation area, or refuge, or with the State Historic Preservation Officer in the case of historic sites.

If it is concluded that the proximity effects do not cause a substantial impairment, the FHWA can reasonably conclude that there is no constructive use. Project documents should, of course contain the analysis of proximity effects and whether there is substantial impairment to a Section 4(f) resource. Except for responding to review comments in environmental documents which specifically address constructive use, the term "constructive use" need not be used. Where it is decided that there will be a constructive use, the draft Section 4(f) evaluation must be cleared with the Washington Headquarters prior to circulation.

ALI F. SEVIN

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240

AUG 17 1994

PEP - ENVIRONMENTAL REVIEW MEMORANDUM NO. ERM94-4

To: Heads of Bureaus and Offices

From: Director, Office of Environmental Policy and Compliance

Subject: Section 4(f) of the Department of Transportation Act

The Secretary has identified, by the attached letter of June 20, 1980, to the Secretary of Transportation, those park and recreation areas, wildlife and waterfowl refuges and historic sites which are under Interior's direct and indirect jurisdiction and which are significant within the context of Section 4(f) of the DOT Act (49 U.S.C. 303, formerly 49 U.S.C. 1653 [f]).

This guidance should be provided to all Departmental officials who have land management or program responsibilities for those areas and resources to which Section 4 (f) would apply, in addition to those personnel who normally review DOT NEPA/4 (f) documents.

This memorandum replaces ER80-2.

Jonathan P. Deason

Attachment

SECTION 4(f) of the DOT ACT

Section 4(f) of the Department of Transportation Act (80 Stat. 931; Public Law 89-670) as amended in Section 18 of the Federal-Aid Highway Act of 1968 (82 Stat. 815; Public Law 90-495).

"(f) It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites. The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. After the effective date of the Federal-Aid Highway Act of 1968, the Secretary shall not approve any program or project which requires the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance as determined by the Federal, State, or local officials having jurisdiction thereof, or any land from an historic site of national, State, or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use."

Section 4(f) is Codified in:

23 U.S.C. 138 and 49 U.S.C. 1653(f)

United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

Honorable Neil Goldschmidt
Secretary
U.S. Department of Transportation
Washington, D. C. 20590

JUN 20 1980

Dear Secretary Goldschmidt:

I am aware of your concerns to expedite the planning process for transportation projects. To the fullest extent we can, I want my Department to assist you in that effort.

It has been our observation, principally with highway projects, that certain delays can be traced to resolution of questions concerning (1) what constitutes land falling under the provisions of Section 4(f) of the DOT Act and (2) whether or not such land is significant within the meaning of Section 4(f).

In order to be helpful and to assist in expediting your transportation project-planning process, a list has been developed identifying areas pursuant to my jurisdictional responsibility as the Federal official for making determinations of significance in accordance with Section 4(f) of the DOT Act, 49 U.S.C. 1653(f). That responsibility is contained in the following provision:

> "After August 23, 1968, the Secretary [of Transportation] shall not approve any program or project which requires the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance as determined by the Federal, State, or local officials having jurisdiction thereof, or any land from an historic site of national, State, or local significance as so determined by such officials unless . . . ." [emphasis added]

The Solicitor of this Department advises that our jurisdiction extends to any public park, recreation area, or wildlife and waterfowl refuge within the scope of the Department's statutory responsibilities and that these responsibilities extend to certain State or locally owned (in fee, less than fee, lease, easement, or otherwise) parks, recreation areas or wildlife and waterfowl refuges. In addition, the Department's

jurisdiction extends to sites which the Department determines to be of national, State, or local historic significance, regardless of ownership. See Stop H-3 Ass'n v. Coleman 533 F2d 434, 441 (1976) Cert. denied 429 U.S. 999 (1976). Jurisdiction to determine areas of national, State, or local historic significance includes any property "significant in American history, architecture, archeology, and culture." Id at 441 note 13.

Accordingly, the Department of the Interior declares the following listed lands as being significant parks, recreation areas, wildlife and waterfowl refuges and historic sites and therefore Section 4(f) would be applicable to all for any Department of Transportation use. The list has been developed consistent with my Solicitor's advice. However, this list may not be exhaustive and there may be other areas that have been inadvertently omitted or that may need to be evaluated on a case-by-case basis.

1. All lands or interests therein authorized, established, or administered as part of the National Park System.

2. All National Park Service "Affiliated Areas."

3. All lands or interests therein authorized, established, or administered as National Wildlife Monuments, or as part of the National Wildlife Refuge System, including Waterfowl Production Areas (wetland easements).

4. All lands or interests therein authorized, established, or administered as part of the National Fish Hatchery System.

5. All waters, lands, and interests therein acquired for mitigation purposes pursuant to the authority of the Fish and Wildlife Coordination Act (16 U.S.C. 661-667e). Such lands and waters are in many cases administered by other Federal agencies, notably the Corps of Engineers, or by State agencies, pursuant to general planning authority (Sec. 663(b)). They may not be made subject to transactions that would "defeat the initial purpose of their acquisition." (Sec. 663(d)).

6. All lands or interests therein under the jurisdiction of the Water and Power Resources Service which are administered or which receive de facto use as parks, recreation areas, wildlife refuges, or historic sites.

applicability of Section 4(f) is especially important whenever lands administered by the Water and Power Resources Service or Bureau of Land Management, or whenever Indian trust lands (Tribal Officials/Bureau of Indian Affairs), are affected by DOT projects. Needless to say, such early coordination concerning other aspects of Section 4(f) is equally important when the lands and interest of our other bureaus are affected.

All of the above lands may also contain significant, but presently unknown or undesignated, historic or archeological sites or properties falling under the protection of Section 4(f). This will be determined on a case-by-case basis by the administering bureau/Tribal officials in consultation with the State Historic Preservation Officer(and/or others with historical expertise). Coordination with this Department, therefore, is also essential in this matter. Such coordination with reference to Section 4(f) should be in addition to (although it may be concurrent with) any coordination that may be required under Section 106 of the National Historic Preservation Act. We would note however, that each is independent of the other.

You may be assured that we stand ready to provide timely technical assistance in the preparation of Section 4(f) documentation for projects involving our lands or interests in lands. You realize, of course, that this Department must make an independent and separate (1) judgment of the need for use of its lands, or interests in lands, by a Department of Transportation program or project, as well as (2) documented determination of project compatibility with the purpose for which the land was acquired (as authorized by Congress) and is being managed.

Also, any approval of conversion of use or of transfers of land is an action requiring our compliance with the National Environmental Policy Act. Such compliance with NEPA would be satisfied by an environmental document prepared by the lead agency and approved by the appropriate bureau(s) in this Department [reference: 40 CFR 1501.5 and .6]. Again, we stand ready to provide timely technical assistance in the preparation of such documents.

12. All Federal surplus real property which has been deeded to State and local governments for use and management as park demonstration areas, recreation areas, or wildlife conservation preserves and refuges, and all historic monuments and properties so deeded, under the Recreation Demonstration Act of 1942, or the Federal Property and Administrative Services Act of 1949, as amended. Most of these lands are also subject to independent approval of conversion of use by the Secretary of the Interior.

13. All abandoned railroad rights-of-way acquired by State and local governments for recreational and/or conservation uses with grants under Section 809(b) of the Railroad Revitalization and Regulatory Reform Act of 1976. Such lands are also subject to independent approval of conversion of use by the Secretary of the Interior.

14. All properties included in or eligible for inclusion in the National Register of Historic Places.

15. All areas publicly owned in fee, less than fee, lease, or otherwise, which receive de facto use as park, recreation, or refuge lands, and which are listed on the National Registry of Natural Landmarks[1/], the National Registry of Environmental Landmarks[2/], the World Heritage List (U.S. listings based on nominations by Secretary of the Interior[3/]), or designated as Biosphere Reserves by the Secretary General, United Nations Educational, Scientific and Cultural Organization (after consultation with the Secretary of the Interior[4/] and the Secretary of State).

De facto use, as mentioned above, will be determined on a case-by-case basis by the Interior bureau having statutory or program jurisdiction over or interest in the land in question. In the case of Indian trust lands, such determination will be made by us, in consultation with the appropriate Tribal officials. De facto use may also include publicly owned lands or interests therein proposed or under study for inclusion in the National Wild and Scenic Rivers System, the National Trails System, or the National Wilderness Preservation System, or as critical habitat for endangered or threatened species. Early coordination with this Department concerning

---

1/ Program administered by Heritage Conservation and Recreation Service.
2/ Program administered by National Park Service.
3/ Handled by Heritage Conservation and Recreation Service.
4/ Handled by National Park Service.

7. All lands or interests therein under the jurisdiction of the Bureau of Land Management which are administered or which receive de facto use as parks, natural areas, natural systems (e.g., flood plains, wetlands, or riparian habitat), environmental education areas, cultural and historic areas, areas of critical environmental concern, recreation areas, or wildlife refuges, or which meet wilderness criteria or are wilderness study areas.

8. All lands held in trust by this Department for the benefit of Indian Tribes which are administered by the Tribe as parks, recreation areas, wildlife refuges, or historic sites, or which receive similar de facto use.

9. All local and State lands, and interests therein, and certain Federal lands under lease to the States, acquired or developed in whole or in part with monies from the Land and Water Conservation Fund Act. Such lands, and interests therein, are also subject to Section 6(f) of the Act requiring independent approval of conversion of use by the Secretary of the Interior.

10. All recreation areas and facilities (as defined in Section 1004) developed or improved, in whole or in part, with a grant under the Urban Park and Recreation Recovery Act of 1978 (Title 10 of P.L. 95-625). Such recreation areas and facilities are also subject to Section 1010 of the Act which requires independent approval of the Secretary of the Interior (Heritage Conservation and Recreation Service) for a conversion to other than public recreation uses.

11. All State lands and interests therein acquired or developed or improved for fish and wildlife conservation, restoration, or management with grants under the Pittman-Robertson Act, the Dingell-Johnson Act, Section 6 of the Endangered Species Act of 1973, and/or the Anadromous Fish Act of 1965 (including, but not limited to, State fish hatcheries, State wildlife conservation areas, and State game lands). For most of these lands, conversion to a non-designated use requires independent approval by the Secretary of the Interior.

There are, of course, other Section 4(f) properties over which the Department of the Interior has no direct or program jurisdiction, which should continue to receive Section 4(f) protection. These include, but are not limited to, community and village parks and playgrounds; State, county and regional park, recreation and refuge lands; school playgrounds open to general public use; State fairgrounds; and all properties determined to have State and local significant historic values, but which were determined not eligible for the National Register. This Department is committed to timely review of Section 4(f) statements prepared for such involvements.

I would appreciate it if you made the above information available to your operating administrations. Additionally, we hope you would instruct the Federal Highway Administration to have this letter included as an addendum to each State's Highway Action Plan, developed pursuant to 23 U.S.C. 109(h) and FHPM 7-7-1. Only with this broad distribution do we believe that the several administrative levels of a State highway agency will be cognizant of the contents of this letter and be able to work with you and us in expediting the planning process.

Thank you for your attention to this matter.

Sincerely,

Cecil D. Andrus

SECRETARY

cc: Council on Environmental Quality

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240

MAR 22 1999

PEP - ENVIRONMENTAL REVIEW MEMORANDUM NO. ERM99-2

To: Heads of Bureaus and Offices

From: Director, Office of Environmental Policy and Compliance

Subject: Interventions in Proceedings of the Federal Energy Regulatory Commission (FERC)

1. PURPOSE

This memorandum describes the procedures to be followed in the Department for intervention in the formal proceedings of FERC. These procedures are in accordance with 452 DM 2.3 A (1) and apply to hydroelectric power and natural gas projects under consideration by FERC.

2. POLICY

It is the Department's policy that FERC intervention actions are delegated to bureau Regional Directors and Regional Solicitors with only occasional elevations to headquarters as appropriate and as described in Part 4 below.

3. PROCESS

A. The Regional Director, or equivalent official, of a bureau requesting intervention will circulate a proposal to intervene (with supporting information) to the Regional Solicitor (RSOL), the Regional Environmental Officer (REO), and regional officials of other bureaus in the region. Bureau supporting information shall include the status of consultations with State, local, and other appropriate entities regarding their concerns with the project and their intervention intentions.

The initiating bureau usually arrives at a decision to seek intervention during the application review process conducted by the Office of Environmental Policy and Compliance (OEPC) under 516 DM 7. The initiating bureau should use the circulation list contained in the OEPC distribution memorandum. In some cases the initiating bureau may make a decision to seek intervention before or after the formal application review process. In these cases the initiating bureau is advised to consult with the REO to determine which other bureaus may have an interest in the matter.

B. The bureau circulation will request comments and recommendations from other bureaus within five working days. It

is the responsibility of the initiating bureau to deliver the circulation documents as expeditiously as possible. It is strongly recommended that hand delivery and fax transmission be used to meet this requirement. Timing is important because late filings at FERC require preparation of additional documentation to make a case for our late intervention. Late filings also mean the decision must be made by the Commission. The decision is automatic if the Department is on time.

C. Other bureaus may provide "no comment" responses to the initiating bureau by telephone. All substantive comments and recommendations in support or opposition shall use either hand delivery or fax transmission to meet the five working day requirement. If the initiating bureau receives no comment within the review period from a particular bureau, it may assume that there are no comments.

D. The RSOL will review the proposal for legal issues and advise the initiating bureau of these findings. This advice and the remainder of the regional record will form the basis of the later decision to (not to) intervene by the Office of the Solicitor.

E. The REO will review the proposal for intra-Departmental, Federal-State, or potential environmental policy issues and advise the initiating bureau of these findings. This advice and the remainder of the regional record will form the basis of the later decision to (not to) intervene by the Office of the Solicitor. The REO shall receive a copy of the record as supplied to the Office of the Solicitor whenever the REO has made substantive comments and/or recommendations.

F. Both sets of findings in "D." and "E.", along with other bureau comments, will serve to guide the initiating bureau regarding potential elevation within the Department. It is at this time that it should be clear whether or not elevation of the request within the Department is needed.

G. If no comments are received by the initiating bureau, that bureau will request the Office of the Solicitor to decide the issue and, if appropriate, file the intervention petition before the close of FERC's comment period.

H. If the initiating bureau and other bureaus determine that intervention is necessary and there are no inter-bureau conflicts, the initiating bureau will request, on behalf of other bureaus, the Office of the Solicitor to decide the issue and, if appropriate, file the intervention petition before the close of FERC's comment period.

I. If the initiating bureau and other bureaus determine that intervention is necessary and there are inter-bureau conflicts that cannot be resolved, the procedures in Part 4 below will be followed.

J. OEPC shall notify the Office of the Solicitor at the appropriate time of its concurrence (non-concurrence) with the intervention request in accordance with 452 DM 2.3 A (5). In most cases, this will likely occur under "E." above but may occur later in controversial cases where the record takes longer to develop.

K. The Office of the Solicitor shall keep track of all FERC intervention activities and include OEPC on the official service list for a copy of any intervention petition filed at FERC. This copy need only be furnished to OEPC headquarters for the central project file.

L. Post-licensing proceedings often involve compliance matters which provide limited time frames for Departmental responses. In such cases, the Office of the Solicitor is authorized to file intervention petitions as necessary to protect and advance the Department's interests in that project proceeding. Such interventions may be made on behalf of any bureau(s) for which the Department intervened in the underlying licensing proceeding, and are made with the concurrence of OEPC [452 DM 2.3A(5)]. Bureaus not seeking intervention in post-licensing matters may be removed from future intervention petitions by notice to the attorney of record.

4. <u>ELEVATION AND CONFLICT RESOLUTION</u>

A. Any intervention request may be elevated to headquarters for Secretarial or other senior management approval upon the recommendation of the RSOL or the REO acting through their respective headquarters' offices whether or not inter-bureau conflict is involved.

B. If bureau conflicts cannot be resolved in the field, the initiating bureau shall forward a request for resolution to the bureau director who will seek resolution with other bureau directors.

C. If resolution cannot be achieved by the bureau directors, the initiating bureau will seek resolution with the assistant secretaries and the Assistant Secretary-Policy, Management and Budget serving as the Department's Dispute Resolution Specialist will apply alternative dispute resolution techniques.

D. If necessary, any assistant secretary seeking to resolve an intervention issue and not fully satisfied with the dispute resolution process may request that the Secretary review the issue.

E. The Secretary may address bureau conflicts at any stage in this process and resolve the matter as he or she may determine to be appropriate.

F. Upon completion of the dispute resolution process, the

Office of the Solicitor will proceed with the filing of the intervention petition unless the decision was not to intervene.

5. REISSUE

This memorandum replaces ERM94-6.

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240

MAR 27 2000

PEP - Environmental Review Memorandum NO. ERM00-2

To: Heads of Bureaus and Offices

From: Director, Office of Environmental Policy and Compliance

Subject: Departmental Participation in Hydroelectric Power Licensing by the Federal Energy Regulatory Commission (FERC)

1. BACKGROUND AND PURPOSE

This memorandum supplements 516 DM 7. The Office of Environmental Policy and Compliance (OEPC) provides oversight, guidance, and process management for the Department's review of FERC applications and associated exhibits, studies, and environmental documents for hydroelectric projects covered by the Federal Power Act (FPA), as amended. Following an extensive Secretarial hydropower initiative (1998-2000) to improve bureau coordination, a number of existing Departmental policies and practices in this area were revised and a number of new policies and practices were introduced. In addition, measures are provided to coordinate legal and technical review and to assure the development of a sound administrative record in FERC licensing proceedings. Legal review for the Department is provided by the Office of the Solicitor (SOL).

The purpose of this memorandum is to provide additional information, policies, and procedures resulting from the Secretarial initiative and past practices to be used by all bureaus in the review of FERC applications. It is not intended to replace any other bureau procedural guidance and such guidance is recommended where necessary. Handbooks and other less formal guidance may be prepared, published, and utilized by bureaus so long as they do not conflict with this memorandum.

2. REISSUE

This memorandum has been revised and reissued as ERM00-2. ERM00-2 replaces ERM94-5 which is no longer applicable to Interior's hydropower review activity.

3. TYPES OF APPLICATIONS

This section outlines the types of applications commonly received from FERC during their conduct of a permitting, licensing or re-licensing action. Bureaus are cautioned to carefully track projects and comment at all appropriate times during the permitting and licensing processes. In

general, bureaus may rely on the distribution from OEPC of FERC notices and review documents to alert them of pending FERC developments. However, bureaus are also strongly urged to maintain local information on all hydroelectric projects at their field and regional offices so that they do not have to catch up on licensing actions further along in the process. In this regard, notices of intent to file for a new license which are issued by FERC approximately five years before license expiration are circulated by OEPC for information [see 5.D(2), below].

A. Preliminary Permit - An application for a preliminary permit is a voluntary action and is not a prerequisite to filing a license application. The permit grants a priority over other competing interests in applying for a project license during the permit period. The permit period may be up to three years. Permits are generally sought to study new projects or to add power to existing non-power projects (18 CFR 4.80-4.84). Because of the voluntary nature of the permit, any comments made by Interior on a permit do not automatically carry over to the licensing process. Preliminary permits carry standard consultation conditions set by FERC. FERC does not include any special conditions. Therefore, bureaus do not need to itemize conditions for the permit but should be ready to provide consultative advice regarding their programs, facilities, and missions. A preliminary permit does not grant the permittee unrestricted access to Federal lands and facilities or occupancy rights to disturb existing landscapes and natural resources. A bureau may independently contact a permittee for the purpose of advising that permission to enter Federal lands or facilities may be restricted or prohibited and may require a special use permit issued by the bureau and subject to the requirements of the National Environmental Policy Act (NEPA).

B. License - A license application is a request to construct, operate, and maintain a new hydroelectric project (original license) or to continue to operate a previously constructed hydroelectric project (new license or relicense) or to install and operate hydroelectric power facilities at an existing Federal or non-Federal dam or canal, including any directly associated transmission facilities. The type of license application depends on the size of the power installation with a major project license issued to any project with an installed capacity of more than 1.5 megawatts and a minor license issued for projects with installed capacity of 1.5 megawatts or less. FERC's licensing program also involves a number of other actions proposed by an applicant. These include: amendments to a project license, termination, surrender, transfer, or Federal capture of a project license and apply both to major and minor projects (18 CFR 4.40-4.71, 4.200-4.202, and 16.1-16.26).

Close attention must be given to licensing actions to ensure that the Department seeks the necessary terms and conditions in the license that will protect its program area of interest. We may oppose the issuance of a project license when the proposal would cause a serious and significant impact on our programs or projects, would conflict with an authorized project, or would conflict with a specific jurisdictional concern of the Department. If the license expires before a new license is issued and the United States does not exercise the right of take over, FERC issues annual licenses to the licensee under the terms and conditions of the existing license until the property is taken over or a new license is issued (18 CFR 16.18).

A license, like a preliminary permit, does not grant the permittee unrestricted access to Federal

lands and facilities or occupancy rights to disturb existing landscapes and natural resources. A bureau may independently contact a permittee for the purpose of advising that permission to enter Federal lands or facilities may be restricted or prohibited and may require a special use permit issued by the bureau and subject to the requirements of NEPA.

C. Exemptions from Licensing - The exemption process is less time consuming than the licensing process and leads to the construction and operation of the following types of projects which may be conditioned by FERC and the resource agencies. The exemption process is still considered a form of licensing and has strict fish and wildlife protection provisions. In both types of exemptions the Department has an opportunity to provide comments, recommended terms and conditions, and mandatory terms and conditions to protect resources managed by the Department. Exemptions do not have expiration dates.

(1) Small conduit hydroelectric facilities are projects with a total installed capacity of 15 megawatts or less on conduits located entirely on non-Federal lands (although it appears that the conduit itself may be federally owned) and not an integral part of a dam. FPA amendments raised this limit to 40 megawatts in the case of a facility constructed, operated, and maintained by an agency or instrumentality of a State or local government solely for municipal water supply. A standard article requires compliance with any terms and conditions determined appropriate to protect fish and wildlife resources by Federal or State fish and wildlife agencies identified within the comment period (18 CFR 4.90-4.96).

(2) Small hydroelectric projects are projects with a total installed capacity of 5 megawatts or less at existing, non-Federal dams or utilizing a natural water feature without the need for a dam or man-made impoundment. FPA amendments allow exemptions at new dams and diversions only if they do not have substantial adverse effects on the environment, are not located on protected river segments, and meet any mandatory terms and conditions set by Federal and State fish and wildlife agencies under the FPA. Standard articles require (a) compliance with any terms and conditions determined appropriate to protect fish and wildlife resources by Federal or State fish and wildlife agencies within the comment period and (b) any rights to use or occupy any Federal lands be obtained from the relevant land management agencies (18 CFR 4.101-4.108).

4. PROHIBITIONS, PRESCRIPTIONS, TERMS AND CONDITIONS, AND AGREEMENTS

A. Prohibitions - FERC is prohibited from issuing original licenses under Part I of the FPA (or exemptions from such Part) for any hydroelectric power project located within the boundaries of any unit of the National Park System that would have a direct adverse effect on Federal land within such unit or unless projects have been specifically authorized by Congress. The FERC is prohibited from issuing licenses for construction of hydroelectric projects on or having a direct and adverse effect on any river listed as a component of the National Wild and Scenic River System including potential additions to the system during such periods as the Wild and Scenic River Act provides. The FERC is also prohibited from licensing projects in wilderness areas under the jurisdiction of the Department of the Interior or in Federal reservations under Interior's supervision where FERC finds that the project will interfere or be inconsistent with the purpose

for which the reservation was created or acquired [16 U.S.C. 797(e)].

B. Mandatory Prescriptions

(1) Section 4(e) of the FPA requires FERC to accept any license terms and conditions, which the Secretary deems necessary for the protection and utilization of a reservation under the Department's supervision. The project must occupy land within the reservation. FERC will make a determination whether the project is consistent with the purpose(s) for which the reservation was created or acquired. Departmental reservations include such lands as Indian reservations, wildlife refuges, reclamation projects, acquired lands held for public purposes, and public lands withdrawn, reserved or withheld from private appropriation and disposal. The Department's comments will specifically identify any Section 4(e) conditions and be supported by substantial evidence in the record. It should be noted that Section 4(e) pertains to licenses, not permits; and the Department interprets it to pertain to those few unique circumstances where exemptible projects could occupy Departmental reservations. FERC states that Section 4(e) pertains only to licenses.

(2) Section 18 of the FPA requires FERC to accept any license terms and conditions for the construction, maintenance, and operation of such fishways as may be prescribed by the Secretary. Departmental comments will specifically identify any Section 18 prescriptions and be supported by appropriate fisheries information and substantial evidence in the record. Further, when the Department cannot establish the need for fishways at the time of licensing, it may exercise its Section 18 authority by reserving the authority to prescribe fishways in the future. In post-licensing situations, either a specific reservation of authority to prescribe or a standard FERC "L-Form" article (Article 15) provides our access for Section 18 prescriptions and can be supplemented by any case-specific, non-standard articles we provide during our review.

(3) Section 30(c) of the FPA pertains to exemptions from licensing and requires FERC to accept such terms and conditions as the FWS determines are appropriate to prevent loss of or damage to fish and wildlife resources and to otherwise carry out the purposes of the Fish and Wildlife Coordination Act. This is interpreted by the Department to include recreational fishing access. Departmental comments will specifically identify any Section 30(c) conditions provided by the FWS and the underlying bases for making them, along with substantial evidence in the record.

C. Recommended Terms and Conditions

(1) Section 10 of the FPA allows FERC to prescribe terms and conditions within any permit or license for a number of reasons. The FERC has established a number of standard articles that are included in all permits and licenses (the L-Forms). In addition, the Department has the right and responsibility under its various authorities to recommend to FERC other non-standard terms and conditions for its consideration. The FERC uses a number of typical articles which provide uniformity for non-standard terms and conditions recommended by Federal agencies. The Department's comments will transmit its recommended terms and conditions, including the underlying bases for making them, along with substantial evidence in the record.

FERC will consider our recommendations, but may or may not accept them or will accept them with modifications. The FERC order issuing a license discusses its disposition of any Departmental recommendations.

(2) Exemptions from licensing are also subject to standard and discretionary terms and conditions issued by FERC. The Department can and should, where appropriate, recommend non-standard terms and conditions for these exemptions in areas other than fish and wildlife resources which are mandatory under Section 30(c). The situation is similar to Section 10 and FERC will consider our recommendations, but may or may not accept them or will accept them with modifications.

(3) Section 10 also has a provision for the protection, mitigation, and enhancement of fish and wildlife resources. FERC is required to base such conditions on the recommendations of Federal and State fish and wildlife agencies. When disagreements arise, FERC is required to attempt to resolve the disagreements with these agencies. If resolution cannot be obtained and FERC does not adopt the agency recommendations, FERC must publish its findings that such conditions are inconsistent with the FPA and/or the conditions selected by FERC comply with Section 10(j)(1) of the FPA.

D. Agreement About Reclamation Facilities - The Department is agreeable, under certain conditions, to the development of hydropower by non-Federal entities at Reclamation projects provided that (1) it is compatible with the authorized purposes of the Reclamation project and (2) power generation is not an authorized purpose of the Reclamation project.

A Memorandum of Understanding (November 6, 1992) provides a process by which FERC and Reclamation resolve issues related to licensing authority at Reclamation facilities. Reclamation and FERC will attempt to resolve issues related to licensing authority in advance of the issuance of any notice by FERC. If FERC proceeds with issuance of a public notice and jurisdiction remains at issue, Reclamation may re-assert jurisdiction, with or without comments, recommendations, and Section 4(e) terms and conditions, under Departmental review procedures contained in this memorandum.

A Memorandum of Understanding (June 22, 1981) provides for the establishment of construction criteria and selected working relationships with FERC when non-Federal projects are licensed at Reclamation projects. However, it does not recognize the Secretary's authority to mandate conditions pursuant to Section 4(e) of the FPA. Departmental comments will specifically identify any such conditions provided by the Bureau of Reclamation.

5. CONSULTATION AND REVIEW PROCEDURES

A. Pre-Application Consultation - FERC requires all applicants for a license or exemption from licensing to consult with each appropriate Federal and State resource agency before submitting its application (18 CFR 4.38). Consultation consists of the following:

(1) First Stage - Applicant provides detailed maps, general engineering design,

proposed operational mode, environmental setting and mitigation to the extent known, streamflow information, and detailed descriptions of any proposed studies. The first stage consultation ends when resource agencies and Indian Tribes have timely filed their comments and recommendations [18 CFR 4.38(b)(6)].

(2) Second Stage - Applicant conducts all reasonable studies and obtains all reasonable information requested by the resource agencies and Indian Tribes. The second stage consultation ends ninety days after the applicant supplies draft application documents to the resource agencies and Indian Tribes [18 CFR 4.38(c)(10)] or at the conclusion of the last joint meeting held in cases where a resource agency or Indian Tribe has responded with substantive disagreements.

(3) Third Stage - Applicant files the application documents with FERC [18 CFR 4.38(d)]. The applicant must also file copies of the application with the resource agencies. This is the only mailing bureaus will receive. Bureaus are strongly advised to save these copies because it may be some time before the application is ready for formal review and the OEPC review request is issued. Similar requirements for applicants for new licenses at existing facilities (relicense applications) are found at 18 CFR 16.8. In response to application filing, FERC will issue a tendering notice inviting comments on the application and the need for any further studies to be done. Following that FERC will issue a notice accepting the application for filing and inviting comments, protests, and motions to intervene.

B. Bureau Review - Bureaus will be involved in all three stages of consultation as necessary to protect their program interests and to develop the Department's complete position on a particular project.

C. Legal Review - In order to ensure the development of a strong, defensible administrative record for all FERC licensings, bureau responses to FERC requests need to be consistent with one another, and with Department policy. To achieve this, the Department must work to identify bureau interests, coordinate bureau comments where there are cross-Department issues, and routinely subject those comments to legal review. Since the FERC licensing process is quasi-judicial, the Department has adopted policies to insure that adequate legal review of its submissions to FERC is carried out.

(1) For every licensing project, the Solicitor's Office will designate an Attorney Point of Contact (also, Designated Attorney) at the beginning of the licensing process (i.e., during first stage consultation) for the provision of general legal advice throughout that process. The Attorney Point of Contact is likely to become the "Attorney of Record" for the project if the Department intervenes in FERC's process. At the client's request and within resource constraints, the Designated Attorney will provide legal representation and legal review of draft comments submitted to FERC or the applicant through the Departmental review process. SOL will keep OEPC informed of these Attorney Points of Contact and Attorneys of Record so that the attorney can be identified on all OEPC distribution memoranda.

(2) Bureaus will provide the Office of the Solicitor three business days for informal

legal review of all bureau tendering and scoping comments before bureaus submit those comments to FERC. Bureaus will fax those draft comments to the appropriate Solicitor's Office at least one week before the FERC deadline in order to allow sufficient time for possible revisions.

D. Departmental Review

(1) The first and second stages of consultation will occur at regional and field offices of the Department's bureaus with assistance provided by the Regional Environmental Officers (REO) upon request. The third stage filing is the point where OEPC assumes process management of the Department's review in accordance with this section. The OEPC will initiate third stage review activities whenever it has an official notice from FERC announcing that:

- the application is accepted for filing and invites comments, protests, and interventions;
- the application is "not ready for environmental analysis" but invites intervention in the proceeding;
- and/or the application is "ready for environmental analysis".

Any bureau on the OEPC review request not in receipt of copies of the application should call the applicant's contact noted in the FERC notice and request those copies. It is not likely that OEPC will have any extra copies since OEPC will have already distributed those copies in its possession. Copies are often available electronically on CD-ROM and over the Internet at FERC's web site. The notices generally give an Internet address.

(2) All bureaus receive FERC's notices of intent to file for a new license, which is required five years before license expiration, via the environmental review system. This action gives bureaus notice that they may need to determine the importance of a project, develop a bureau position, and track its progress through the FERC process. It is recommended that bureaus begin working with applicants as early as possible after this notice of intent to insure full consideration of their resource concerns.

(3) Bureaus should recommend that any studies needed to define and mitigate impacts to our properties and resources be completed prior to issuance of a license unless such studies are dependent on post construction operations. Bureaus are also encouraged to make study requests during pre-filing consultation and whenever a tendering notice is issued so studies are completed and available for use in developing terms and conditions and recommendations.

(4) OEPC is the focal point for Departmental receipt, review, and comment on policies, regulations, and project applications of FERC. OEPC maintains all necessary databases to assist bureaus in tracking and reviewing critical FERC projects.

(a) All applications and other matters that may affect more than one bureau or the policy interests of the Secretary will be controlled by OEPC. In this regard OEPC may designate reviewing and lead bureaus, review schedules, and the responsible office for forwarding comments to FERC. Upon request OEPC also revises these designations as necessary when brought to its attention by bureau personnel or others.

(b) Post-review process issues of interest to a single bureau are usually assigned to that bureau with only a requirement to keep OEPC informed of the results. Examples include Section 10(j) fish and wildlife consultation where recommendations previously transmitted to FERC via the Departmental comment letter are later resolved by FWS and FERC at the field level and any other single bureau issue occurring later than the date of the Department's comments. It is recommended that the REO be consulted if there is any doubt about a single bureau issue. The REO can assist in coordinating a reply if other bureaus are involved. For legal review, bureaus should maintain contact with and seek the advice of the Designated Attorney or the Attorney of Record.

(c) As a general rule OEPC will assign projects five megawatts or less in capacity to REOs for signature and projects larger than five megawatts to headquarters, with controversial issues referred as necessary to the Assistant Secretary-Policy, Management and Budget or other senior policy officials. Projects known or later found to occupy National Park System lands are assigned to headquarters. Projects known or later found to occupy Federal reservations may be assigned to headquarters depending on the policy nature of the issue.

(5) OEPC forwards to the bureaus, through the environmental review (ER) system, certain FERC notices it retrieves from the Internet. This provides a significant time saving over waiting for FERC's mailing of the notices. Bureaus receiving notices via the Internet or any other means must always check with their ER staff and/or OEPC to determine if a control number has been assigned and to receive review instructions if not previously made available.

(6) As soon as memoranda regarding FERC notices are ready for distribution, OEPC will forward, via fax, certain time-sensitive project notices directly to the appropriate bureau reviewers in the field. This is another time saving practice utilized for the following types of notices:

- Applications Tendered and Requesting Additional Studies
- Notice of Filing Accepted
- Notice of Scoping, Scoping Meetings, Scoping Documents, etc.
- Notice of Request to Intervene
- Applications Ready for Environmental Analysis
- Notices of Draft or Final Environmental Assessments or Statements

OEPC will maintain a current list of field office fax numbers for this purpose.

(7) In its licensing process FERC (rather than the applicant) must consult with the Department pursuant, but not limited, to the following statutes and subordinate regulations, directives, or procedures.

- Federal Power Act
- Water Resources Planning Act
- Wild and Scenic Rivers Act
- Fish and Wildlife Coordination Act
- Endangered Species Act
- National Historic Preservation Act
- National Environmental Policy Act

(8) In addition, the Department may have additional jurisdiction over all or portions of a FERC hydroelectric project pursuant, but not limited, to the following statutes:

- Reclamation Law
- Federal Land Policy and Management Act
- Alaska Native Claims Settlement Act
- Alaska National Interest Lands and Conservation Act
- National Park Service Organic Act
- National Wildlife Refuge System Administration Act
- Land and Water Conservation Fund Act
- Urban Park and Recreation Recovery Act
- Federal Property and Administrative Services Act
- Recreation Demonstration Project Act
- National Trails System Act
- Mining Law of 1872

E. Alternative Administrative Process

(1) This is a parallel process to the three stage consultation process (see 18 CFR 4.34 and related modifications to existing sections of FERC's rules). It is also known as the "collaborative process" and "alternative licensing process".

(2) OEPC notices will identify use of the collaborative process by an applicant through the ER system. Appropriate instructions will be outlined in the distribution memoranda.

(3) Bureaus must be aware of the requirements of this process so that they can use and participate in this process to its fullest extent and understand its larger demand on their field resources.

(4) REOs may facilitate Interior's participation in this process if requested and if time permits.

6. TIME PERIODS FOR DEPARTMENTAL REVIEW

A. Permits - The FERC rules do not specify a review period. The notice from FERC announcing the permit will indicate a review period, and it is usually 60 days. Time extensions are not routinely sought on permit applications because FERC issues all permits with a set of standard conditions requiring the permittee to consult with all agencies concerned with natural resources and environmental matters.

B. Licenses and Exemptions - FERC regulations state that all review comments and recommendations and mandatory terms and conditions and prescriptions are due to FERC no later than 60 days after FERC announces the application as being "ready for environmental analysis". Extensions may be granted by FERC for good cause or extraordinary circumstances. Therefore, the OEPC review request will specify a firm date for response by bureaus to the lead bureau and to OEPC. All comments and recommendations received by that date will be considered for the Departmental letter. Any comments and recommendations received after that date may be considered for a supplemental letter to FERC.

C. Time Extensions - OEPC will seek time extensions based upon a written request from an REO or any reviewing bureau. All such requests must provide the reason(s) for the extension. These requests may be electronically transmitted to OEPC.

7. INTERVENTION

A. Intervention is the legal process by which the Department becomes a formal party to FERC's quasi-judicial process and establishes its right to appeal permits, licenses, and exemptions and associated terms and conditions once they are issued. Petitions to intervene and subsequent proceedings are processed by the Solicitor's Office.

B. Procedures for requesting intervention in FERC's proceedings are found in 452 DM 2. Reviewers should follow the additional guidance found in ERM99-2.

8. NATIONAL HYDROPOWER MEETING

To assist in managing the Department's activities relating to hydropower licensing, the Department will hold an annual hydropower meeting for the appropriate Departmental bureaus and staff. The meeting's main purposes are: (1) to foster discussions among bureaus and other Departmental offices on broad policy matters relating to FERC hydropower licensing and (2) to identify, discuss, and prepare for those hydropower projects of critical importance to the Department in the coming year. This meeting is subject to the availability of funding and a willing bureau sponsor.

THE SECRETARY OF THE INTERIOR
WASHINGTON

ORDER NO. 3355

Subject: Streamlining National Environmental Policy Act Reviews and Implementation of Executive Order 13807, "Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects"

Sec. 1 **Purpose**. This Order is intended to: 1) immediately implement certain improvements to National Environmental Policy Act (NEPA) reviews conducted by the Department of the Interior (Department); 2) begin assessment of additional such opportunities; and 3) begin implementation of Executive Order 13807 of August 15, 2017, "Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects" (E.O. 13807).

Sec. 2 **Authorities**. This Order is issued under the authority of section 2 of Reorganization Plan No. 3 of 1950 (64 Stat. 1262), as amended. Other statutory authorities for this Order include, but are not limited to, NEPA, 42 U.S.C. 4321-4347.

Sec. 3 **Background**. The Department has broad responsibilities to manage Federal lands and resources for the public's benefit. The NEPA applies to the execution of many of the Department's responsibilities with the goal of ensuring that information regarding environmental impacts is available to decisionmakers and the public before decisions are made. The NEPA accomplishes this goal by requiring Federal agencies to prepare an Environmental Impact Statement (EIS) for major Federal actions significantly affecting the quality of the human environment.

Both the Department and the Council on Environmental Quality (CEQ) have issued regulations to implement NEPA. Because the purpose of NEPA's requirements is not the generation of paperwork, but the adoption of sound decisions based on an informed understanding of environmental consequences, the regulations encourage agencies to: 1) focus on issues that truly matter rather than amassing unnecessary detail; 2) reduce paperwork, including by setting appropriate page limits; 3) discuss briefly issues that are not significant; and 4) prepare analytic (rather than encyclopedic) documents, among other measures.

In recognition of the impediments to efficient development of public and private projects that can be created by needlessly complex NEPA analysis, I am issuing this Order to enhance and modernize the Department's NEPA processes, with immediate focus on bringing even greater discipline to the documentation of the Department's analyses and identifying opportunities to further increase efficiencies.

This NEPA-streamlining effort dovetails with E.O. 13807. Among other requirements, E.O. 13807 requires CEQ to take actions to enhance and modernize the Federal environmental review process and to form an inter-agency working group to identify agency-specific

impediments to efficient and effective reviews for covered infrastructure projects. This Order begins implementation of E.O. 13807 in the context of the Department's overall effort to streamline the NEPA process.

Sec. 4 **Directives**.

a. Setting Page and Timing Limitations for Environmental Impact Statements.

(1) To implement the longstanding directives in 43 C.F.R. 46.405, and in 40 C.F.R. 1500.4 and 1502.7, all EISs 1) for which a bureau is the lead agency and 2) that have not reached the drafting stage shall not be more than 150 pages or 300 pages for unusually complex projects, excluding appendices. Approval of the Assistant Secretary with responsibility for the matter, in coordination with the Solicitor, is required to produce an EIS exceeding the above stated page limitations. In instances of EISs prepared with bureaus serving as co-leads, each responsible Assistant Secretary shall approve any deviations from this policy. To meet the page limitations, each preparer should focus on various techniques such as tiering or incorporation by reference.

(2) To ensure timely completion of EISs, and consistent with the timelines established for major infrastructure projects in E.O. 13807, each bureau shall have a target to complete each Final EIS for which it is the lead agency within 1 year from the issuance of a Notice of Intent (NOI) to prepare an EIS. The initial timeline must be developed by the lead bureau before issuing the NOI in accordance with 43 C.F.R. 46.240, taking into account all relevant timing factors listed therein, including any constraints required by cooperating agencies. An updated timeline should be prepared as needed during the development of the EIS (e.g., at the completion of scoping or if additional time is provided for public comment). Timelines exceeding the target by more than 3 months must be approved by the Assistant Secretary with responsibility for the matter. In instances of EISs prepared with bureaus serving as co-leads, each responsible Assistant Secretary must approve any deviations from this policy.

b. Setting Target Page and Timing Limitations for the Preparation of Environmental Assessments. Within 30 days, each bureau head shall provide to the Deputy Secretary through its supervising Assistant Secretary a proposal for target page limitations and time deadlines for the preparation of environmental assessments. Any common impediments to achieving the proposed targets should also be identified. In developing its proposal, each bureau should consider guidance from CEQ on the page length of environmental assessments. (Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, 46 Fed. Reg. 18,026, 18,037, Question and Answer 36a. (Mar. 23, 1981)).

c. Additional NEPA-Streamlining Review.

(1) The Deputy Secretary will coordinate a review of the Department's NEPA procedures to identify additional ways to streamline the completion of NEPA responsibilities. The review will include, but is not limited to, the following areas:

(a) bureau/office NEPA regulations, policies, guidance, and processes to identify: 1) impediments to efficient and effective reviews; 2) best practices and whether they can be implemented more widely; and 3) whether the Department should consider establishing additional categorical exclusions or revising current ones;

(b) requirements and process improvements under Title 41 of the Fixing America's Surface Transportation (FAST) Act, 42 U.S.C. 4370m-1(c)(1)(D), to determine whether any best practices can be broadly applied, including to projects beyond the terms of the FAST Act;

(c) requirements and process improvements required by E.O. 13807, to determine whether any best practices can be broadly applied, including to any projects beyond the terms of E.O 13807; and

(d) CEQ NEPA regulations and guidance to assess whether to recommend changes to facilitate agency processes.

(2) Within 30 days of the effective date of this Order, each Assistant Secretary, in coordination with bureau heads, should provide recommendations for actions to streamline the NEPA process to include potential regulatory revisions, development of revised or additional categorical exclusions, revised or new guidance or policies, and recommendations on streamlining the surnaming process.

d. Implementation of E.O. 13807. The Deputy Secretary will also coordinate implementation of E.O. 13807.

(1) In order to begin implementation of E.O. 13807, each Assistant Secretary, in coordination with the bureau heads, is hereby directed to identify:

(a) potential impediments to efficient and effective reviews for infrastructure and develop an action plan to address such impediments as a subset of the review required in Sec. 4c(1)(a) above;

(b) potential actions that could be taken by CEQ to facilitate a review of major infrastructure projects, as a subset of the review required in Sec. 4c(1)(d) above; and

(c) pending proposals for major infrastructure projects, as defined in E.O. 13807 and that are not yet the subject of a NOI issued by the Department, that could be candidates for the "One Federal Decision" process.

(2) Within 30 days of the effective date of this Order, each Assistant Secretary, in coordination with the bureau heads, should provide the information requested in Sec. 4d(1)(a)-(c) above.

Sec. 5 **Implementation**. The Deputy Secretary is responsible for implementing all aspects of this Order, in coordination with the Solicitor and the Assistant Secretaries.

Sec. 6 **Effect of the Order**. This Order is intended to improve the internal management of the Department. This Order and any resulting report or recommendations are not intended to, and do not, create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its departments, agencies, instrumentalities or entities, its officer or employees, or any other person. To the extent there is any inconsistency between the provisions of this Order and any Federal laws or regulations, the laws or regulations will control.

Sec. 7 **Expiration Date**. This Order is effective immediately and will remain in effect until it is amended, superseded, or revoked, whichever occurs first.

Deputy Secretary

Date: AUG 3 1 2017

THE DEPUTY SECRETARY OF THE INTERIOR
WASHINGTON

APR 2 7 2018

Memorandum

To: Assistant Secretaries
Heads of Bureaus and Offices
NEPA Practitioners

From: Deputy Secretary

Subject: Additional Direction for Implementing Secretary's Order 3355

Purpose:

On August 31, 2017, I issued Secretary's Order 3355 (Order) with the intent of immediately improving the Department's National Environmental Policy Act (NEPA) review. Specifically, the Order instructs each Bureau and Office serving as a NEPA lead agency to prepare Environmental Impact Statements (EIS) that are no longer than 150 pages (300 pages for unusually complex projects)[1] and to complete each Final EIS within 365 calendar days of publishing the associated Notice of Intent (NOI), unless otherwise approved by the Department.[2] The following guidance provides additional directives for implementation and compliance with the Order, 43 C.F.R Part 46, Subpart E,[3] and 40 C.F.R. 1500-1508.

Further Direction:

Within 30 days of the effective date of this Memorandum, each Bureau or Office EIS Project Team[4] shall submit the following to the Office of the Deputy Secretary and the Director of the Office of Environmental Policy and Compliance (OEPC) by uploading it to the NEPA and Permit Tracking Database (Database):[5]

1. EIS Project Schedule:

    a. For each outstanding EIS with a NOI published on or before August 31, 2017, provide a project schedule with a Final EIS completion and Record of Decision

[1] Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act, Council on Environmental Quality 40 C.F.R.§ 1502.7.
[2] *See* Secretary's Order 3355 - Streamlining National Environmental Policy Reviews and Implementation of Executive Order 13807, "Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects".
[3] Implementation of the National Environmental Policy Act of 1969, Department of the Interior, 43 C.F.R. § 46.405.
[4] EIS project teams include but are not limited to Departmental NEPA staff, Senior Executive Service members, subject matter experts, contractors, planners, an attorney from the Office of the Solicitor, and others who work on EISs at the field level (EIS Project Team).
[5] OEPC will provide each Bureau with access to the Database.

(ROD) issuance date of no later than 365 calendar days from the effective date of this Memorandum. The submission should include confirmation that the EIS will be completed in under 150 pages.[6]

b. For each outstanding EIS with a NOI published after August 31, 2017, provide a project schedule with a Final EIS completion and ROD issuance date within 365 days of the NOI's publication date. The submission should include confirmation that the EIS will be completed in under 150 pages.

2. Projects With A Draft EIS In Progress Prior to the Issuance of This Memorandum:

a. Projects with a published Draft EIS are exempt from the Order's page count requirements and do not require a waiver. However, these projects are still subject to the Order's timelines, which is to be documented in the project's schedule and uploaded into the Database.

b. Projects with a Draft EIS in the drafting phase that have not been published are subject to the Order's page count and timelines.[7] A waiver may be considered if the Draft EIS has been widely circulated or communicated to cooperating agencies and stakeholders in its current and noncompliant length.[8]

3. EIS Team and Solicitor Assignments:

a. For each EIS, regardless of its current phase in the EIS process, provide the name, title, and contact information for the first line Senior Executive Service (SES) member with line authority over the proposed action, and the other members of the EIS Project Team, by uploading the information into the Database. Contact information shall include a telephone number and an email address.[9]

b. An attorney in the Office of the Solicitor, based either in the field, regionally, or in Washington, DC, shall be incorporated into each new and existing EIS Project Team, regardless of the project's phase. Bureaus shall identify the solicitor and include his/her contact information in the Database.

Waiver Guidance:

1. Timeliness or Page Limit Waiver Requests:

---

[6] This project schedule requires concurrent compilation and completion of an Administrative Record and Decision File within the 365 day time limit set forth in the Order.
[7] Order 3355 4(a)(1-2); §1502.7.
[8] See the 'Waiver Guidance' section below for waiver procedures.
[9] This directive is not asking for the list of preparers pursuant to 40 C.F.R. § 1502.17, but those responsible for project oversight, management, and compliance with the Order.

a. The need for a waiver may arise if an EIS presents challenges that make it unlikely to be completed in under 150 pages or within 365 days of either the Order or the project's NOI date.[10]

b. If an EIS Project Team identifies the need for a waiver, it shall provide a detailed description of the need and justification for a "timeliness" and/or "page count" waiver on the template provided in Attachment 1.[11]

c. To better ensure Departmental consistency, waiver requests shall be submitted to the Office of the Deputy Secretary for review at nepa.depsec@ios.doi.gov.[12] Waiver requests will be processed within 20 days of receipt.[13] This instruction modifies the Order's waiver approval process by shifting approval from the Assistant Secretaries to the Office of the Deputy Secretary.

d. Projects that qualify under the Fixing America's Surface Transportation Act[14] or the One Federal Decision (OFD) Memorandum of Understanding automatically qualify for a 2 year timeline that allows for 1 year and 9 months to complete the project's EIS, and 3 months to complete permitting.[15] Qualifying projects should note this qualifying status in the Database and project timeline. Such projects are subject to the Order's page limits but do not otherwise require a timeliness waiver if consistent with the OFD timeline.

2. Unusually Complex EIS:

a. An EIS may be considered unusually complex based upon the action's circumstances, and an EIS Project Team may seek a "timeliness" and/or "page count" waiver to address these circumstances.[16]

b. The following considerations, among other factors, may be weighed when determining whether an action rises to the level of unusually complex and merits a waiver. To be considered unusually complex, each factor, taken singly or as a whole, must result in unusual complexity that a reasonable person with knowledge of the facts and the law would discern:

i. Nature of Potential Impacts:

1. Whether the type of action is new to a geographic area;

---

[10] Order 4(a)(1-2); § 1502.7.
[11] This provision applies to all EISs, both current and future.
[12] Unless otherwise stated, all notices, waiver requests, and communications with the Office of the Deputy Secretary referenced in this Memorandum shall be directed to nepa.depsec@ios.doi.gov.
[13] Waiver requests should be rare, are granted at the discretion of the Deputy Secretary, and are only to be submitted after ensuring that a waiver is truly merited.
[14] Pub. L. No. 114-94.
[15] Additional guidance for complying with the Fixing America's Surface Transportation Act and the One Federal Decision Memorandum of Understanding is forthcoming.
[16] Order 4(a)(1-2); §1502.7.

2. The subjective nature of the methodology or unavailability of data;
3. Newly established land designations, *i.e.* Areas of Critical Environmental Concern and Wilderness Areas;
4. The presence of endangered species or special status species;
5. Environmentally sensitive areas;
6. High likelihood of substantial weather impacts on the proposed project; or
7. High likelihood of substantial harm in the event of an incident.

ii. Projects That Are Large In Scope or Are Multi-Jurisdictional:

1. Linear projects;
2. Water systems;[17]
3. Multiple actions within the scope of the EIS;
4. For offshore activities, distance to shorelines, designated use zones, and depth; or
5. Projects crossing State lines requiring multiple amendments to land use plans.

Page Limit and Timeline Guidance:

The following guidance will help EIS Project Teams plan with the goal of completing an EIS in under 365 days and 150 pages, absent unusual scope or complexity:

1. Upon receiving demonstrated interest from a project proponent, and pre-NOI, it is considered best practice to appraise proponent applications to ensure that they are complete and properly prepared by the proponent. An appraisal may be comprised of a meeting, teleconference, follow-up discussion, or an application review with the proponent prior to accepting an application. An appraisal is not a decisional step, but is intended to confirm that proponents are ready to proceed;

2. Pursuant to 40 C.F.R. § 1501.6, Bureaus shall include other Federal Agencies with jurisdiction by law or special expertise in the project subject matter as cooperating Agencies, and Bureaus must cooperate at the request of another Bureau; and

3. Two guidance documents are attached to this Memorandum that should help promote Order compliance. The first is titled, "DOI EIS Page Length Considerations and Guide"[18] and the other is entitled "DOI Guidance on the Environment Review Process for a 365-Day Timeline"[19]. Note that these documents are simply meant to guide compliance with the Order, and Bureaus should utilize their experience and expertise to find solutions that address unique circumstances as they arise.

---

[17] Water Systems generally refers to water pipelines, canals, irrigation channels, dams, and any other form of water infrastructure or conveyance that impacts multiple stakeholders, jurisdictions, or water rights.
[18] Attachment 2.
[19] Attachment 3.

Contractor Guidance:

When a Bureau is using a contractor to prepare an EIS, the Order's page and time limitations shall be included and adhered to as a material term in each Department solicitation for a Statement of Work, and the subsequent contract for EIS preparation services issued after the date of this Memorandum.

Utilizing Pre-NOI Time Effectively:

1. To facilitate the implementation of the Order, each Bureau shall review its NEPA policies and procedures to identify opportunities to accelerate the EIS process. In coordination with the Office of the Solicitor and OEPC, each Bureau shall identify best practices for gathering information, coordinating with stakeholders, and preliminary drafting before the publication of a NOI.

2. Within 30 days of the effective date of this Memorandum, each Bureau NEPA coordinator shall provide the Office of the Deputy Secretary and OEPC Director with its pre-NOI best practices via email. The OEPC Director shall aggregate and publish these best practices within 90 days of the effective date of this Memorandum. Attachment 4 contains sample best practices.

Bureau NEPA Handbooks:

1. Within 45 business days of the effective date of this Memorandum, Bureau Directors and their NEPA staff shall meet with the Office of the Deputy Secretary and OEPC to identify whether changes are required to each Bureau's NEPA Handbook to comply with the Order. All approved changes shall be made to Bureau Handbooks within 15 business days of approval.

2. Bureau Handbook changes shall be implemented as soon as practicable through issuance of an updated Handbook or by using an established, Bureau-specific amendment process (i.e. issuance of a Permanent Instruction Memorandum). If a Permanent Instruction Memorandum is utilized, the Bureau's Handbook shall be revised and amended as soon as practicable.

Judicial Review:

This guidance establishes internal Department guidelines only. It does not create any rights, substantive or procedural, enforceable at law by any party.

Effective Date:

Directives and guidance within this Memorandum are effective immediately upon distribution.

Attachment 1 – Waiver Template

Request for Waiver of Time and Page limits under S.O. 3355

To: Office of the Deputy Secretary

Through: [Bureau Director]

From: [SES Supervisor Responsible for the Project]

Date:

1. Bureau or Office Name:

2. Title of Document: *Document Title*

3. Description of Action: *Description of the action or project that the NEPA document is analyzing, including the name of the project proponent and cooperating agencies, if applicable.*

4. Time waiver: ☐ 150 Page waiver: ☐ (*check all that apply*)

5. Description of Reason for Request:

For Example:

At this time, the project schedule cannot be expedited to meet the new time frames due to...Therefore, we are requesting a waiver of the schedule requirements and instead propose a Final EIS and ROD date of...

We are requesting a waiver of the 150 page limit, and seek an exception allowing for 300 pages. The project is unusually complex because...Therefore, we seek approval for a 300 page EIS.

6. Need and deadline (if any) for issuance of waiver(s) decision:

7. Positions of affected stakeholders: *Who is affected by not meeting the timeframe?*

8. Other relevant considerations: *For Example: Schedule delays and paper length due to project complexity, budget, analysis needs arising from....*

9. Attachments: *If the request is for a waiver of the time requirement, attach a copy of the original and the new proposed project timeline with the waiver request.*

Granted: _____ Date: _____

Denied: _____ Date: _____

Attachment 2 – DOI EIS Page Length Considerations and Guide

Chapter/Section	Standard EIS Number of Pages (150 Max)	Complex EIS Number of Pages (300 Max)
Executive Summary	5	10
Purpose and Need for Action	2	5
Proposed Action	2	4
Alternatives (Include Table)	10	20
Affected Environment	38	76
Environmental Consequences	85	167
Mitigation	5	10
Consultation and Coordination	3	8
Total	**150**	**300**
Appendix to include: Preparers, Index, References, Glossary, and Acronyms		

Attachment 3 – DOI Guidance on the Environment Review Process for a 365-Day Timeline

[See Attached]

Attachment 4 – Pre-Notice of Intent Guidance to Streamline the NEPA Process

A Notice of Intent must ***briefly:***

Describe the proposed action and possible alternatives
Describe the Agency's proposed scoping process
Provide a point of contact (POC)

Prior to publishing a NOI to prepare an EIS pursuant to the Order, CEQ Regulations, and NEPA best practices, Bureaus should have achieved the following:

1. Identified an achievable goal, a clearly defined proposed action, and a purpose and need statement that can achieve that goal.
    a. When the action involves a third party proponent, is the proposed project sufficiently defined to provide the facilitating or authorizing agency with the information it needs to prepare a clearly defined proposed action, purpose and need, and reasonable alternatives?
    b. Is the project technically and/or financially feasible?
    c. Is the application, as applicable, complete?
2. Identified and collected relevant known background information and data such as GIS layers, historical data, and other environmental documents and studies.
3. Identified what data is missing/needed or other skills needed for analysis.
4. Anticipated issues or concerns.
5. Identification of possible alternative ways to achieve the goal.
    a. Is it possible to meaningfully evaluate the effects of the proposed action and reasonable alternatives?
6. Sufficient resources are available to begin and complete NEPA in keeping with the time requirements of OFD, FAST-41, E.O. 13807 or S.O. 3355 (as applicable).
    a. Has the agency committed and made available the staffing or contracting resources need to begin NEPA?
    b. Is the project sponsor ready to begin NEPA, and have they committed sufficient and appropriate staff, POCs, consulting services, and financial resources to complete NEPA? If a contractor is used, is there a signed disclosure statement to avoid conflict of interest?
    c. Is there sufficient Agency and sponsor leadership attention to help prioritize tasks and assist in issue resolution?
7. Identified POCs for project proponent and Federal, State, and Tribal agencies that will need to be involved.
    a. MOU/MOAs executed with cooperating agencies.
8. Coordinated Work Plan/EIS development plan including approved schedule, critical action dates, timelines for consultations, and communications strategy.
9. Determine place, date(s), time(s) for public scoping meetings with/without third-party contractor assistance.

Department of the Interior Environmental Impact Statement (EIS) Process Timeline

	Timeline Varies	1 YEAR						90 days
DURATION	Pre-Notice of Intent (NOI)	Public comment for NOI and Scoping -- 30 days	Drafting and publication of DEIS	Public comment period for DEIS - min. 45 days (40 CFR 1506.10(c))	Minimum 90 days between publication of Draft EIS and Final EIS (40 CFR 1506.10(b)(1))	Review Period for Final EIS - minimum 30 days (40 CFR 1506.10 (b)(2))	Agency signs Record of Decision (ROD) no earlier than 31st day after notice	All Authorizations issued
NEPA Process	1. Receive Application (if applicable); 2. Review application to determine if complete; 3. Ensure sufficient staffing or contracting resources available to complete NEPA; 4. Put together project managment, writing, review and production teams; 5. Develop project schedule and coordination plan; 6. Develop page budget; 7. Develop draft Purpose and Need; 8. Screen and identify preliminary proposed project alternatives, eliminating unreasonable alternatives or other alternatives considered, but dismissed; 9. Identify and begin writing of Affected Environment; 10. Determine methodologies for analysis; 11. Identify potential environmental impacts--could include planning studies and resource surveys; 12. Identify and collect relevant existing current data; 13. Identify data needed; 14. Identify issues and concerns that will need to be addressed; 15. Identify points of contact for cooperating agencies and stakeholders, coordinate with government and non-government stakeholder groups, and develop memoranda of agreement as applicable; 16. Determine place, date(s), time(s) for scoping meetings; 17. Prepare NOI and complete approval process.	Publish NOI intiating Public Comment and Agency review. 1. Continue analysis of data identified during pre-NOI; 2. Continue drafting the affected environment and purpose and need; 3. Continue to develop and collected needed data.	1. Complete analysis of data (including information received during public comment period); 2. Continue drafting previous sections and begin writing Environmental Impact Document- prepared concurrentlty in sections/parts, whenever possible; 3. Identify Preferred Alternative* and share with cooperating agencies, as applicable; and 4. Complete internal DOI approval process. ^BLM Draft EIS for some programs may need to be completed in less than 4 months to allow for 90 day regulatory public comment period.	Publish DEIS - EIS must be filed with EPA, which starts the DEIS comment period 40 CFR 1506.10(a) (public hearings /meetings) ^ BLM Draft EIS or Land Use Plan must be available for 90 days	1. Address and respond to DEIS comments; 2. Prepare FEIS; 3. Coordinate with cooperating agencies and applicable stakeholders; 4. Complete approval process;	Publish FEIS/ROD - Consider agency comments/may recieve public comments		All required permit approvals received E.O. 13807, 82 FR 40463
ESA	Define Action Area - Obtain FWS concurrence with preliminary species list - Conduct any required species surveys/habitat assessments -Some surveys may need to be conducted at specific times of year	Develop Biological Assessment		Submit Biological Assessment and FWS prepares Biological Opinion (135 days maximum) 50 CFR § 402.14(c)		FWS isssus final BO/ concurrence letter		
Section 106	Identify consulting parties -Work with THPO /SHPO on areas of potential effect - Early investigations to identifying Section 106 properties - Early engagement with stakeholders	Invite consulting parties	Define Area of Potential Effect and assess adverse effects Identify historic properties / Conduct archaeological surveys (Fieldwork may be seasonal)	Consultation to resolve adverse effects		Sign Programmatic Agreement/Memorandum of Agreement		
Section 404 Permit	Determine project impact areas Conduct wetland delineations (note that fieldwork is seasonal), and submit permit application	Use EIS NOI to inform public of comment period and notice of permit application/public hearing	Preliminary additional determination with public hearings	USACE Least Environmentally Damaging Practicable Alternative (LEDPA) Determination--if needed, develop draft mitigation plan		Agency determination		
Other Determinations**	Pre-application Exchange of preliminary information	Assessment of Resources Develop Preliminary Mitigation	Submit permit application (if applicable) or include other information within the NEPA document for public review	Public Review	Address comments. Mitigation commitments are incorporated into the project	Agency determination		

*This chart assumes that the NEPA preferred alternative aligns with the alternative identified through the other environmental permitting processes.

**Other determinations may include, but are not limited to: Essential Fish Habitat, Endagered Species Act, Coastal Zone Management, etc.

THE DEPUTY SECRETARY OF THE INTERIOR
WASHINGTON

APR 2 7 2018

Memorandum

To: Assistant Secretaries
Heads of Bureaus and Offices
NEPA Practitioners

From: Deputy Secretary

Subject: NEPA Document Clearance Process

Purpose:

On August 31, 2017, I issued Secretary's Order 3355 (Order) with the intent of immediately improving the Department of the Interior (Department) National Environmental Policy Act (NEPA) process.[1] The process for obtaining official concurrence on draft documents related to the Environmental Impact Statement (EIS) process, such as Notices of Intent (NOI) and Notices of Availability (NOA), prior to their publication in the Federal Register, is an area that needs improvement because it has become overly burdensome. This concurrence process, known as "surnaming," is intended to provide Department leadership with valuable situational awareness and improve the quality of documents, but I believe there are better ways to meet these objectives while moving decision making further out into the field, reducing duplicated effort, and eliminating unneeded delay. Accordingly, this Memorandum replaces the EIS document surnaming process with a new briefing procedure and a streamlined approval process.[2]

Directive:

Any proposed Agency action[3,4] that is determined to require EIS review under NEPA[5] shall be reviewed according to the procedure outlined below.[6] Each Bureau shall coordinate with and follow the Office of Environmental Policy and Compliance's (OEPC) protocol for electronically submitting and tracking EIS documents that will be reviewed by Department leadership, which will ensure that the outlined procedures are followed.

1. Initial Action Notice:

---

[1] Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act, 40 C.F.R.§ 1500-1508.
[2] This Memorandum withdraws surnaming guidance documents that related to EIS review.
[3] *See* Administrative Procedure Act, 5 U.S.C § 704, § 551.
[4] 40 C.F.R. § 1508.18.
[5] National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(C)
[6] EIS review should only occur after fully and properly considering use of a relevant Categorical Exclusion or Environmental Assessment.

a. When a Bureau or Office determines to move forward with an EIS, either by receipt of a completed application from an external project proponent or an internal determination to pursue an action, a Notice, composed of a 1-2 page description of the proposed action, preliminary purpose and need, challenges to project completion (i.e., social, economic, physical), elected and appointed official perspectives, Tribal perspectives, applicability of the Fixing America's Surface Transportation Act or the One Federal Decision criteria (Briefing Materials), and an estimated NOI date, shall be sent to the Review Team via email. The Review Team shall be composed of the following officials (as appropriate to the EIS subject matter) or their designee(s):

   i. Regional or State Director;
   ii. Bureau Director;
   iii. Assistant Secretary;
   iv. Director, OEPC;
   v. Deputy Solicitor;[7]
   vi. Office of the Deputy Secretary;[8] and
   vii. The Chief of Staff.

b. No action is required of the Review Team at this stage. However, the Review Team shall have 2 days to further inquire into the noticed project or request a single oral briefing for all interested members of the Review Team.

2. Notice of Intent:

a. Once a NOI is prepared, the EIS Project Team[9] shall share the proposed NOI text, a briefing PowerPoint presentation, maps, a 1-2 page project description consistent with the Briefing Materials, and a draft congressional notification letter[10] with the Review Team via email. The Review Team shall have 3 business days to provide comments on the NOI or object to its publication.

b. The first Senior Executive Service (SES) member with line authority over the proposed action shall bear ultimate responsibility for the EIS process. If no objections are raised by the Review Team within its 3 day feedback period, and subsequent to the concurring signature of the assigned solicitor, the SES member with line authority over the project may sign and approve the NOI and send it to the Office of the Executive Secretariat and Regulatory Affairs (OES) for Federal Register publication review. Once the review is complete, OES will notify the Bureau or Office and they will deliver the NOI to the Federal Register for publication. If an objection is raised by the Review Team, then the SES member

[7] The Deputy Solicitor with authority over the proposed project and/or Bureau shall be the noticed Deputy Solicitor.
[8] All notices, waiver requests, and communications with the Office of the Deputy Secretary referenced in this Memorandum shall be directed to nepa.depsec@ios.doi.gov.
[9] EIS Project Teams include but are not limited to Departmental NEPA staff, Senior Executive Service members, project managers, subject matter experts, an attorney from the Office of the Solicitor, contractors, planners, and others who work on the EIS at the field level (EIS Project Team).
[10] See Attachment 1 for a Congressional Notification Letter template.

will either resolve the objection or obtain a decision from the Office of the Deputy Secretary regarding the objection, prior to signing and approving the NOI.

3. Draft EIS Development Briefing:

   a. After an NOI is published and its scoping comment period closes, the designated EIS Project Team shall prepare and schedule an oral briefing to inform the Review Team of the planned development of the Draft EIS. Briefing materials shall be provided to the Review Team one calendar week prior to the briefing date. The briefing shall be held either in person or via teleconference and should highlight the opportunities and challenges presented in moving forward with the EIS process. Ideally, each member of the Review Team should be present in a single briefing, whether in person or via teleconference.

   b. The Review Team shall provide feedback to the EIS Project Team during the briefing and up to 5 business days after the date of the briefing. If no objections are raised by the Review Team, the delegated SES member may direct the EIS Project Team to continue development of the Draft EIS. Members of the Review Team who do not participate in the briefing or feedback period may raise new or otherwise unforeseen issues that materially impact the development of a Draft EIS with the Deputy Secretary in a timely and expeditious manner for resolution with the EIS Project Team.

4. Draft EIS and NOA Clearance:

   a. Upon completion of the administrative Draft EIS, EIS Project Teams shall provide the Review Team, via email, the link to an electronic copy of the Draft EIS and schedule an oral briefing. The oral briefing shall provide an overview of the proposed action, purpose and need, alternatives, salient environmental impacts and resource conflicts, and the significant opportunities and hurdles that exist in completing the project. Briefing Materials shall be provided to the Review Team 1 calendar week prior to the briefing date. In particular, the briefing should address the Secretary's priorities, resolution of resource conflicts, land-use restrictions, transportation or access limitations, elected official views, and inter-jurisdictional considerations.

   b. The EIS Project Teams shall brief the Review Team, collect comments and guidance for amending the Draft EIS, and poll whether there are any objections to approving the Draft EIS for release for public comment. Ideally, each member of the Review Team should be present in a single briefing, whether in person or via teleconference. The Review Team shall provide feedback to the EIS Project Team during the briefing and up to 10 business days after the date of the briefing. Members of the Review Team who do not participate in the briefing or feedback period may raise new or otherwise unforeseen issues that

materially impact the Draft EIS with the Deputy Secretary in a timely and expeditious manner for resolution with the EIS Project Team.

c. The EIS Project Teams shall also include a draft NOA as part of the briefing package:

   i. If the only NOA format used is provided by the Environmental Protection Agency (EPA), then the NOA may be submitted directly to the EPA for publication in the Federal Register with the filing of the approved Draft EIS.

   ii. If the Bureau must (by regulation) or chooses to (by practice) publish a Bureau-specific NOA in addition to the EPA's NOA, then the Bureau-specific NOA will be sent to OES for Federal Register publication review. Following the review, the Bureau or Office will deliver the NOI to the Federal Register for publication following clearance of the Draft EIS, in coordination with the simultaneous (same day) submission of the Draft EIS and publication of the EPA-issued NOA.

d. If no objections are raised by the Review Team, and subsequent to the concurring signature of the assigned solicitor, the delegated SES member may sign and approve the Draft EIS for publication. If an objection is raised by the Review Team, then the SES member will either resolve the objection or obtain a decision from the Office of the Deputy Secretary regarding the objection, prior to signing and approving the document.[11]

5. Final EIS and NOA Clearance:

   a. Following the Draft EIS public and inter-agency comment analysis, EIS Project Teams shall prepare: 1) a Final EIS, 2) a Record of Decision (ROD), and 3) NOAs (if required or by practice) for both the Final EIS and the ROD; provide the Review Team, via email, the link to electronic copies of the documents; and schedule an oral briefing.

   b. The EIS Project Teams shall brief the Review Team on the Final EIS and Draft ROD. Briefing materials shall be provided to the Review Team one calendar week prior to the briefing date. The Review Team shall provide feedback to the EIS Project Team during the briefing and up to 5 business days after the date of the briefing. Ideally, each member of the Review Team should be present in a single briefing, whether in person or via teleconference. Members of the Review Team who do not participate in the briefing or feedback period may raise new or otherwise unforeseen issues that materially impact the Final EIS with the Deputy Secretary in a timely and expeditious manner for resolution with the EIS Project Team.

[11] Paragraphs 4(c) and 4(d) are defined as 'Approval and Publication Protocol'.

c. Unless an objection is raised, the delegated SES member may then sign and approve the Final EIS and NOA according to the Approval and Publication Protocol.[12]

6. ROD and NOA Clearance:

a. After the close of the Final EIS notice period (30 days), the EIS Project Team shall send a one-page notice to the Review Team seeking objections to Final ROD approval. The one-page notice shall include: 1) a brief discussion on any substantive issues that arose during the Final EIS notice period, 2) the Final ROD text, and 3) confirmation that it did not change from what was initially reviewed, or advise of any outstanding issues that need to be addressed, such as protest resolutions or Governor's Consistency Review objections.

b. No action is required of the Review Team at this stage. However, the Review Team shall have 3 business days to inquire further into the ROD or request a single oral briefing for all interested members of the Review Team. Unless an objection is raised, the delegated SES member may sign and approve the ROD and, if applicable, the NOA, according to the Approval and Publication Protocol.

Judicial Review

This guidance establishes internal Department guidelines only. It does not create any rights, substantive or procedural, enforceable at law by any party.

Effective Date:

Directives and guidance within this Memorandum are effective immediately upon distribution.

[12] This term is subject to bureau specific requirements including Governor's Consistency Reviews and Protest Resolution.

Attachment 1 – Sample Congressional Notification Letter

Department of the Interior
Bureau of Land Management
1849 C St NW # 5660
Washington, DC 20240

To: [Elected Official]

From: [Bureau, Region, Office, etc.]

Subject: [NOI, Draft EIS etc.] Regarding [Project]

[Document Title Including the Name of the Project and its Phase]

Dear [Elected Official]:

This letter is to notify your office that the [Bureau] is taking action on [Project], which will [wholly or in part] take place within your [District/State].

The project's [NOI/NOA/Draft EIS etc.] is attached for you information and convenience. If you have further questions regarding the project, please feel free to contact [first SES member with line authority of over the action] at [phone number] or [email address].

Best regards,

[SES member name]
[e/Signature]

Attachment

THE DEPUTY SECRETARY OF THE INTERIOR
WASHINGTON

APR 2 7 2018

Memorandum

To: Assistant Secretaries
Heads of Bureaus and Offices
NEPA Practitioners

From: Deputy Secretary

Subject: Compiling Contemporaneous Decision Files

Purpose:

This Memorandum provides direction regarding the contemporaneous compilation of Decision Files to document Agency review and decision making pursuant to the National Environmental Policy Act (NEPA) and other applicable requirements.[1]

Background:

On August 31, 2017, I issued Secretary's Order 3355 (Order) to immediately improve the Department of the Interior's (Department) NEPA process. In the course of implementing that Order, it has come to my attention that some Bureaus do not compile Decision Files contemporaneously with the development of Agency decisions. This yields a need to invest significant time and resources later if the Bureau is asked to compile records before or following a decision.

The Department has multiple responsibilities for the maintenance and disclosure of Federal records. For purposes of this Memorandum, document compilation responsibilities fall into three general categories that often intersect, including: (1) records management governed by 44 U.S.C. Chapters 29 and 31; (2) the Freedom of Information Act (FOIA);[2] and (3) preparation of Administrative Records for litigation.

A Decision File is a contemporaneous record of the Agency's decision-making process. Practically, the Decision File is a collection of documents maintained by a designated employee who is generally the project's program manager, the project manager, or staff who has access to the relevant documents that detail the development of an Agency's decision. Compilation of a Decision File should flow from an already established practice within the Bureaus and Offices to comply with the Federal Records Act (FRA).[3]

---

[1] These procedures apply to Decision Files for Agency decisions other than notice-and-comment rulemaking, which have their own proscribed processes.
[2] 5 U.S.C. § 552.
[3] 44 U.S.C. § 31 et seq.

The FRA dictates the need to document, and preserve evidence of, Agency decisions. It requires the head of each Federal Agency to make and preserve records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the Agency for the purpose of furnishing the information necessary to protect the legal and financial rights of the Government and of persons directly affected by the Agency's activities.[4] By adhering to the FRA, Bureaus and Offices will find themselves well placed to create a Decision File in real time.

If the decision is subjected to judicial review, the Decision File will be used as the primary basis for compilation of the Administrative Record to be submitted to a court. This Memorandum does *not* address the standards for compiling an Administrative Record, which may be a subset of the Decision File document or, in some cases, could be broader. The Decision File may also serve as the primary compilation of documents that may be responsive to a FOIA or other records request, although additional document gathering may be needed depending upon the nature of the request.

Directives:

1. No later than May 11, 2018, each Bureau shall issue direction requiring contemporaneous compilation of Decision Files for decision-making processes that will or could result in a "final Agency action" subject to challenge under the Administrative Procedure Act.[5] Each Bureau shall further establish a system for standardized Decision File tracking to comply with this Memorandum and that comports with the needs of the Office of the Solicitor, the Office of Environmental Policy and Compliance, and the Office of the Chief Information Officer.

2. The Decision File should:

    - Contain the complete story of the Agency decision-making process, including options considered and rejected by the Agency;

    - Include important substantive information that was presented to, relied on, or reasonably available to the decision maker;

    - Establish that the Agency complied with relevant statutory, regulatory, and Agency requirements; and

    - Demonstrate that the Agency followed a reasoned decision-making process.

3. Bureaus and Offices have wide latitude to create and maintain Decision Files, but the following general guidelines should be followed:

---

[4] 44 U.S.C. § 3101.
[5] 5 U.S.C. § 704.

- The Office of the Solicitor should be consulted throughout the process as necessary;

- A Decision File should be created once consideration of a proposal, application, request, or decision begins, which will vary based on the situation;

- The Decision File should serve as a single organized source of information that records the Agency decision and decision-making process;

- As a routine matter, the Decision Files should capture information from employees who are involved in the decision-making process prior to those employees leaving such roles;

- The Decision File should be kept in an accessible location and should be organized in a logical manner, such as chronologically or by topic—or even chronologically within each topic—so that documents can be added to the Decision File as they are generated or received;

- To the extent documents may be subject to a privilege, they should be so marked to the extent practicable during the decision-making process;

- All documents placed in the Decision File should be appropriately labeled and dated;

- Substantive meetings that are relevant to the decision-making process should be sufficiently documented;

- Drafts that help substantiate the Agency's decision-making process should be included in the Decision File;

- Documentation of electronic information (such as that found on websites) and communications (such as emails) should be maintained in the Decision File only if relevant, substantive, and if it documents the decision-making process;

- When information contained on websites is relied on, the Decision File should contain a contemporaneous copy of the website, including the address and date it was downloaded, to ensure that the information relied on is preserved before the website content changes;

- Contemporaneous memoranda that document relevant oral communications, serve to explain otherwise confusing emails, or that document other matters that demonstrate the Agency's decision-making process should be written or collected and placed in the Decision File before the final decision is reached; and

- Once the decision maker has made a final decision, the Decision File should be closed.

4. Bureaus and Offices are directed to provide a copy of the direction referenced in section 3 – paragraph 1 to the Office of the Deputy Secretary at nepa.depsec@ios.doi.gov no later than May 15, 2018.

Effective Date:

Directives and guidance within this Memorandum are effective immediately upon distribution.

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240

APR 30 2018

PEP - ENVIRONMENTAL REVIEW MEMORANDUM NO. ERM 10-09

To: Heads of Bureaus and Offices

From: Michaela E. Noble, Director
Office of Environmental Policy and Compliance (OEPC)

Subject: Entering Information into the Department National Environmental Policy Act (NEPA) and Permit Tracking Database

The purpose of this environmental review memorandum (ERM) is to instruct the bureaus and offices on what information to enter into the Department-wide NEPA and Permit Tracking Database (Database).

The Database

The Database can be accessed at: https://ecl.doi.gov/nepadocs.cfm. If you are experiencing problems and have already contacted your local IT support without resolution, please call OEPC at 202-208-5464 and someone will try to assist you.

Information Entered in the Database

Bureaus and offices are to follow this guidance when inputting data:

- Enter information on all projects in which a bureau or office is the Lead Federal Agency for an environmental impact statement (EIS) or if a bureau or office is a cooperating agency or participating agency for Title 41 of the Fixing America's Surface Transportation (FAST-41) or Executive Order (EO) 13807 project. At this time, the database does not capture information on proposed project environmental review and permitting processes in which another federal agency is the lead agency for NEPA on non-FAST-41 or EO 13807 projects. Nor does this database track environmental assessments (EAs) or categorical exclusions.

- Each project entry should only be added once into the Database. Bureaus/offices should search for the project prior to entering any data to ensure that the project is not entered into the Database more than once.

- For bureau or office led EISs, a project must be entered into the Database once a bureau or office has developed the project timeline and prior to the publication of a Notice of Intent. The project timeline must be uploaded into the Database at the time the project is entered. If you are co-lead with another bureau, the bureau or office that is the main point of contact for the project is responsible for database entry.

- For FAST-41 projects, review and permitting actions will be entered into the Database once the Coordinated Project Plan has been developed and posted in the Federal Permitting Dashboard (Dashboard) and not later than 60 days after initiation as a covered project. Bureaus/Offices will be responsible for entering data in both the Database and the Dashboard and ensuring that the same data is in both systems.

- For EO 13807 projects, review and permitting actions will be entered into the Database once the Permitting Timetable has been established and the project is in the Dashboard. Bureaus/Offices will be responsible for entering data in both the Database and the Dashboard and ensuring that the same data is in both systems.

- Required data fields are marked by an asterisk in the database. The information submitted for projects in which a bureau or office is the Lead Federal Agency should capture: general project information; NEPA team points of contact; co-lead and cooperating agencies and points of contact for each of the agencies; NEPA document milestones; bureau/office permitting actions and milestones; and other Federal Agency permitting actions and milestones.

- For FAST-41 or EO 13807 projects in which a bureau or office is a cooperating agency or participating agency, the information submitted should capture: general project information, bureau or office points of contact, and bureau/office permitting actions and milestones.

Updating Information in the Database

The project data must be kept up-to-date. At a minimum, the information in the Database should be updated by the responsible bureau or office on a quarterly basis (March, June, September, and December). However, other guidance for FAST-41 or EO 13807 projects may require more frequent information updates. Bureaus and offices should follow the update requirements outlined in guidance for those types of projects and update the Database at the same time. Bureaus and offices should also ensure that the project's Database entry is up to date prior to scheduling any Headquarter briefings regarding the project.

On occasion, OEPC will receive data requests from the Council on Environmental Quality (CEQ) and senior leadership. If adequate time allows, OEPC will inform bureaus and offices of the request and allow time to update project information. However, if time does not permit for bureau/office updates, OEPC will run the data request with the information currently available in the Database on behalf of the Department.

Database Resources

Within the Database are two resource tabs; one for NEPA resources and one for FAST-41 resources. More detailed instructions on how to fill out the Database fields is located under the NEPA resource tab to assist the bureaus and offices in entering information correctly.

Bureau/Office Administrators and Users

Each bureau/office is to designate at least one Headquarters primary administrator and one backup administrator. The bureau/office administrators have access to edit all projects related to their bureau or office. Bureau/office administers also have the role of approving bureau/office users. After they are approved, bureau or office users will be able to edit project information. Bureaus are responsible for submitting the names and contact information of their administrators to OEPC.

All other Department employees that are on the Department's network will be able to search for projects and see the project summaries for all projects in the Database.

THE DEPUTY SECRETARY OF THE INTERIOR
WASHINGTON

JUN 1 1 2018

Memorandum

To: Assistant Secretaries
Head of Bureaus and Offices
Directors of State, Regional, and Field Offices

From: Deputy Secretary

Subject: Standardized Intra-Department Procedures Replacing Individual Memoranda of Understanding for Bureaus Working as Cooperating Agencies

Department of the Interior (Department or DOI) Bureaus that are asked by another DOI Bureau that is the lead agency in a National Environmental Policy Act (NEPA) review shall act as a cooperating agency based on the following parameters, and without the need for an individual Memorandum of Understanding (MOU).

Background

The National Environment and Policy Act (NEPA),[1]through the Council on Environmental Quality,[2] directs lead agencies conducting environmental reviews to include other Federal or State agencies with jurisdiction, either by subject matter expertise or by law, as cooperating agencies during a NEPA analysis. Federal and State Agencies historically formalize this relationship through the use of a MOU to clarify each agency's roles and responsibilities.

Despite residing within the same department, DOI's Bureaus have also employed NEPA cooperating agency MOUs. Intra-Department MOUs were intended to coordinate Bureau efforts and direct the deployment of resources, yet they often and unnecessarily delay environmental reviews. Accordingly, the following guidance replaces the Intra-Department MOU process with standardized guidance for efficient NEPA review and Bureau collaboration.

Directive

Intra-Department Bureaus that are asked to participate in the NEPA process[3], where another DOI Bureau is the lead Agency, and that qualifies as a cooperating agency under 42 U.S.C. § 4332 and 40 CFR 1501.6, shall act as a cooperating agency without developing an individual MOU. Instead, the agreements below should serve as their operating agreement.

---

[1] 42 U.S.C. §4332.
[2] 40 CFR 1501.6.
[3] The direction in this Memorandum applies to Environmental Impact Statements, Environmental Assessments, Categorical Exclusions, and any other form of analysis under NEPA.

Agreements

Intra-Department cooperating agency relationships shall be conducted in accordance with 40 CFR 1501.5 and 1501.6 and this section, which sets forth the Bureaus' cooperative roles in the NEPA review process:

Determination of Lead Agencies

When a project proponent or agency proposes an action as defined by the Administrative Procedure Act §704 or by 40 CFR §1508.18, lead and cooperating agencies shall be determined as soon as practicable according to 40 CFR 1501.5 and 1501.6. The lead and cooperating agency shall immediately designate a Point of Contact (POC) to represent each Bureau in Intra-Departmental consultations regarding that project or action.[4]

In executing this process, Lead Agencies shall:

a. request the participation of each cooperating agency in the NEPA process at the earliest practicable time;
b. 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 the lead agency;
c. to the extent possible:[5]
    1. Recover costs from project proponents; and
    2. Fund major activities or analyses it requests from cooperating agencies, and include such funding requirements for NEPA analysis in project budget requests, to the extent that project proponents are not already paying for the analysis.
d. organize the NEPA review for a proposed project or action, including assigning a Senior Executive Service (SES) official to lead the NEPA review process and identifying a primary POC at each cooperating or participating agency;
e. meet with a cooperating agency at that Bureau's request;
f. prepare and coordinate Federal Register notices and filing Environmental Impact Statement (EIS) with EPA;
g. prepare the sole NEPA analysis for the project in coordination with the cooperating agencies. All NEPA analyses should include an adequate level of detail to inform decision makers regarding the environmental impacts of a proposed project or action while maintaining the Department's document and timeline standards;
h. inform cooperating agencies of new material information and changes related to the project or action;
i. review and consider comments submitted by cooperating agencies;

---

[4] In instances where Bureaus are co-lead agencies, it is incumbent upon them to determine which acts as the administrative lead agency with final responsibility responsible for completion of the tasks within the Lead Agency section of this Memorandum. However, co-lead agencies shall work together to complete these responsibilities.
[5] The terms in this paragraph apply to both intra and inter Departmental NEPA analysis.

j. if required, develop the NEPA document's purpose and need, identify the range of alternatives to be analyzed, identify the preferred alternative(s), and determine whether to develop the preferred alternative to a higher level of detail;
k. provide cooperating agencies the opportunity to review and contribute to all relevant and substantive phases of the NEPA analysis and its preparation;
l. if required by One Federal Decision (OFD), prepare and publish a single Record of Decision (ROD) for all cooperating agencies responsible for the project or action to support any necessary authorization decisions. The ROD will incorporate the decisions of each such agency; and
m. maintain a contemporaneous Decision File of the information assembled and utilized by the cooperating agencies as the basis for their NEPA review.

In executing this process, Cooperating Agencies shall:

a. participate in the NEPA process beginning at the earliest practicable time;
b. participate in the scoping process, attend regularly scheduled meetings, and engage in any other activity necessary to efficiently conduct a project's NEPA analysis;
c. upon the request of the lead agency, assume responsibility for developing information and preparing environmental analyses, including portions of an Environmental Assessment (EA) or EIS with which that Bureau has special expertise;
d. review and submit comments to the lead agency on the environmental analysis performed by the lead and other cooperating agencies within the specified timeframe;
e. if required by OFD, participate in the preparation of a single ROD by providing technical drafting assistance and comments that support the underlying authorization decision;
f. compile a contemporaneous Decision File composed of all documents and communications that inform the cooperating agency's analysis, and systematically provide those documents to the lead agency; and
g. make staff support available at the lead agency's request, within the Bureau's available resources.

Dispute Resolution

a. Any disputes arising among lead and cooperating agencies in the NEPA review process shall be promptly brought to the attention of the appropriate first line SES members with authority over the project, or the office responsible for the NEPA review, and be resolved by them;
b. In the event that first line SES members are unable to resolve such disputes, the issue shall be raised to the appropriate Bureau directors for resolution;
c. In the event that Bureau directors are unable to resolve such disputes, the issue shall be raised to the appropriate Assistant Secretaries for resolution; and
d. In the event that Assistant Secretaries are unable to resolve such disputes, the issue shall be raised to the Office of the Deputy Secretary for resolution.

NEPA Timelines, Schedules, and Document Page Count

a. When conducting a NEPA analysis, Intra-Departmental cooperating agencies shall strive to meet the page count and timelines set forth in Secretarial Order 3355 by agreeing upon a timeline or schedule of milestones;
b. If a proposed project or agency action qualifies as a Fixing America's Surface Transportation Act or OFD action, then Intra-Departmental Bureaus will comply with the timelines set forth in the OFD Memorandum of Understanding;
c. To comply with agreed upon timelines, Intra-Departmental agencies shall cooperate, communicate, share information, and resolve conflicts that could prevent timely completion of the NEPA review; and
   Each agreed upon project or action schedule shall be uploaded to the NEPA and Permit Database by the lead agency, and where appropriate, the Federal Permitting Dashboard, as soon as is practicable based upon the timely filing of the project or action's Notice of Intent (NOI).

Communication

Intra-Department cooperating agencies shall proactively participate in environmental reviews by communicating with one another, as well as project proponents and stakeholders, in an effective and structured manner that starts early and continues throughout the review process. Active communication will provide all cooperating agencies with the opportunity to identify concerns, raise potential issues early in the review process, and identify solutions.

Concurrent Reviews

Cooperating agencies shall carry out their obligations with respect to NEPA concurrent to the review performed by the lead agency.[6] Intra-Department NEPA reviews shall also be conducted according to the guidelines within Secretary Order 3355.

Additional Provisions

a. Nothing contained in this Memorandum is intended to or should be construed to limit or affect the authority or legal responsibilities of the Department's Bureaus, nor bind Bureaus to perform actions beyond their respective authorities;
b. This Memorandum shall be implemented consistent with applicable law and subject to the availability of appropriations;
c. Specific activities that involve the transfer of money, services, or property between or among the Bureaus may require execution of separate agreements or contracts that occur as a matter of course;
d. This Memorandum does not preclude the utilization of NEPA compliance agreements between Bureaus that were in place prior to its effective date; and

[6] Concurrent review includes but is not limited to Section 7 review under the Endangered Species Act, Section 106 review under the National Historic Preservation Act, and other permitting activities such as coordinating Right-of-Way authorizations.

e. This Memorandum 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.

Effective Date

This Memorandum is effective immediately upon distribution and shall remain in effect until revoked in writing by the Deputy Secretary.

The Heads of Bureaus and Offices are responsible for transmitting this Memorandum to the appropriate staff in the State, regional, and field offices.

THE DEPUTY SECRETARY OF THE INTERIOR
WASHINGTON

JUL 23 2018

Memorandum

To: Assistant Secretaries
Heads of Bureaus and Offices
NEPA Practitioners

From: Deputy Secretary

Subject: Reporting Costs Associated with Developing Environmental Impact Statements

Purpose

This memorandum provides guidance to yield greater transparency by capturing the estimated costs to develop and produce EIS documents prepared by the Department's Bureaus and Offices when serving as the lead Agency.[1] A standard description of cost estimates will assist Bureaus in determining how to appropriately focus resources, diagnose problems, find opportunities to improve project planning, and be used to meet the Agency Performance Accountability System requirements established under Executive Order 13807.

Scope

This memorandum applies to all proposed actions for which the Department, including any of its Bureaus or Offices, is the lead Agency and has published a Notice of Intent (NOI) to prepare an EIS. For purposes of this memorandum, "environmental review costs" include the lead Agency's personnel, contractors, or other direct costs associated with project authorization and NEPA compliance, but do not include the estimated costs incurred by cooperating Agencies.[2] "Environmental review costs" also include the lead Agency's costs associated with complying with laws other than NEPA, such as the Endangered Species Act or the National Historic Preservation Act, that are necessary for the lead Agency to authorize the proposed action evaluated by the EIS.

Directive

Upon the effective date of this memorandum, all Bureau or Office-led Draft, Supplemental, and Final EISs shall display the estimated environmental review costs associated with developing and producing the EIS, to that point in the NEPA process, on the EIS cover page according to the following guidance:

---

[1] 40 CFR 1508.16.
[2] 40 CFR 1501.6.

I. Cost Tracking and Reporting Guidance

1. For ongoing proposed actions, lead Bureaus or Offices shall make a good faith estimate of past incurred environmental review costs;

2. To facilitate an estimate, each lead Bureau or Office shall begin tracking environmental review costs once it has determined that it will prepare an EIS to evaluate a proposed action;[3]and

3. Each lead Bureau or Office shall continue to track environmental review costs until it issues a final decision on the proposed action evaluated by the EIS.

II. Developing a Cost Estimate

1. Lead Bureaus and Offices shall track the costs of their full-time equivalent (FTE) personnel hours, contractor costs, and other direct costs related to the proposed action and associated environmental review.

2. Lead Bureau and Office FTE hours should include an estimate of the cost of time spent by:

    a. the project management team responsible for the proposed action;
    b. subject matter experts who participate in a portion of the review;
    c. managers or supervisors who have delegated responsibility over or direct oversight of the proposed action and EIS; and
    d. attorneys who review documents pertaining to the proposed action.

3. Contractor costs should include:

    a. the direct costs associated with a lead Bureau or Office employing a contractor to develop an EIS or other environmental reviews;
    b. any additional contractor costs; and
    c. any additional third-party costs that were necessary to complete the EIS or other environmental reviews that were not directly billed to the contractor.

III. Calculating Time and Costs

1. Lead Bureaus or Offices shall calculate a proposed action's environmental review costs by totaling the lead Agency's direct and contractor costs and rounding that number to the nearest thousand-dollar figure.[4] Department financial and administrative systems

---

[3] Costs include those incurred pre-application and pre-Notice of Intent (NOI) to assist the applicant in submitting a complete application and to assist in issuing an effective NOI and EIS.

[4] For example, if environmental review costs for a Draft EIS total $456,678.09, then the number displayed prominently on the cover page of the Draft EIS should be $457,000.

may be used to track such costs.[5]

2. Lead Bureaus and Offices may calculate **FTE costs** by estimating, or by reporting tracking system data, the amount of applicable staff time spent on an environmental review and multiply those hours by the Bureau or Office's average hourly rate.

   FTE Costs = Total estimated FTE hours x Average FTE Hourly Rate

3. Lead Bureau, Office, and applicant-funded **contractor costs** of producing or reviewing an EIS and other environmental reviews should be totaled and added to Bureau or Office FTE costs as described above.

   Contractor Costs = Bureau/Office contractor expenses + applicant contractor expenses + FTE costs devoted to applicant document review + additional third-party costs

4. Lead Bureaus and Offices shall **total FTE and contractor costs**, and any other direct costs associated with preparing an EIS and other environmental reviews, rounded to the nearest thousand-dollar figure, and prominently display the total costs on the EIS cover page at the Draft, Supplemental, and Final EIS stage.

   Total Costs = FTE Costs + Contractor Costs

IV. Cost Reporting

1. The Lead Bureau or Office shall enter environmental review costs into the NEPA and Permit Tracking Database (Database) at the Draft EIS, Supplemental EIS, and Final EIS stages and include the total estimated costs on the covers of the Draft EIS, Supplemental EIS, and Final EIS. Please see Attachment 1 for the template language and placement of total estimated costs on EIS cover pages.

2. No later than 30 days after the publication or issuance of the final Agency decision or action on the project, the Lead Bureau or Office shall total its estimated environmental review costs and upload them into the Database.

Judicial Review

This guidance establishes internal Department guidelines only. It does not create any rights, substantive or procedural, legally enforceable by any party.

---

[5] Work Breakdown Structure (WBS) coding may be used for applicable proposed actions, even if costs accrue across budget cycles. These codes can be used in the Department's time and attendance tracking system, QuickTime; travel approval and voucher system, Concur; and financial systems, including Federal Business Management Systems (FBMS) to assist with the calculation of authorization and environmental review costs associated with each project.

Attachment 1 – Example EIS Cover Page

DRAFT ENVIRONMENTAL IMPACT STATEMENT

FOR THE PROPOSED HABITAT CONSERVATION PLAN FOR THE ENDANGERED AMERICAN BURYING BEETLE FOR AMERICAN ELECTRIC POWER IN OKLAHOMA, ARKANSAS, AND TEXAS

VOLUME I: CHAPTERS 1-7

U.S. Fish and Wildlife Service
Southwest Region
Albuquerque, NM

March 2018

Estimated Lead Agency Total Costs Associated with Developing and Producing This EIS

$274,000

THE DEPUTY SECRETARY OF THE INTERIOR
WASHINGTON

AUG 06 2018

Memorandum

To: Assistant Secretaries
Heads of Bureaus and Offices
NEPA Practitioners

From: Deputy Secretary

Subject: Additional Direction for Implementing Secretary's Order 3355 Regarding Environmental Assessments

Purpose:

On August 31, 2017, I issued Secretary's Order 3355 (Order) to improve the Department of the Interior's (Department) environmental review processes under the National Environmental Policy Act (NEPA). Section 4b of the Order directed the Department's Bureau and Office (Bureau) heads to recommend target page and time goals for the preparation of Environmental Assessments (EA) where a Bureau is the Lead Agency. The following guidance considers and incorporates each Bureau's feedback for the thorough and timely consideration of environmental impacts analyzed within an EA document.

EA Guidance:

1. EA Page and Time Guidelines:

    a. Bureaus should strive to produce EAs that are consistent with both the Council on Environmental Quality's (CEQ) guidance and the Department's normal practice. The CEQ recommends that EAs be approximately 10-15 pages and be completed in 3 months or less.[1] The Department generally produces EAs that are approximately 30-40 pages.

    b. In certain circumstances, EAs may need to exceed CEQ's guidance and the Department's normal practice. In these instances, Bureaus should strive to complete EAs in 75 pages or less, excluding appendices, and to conclude the EA

[1] Council on Environmental Quality: Memorandum to Agencies – *Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations*, 46 Fed. Reg. 18026 (March 23, 1981).

review within 180 calendar days of the commencement[2] date, pursuant to 43 CFR § 46.325.[3]

c. If a proposed action presents particular environmental challenges that make it unlikely for an EA to be completed in less than 75 pages or 180 days, the EA Project Teams should consult with the Office of the Solicitor, Bureau Director, and first-line Senior Executive Service (SES) member with line authority over the proposed action to determine the best course of action.

2. EA Tracking and Management:

a. Within 30 calendar days of the effective date of this Memorandum:

i. Bureaus shall upload[4] EA project information and schedules to the NEPA and Permit Tracking Database (Database) for EAs that were initiated before the effective date of this Memorandum and that are not yet complete, if the total time to complete the EA is likely to exceed 180 calendar days from the effective date of this Memorandum or is unlikely to be completed in 75 pages or less.

ii. Bureaus are not required to upload existing EA project information and schedules if the EA will be completed within 180 calendar days of the date of this Memorandum.

iii. Bureaus shall upload EA project information and schedules to the Database for EAs that are initiated after the effective date of this Memorandum if the total time to complete the EA is likely to exceed 180 calendar days or is not likely to be completed in 75 pages or less.

b. EA documents should continue to be approved and/or cleared according to each Bureau's current program, and with the expectation that the first-line SES member with line authority over the proposed action will bear ultimate responsibility for each EA.

3. EA Team and Solicitor Assignments:

a. For each EA to be uploaded into the Database, provide the name, title, and contact information for the first-line SES member with line authority over the proposed action and the other members of the EA Project Team, by uploading the

---

[2] EAs commence once a Bureau receives a completed application from a project proponent, receives or obtains sufficient information to analyze the proposed action, publishes a Notice of Proposed Rulemaking in the Federal Register, or internally determines to pursue action planning.

[3] EAs conclude upon the issuance of a Notice of Intent (NOI) to prepare an Environmental Impact Statement (EIS), the signing of a Finding of No Significant Impact (FONSI) or mitigated FONSI, or written determination of no further action.

[4] The task of uploading EA project information and schedules to the Database may be assigned to any Bureau employee, however, that person should have first-hand knowledge of the project and the status of the EA document.

information into the Database. Contact information shall include a telephone number and an email address.[5]

b. An attorney in the Office of the Solicitor, based either regionally or in Washington, DC, shall be incorporated into all new and existing EA Project Teams[6] if the EA is expected to be controversial, complex, or is perceived to possess a greater-than-average risk of litigation.[7] Bureaus and their EA Project Teams shall present EAs that may meet this criteria to the Office of the Solicitor, which will then determine whether an attorney needs to be assigned to the EA Project Team. The assigned attorney is responsible for ensuring that the EA is legally sufficient prior to the conclusion of the EA analysis.

c. Where required, Bureaus shall provide the assigned attorney's name and contact information in the Database.

4. Meeting EA Page and Timeline Goals:

The following recommendations should help EA Project Teams plan with the goal of completing an EA in 180 calendar days and 75 pages or less. While each of these recommendations may prove helpful, Bureaus are expected to draw upon their expertise and experience to address individual issues as they arise:

a. Departmental NEPA regulations state that an EA can be prepared in any format that is useful to facilitating planning, decision making, and informing the public.[8] The attachment provides a suggested layout and page count for a fully developed, yet concise EA.[9]

b. Upon receiving demonstrated interest from a project proponent, and prior to initiating an EA, it is considered best practice to assess or evaluate proponent applications to ensure that they are complete and properly prepared by the proponent. This assessment may be comprised of a meeting, teleconference, follow-up discussion, or an application review with the proponent prior to accepting an application. This assessment is not a decisional step, but is intended to confirm that proponents are ready to proceed.

---

[5] This directive is not asking for the list of preparers pursuant to 40 CFR §1502.17, but those responsible for project oversight, management, and compliance with this Memorandum pursuant to 43 CFR § 46.310.

[6] EA Project Teams may include, but are not limited to, Departmental NEPA staff, Senior Executive Service members, subject matter experts, contractors, planners, attorneys from the Office of the Solicitor, and others who work on EAs at the field level.

[7] This term does not alleviate the Office of the Solicitor from reviewing EA documents prior to publication; it simply limits their required formal EA Project Team participation to projects that are controversial, unusually complex, or possess a greater-than-average litigation risk.

[8] 43 CFR § 46.310, 46.315.

[9] This template is simply meant as a guide to help EAs remain under 75 pages, in the event that page restraint becomes an issue, and Bureaus should utilize their experience and expertise to find solutions that address unique circumstances as they arise.

c. Pursuant to 40 CFR §1501.6, Bureaus shall include as cooperating Agencies other Federal agencies with jurisdiction by law or special expertise in the project subject matter,[10] and Bureaus must cooperate at the request of another Bureau.

5. Public Involvement:

a. Both CEQ[11] and the Department's[12] regulations require some form of public involvement – *to the extent practicable*[13] – in the preparation of an EA. Each regulation gives Bureaus the discretion to determine how much and what kind of public involvement is most appropriate for an individual EA.

b. Public involvement may include, but is not limited to, public notice prior to or during EA preparation, public scoping, public meetings, requests for information, or public comment on the completed EA and unsigned Finding of No Significant Impact.

c. Bureaus should ensure that the selected level of public involvement is incorporated into the project's 180-calendar-day timeline.[14]

6. Contractor Guidance:

When a Bureau is using a contractor to prepare an EA, this Memorandum's page and time goals shall be included and adhered to as a material term in each Bureau's solicitation for a Statement of Work, and the subsequent contract for EA preparation services, issued after the date of this Memorandum.

7. Bureau NEPA Handbooks:

a. According to the Secretary's Order 3355 guidance documents issued on April 27, 2018, Bureau Directors and their NEPA staff are meeting with the Office of the Deputy Secretary and the Office of Environmental Policy and Compliance to identify whether changes are required to each Bureau's NEPA Handbook (Handbook). To avoid duplicating efforts, Bureaus shall update their Handbooks to reflect the EA guidance within this Memorandum in conjunction with Environmental Impact Statement (EIS) updates. Both the EIS and the EA NEPA Handbook update meetings shall now be completed by September 1, 2018, instead of the original date of July 2, 2018.

---

[10] It shall be incumbent upon Bureaus acting as Lead Agencies to ensure that cooperating Federal Agencies outside of the Department adhere to the Department's page and timeliness guidelines as nearly as is practicable, subject to applicable law, statutory authority, and appropriations.
[11] 40 CFR 1500.2(d), 1501.4(e)(2), 1506.6.
[12] 43 CFR § 46.305.
[13] *Id.*
[14] Deviation from this guidance may be required if the EA is tied to a formal Agency rulemaking procedure that proscribes a certain level of public involvement – such as public comment.

b. Bureau Handbook changes should be implemented as soon as practicable through issuance of an updated Handbook or by using an established, Bureau-specific amendment processes, such as issuance of a Permanent Instruction Memorandum. If a Permanent Instruction Memorandum or other amendment process is utilized, the Bureau's Handbook shall be revised and amended as soon as practicable.

Additional Provisions:

8. Nothing contained in this Memorandum is intended to or should be construed to limit or affect the authority or legal responsibilities of the Department's Bureaus or other Federal- or State-level government entities, nor bind them to perform actions beyond their respective authorities.

9. This Memorandum shall be implemented consistent with applicable law and subject to the availability of appropriations.

10. Specific activities that involve the transfer of money, services, or property between or among the Bureaus may require execution of separate agreements or contracts that occur as a matter of course.

11. This Memorandum 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.

Effective Date:

Directives and guidance within this Memorandum are effective immediately upon distribution.

Attachment

Attachment – DOI EA Page Allocation Guide

Chapter/Section	EA Page Count
Executive Summary	2
Purpose and Need for Action	4
Proposed Action	4
Alternatives	12
Affected Environment	20
Environmental Consequences	28
Mitigation (If applicable)	5
Total	**75**

United States Department of the Interior

FISH AND WILDLIFE SERVICE

WASHI

NGTON, D.C. 20240

ADDRESS ONLY THE DIRECTOR.
FISH AND WILDLIFE SERVICE

In Reply Refer To:
FWS/DHC/BFA APR 6 1993

Memorandum

To: Service Directorate

From: Deputy Director

Subject: The Fish and Wildlife Service and the National Environmental Policy Act

On March 1, 1993, Secretary Babbitt asked all bureaus in the Department of the Interior (Department) to rededicate their commitment to the policy set forth in the National Environmental Policy Act of 1969 (NEPA), with a view toward effective conservation and environmental protection (copy attached). I strongly support the Secretary's commitment.

The Fish and Wildlife Service (Service) leads the Department in providing careful scrutiny and review of other Federal agency proposals during external reviews. The purpose of these reviews by Service field and Regional offices is to assist other agencies to adequately consider fish and wildlife resources in their proposals and to incorporate measures to protect and enhance resources under our stewardship. I strongly urge you to provide your comments to other agencies early in their scoping process to seek avoidance and potential resolution of conflicts. By providing clear, concise, and detailed comments on agency "notices of intents," we can be instrumental in the early resolution of important concerns on wetlands, endangered species, migratory birds, and anadromous fish.

I strongly urge you to effectively utilize the planning and decision making functions of NEPA in the execution of Service proposals. Your plans should reflect the Service's commitment to meeting the twin objectives of NEPA: (1) the careful consideration of detailed information on significant environmental impacts before decision making; and (2) recognition of the important role of the public in both the decision making process and the implementation of that decision. These objectives embody the principles of NEPA to make better environmental decisions.

Our renewed attention to making effective use of NEPA will further the resource programs of the Service and of the Department.

Attachment IN-9

550 FW 3
Documenting and Implementing Decisions

FWM#: 248 (new)
Date: March 29, 1996
Series: Environmental Quality
Part 550: National Environmental Policy Act
Originating Office: Division of Habitat Conservation

3.1 Purpose. Fish and Wildlife Service (Service) personnel involved in making and implementing decisions on an action are to establish an appropriate administrative record of the Service's decision. This chapter establishes procedures to ensure that decisions and their implementation are made in accordance with the Council on Environmental Quality's (CEQ) Regulations for Implementing the Procedural Requirements of the National Environmental Policy Act (NEPA) (40 CFR 1505) and Department of the Interior (Department) NEPA procedures (516 DM 1-6).

3.2 Scope. This chapter addresses the Service's preparation of the record of decision (ROD), finding of no significant impact (FONSI), and environmental action statement (EAS); and the implementation and monitoring of the Service's decision. Refer to the NEPA Reference Handbook, authorized in 550 FW 1.7, for full texts of various NEPA authorities and checklists and samples for the preparation of environmental documents; and 550 FW 2, for public review procedures for the notice of intent (NOI) to prepare an environmental impact statement (EIS), the EIS, and environmental assessment (EA).

3.3 NEPA Decision Documents.

A. Record of Decision (ROD).

(1) Making the Decision. Following completion of an EIS (see 550 FW 2), the Service shall prepare a ROD. The ROD is a concise public record of the decision, which may be integrated into any other record prepared by the Service.

(2) Content of the ROD. The content of the ROD is to be the same as described in 40 CFR 1505.2. Any conditions adopted for monitoring or enforcement must be addressed in the ROD (40 CFR 1505.3). Exhibit 1 is an example of a ROD. Exhibit 2 is an example of a notice of availability (NOA) of the ROD in the Federal Register.

(3) Processing and Distributing the ROD. The decision to implement an action cannot be made sooner than 30 days following publication by the Environmental Protection Agency of the notice of availability of the final EIS in the Federal Register. After 30 days, the ROD, signed by the Service decisionmaker (see 550 FW 1.6), shall be made available to the affected public by appropriate public notice. Appropriate public notice can include publication in the Federal Register, or by other means to ensure that the ROD is made available to the affected public [40 CFR 1506.6(b)].

(4) Implementing the Action in the ROD. The action may be initiated immediately upon signature of the ROD by the appropriate Service decisionmaker. The Service must substantially comply with the decision made in the ROD. The actions, terms, and conditions stated in the ROD are enforceable by Federal agencies and private parties. The ROD can be used to compel compliance with or execution of mitigation, monitoring, and

enforcement measures identified therein (40 CFR 1505.3). The Service should make a diligent effort to involve the public in the implementation of the action (40 CFR 1506.6).

B. Finding of No Significant Impact (FONSI).

(1) Making the Decision. The EA serves as the basis for determining whether implementation of the proposed action would constitute a major Federal action significantly affecting the quality of the human environment. If a positive finding is made, an EIS is required. If a negative finding is made, a FONSI is prepared and signed. Either finding will be based on the information presented in the text of the EA. The text of the EA should provide sufficient factual material to support the finding. Determinations of major Federal actions and significant effects on the human environment are subject to varying interpretation, and no hard-and-fast rules are available to label an action conclusively one way or the other. The need to prepare an EIS is a matter of professional judgment requiring consideration of all issues in question, particularly all information documented in the EA.

(2) Criteria to Assist in Determining the Need to Prepare an EIS. It is important to be as objective as possible when making a determination on whether to prepare an EIS. For general guidance on what may constitute a "major Federal action" and "significant effect," refer to 40 CFR 1508.18 and 1508.27, respectively. In addition, one or more of the following criteria, depending on the severity and duration of effects, may trigger the preparation of an EIS.

(a) Controversy over environmental effects (e.g., major scientific or technical disputes or inconsistencies over one or more environmental effects).

(b) Change in Service policy having a major positive or negative environmental effect.

(c) Precedent-setting actions with wide-reaching or long-term implications (e.g., special use permits for off-road vehicles, mineral extraction, new road construction).

(d) Major alterations of natural environmental quality, that may exceed either local, State, or Federal environmental standards.

(e) Exposing existing or future generations to increased safety or health hazards.

(f) Conflicts with substantially proposed or adopted local, regional, State, interstate, or Federal land use plans or policies, that may result in adverse environmental effects.

(g) Adverse effects on designated or proposed natural or recreation areas, such as wilderness areas, parks, research natural areas, wild and scenic rivers, estuarine sanctuaries, national recreation areas, habitat conservation plan areas, threatened and endangered species, fish hatcheries, wildlife refuges, lands acquired or managed with Dingell-Johnson/Pittman-Robertson funds, unique or major wetland areas, and lands within a 100-year floodplain.

(h) Removal from production of prime and unique agricultural lands, as designated by local, regional, State, or Federal authorities; in accordance with the Department's Environmental Statement Memorandum No. ESM 94-7.

(i) Adverse effects on municipal, industrial, or agricultural water supply or quality; or major consumptive use or other long-term commitment of water.

(j) Condemnation of property rights or fee title to land; or large-scale relocation of people, homes, commercial, industrial, or major public facilities.

(3) Content of the FONSI. The content of the FONSI is to be the same as discussed in 40 CFR 1508.13. Also refer to 516 DM 2.3C. Exhibit 3 is an example of a FONSI.

(4) Processing and Public Availability/Review of the FONSI.

(a) The FONSI, signed by the Service decisionmaker, is an "environmental document" under 40 CFR 1506.6(b) and, therefore, must be made available to the affected public. A combination of methods may be used to provide notice, tailored to the needs of the particular case. Local mailings, publication in newspapers, radio announcements, and other means, including publication in the Federal Register, may be used.

(b) The FONSI must be made available for public review if the proposed action would be located in a floodplain or wetland, pursuant to Executive Orders 11988 and 11990, respectively.

(c) In certain cases, the Service must make the FONSI available for public review for 30 days before the action can be implemented, in accordance with 40 CFR 1501.4(e)(2). If the EA was not previously made available for public review, it should be made available for public review at the same time the FONSI is circulated. The criteria for circulating the FONSI are as follows.

(i) The proposal is a borderline case (i.e., there is a reasonable argument for preparation of an EIS).

(ii) The proposal is an unusual case, a new kind of action, or a precedent-setting case.

(iii) There is either scientific or public controversy over the proposal.

(iv) When the FONSI involves a proposal which is or is closely similar to one which normally requires preparation of an EIS. Refer to 516 DM 6, Appendix 1.5B. See 550 FW 3.3B(6).

(5) Implementing the Action in the FONSI.

(a) The action may be initiated immediately following completion of 550 FW 3(B)(4). The Service must substantially comply with the decision made in the FONSI. The Service should make a diligent effort to involve the public in the implementation of the action (40 CFR 1506.6).

(b) When the initial proposed action in the EA integrates mitigation measures, without which the proposed action would cause significant effects, those mitigation measures are enforceable, thereby precluding the preparation of an EIS or reevaluation of the proposal. If those mitigation measures are not implemented, an EIS or reevaluation of the proposal would be required (40 CFR 1508.8 and 1508.27).

C. Environmental Action Statement (EAS).

(1) Purposes of the EAS. The purposes of the EAS are:

(a) to establish a process for internal review of Service NEPA-related decision documents at the Regional and Headquarters Office level to ensure inter-program coordination, and

(b) to provide an appropriate administrative record of NEPA-related decisions at all management levels of the Service.

(2) Actions for which an EAS should be Prepared. An EAS should be initiated by the Service office responsible for preparation of the NEPA documents. An EAS should be prepared when the following circumstances occur.

(a) To facilitate internal inter-program review and final approval when a FONSI is to be signed at the Service Washington or Regional Office level.

(b) To document a normally categorically excluded action that may be controversial.

(c) To document emergency NEPA actions pursuant to 40 CFR 1506.11.

(d) When, after the review of an EA, a decision is made to publish an NOI in the Federal Register announcing the decision to prepare an EIS.

(e) When a proposed action is not approved because of unacceptable environmental damage, or violation of Service mandates, policy, regulations, or procedures.

(f) Whenever additional internal review and/or documentation of the NEPA administrative record is desirable.

(3) Content of the EAS. The EAS will consist of a one-page document indicating the proposal, the Service decision, references to supporting documents (if any), and a signature block. The format of the EAS should be in accordance with Exhibit 4.

(4) Processing the EAS. The EAS will accompany the decision documents for the action through the surname and signature process. The EAS will be signed no sooner than when the decision is made on a categorical exclusion, or when the ROD or FONSI is signed.

(5) Signature Approval of the EAS. The signature approval blocks (Exhibit 4) may be modified to accommodate the Service office where final signature approval occurs.

(a) At the field office level, the signature block would normally include the signature and date of the originator and the field office supervisor.

(b) At the Regional Office level, the signature block would normally include the signature and date of the originator, the Regional Environmental Coordinator, appropriate Assistant Regional Director(s) or their designees, and the Regional Director.

(c) At the Headquarters level, the signature block would normally include the signature and date of the originator, the Headquarters Environmental Coordinator, the appropriate Assistant Director(s) or their designees, and the Director.

(6) Distribution of the EAS

(a) The EAS is part of the Service's NEPA administrative record for an action. Although it is not normally distributed to the public, the Service shall provide a copy of the EAS to the public whenever requested in the same manner as other NEPA environmental documents [40 CFR 1506.6(f)].

(b) The original EAS should be maintained by the Service office originating the action.

(c) A copy of the EAS should be provided to each Service office indicated on the signature block; the Headquarters or Regional Office Environmental Coordinator, as appropriate; and other affected Service offices.

3.4 Implementing and Monitoring the Decision. Until the Service issues the ROD or FONSI, as appropriate, no action concerning the proposal shall be taken (40 CFR 1506.1). When the Service implements an action, that action must be carried out in substantially the same manner as addressed in the ROD or FONSI. Mitigation and other conditions committed as part of the decision should be implemented. The Service may provide for monitoring to assure that decisions are carried out, and should do so in important cases (40 CFR 1505.3).

For more information about this policy, contact the Office of Fisheries and Habitat Conservation. For additional information regarding this Web page, contact Krista Bibb, in the Division of Policy and Directives Management.

Privacy, Disclaimer and Copyright Information | Information Quality Act

U.S. Fish and Wildlife Service Home Page | Department of the Interior | USA.gov | About the U.S. Fish and Wildlife Service | Accessibility | Privacy | Notices | Disclaimer | FOIA

U.S. DEPARTMENT OF INTERIOR, FISH AND WILDLIFE SERVICE

RECORD OF DECISION

SOUTH TONGUE POINT LAND EXCHANGE AND MARINE INDUSTRIAL PARK DEVELOPMENT PROJECT CLATSOP COUNTY, OREGON

This Record of Decision (ROD) has been developed by the U.S. Fish and Wildlife Service (Service) in compliance with the agency decision-making requirements of the National Environmental Policy Act (NEPA) of 1969, as amended. The purpose of this ROD is to document the decision of the Service for the selection of an alternative for implementing the South Tongue Point Land Exchange and Marine Industrial Park Development Project (Project). Alternatives have been fully described and evaluated in the May 1994, Final Environmental Impact Statement (EIS) for the Project.

This ROD is designed to: a) state the Service's decision, present the rationale for its selection, and portray its implementation; b) identify the alternatives considered in reaching the decision; and c) state whether all means to avoid or minimize environmental harm from implementation of the selected alternative have been adopted (40 CFR 1505.2).

Based upon the review of the alternatives and their environmental consequences described in the Final EIS for the Project, the decision of the Service is to implement Alternative A, the Preferred Alternative. The selected action entails the transfer of lands under Federal administration for lands under Oregon State administration. Former State lands will be conveyed to the Service's Lewis and Clark National Wildlife Refuge (Refuge). The State of Oregon will sponsor the development of a marine industrial park by on the former Federal lands.

Timing of implementation of various components of the project will occur based on funding and the availability of personnel and other resources. The Project's land exchange component is expected to enhance habitat and wildlife protection on the Refuge. The Project's development component is expected to create real property assets and associated income for the Common School Fund of the State of Oregon, encourage new industrial employment within the South Tongue Point area

For further information, please contact: Ben Harrison, U.S. Fish and Wildlife Service, 911 NE llth Avenue, Portland, Oregon 97232-4181, telephone: (503) 231-2231.

PROJECT DESCRIPTION

The U.S. General Services Administration (GSA) is proposing to convey approximately 130 acres of upland and submerged lands administered by the U.S. Army Corps of Engineers (Corps) to the Division of State Lands (Division), an agency of the State of Oregon. In exchange for the Federal land, the Division is proposing to convey approximately 3,930 acres of State-owned land within the administrative boundary of the Refuge to GSA, which will in turn transfer those lands to the Service..

Under the proposed land exchange, the Service would gain fee title ownership to certain lands within the administrative boundary of the Refuge which would provide a more substantial and durable means of protecting wildlife resources from incompatible uses. Other State administered lands within the Refuge will be managed by the Service under a long-term cooperative management agreement with the Division. The Division has proposed to develop a multi-tenant marine industrial park on the property conveyed to it.

KEY ISSUES

Through public scoping and with input from various agencies and publics, key issues were identified. These focused on the following subject areas: 1) certain aspects of the physical environment, especially the potential for hazardous materials to be released from local sediments; 2) certain aspects of the biological environment, especially wetlands and threatened and endangered species; and 3) certain aspects of the cultural and social environment, especially the local and regional economy. These factors were also examined for the State-owned islands proposed as additions to the Refuge. These issues were thoroughly examined in the Draft and Final EIS.

ALTERNATIVES

More than 20 alternatives were considered before limiting the alternatives to be advanced for further study. Alternatives considered but not advanced for detailed analysis included alternative development concepts, alternative sites, and single versus multi-tenant developments. Alternatives advanced for detailed analysis include (A) the proposed land exchange and development of a multi-tenant marine industrial development; (B) the proposed land exchange and multi-tenant marine industrial development with connecting road to North Tongue Point; and (C) a No Action Alternative. Adverse and beneficial impacts of each alternative are considered.

Alternative A

Alternative A comprises two elements: (1) the land exchange, and (2) the multi-tenant marine industrial development.

(1) Approximately 3,930 acres of State-owned land within the administrative boundary of the Lewis and Clark National Wildlife Refuge would be exchanged through GSA to the

ENVIRONMENTAL QUALITY

service for the 130 acres on South Tongue Point. The remaining 950 acres would be managed under a long-term cooperative agreement between the Division and the Service.

(2) Development of the multi-tenant marine industrial site would occur in two phases. Phase 1 would involve site infrastructure developments and construction of marine industrial facilities. Construction would begin in 1994 and occur at a rate supported by market conditions.

Alternative B

Alternative B comprises the same two elements as Alterative A with the addition, in Phase 2, of a road connecting South Tongue Point to North Tongue Point. Construction of the connecting road would be dependent upon the need for additional land to support marine industrial development and increased port activities at North Tongue Point.

Alternative C

With the No Action Alternative, South Tongue Point would remain in its present. undeveloped condition except for the existing Corps Field Station. There would be no land exchange. The No Action Alternative would not have direct adverse impacts to the physical and biological environment. However, the No Action Alternative would not have direct economic benefits from job creation and tax revenues.

DECISION

The Service's decision is to implement the Preferred Alternative, Alternative A, as it is described in the Final EIS for the South Tongue Point Land Exchange and Marine Industrial Development Project. This decision is based on a thorough review of the alternatives and their environmental consequences.

Other Agency Decisions

A Record of Decision will be produced by the Corps. The responsible officials at the Corps will adopt the Final EIS as part of the permit process required by Section 404 of the Clean Water Act.

A Record of Decision will be produced by GSA. The responsible officials at GSA will adopt the EIS in order to comply with National Environmental Policy Act requirements for the disposal and exchange of Federal properties.

RATIONALE FOR DECISION

The Preferred Alternative has been selected for implementation based on consideration of a number of environmental and social factors. Alternative A has been selected as the preferred. alternative because: 1) the land exchange provides the most durable means for protecting wildlife habitats and enhancing wildlife populations; 2) the development component avoids

significant adverse environmental impacts; and 3) the project will result in significant economic benefits in a economically depressed area.

Alternative A was selected because it balances resource protection with water dependent development. The preferred alternative provides a net benefit for wildlife and benefits for the local economy. The land exchange is the most practical means available to secure and protect additional lands from incompatible uses within the administrative boundary of the Refuge. Migratory bird and resident wildlife populations will benefit from additional secure habitat and be enhanced through wildlife management programs which could not be without fee title ownership. The. development component has been carefully designed to minimize adverse environmental effects. Wintering bald eagles will benefit from compensatory measures designed to enhance foraging opportunities. A net gain in wetlands will be realized through successful implementation of mitigation measures.

Implementation of the Preferred Alternative extends the protection of the environmental resources and maintenance of environmental quality beyond what would be achieved under either of the other two alternatives. Alternative B was not selected as the preferred alternative due to the significant impacts expected to resident bald eagles. Alternative C, the No Action Alternative, was not selected as the preferred alternative because, it would not result in the Service increasing habitat protection within the Refuge.

Marvin L. Plenert, Regional Director
Date6/20/94

ENVIRONMENTAL
QUALITY

Federal Register Vol. 59, No. 122. Monday. June 27, 1994 /-Notices **3300!**

Fish and Wildlife Service
Fish and Wildlife,
a nonessential experimental population
Record of Decision; Black-Footed
Ferret Reintroduction Conata Basin/
Badlands, SD
AGENCY: Fish and Wildlife Service
ACTION: Notice.
SUMMARY: Pursuant to regulations*
promulgated by the Council on
Environmental Quality *(40 CFR 1505.2)*
and the implementing procedure of the
U.S. Fish and Wildlife Service for the
National Environmental Policy Act of
1969 (40 U.S.C. 1501 et seq.). the
Department of Interior has p
record of decision on the *F0*
Environmental *Impact Statement,*
Black-Footed Ferret Reintroduction,
Conata Basin/Badlands, South *Dakota.*
The record of decision is a concise
statement of what decisions were made,
and their progeny will be classified as
a nonessential experimental population
under Federal rule making
requirements.
mean to avoid or minimize
Other Alternatives Considered
from implementation of the preferred
Five alternatives, including the
alternative, were analyzed in.....
the final environmental impact
propose to reintroduce black-footed
ferrets as a nonessential
experimental
accept the proposed action to release
captive reared black-
footed ferret$ into.
the Conata Basin/Badlands area near
BGNG (No Action).
Alternative C in the Final
Alternative B-Black-footed ferrets
and this would be released only in BNP in a
reintroduction area of appr6dmately
25.000 acres which contains about 3.200
acres of prairie dog colonies.
Alternative D-Reintroduce
black--
public response; legislative intent;
footed ferrets into a *42,000* acre
socioeconomic. and environmental
impact statement. The
Service considers that all
practicable
alternatives
considered acceptable.
Decision
statement. All action
The Fish-and Wildlife Service will
ferrets as a nonessential
population. The alternatives included:
Alternative A-Black-footed
ferrets
would not be reintroduced into BNP or
Alternative B-Black-footed ferrets
and this would be released only in BNP in a
reintroduction area of appr6dmately
25.000 acres which contains about 3.200
acres of prairie dog colonies.
management objectives; and
Cost.
reintroduction area on BNP and
BGNG
Environmental *Impact*
Statement,
Black-Footed
Ferret Reintroduction.
Conta Basin Badlands.
South *Dakota.*
After careful
evaluation of each
alternative and considering the
issues of

what alternatives were considered, and with initial releases in BGNG.
effects, the Fish and Wildlife Service
acceptable mitigation manures believes that the proposed action
represents the most balanced course of
approximately *8,000*
management of the
This reintroduction effort is an black-footed
ferret.
Alternative E-
Release black-footed **21,1994.**
Is
feints into a in.000 acre
Service. and the Forest Service. Each
BGNG Robert D. Jacobsen
consisting of the entire north unit of the***Acting Regional Director, M***
1973. as ***States region.***
over threatened and (FR Doc.
94-IS478 ***6-24-94; 41:45*** SMI
this initial. The initial black-footed ""4 **4"O'W-m**
prepare a separate record of decision to
the most
cover its respective responsibilities itable habitat within the
under the reintroduction program.
The Selected Alternative Environmentally Preferable Alternative
The Fish and Wildlife Service
C. releases black-footed ferrets consider Alternative E to be the most
environmentally preferred alternative.
The levels of active prairie dog habitat
(16.997 he)
Alternatives C
on the Badlands National Park (BNP)
and the Buffa Gap National Grassland potential risks to the black-footed ferret

measures
occur an the BNP. This area contains
approximately 8.000 acres *(3,238* and trapping restriction and possible
black-tailed prairie dog colonies. A
an
nonessential experimental population
area of approximately 1.282.200 acres isAlternative C was selected bemuse it

program that
a

of the black-footed ferret is chaige compatible with the existing
from endangered to nonessential recreational and agricultural land uses
experimental to allow for greater in the area thereby garnishing additional
management flexibility. AH of the support. It is the Fish and Wildlife
proposed reintroduction area is public Ser-Ace's assessment that the benefits of
land administered by either the Nationaladditional support outweigh the
Park Service or the Forest Service. possible benefits of extending land use
The purpose of the proposed action is restrictions associated with the
to use experimental techniques to expanded reintroduction area of
reintroduce and establish a free Alternative E.
cooperatively managed wild population ~
of black-footed ferrets in the Conata minimization of Impacts
Basin/Badlands experimental Public concerns. potential impacts,
population area near Wall. South and methods to mitigate those impacts
Dakota. The released black-footed ferrets am addressed in the final environmental

REVISED FINDING OF NO SIGNIFICANT IMPACT
PROPOSED LAND ACQUISITION FOR NATIONAL EDUCATION AND

VICINITY OF HARPER'S FERRY, WEST VIRGINIA

acquire property near Shepherdstown, West Virginia, for the

An Environmental Assessment (EA) was prepared which addressed

alternative (copy enclosed). The acquisition of a selected site

construct a facility that would provide a training center for

the site would accommodate a development envelope of at least 250

Federal, State., and local plans and requirements.

Impact (FONSI) was published in the Federal Register on July 9,

B Driggs (Quarry) and Springs Run. 'However, due to the difficulty in remediating minor contamination on the site, the Service has determined that it is not in the best interest of the government to acquire Site E.

The new selected alternative is Site D -- Terrapin Neck. Site D is located approximately three miles north of Shepherdstown, West Virginia. The Potomac River serves as the northern boundary, with Terrapin Neck Road to the east, and Shepherd Grade Road bordering the southwestern sections of the site. The site occupies approximately 525 acres and is comprised of forested land, agricultural land, and open fields.

Site D was selected because it has many of the amenities which would be supportive of the NCTC goal. The picturesque site overcooks the Potomac River Valley and is surrounded by a diversity*of habitats. Several 18th and 19th century buildings occur on the site that will be maintained for their historical value. Community acceptance of Site D is anticipated to be good. Except for several debris piles containing minor, former farm related refuse, no other hazardous materials or-evidence of other contaminants occur on the property. Although some minor improvements may be needed, the capacity of existing roadways appears adequate. We anticipate no adverse impacts to State or Federal rare, threatened, or endangered species that may occur on the site.

The other land acquisition alternatives considered were the Gibson and Capriotti Properties, Cooper Farm, Nalls Property, Driggs (Quarry)/Springs Run, and no-action.

The previous plan to include a public education (habitat) component to theNCTCC has been dropped.

03/29/96 FWM 248 ENVIRONMENTAL Quality
N~w

A small portion of reverie wetlands system is located in the northern part of the site and a small pond occurs near the farm buildings, but all reasonable alternatives were considered in the evaluation of this project. Any project-caused wetland and flood plain impacts will be minor to negligible. The project complies with the provisions of Executive Orders 11988 and 11990.

Based on my review and evaluation of the enclosed Environmental Assessment and other supporting documentation, I have determined that the acquisition of Site D for the Service's National Education and Training Center is not.. a major Federal action which would significantly affect the quality of the. human environment within the meaning of Section 102(2)(C) of the National Environmental Policy Act of 1969. Accordingly, preparation of an environmental impact statement on the proposed action is not required.

Director
Acting
FEB 2 0
1992
Date

Reference:
Environmental Assessment, dated
December 1990

Enclosure

xhibit

UNITED STATES FISH AND WILDLIFE SERVICE

ENVIRONMENTAL ACTION STATEMENT

Within the spirit and intent of the Council on Environmental Quality's regulations for implementing the National Environmental Policy Act (NEPA), and other statutes, orders, and policies that protect fish and wildlife resources, I have established the following administrative record and determined that the action of (describe action):

Check One:

is a categorical exclusion as provided by 516 DM 2, Appendix 1 and 516 DM 6, Appendix 1. No further NEPA documentation will therefore be made.

is found not to have significant environmental effects as determined by the attached environmental assessment and finding of no significant impact.

is found to have significant effects and, therefore, further. consideration of this action will require a notice of intent to be published in the Federal Register announcing the decision to prepare an EIS.

is not approved because of unacceptable environmental damage, or violation of Fish and Wildlife Service mandates, policy, regulations, or procedures.

is an emergency action within the context of 40 CFR 1506.11. Only those actions necessary to control the immediate impacts of the emergency will be taken. Other related actions remain subject to NEPA review. Other supporting documents (list): Signature Approval

(1) Originator Date (2) WO/RO Environmental Date

Coordinator

(3) AWARD Date (4) Director/Regional Date

Director

[Federal Register: January 16, 1997 (Volume 62, Number 11)]
[Notices]
[Page 2375-2382]
From the Federal Register Online via GPO Access [wais.access.gpo.gov]
[DOCID:fr16ja97-40]

==========
- - - -

516 DM 6 Appendix 1

Fish and Wildlife Service

1.1 NEPA Responsibility

A. The Director is responsible for NEPA compliance for Fish and Wildlife Service (Service) activities, including approving recommendations to the Assistant Secretary (FW) for proposed referrals to the Council on **Environmental** Quality (CEQ) of other agency actions under 40 CFR 1504.

B. Each Assistant Director (Refuges and Wildlife, Fisheries, International Affairs, External Affairs, and Ecological Services) is responsible for general guidance and compliance in their respective areas of responsibility.

C. The Assistant Director for Ecological Services has been delegated oversight responsibility for Service NEPA compliance.

D. The Division of Habitat Conservation (DHC--Washington), which reports to the Assistant Director for Ecological Services, is responsible for internal control of the **environmental** review and analysis of documents prepared by other agencies and **environmental** statements prepared by the various Service Divisions. This office is also responsible for preparing Service NEPA procedures, guidelines, and instructions, and for supplying technical assistance and specialized training in NEPA compliance, in cooperation with the Service Office of Training and Education, to Service entities. The Washington Office **Environmental** Coordinator, who reports to DHC, provides staff assistance on NEPA matters to the Director, Assistant Directors, and their divisions and offices, and serves as the Service NEPA liaison to the CEQ, the Department's Office of **Environmental Policy** and Compliance (OEPC), and NEPA liaisons in other Federal agencies, in accordance with **516 DM 6**.2.

E. Each Regional Director is responsible for NEPA compliance in his/her area of responsibility. The Regional Director should ensure that Service decisionmakers in his/her area of responsibility contact affected Federal agencies and State, Tribal and local governments when initiating an action subject to an EA or EIS. An individual in each Regional Office, named by title and reporting to the Assistant Regional Director for Ecological Services, other appropriate Assistant Regional Director, or the Regional Director, will have NEPA coordination duties with all program areas at the Regional level similar to those of the Washington Office **Environmental** Coordinator, in accordance with **516 DM 6**.2.

1.2 General Service Guidance

Service guidance on internal NEPA matters is found in 30 AM 2-3 (organizational structure and internal NEPA compliance), 550 FW1-3 (in preparation), 550 FW 3 (documenting and implementing Service decisions on Service actions), and 550 FW 1-2 (replacement to 30 AM 2-3 in preparation). These guidance documents encourage Service participation as a cooperating agency with other Federal agencies, encourage early coordination with other agencies and the public to resolve issues in a timely manner, and provide techniques for streamlining the NEPA process and integrating the NEPA process with other Service programs, **environmental** laws, and executive orders. Some Service programs have additional NEPA compliance information related to specific program planning and decisionmaking activities. Service program guidance on NEPA matters must be consistent with the Service **Manual** on NEPA guidance and **Departmental** NEPA procedures. For example, additional NEPA guidance is found in the Federal Aid Handbook (521-523 FW), refuge planning guidance (602 FW 1-3), Handbook for Habitat Conservation Planning and Incidental Take Processing, and North American Wetlands Conservation **Act** Grant Application Instructions.

1.3 Guidance to Applicants

A. Service Permits. The Service has responsibility for issuing permits to Federal and State agencies and private parties for actions which would involve certain wildlife species and/or use of Service-administered lands. When applicable, the Service may require permit applicants to provide additional information on the proposal and on its **environmental** effects as may be necessary to satisfy the Service's requirements to comply with NEPA, other Federal laws, and executive orders.

(1) Permits for the Taking, Possession, Transportation, Sale, Purchase, Barter, Exportation, or Importation of Certain Wildlife Species. The Code of Federal Regulations, Part 13, Title 50 (50 CFR 13) contains regulations for General Permit Procedures. Section 13.3 lists types of permits and the pertinent Parts of 50 CFR. These include: Importation, Exportation, and Transportation of Wildlife (Part 14); Exotic Wild Bird Conservation (Part 15); Injurious Wildlife (Part 16); Endangered and Threatened Wildlife and Plants (Part 17); Marine Mammals (Part 18); Migratory Bird Hunting (Part 20); Migratory Bird Permits (Part 21); Eagle Permits (Part 22); Endangered Species Convention (Part 23); and Importation and Exportation of Plants (Part 24). Potential permit applicants should request information from the appropriate Regional Director, or the Office of Management Authority, U.S. Fish and Wildlife Service, Department of the Interior, Washington, DC 20240, as outlined in the applicable regulation.

(2) Federal Lands Managed by the Service. Service lands are administered under the **National** Wildlife Refuge System Administration **Act** of 1966 (16 U.S.C. 668dd-668ee), the Refuge Recreation **Act** of 1962 (16 U.S.C. 460k-460k-4), and the Alaska **National** Interest Lands Conservation **Act** of 1980 (16 U.S.C. 410hh-3233, 43 U.S.C. 1602-1784). inherent in these acts is the requirement that only those uses that are compatible with the purposes of the refuge system unit may be allowed on Service lands. The Service also complies with Executive Order 12996, signed March 25, 1996, entitled ``Management and General Public Use of the **National** Wildlife Refuge System." This Executive Order identifies general public uses that will be given priority consideration in refuge planning and management, subject to meeting the compatibility requirement and if adequate funding is available to administer the use. Detailed procedures regarding comprehensive management planning and integration with NEPA are found in the Service **Manual** (602 FW 1-3). Reference to this and other **National** Wildlife Refuge System requirements are found in the Code of Federal Regulations, Title 50 parts 25-29, 31-36, 60, and 70-71. Under these regulations, these protections are extended to all Service-administered lands, including the **National** Fish Hatchery System.

B. Federal Assistance to States, Local or Private Entities.

(1) Federal Assistance Programs. The Service administers financial assistance (grants and/or cooperative agreements) to State, local, and private entities under the Anadromous Fish Conservation **Act** (CFDA #15.600); North American Wetlands Conservation **Act**; Fish and Wildlife **Act** of 1956; Migratory Bird Conservation **Act**; Food Security **Act** of

[[Page 2381]]

1985; Food, Agriculture, Conservation and Trade **Act** of 1990; Partnerships for Wildlife **Act** of 1992; and Consolidated Farm and Rural Development **Act**. The Service administers financial assistance to States under the Sport Fish Restoration **Act** (CFDA #15.605), Wildlife Restoration **Act** (CFDA #15.611), Endangered Species **Act** (CFDA #15.612 and 15.615), Coastal Wetlands Planning Protection and Restoration **Act** (CFDA #15.614), and Clean Vessel **Act** of 1992 (CFDA #15.616).

(2) Program Information and NEPA Compliance. Information on how State, local, and private entities may request funds and assist the Service in NEPA compliance relative to the Anadromous Fish Conservation **Act** may be obtained through the Division of Fish and Wildlife Management Assistance, U.S. Fish and Wildlife Service, Department of the Interior, Arlington Square Building, Room 840, Washington, D.C. 20240. Similar information regarding the North American Wetlands Conservation **Act** may be obtained through the North American Waterfowl and Wetlands Office. U.S. Fish and Wildlife Service, Department of the

Interior, Arlington Square Building, Room 110, Washington, D.C. 20240. All other requests for information on how funds may be obtained and guidance on how to assist the Service in NEPA compliance may be obtained through the Chief, Division of Federal Aid, U.S. Fish and Wildlife Service, Department of the Interior, Arlington Square Building, Room 140, Washington, D.C. 20240.

1.4 Categorical Exclusions

Categorical exclusions are classes of actions which do not individually or cumulatively have a significant effect on the human environment. Categorical exclusions are not the equivalent of statutory exemptions. If exceptions to categorical exclusions apply, under **516 DM** 2, Appendix 2 of the **Departmental Manual**, the **departmental** categorical exclusions cannot be used. In addition to the actions listed in the **departmental** categorical exclusions outlined in Appendix 1 of **516 DM** 2, the following Service actions are designated categorical exclusions unless the action is an exception to the categorical exclusion.

A. General.

(1) Changes or amendments to an approved action when such changes have no or minor potential **environmental** impact.

(2) Personnel training, **environmental** interpretation, public safety efforts, and other educational activities, which do not involve new construction or major additions to existing facilities.

(3) The issuance and modification of procedures, including manuals, orders, guidelines, and field instructions, when the impacts are limited to administrative effects.

(4) The acquisition of real property obtained either through discretionary acts or when acquired by law, whether by way of condemnation, donation, escheat, right-of-entry, escrow, exchange, lapses, purchase, or transfer and that will be under the jurisdiction or control of the United States. Such acquisition of real property shall be in accordance with 602 **DM** 2 and the Service's procedures, when the acquisition is from a willing seller, continuance of or minor modification to the existing land use is planned, and the acquisition planning process has been performed in coordination with the affected public.

B. Resource Management. Prior to carrying out these actions, the Service should coordinate with affected Federal agencies and State, Tribal, and local governments.

(1) Research, inventory, and information collection activities directly related to the conservation of fish and wildlife resources which involve negligible animal mortality or habitat destruction, no introduction of contaminants, or no introduction of organisms not indigenous to the affected ecosystem.

(2) The operation, maintenance, and management of existing facilities and routine recurring management activities and improvements, including renovations and replacements which result in no or only minor changes in the use, and have no or negligible **environmental** effects on-site or in the vicinity of the site.

(3) The construction of new, or the addition of, small structures or improvements, including structures and improvements for the restoration of wetland, riparian, instream, or native habitats, which result in no or only minor changes in the use of the affected local area. The following are examples of activities that may be included.

i. The installation of fences.

ii. The construction of small water control structures.

iii. The planting of seeds or seedlings and other minor revegetation actions.

iv. The construction of small berms or dikes.

v. The development of limited access for routine maintenance and management purposes.

(4) The use of prescribed burning for habitat improvement purposes, when conducted in accordance with local and State ordinances and laws.

(5) Fire management activities, including prevention and restoration measures, when conducted in accordance with **departmental** and Service procedures.

(**6**) The reintroduction or supplementation (e.g., stocking) of native, formerly native, or established species into suitable habitat within their historic or established range, where no or negligible **environmental** disturbances are anticipated.

(7) Minor changes in the amounts or types of public use on Service or State-managed lands, in accordance with existing regulations, management plans, and procedures.

(8) Consultation and technical assistance activities directly related to the conservation of fish and wildlife resources.

(9) Minor changes in existing master plans, comprehensive conservation plans, or operations, when no or minor effects are anticipated. Examples could include minor changes in the type and location of compatible public use activities and land management practices.

(10) The issuance of new or revised site, unit, or activity-specific management plans for public use, land use, or other management activities when only minor changes are planned. Examples could include an amended public use plan or fire management plan.

(11) Natural resource damage assessment restoration plans, prepared under sections 107, 111, and 122(j) of the Comprehensive **Environmental** Response Compensation and Liability **Act** (CERCLA); section 311(f)(4) of the Clean Water **Act**; and the Oil Pollution **Act**; when only minor or negligible change in the use of the affected areas is planned.

C. Permit and Regulatory Functions.

(1) The issuance, denial, suspension, and revocation of permits for activities involving fish, wildlife, or plants regulated under 50 CFR Chapter 1, Subsection B, when such permits cause no or negligible **environmental** disturbance. These permits involve endangered and threatened species, species listed under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), marine mammals, exotic birds, migratory birds, eagles, and injurious wildlife.

(2) The issuance of ESA section 10(a)(1)(B) ``low-effect'' incidental take permits that, individually or cumulatively, have a minor or negligible

[[Page 2382]]

effect on the species covered in the habitat conservation plan.

(3) The issuance of special regulations for public use of Service-managed land, which maintain essentially the permitted level of use and do not continue a level of use that has resulted in adverse **environmental** effects.

(4) The issuance or reissuance of permits for limited additional use of an existing right-of-way for underground or above ground power, telephone, or pipelines, where no new structures (i.e., facilities) or major improvement to those facilities are required; and for permitting a new right-of-way, where no or negligible **environmental** disturbances are anticipated.

(5) The issuance or reissuance of special use permits for the administration of specialized uses, including agricultural uses, or other economic uses for management purposes, when such uses are compatible, contribute to the purposes of the refuge system unit, and result in no or negligible **environmental** effects.

(**6**) The denial of special use permit applications, either initially or when permits are reviewed for renewal, when the proposed action is determined not compatible with the purposes of the refuge system unit.

(7) Activities directly related to the enforcement of fish and wildlife laws, not included in **516 DM** 2, Appendix 1.4. These activities include:

(a) Assessment of civil penalties.

(b) Forfeiture of property seized or subject to forfeiture.

(C) The issuance or reissuance of rules, procedures, standards, and permits for the designation of ports, inspection, clearance, marking, and license requirements pertaining to wildlife and wildlife products, and for the humane and healthful transportation of wildlife.

(8) Actions where the Service has concurrence or coapproval with another agency and the action is a categorical exclusion for that agency. This would normally involve one Federal action or connected

actions where the Service is a cooperating agency.

D. Recovery Plans.

Issuance of recovery plans under section 4(f) of the ESA.

E. Financial Assistance.

(1) State, local, or private financial assistance (grants and/or cooperative agreements), including State planning grants and private land restorations, where the **environmental** effects are minor or negligible.

(2) Grants for categorically excluded actions in paragraphs A, B, and C, above; and categorically excluded actions in Appendix 1 of **516 DM** 2.

1.5 Actions Normally Requiring an EA

A. Proposals to establish most new refuges and fish hatcheries; and most additions and rehabilitations to existing installations.

B. Any habitat conservation plan that does not meet the definition of ``low-effect'' in the Section 10(a)(1)(B) Handbook.

C. If, for any of the above proposals, the EA determines that the proposal is a major Federal action significantly affecting the quality of the human environment, an EIS will be prepared. The determination to prepare an EIS will be made by a notice of intent in the Federal Register and by other appropriate means to notify the affected public.

1.**6** Major Actions Normally Requiring an EIS

A. The following Service proposals, when determined to be a major Federal action significantly affecting the quality of the human environment, will normally require the preparation of an EIS.

(1) Major proposals establishing new refuge system units, fish hatcheries, or major additions to existing installations, which involve substantive conflicts over existing State and local land use, significant controversy over the **environmental** effects of the proposal, or the remediation of major on-site sources of contamination.

(2) Master or comprehensive conservation plans for major new installations, or for established installations, where major new developments or substantial changes in management practices are proposed.

B. If, for any of the above proposals it is initially determined that the proposal is not a major Federal action significantly affecting the quality of the human environment, an EA will be prepared and handled in accordance with 40 CFR 1501.4(e)(2). If the EA subsequently indicates the proposed action will cause significant impacts, an EIS will be prepared.

Dated: January 13, 1997.

Willie Taylor,
Director, Office of **Environmental Policy** and Compliance, Office of the Secretary, U.S. Department of the Interior.
[FR Doc. 97-1071 Filed 11-15-97; 8:45 am]
BILLING CODE 4310-55-M

Index to 505 FW

Chapter 1 Policy and Responsibilities

Chapter 2 NEPA Assistance

Chapter 3 Review of Environmental Documents

Chapter 4 Other Related Reviews

Chapter 5 CEQ Referrals

1.1 **Purpose.** This part establishes policy and provides uniform guidance to Fish and Wildlife Service (Service) personnel participating in other agencies' National Environmental Policy Act (NEPA) processes and with Federal and State agencies in the review of environmental documents (40 CFR 1508.10) and other related project reviews.

1.2 **Scope.** This part addresses Service reviews of actions being planned by other Federal agencies under NEPA and other related reviews for which the Service has legal jurisdiction and/or special expertise. It does not address Service compliance with NEPA for its own actions, which are in 550 FW.

1.3 **Policy.** Service personnel shall provide timely input and effective participation in other agencies' environmental documents and other project reviews to further our mission of providing Federal leadership to achieving a national net gain of fish and wildlife and the natural systems which support them.

1.4 **Authority.** Major authorities, regulations, and guidance which establish and promulgate the above purpose are listed below. The chapter on other Related Reviews (505 FW 4) addresses additional authorities for Service reviews.

A. 42 U.S.C. 4321-4347, National Environmental Policy Act of 1969, as amended.
B. 40 CFR 1500-1508, Council on Environmental Quality (CEQ) Regulations for Implementing the Procedural Provisions of NEPA, July 1, 1986.
C. 46 FR 18026, CEQ's Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, March 23, 1981.
D. **48 FR 34263,** CEQ's Guidance Regarding NEPA Regulations, July 28, 1983.
E. 516 DH I and 7. Department of the Interior's (Departmental or DOI) Manual; Department of the Interior, Office of Environmental Policy and Compliance (OEPC) Environmental Review (ER) Memoranda.

1.5 **Terms Used**.

A. Definition of Terms. Terms particular to NEPA, environmental documents, and other project-reviews are defined in CEQ's NEPA regulations (40 CFR 1508). A list of acronyms and abbreviations common to all chapters is found in Exhibit 1.
B. Environmental Review (ER) Number. Environmental documents and other project reviews are forwarded by DOI's OEPC to the Service and other DOI bureaus for review and comment. These documents are controlled by assignment of an ER number. The number before the slash represents the calendar year and the number after the slash represents the sequential order of the document, e.g., ER 93/0167. The same ER number is generally assigned to subsequent documents concerning the same project; if not, the

OEPC memorandum will generally cross reference related ER-numbered documents.

C. **Environmental Coordination (EC) Number**. Environmental documents and other project reviews that are not assigned an ER number by OEPC, including those from other DOI bureaus, are assigned a sequential EC number by the Division of Habitat Conservation. These documents are normally reviewed in the same manner as ER-numbered documents.

D. **Environmental Document (ED) Number**. To provide a coordinated internal review of Service environmental impact statements (EIS) or other documents, DHC may assign sequential ED numbers to these documents. ED-numbered documents should be reviewed in the same manner as ER-numbered documents.

E. **Ecological Services (ES) Environmental Review Distribution Transmittal.** The Department's OEPC, via a memorandum, transmits controlled documents to the bureaus with specific instructions, such as requirements for any interrelated reviews, assignment of lead bureau responsible for collating comments, and deadlines for providing comments (Exhibit 2). From the OEPC memorandum, the Service prepares the ES Environmental Review Distribution Transmittal (transmittal), which provides specific Service deadlines and instructions for routing comments, as well as any other additional instructions or guidance to aid the reviewer (Exhibit 3).

1.6 **Responsibilities.**

A. Director.

(1) Responsible for overall management and guidance of the Service's review of environmental documents and other project reviews.

(2) Approves Service recommendations to the Assistant Secretary for all proposed referrals of other agency actions to CEQ under 40 CFR 1504.

(3) Maintains signature authority to request, approve, or decline-Service participation as a-cooperating agency on EISs prepared by other Federal agencies that affect more than one Region.

(4) Maintains signature authority for Service comments on proposed rulemaking, environmental documents involving programmatic or nation-wide actions, documents of a controversial nature, documents of interest to the Secretary, and documents involving more than one Region.

B. Assistant Director - Ecological Services.

(1) Exercises oversight responsibility for the Service's review of other agencies' environmental documents and other related reviews.

(2) Designates a Washington Office Environmental Coordinator responsible for overseeing matters pertaining to NEPA pursuant to 516 DM 6.2.

(3) Assists the Director in coordinating and processing referrals to do and emergency actions under NEPA. Advises OEPC, CEQ, and the Washington Office of the involved Federal agency of potential referral pursuant to 40 CFR 1504 and 505 FW 5.

C. Chief, Division of Habitat Conservation.

(1) Prepares NEPA policies, directives, guidance, and training materials for Service personnel related to environmental reviews and other related reviews.

(2) Coordinates and controls distribution of and deadlines for reviewing and commenting on environmental documents and other project reviews controlled by DOI and the Service. Also controls and distributes the review of environmental documents and other project reviews prepared by the Service and other bureaus in DOI.

(3) Designates a lead Service program area to collate and submit the Service's response when environmental reviews involve proposals that involve two or more program areas.

(4) Maintains Service lead in collating comments when environmental reviews involve more than one Region, unless otherwise directed.

(5) Informs OEPC of any agreements to assume cooperating agency status or any declinations pursuant to 40 CFR 1501.6(c) and 516 DM 2.5.

(6) Maintains the Service's administrative record of all environmental reviews controlled by the Service and DOI, including a record of all acceptances or declinations to be a cooperating agency.

D. Washington Office Environmental Coordinator.

(1) Provides staff support to ensure NEPA responsibilities delegated to the Assistant Director - Ecological Services, and Chief, Division of Habitat Conservation, are carried out in accordance with CEQ's NEPA regulations, DOI's NEPA procedures, and Service NEPA guidance, and

(2) Serves as Service liaison to CEQ, OEPC, and other Federal agency NEPA staff on NEPA matters, including potential CEQ referrals under NEPA, pursuant to 516 DM 6.2.

(3) Reviews nationally-significant environmental documents, including nondelegated EISs, of interest or concern to the Director.

(4) Conducts and coordinates training, including the preparation of training materials, for Washington and Regional Office personnel, including the Regional Environmental Coordinators, on environmental reviews and other related reviews.

(5) Provides technical assistance, quality control and overview regarding the Service-wide review of controlled environmental documents and other project reviews prepared by other Federal agencies.

E. Regional Director.

(1) Designates an individual in the Regional Office, pursuant to 516 DM 6.2 and Appendix 1.1E, who has responsibility for coordinating region-wide reviews of environmental documents and related reviews.

(2) Ensures quality control of all environmental review comments submitted by offices and divisions under his/her control to the Director, Department, other Federal agencies, and State agencies.

(3) Ensures that Regional and field office personnel are adequately trained in environmental review matters.

(4) May enter into cooperating agreements with other Federal agencies in the preparation of EISs affecting the Region, or decline Service participation as a cooperating agency for proposed actions where the Service has special expertise.

(5) Advises AD-ES (Attention: DHC), and OEPC, if appropriate, of Service acceptance or declination of requests for cooperating agency status. In accordance with 40 CFR 1501.6 and 516 DM 2.5, any declination to a request to be a cooperating agency where the Service has significant jurisdiction by law [refer to 505 FW 2.2(A)] must be reported to CEQ. Such responses shall be routed to the Director for his/her signature.

(6) Submits Service comments controlled by OEPC directly to the lead collating bureau, the Department's Regional Environmental Officer (REO), or OEA, as directed, for all environmental reviews involving proposals within the Region. The Regional-Director may not redelegate this responsibility below the Regional Office level, except for notices of intent (NOI).

(7) Provides "no comments" to lead collating bureau, RED, OEPC, or Service Washington Office, as appropriate, for controlled environmental reviews.

(8) Advises the Director and the RED, as appropriate, whenever significant controversy exists over environmental reviews or before taking any actions which involve major policy considerations or the potential for substantial controversy.

(9) Advises the AD-ES whenever incorporating "may refer" language in Service comments on draft EISs, as this matter may ultimately involve the Secretary. The Regional Director must actively seek resolution of referral issues pursuant to 40 CFR 1504 and 505 FW 5 prior to submission of the referral package to the Secretary.

(10) Coordinates internal Regional review of Service NEPA documents prepared in the Region with affected program areas in the Region.

F. Regional Environmental Coordinator.

(1) Coordinates significant Regional environmental review issues on an interagency and intra-Service level.

(2) Collates comments from other DOI bureaus when the Service is designated lead bureau by OEA.

(3) Coordinates with counterparts in other agencies to resolve Regional NEPA-related conflicts.

(4) Provides staff assistance to the Regional Director in coordinating potential CEQ referrals with Regional and field office personnel and DHC.

(5) Prepares and coordinates training for Regional and field office personnel on environmental reviews and other related reviews.

(6) Maintains a record of all DOI and Service Washington Office controlled environmental reviews involving the Region, including a record of "no , comments." REC will ensure that a signed copy of all Regional comments are provided to DHC. Advises DHC of all acceptances or declinations to be a cooperating agency on another agency's EIS.

(7) Serves as the Regional staff point of contact and liaison with OEPC staff, the RED, other Federal agency NEPA staff, and DOI and Service Washington Office staff on controlled environmental documents and other project reviews.

(8) Coordinates all requests from the Region for extensions of time directly with the lead collating bureau, REO, OEPC, or the Service Washington Office, as appropriate. REC will ensure that all Service reviewers are aware of any approved extensions of time.

G. Service Divisions and Offices. Most interagency coordination on environmental reviews is conducted by Ecological Services field offices, and their specific responsibilities are outlined below. However, other Service offices and divisions (e.g., Division of Endangered Species, Division of Environmental Contaminants, Division of Refuges, Division of Fish Hatcheries) may also be notified of such reviews, when appropriate.

(1) Provide early cooperation and coordination with other agencies and other Service offices and divisions in their NEPA processes. This includes providing technical assistance or commenting on preliminary working drafts and participating in scoping activities and as a cooperating agency.

(2) Provide site-specific review and comment on NEPA-related documents and for preparing comment letters and memoranda.

(3) Unless otherwise instructed, have signature authority for comments on notices of intent to prepare environmental documents.

(4) Service Washington offices and divisions, with input from Regional and field offices, coordinate reviews of programmatic or nationwide EISs prepared by other agencies.

1.7 NEPA Reference Handbook. The NEPA Reference Handbook, authorized in 550 JFW 1, includes the full texts of various NEPA authorities, texts of selected authorities for related reviews, and checklists and samples for the preparation and review of environmental documents.

Exhibits 1-3 are available from the Division of Habitat Conservation (703) 358-2183.

Exhibit 1, Abbreviations and Acronyms
Exhibit 2, Memorandum (Review of"Final Environmental Statement for the Fish Creek Reservoir Expansion, Routt County, Colorado)
Exhibit 3, Environmental Review Distribution Transmittal

2.1 Early Involvement. Early Fish and Wildlife Service (Service) involvement with other agencies in project planning and National Environmental Policy Act (NEPA) scoping is necessary for achieving full consideration of fish and wildlife resource values and for resolving resource conflicts. When environmentally acceptable and unacceptable actions are identified early in the planning process, the need for subsequent intensive Service review of environmental documents and other project reviews is reduced and fewer project revisions are required late in the planning process. Early involvement can occur prior to scoping, during scoping, or as a cooperating agency.

2.2 Cooperating Agencies. Basic procedures for cooperating agencies are described in 40 CFR 1501.6. Service responsibilities for compliance with 40 CFR 1501.6 are described in 032 FW, 505 FW 1.6, and 516 DM 2.5.

A. **NEPA Regulations.** The Council on Environmental Quality's (CEQ) NEPA regulations point out two instances in which an agency may be requested to cooperate: jurisdiction by law or special expertise. The Department of the Interior's (DOI) Environmental Statement Memorandum No. ES84-3 lists Federal agencies with jurisdiction by law or special expertise on environmental quality issues (refer to Service NEPA Reference Handbook). If the Service has significant jurisdiction by law, CEQ'snipe regulations state that the Service shall be a cooperating agency, if requested. Examples of significant jurisdiction by law include actions that may significantly affect lands and water administered under the National Wildlife Refuge System, or lands and waters administered as national fish hatcheries. The issuance of permits, consultation, or reporting requirements are not sufficient to be deemed significant jurisdiction by law, within the meaning of CEQ's NEPA regulations. If the Service does not have significant jurisdiction, but has special expertise on certain environmental issues (e.g., protection of wetlands, protection of threatened and endangered species), CEQ's NEPA regulations state that the Service may be a cooperating agency.

B. **Cooperating Agency Request.** The request to be a cooperating agency may involve technical assistance or review of early planning efforts, as is required in scoping, or the Service could be requested to develop specific information and/or to prepare analyses, including writing portions of an environmental impact statement (EIS). The level of commitment is negotiable, will be determined on a case-by-case basis, and may involve deliberations between the lead agency and the Service field office. When a major commitment of resources will be necessary, the Regional Director or designee should negotiate with the

lead agency or applicant for a transfer of funds. The lead agency still makes the final decision as to the content of its EIS. Exhibit 1 depicts the process for evaluating a request to be a cooperating agency.

C. **Negotiations**. The Service normally does not have the capability to develop basic data because of recommitted and limited staff resources. The Service can, however, provide available information, professional opinions, and technical assistance in conducting necessary studies. Th~ Service should advise the lead agency that State fish and wildlife resource agencies are often capable of providing basic data. Agreed upon time limits in which the Service will provide studies and analyses should be established prior to being undertaken, and should be adhered to. The services of, and data available from, all Service divisions should be utilized as appropriate.

D. **Funding.** Action agencies with a continuing need for Service cooperation should be encouraged to make long-term commitments or supply needed funds and personnel. For example, scopes of work (SOW) for funds from the Corps of Engineers (Corps) and the Bureau of Reclamation (BR) describe the products to be delivered by the Service, deadlines for delivery, and the amount of funds for the Service. Funding and other issues may need to be negotiated annually between those agencies and Service field offices. As applicable, SOWs should include descriptions of the level of effort and funding necessary for adequate Service participation as a cooperating agency. This discussion of funding pertains only to Service participation as a cooperating agency. The costs of scoping participation and of reviewing and commenting on EISs are normally borne by the reviewing Federal agencies.

E. **Declinations.** The benefits of early coordination in another agency's planning cannot be over-emphasized. Such coordination encourages early resolution of fish and wildlife resource concerns, which may result in more environmentally acceptable actions. Careful assessment of the resources to be impacted and the magnitude and severity of potential impacts should be made before the Service declines a request to coop~rate. If, however, the Service is precluded from cooperating due to other program commitments, or if a mutually satisfactory agreement as to the level of involvement (e.g., transfer of funds and/or personnel) cannot be reached, the Regional Director should notify the requesting lead agency as soon as possible in writing of the Service's intention not to be a cooperating agency.

2.3 Scoping. Basic procedures are described in 40 CFR 1501.7.

A. **Scoping Process.** "Scoping" is defined in CEQ's NEPA regulations as "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." Potential alternatives should be described, if known. Scoping is a document design process for the NEPA document, not a

single event or meeting. Scoping ends with the issuance of the draft EIS. The Service should provide clear, concise and detailed comments on agency "notices of intents," to seek early resolution of important concerns on wetlands, endangered species, migratory birds, anadromous fish, and other resources. Thus, scoping is a crucial step in the early planning stage for the Service to identify fish and wildlife resource concerns and to define the depth to which such concerns should be addressed in an EIS.

B. **Initiation of Informal Scoping.** Conflicts should be addressed by the Service as soon as possible with the lead Federal agency. If possible, this should occur before formal scoping commences to better assure environmentally sensitive planning.

C. **Initiation of Formal Scoping.** Initiation of an agency's scoping process formally commences with Federal Register publication of a notice of intent (NOI) to prepare an EIS. CEQ's NEPA regulations intend for coordination to take place as fully as possible prior to release of a draft EIS. At a minimum, Service input into the scoping process and our responses to the NOI should indicate our general jurisdictional and/or environmental concerns, proposed resolutions, or our no objection to project implementation if it is determined there will be little or no impact on fish and wildlife resources. If the proposed action may affect any resources for which the Service has jurisdictional responsibility, the lead agency must be notified at this time and a process established for resolving any concerns. Replies to NOIs may be made directly to the lead agency by the project leader pursuant to 505 FW 1.6(B)(8).

D. **Service Participation in Scoping.**

(1) Service personnel should normally attend scoping meetings. If attendance is precluded due to travel restrictions or other commitments, written Service comments from the field level should be provided in accordance with instructions in the scoping invitation or public notice.

(2) If the Service is aware that a proposed project may have potential, significant impacts on fish and wildlife resources under the jurisdiction of the Service (e.g., national wildlife refuges, endangered species), the Service field office should advise the sponsoring agency that the Service will be participating in the scoping process and may wish (or requests) to be a cooperating agency.

(3) Service participation in scoping should be coordinated with the appropriate State agencies with regard to the conservation of fish and wildlife resources of mutual interest.

(4) All Service reports and project recommendations must be provided to the lead agency to permit incorporation into project plans, including the draft EIS.

(5) Service reports resulting from participation in the scoping process will be coordinated with other reports or compliance required by the Fish and Wildlife Coordination Act (FWCA), Endangered Species Act, and other laws.

(6) Service input into scoping processes should be documented in EISs, and Service comments should point out any omissions or discrepancies in the use of this input. The Service NEPA Reference Handbook contains a sample Service comment letter to the lead Federal agency on its NOI to prepare an EIS.

2.4 Resolving Federal Agency Planning Inconsistencies.

A. This section describes general guidance for resolving agency differences. For example, the Service may believe another agency's actions are inconsistent with CEQ's NEPA regulations. The Service may have clearly indicated to the agency that their proposed action is "major or significant," but the agency may have prepared an environmental assessment (EA) when the Service believes an EIS is required.

B. In instances such as these, the Service should make its concerns known to the agency formally in writing. To be effective, the Service's comments must emphasize substantive concerns and reference any previous attempts to resolve them. Service comments should describe the requirements of CEQ's NEPA regulations and, whenever appropriate, the agency's procedures for implementing these and other regulations. Most importantly, the Service should clearly state what the other agency must do to adequately address Service concerns.

C. Major differences on policy and procedural matters can be elevated to the Regional Director or Director for resolution. However, all coordination measures should be tried at the lower organizational levels prior to elevating an issue. If Service Regional and Washington Office efforts are unsuccessful in resolving a major issue, a letter summarizing the issues can be drafted to CEQ, in consultation with the Departments's Office of Environmental Policy and Compliance, seeking their review and assistance in resolving the issue. This is not a formal referral under 40 CFR 1504, but a request for CEQ to review a matter of concern to the Service. CEQ's style for resolution generally involves bringing all involved Federal parties together to clearly and succinctly present their positions. CEQ would likely provide its recommendations to the agencies for resolving the issue(s), either informally or formally (in writing), depending on the circumstances.

Exhibit 1, Evaluating A Request To Cooperate, is available from the Division of Habitat Conservation (703) 358-2183.

3.1 Duty to Comment.

A. The Council on Environmental Quality's (CEQ) National Environmental Policy Act (NEPA) regulations (40 CFR 1503.2) require Federal agencies to review and comment on environmental impact statements (EIS) for proposed actions within their expertise or jurisdiction. Throughout another agency's NEPA process, Fish and Wildlife Service (Service) review activities should focus on clear, meaningful analysis of significant environmental issues. The Service should assist a lead agency in making a reasoned decision consistent with the purpose, objectives, and goal of NEPA. Better EISs, in and of themselves, are not the goal of NEPA nor of Service involvement in the NEPA process. The goal of NEPA is better environmental decisions.

B. Other Federal agencies should provide the Department of the Interior's (DOI) Office of Environmental Policy and Compliance (OEPC) with sufficient copies of environmental and other project review documents to allow distribution of the documents to the Service and other DOI bureaus being requested to participate in the review. When necessary, Service reviewing offices may remind other Federal agencies or State offices which prepare and distribute environmental documents to provide appropriate copies to OEPC. Normally, other Federal agencies should provide the following number of copies to OEPC.

   (1) Twelve copies of a draft and six copies of a final document for projects in the Eastern United States, including Minnesota, Iowa, Missouri, Arkansas, and Louisiana. The same number of copies should be provided for projects in America Samoa, Guam, Hawaii, Puerto Rico, and the Virgin Islands.

   (2) Eighteen copies of a draft and nine copies of a final document for projects in the Western United States westward of the westward boundaries of Minnesota, Iowa, Missouri, Arkansas, and Louisiana.

   (3) Eighteen copies of a draft and nine copies of a final document for review requests which are national in scope, such as agency regulations, scientific reports, special reports, program plans, and other interagency documents.

   (4) Sixteen copies of a draft and eight copies of a final document for projects in Alaska.

C. When Service field offices receive other agency environmental documents directly from that agency instead of through transmittal from OEPC, they should advise the Service's Division of Habitat Conservation (DHC) (Attention: Environmental Review Technician) and OEA staff to ensure the document will be distributed by the Department for formal review. Service field offices should reply, in most cases, through formal Departmental review channels and not directly to the other agency.

D. Service reviews and comments on other agency environmental documents should accomplish the following objectives.

(1) Encourage agencies to contribute to the maintenance and enhancement of fish and wildlife values during their actions.

(2) Assure that all potential beneficial and adverse effects of a proposed action are recognized by the lead agency, and are understandably presented to the general public and decision makers.

(3) Assure that practicable alternatives less damaging to fish and wildlife resources are adequately described, realistically evaluated, and adopted where feasible.

(4) Assure that mitigation measures to offset unavoidable losses are adequately developed and included as part of the preferred alternative. Service mitigation recommendations and comments on other agency mitigation plans should be consistent with 501 FW 2, Service Mitigation Policy.

3.2 Administrative Procedures.

A. Department's Office of Environmental Policy and Compliance (OEPC)

(1) OEPC, under the Assistant Secretary for Policy, Management, and Budget (AS/PMB), is responsible for managing and coordinating DOI review of environmental documents and other project reviews (112 DM 4). One of OEPC's primary responsibilities is to ensure that a consolidated, single, consistent DOI response is prepared for Departmental signature. In addition to the Washington Office staff, OEPC has Regional Environmental Officers (REO) that handle many regional problems, serve on interagency task forces and regional commissions, and are authorized to sign DOI NEPA comment letters to other agencies on items of mainly regional concern. OEPC receives draft final EISs from Federal agencies outside DOI and assigns them for review to those DOI bureaus having jurisdiction or special expertise regarding a proposed action and its impacts.

(2) OEPC also receives and distributes for review various other environmental documents, such as environmental reports, proposed regulations, and Department of Transportation section 4(f) statements. OEPC does a preliminary review of the documents and determines which bureau, by virtue of jurisdiction or special expertise, will be "lead," that is, will have the responsibility of consolidating bureaus' comments into a single response for signature of either the REO or OEPC. In some cases the lead is retained by OEPC, and bureau comments are consolidated in Washington by OEPC staff for OEPC or AS/PMB signature.

B. Service Environmental Coordination Activities. Specific Service redelegations to the Assistant Directors and Regional Directors are described in 032 FW. DHC has been delegated the responsibility for assigning lead

within the Service for review and comment on OEPC-controlled documents. If it appears that an error in assignment has been made, or that another Service office has more expertise and should have been assigned lead, DHC should be contacted immediately. DHC will make all to reassignments. Reassignments will be coordinated with the Service's Regional Environmental Coordinators (REQ and other appropriate Service entities. OEPC-controlled documents received in DHC will normally be processed and mailed to the Region and field office within one working day's time. Environmental documents which require a response in less than two weeks are normally transmitted to the Region and field offices by "overnight" mail, fax, or by an appropriate form of electronic transmission.

C. Lead Bureau.

(1) The DOI bureau having either greatest expertise or jurisdiction by law for an action proposed by another Federal agency is designated lead bureau. The lead bureau is determined by OEPC. When OEPC designates the Service as lead bureau, it has responsibility for preparing DOI's response. Either the Regional Office or the Director of the Fish and Wildlife Service (Director) can be responsible for collating-comments, as described in 505 FW 3.2. This responsibility is indicated in the OEPC memorandum and/or the Ecological Services (ES) transmittal. The ES transmittal will provide the necessary instructions. DHC or another designated Division will collate bureau comments when the Director is assigned lead by OEPC.

(2) If conflicting bureau positions cannot be resolved on a proposed project, resolution will be made by either the Department's REO or by OEPC, in consultation with the Service and the other involved bureau(s). When the Service, as lead bureau, prepares the collated DOI response for the REO's or OEPC's signature, the original of each bureau's comments and/or notes of phoned comments or "no comments must accompany the letter.

D. Lead Service Region. When projects cross Regional boundaries or otherwise involve more than one Region, the Assistant Director - Ecological Services (through DHQ will collate and submit the Service's response. If a proposed action has potential site-specific impacts, the document is sent for review to the responsible Region and Service field office. If two or more field offices are involved, lead is assigned to the one responsible for the geographic area in which the greatest potential impact may occur. Unresolved differences on the Service position between Regions will be resolved by the Director.

E. Programmatic or National Reviews. For proposed actions having national impacts or for programmatic statements, DHC will assign review and comment responsibility to the Service's Washington Office division or unit with the necessary expertise.

F. Noncontrolled Reviews. Environmental documents and other project reviews prepared by other DOI bureaus may be received by Service field

offices directly from the preparing bureau or from DHC. If the preparing bureau sends a copy to DHC, DHC will control it with an "EC" number. Other site-specific bureau-prepared environmental documents received directly by Service field offices may be commented on directly from the field level or as per Regional Office instructions. Copies of noncontrolled review comments should be sent to DHC. OEPC does not control bureau-prepared environmental documents and other project reviews, with the exception that it has review and approval responsibilities over all non-delegated EISS. DOI Environmental Statement Memorandum 85-2 describes these procedures (refer to Service NEPA Reference Handbook).

G. **Advance Copies.** Regional and field offices often receive courtesy or advance copies of official draft or final EISs, project plans, section 4(f) statements from non-DOI agencies, or other documents which are being circulated for formal review. The advance copy will allow additional review time between receipt of the official controlled copy and transmittal from DHC. ES transmittal instructions for review and comment should come from DHC in approximately one week (to allow for OEPC and DHC processing and mail delay). If such instructions are not received, or if the reviewer has reason to believe the action agency has failed to submit the document to DOI for review, DHC should be notified immediately. The field and Regional Office review should continue and the comments should be processed as if they were controlled.

H. **Technical Assistance.**

(1) Other agencies and bureaus are encouraged to consult with Service field offices during early planning for technical assistance to help ensure full consideration of fish and wildlife resources. Requests for technical assistance and planning documents received as part of cooperating or scoping efforts are to be reviewed at the field level with comments sent directly to the agency. This includes review of preliminary or working draft EISs, other draft environmental documents, and other draft project reviews. DHC should be advised, by copy, of significant or controversial issues.

(2) When reviewing documents that may become part of an EIS or project plan, the agency should be reminded that such informal coordination is rendered as technical assistance, and does not represent the final position of DOI. Some requests for technical assistance are routed through DOI and controlled by OEPC. These requests are generally responded to directly by the Service field office.

I. **Processing Environmental Review Documents.**

(1) Environmental documents received by OEPC from other Federal agencies are processed in the following manner.

(a) OEA assigns an "ER" control number to the document and routes it to DOI bureaus, via an OEPC memorandum.
(b) DHC receives the OEPC memorandum and prepares an ES environmental Review Distribution transmittal and routes the transmittal and the document to reviewers, with information copies, as appropriate.
(c) ES field office (or other appropriate office) does site specific review and prepares a comment letter for Regional Director's signature (unless otherwise directed by ES transmittal).
(d) Regional Directors review field office comments, sign comment letters, and forward comment letters to lead bureau, REO, OEPC, or Service Washington Office, as indicated in the ES transmittal, with copy to DHC.
(e) DHC coordinates comments directed through the Washington Office with other appropriate Service entities.
(f) Lead bureau prepares consolidated DOI letter for REO's signature.
(g) OEA prepares consolidated DOI letter for OEPC or A/S PMB signature.
(h) Lead Federal agency receives DOI comments.

(2) Service comments on DOI (bureau) environmental documents received by DHC are generally signed at the Regional or field office level and are processed as follows.
(a) DHC assigns an "EV control number, prepares ES transmittal, and routes to the Service reviewer.
(b) ES field office (or other appropriate office) prepares site-specific review and prepares a comment letter for the Regional Director's signature, unless otherwise instructed.
(c) Regional Directors review field office comments, sign comment letters, and forward comments directly to lead bureau, with copy to DHC.
(d) Lead bureau receives Service's comments.

J. Signature Levels. In general, OEPC's instructions for processing review comments are duplicated on the ES transmittal. Unless instructed otherwise by the Department, signature levels are consistent with 032 FW and 505 FW 1.6.

K. Review Deadlines/No Comments.

(1) EISs and some other environmental documents have time periods set by law or regulation during which other agencies and the public may provide comments. CEQ's NEPA regulations (40 CFR 1506.10) require a minimum of 45 days for review and comment on draft EISs and a 30-day waiting

period following release of final EISs. However, Federal agencies may choose to adopt longer, but not shorter, routine time periods. The time period is calculated from the date the Notice of Availability (NOA) is published by the Environmental Protection Agency (EPA) in the Federal Register. The comment due date is provided in these notices. Time periods for draft and final revised or supplemental EISs are calculated the same as for draft EISs and final EISs. CEQ's NEPA regulations require agencies with jurisdiction by law or special expertise to comment or reply that they have no comments, within the time period specified (40 CFR 1503.2). The action agency is under no legal obligation to consider comments received after the established time period expires. To ensure that other agencies give full consideration to Service concerns and comments, reviewers must meet the deadlines given in the ES transmittal.

(2) If the Service is a cooperating agency, or if the Service has otherwise been a participant in the scoping process for a proposed action, review of the draft EIS is needed only to the extent that it ensures our concerns have been correctly addressed.

(3) When controlled documents arrive for review, they should be quickly scanned to determine deadlines and relative priority, and the review should be assigned immediately. If the immediate determination indicates a low priority and a potential for a "no comment" response, the reviewer should follow through with a quick reply.

(4) "No Comments" on draft EISs and on proposed Chief's Reports must be made in writing.

(5) Field office review schedules should ensure that intermediate offices such as the Regional Office, lead collating bureau, REO, OEPC, DHC, and other appropriate Washington Office entities are allowed adequate time to briefly review proposed comments. Potential mail delays and holiday and weekend "down time" should be factored in both DHC's mail schedule and the reviewer's schedule, to the extent possible. DHC shall ensure that the most expeditious mailing system is used, to include routine use of daily bulk "overnight" mail to the Regions, faxed copies, and other appropriate electronic mail transmission, as warranted.

L. Extensions of Time. Organizational responsibilities for meeting deadlines and for requesting extensions of time are described in 505 FW 1.6.

(1) Extensions of review deadlines will occasionally be needed because of unusual routing or mail delays, required field studies, necessary coordination with other Federal or State

agencies, or the discovery of unforeseen problems with the proposed action. The need for any extension must be determined early in the review process and should be requested not later than three days after receipt of the controlled document. The nearer the deadline, the more difficult it is to obtain extensions. An extension should be requested only when it is expected that substantive comments will be made, or substantive field inspection or coordination is needed. It is usually not appropriate or possible to get an extension on a final EIS unless needed in an attempt to avoid CEQ referral.

(2) Extensions of time on OEPC-controlled documents must be made in a request to the lead Federal agency. Unless otherwise directed, this is done by DOI (OEPC or REO, as appropriate).

(3) Extensions of time will be negotiated by the REC with OEPC or the REO, as appropriate. Extensions of one week or less can generally be requested and confirmed verbally. Requests for extension in excess of two weeks must be made in writing for DOI confirmation to the action agency. This letter request will be prepared and processed by DHC. However, the requesting field office must be prepared to offer explicit justification for lengthy extensions. Some examples of good reasons are the need to attend public meetings scheduled after the comment due date or the need for additional coordination with State resource agencies. The Washington Office Environmental Coordinator will notify the REC as soon as the extension ~as been granted or denied.

(4) To obtain an extension of the date due to a DOI lead bureau, such as the National Park Service, the REC should request an extension directly from the lead bureau.

(5) The REC will negotiate extensions through the REO when the Regional Office has the lead in collating bureau's comments for the REO's signature.

M. DOI Comment Letters. DOI review comments are signed by OEPC or AS/PMB in the Washington Office or by the appropriate REO.

(1) Copies of signed letters are forwarded to DHC. DHC provides the appropriate Regional and field offices with copies of Departmental letters signed at the Secretarial level in Washington. It is important that Service offices retain these letters for future use, as they indicate the Service and/or DOI position on the project. DHC maintains the Service's administrative record of all Service responses to DOI and Federal agencies on controlled environmental reviews. Regional and field offices should maintain similar

files for controlled environmental reviews within the scope of the Region.

(2) Service personnel should compare these letters with t * he comments submitted. The preparer and/or REC should question any substantial changes in Service comments made by OEPC or a lead bureau that were not coordinated.

3.3 How to Review Environmental Documents.

A. Service personnel responsible for reviewing an environmental document will normally have had previous experience with the proposed action by participating in the scoping process, representing the Service as a cooperating agency, authoring planning aid letters or formal Fish and Wildlife Coordination Act (FWCA) Reports, or through consultation under the Endangered Species Act.

B. Service reviewers must be extremely careful not to foreclose future options by declining to review and comment on environmental documents. Failure to review and comment on other agencies' draft EISs and other environmental documents can be interpreted by those agencies as meaning the Service has no concerns or believes that the proposed action will not have significant impacts on fish and wildlife resources. It can further be interpreted to mean that the Service will have no objections to issuance of any permits required for project construction.

C. **Major Areas of Concern to be Addressed in Service Reviews of Environmental Documents.**

(1) Service comments and advice on environmental documents should be confined to items of Service jurisdiction and expertise and should be based on facts, published research, or professionally supported opinion.

D. **Tiering.** CEQ's NEPA regulations (40 CFR 1502.20) encourage tiering EISs. Tiering, however, is not a substitute for the adequate assessment of site specific environmental effects. For example, a programmatic EIS must consider cumulative, direct, and indirect impacts; however, this may result in less detailed assessments of impacts than would be addressed on a site specific EIS.

E. **Discussion of Inconsistencies with State and Local Plans.** CEQ's NEPA regulations'140*CFR 1506.2(d)] require an EIS to discuss any inconsistencies the proposed action may have with an approved State or local plan or law, and to address the extent to which the lead agency plans to reconcile its proposed action with the plan or law. Service comments on EISs should address key State and local planning efforts which have Service involvement in development, review, and/or approval. Some of these are listed below.

(1) Management and habitat acquisition plans funded by Dingell-Johnson (D-J).and Pittman-Robertson (P-R),

Land and Water Conservation Act, section 6 (Endangered Species Act) cooperative agreements, or through other grant programs.

(2) Coastal Zone Management Plans.

(3) State and local wetland and flood plain management plans.

(4) Coastal Barriers Resources Act, as amended.

(5) Habitat conservation planning under section 10(a)(1)(B), recovery plans, and recovery actions, pursuant to the Endangered Species Act.

(6) State water quality standards.

F. **Service Reviews should be Total and Comprehensive.**

(1) EIS reviews should include consideration of total, long-term ecological impacts, including any direct and secondary (or indirect) impacts. Also, Service reviewers should consider any cumulative effects, or possible project segmentation which could mask cumulative effects.

(2) The Service should provide consistent positions. Do not contradict earlier statements unless project alternatives, impacts, or conditions have substantially changed; or significant new data are available. Any significant change in Service position must be substantiated (justified) in writing.

(3) Service reviews must represent the views of all Service program areas. Any uncompleted or unresolved reviews or consultations under other statutes must be indicated/summarized in the Service's comments.

3.4 Comments on Draft EISs. The Service should review and comment on an agency's draft EIS to ensure that fish and wildlife resources are adequately considered in their programs and plans. A sample DOI letter commenting on a draft EIS is found in the Service NEPA Reference Handbook. The following points should be considered.

A. If a draft EIS is so inadequate as to preclude meaningful analysis, but it appears that there may be significant adverse effects on fish and wildlife resources, Service comments should state explicitly what would be required to make the document adequate. The action agency should be requested to prepare and circulate a revised draft EIS, in accordance with 40 CFR 1502.9(a).

B. The Service should indicate which alternative is environmentally preferred from a fish and wildlife standpoint. The Service should make recommendations regarding each alternative to ensure that, whichever is selected, the lead agency is aware of necessary fish and wildlife measures that should be incorporated therein.

C. Service comments on a draft EIS may request the action agency to prepare a supplement to the EIS if such an analysis will help to satisfy Service concerns. Requests for supplemental documents must be consistent with the criteria set forth in 40 CFR 1502.9(c).
D. If there is any possibility that the Service may refer a project to CEQ (40 CFR 1504), that fact must be pointed out to the agency at the earliest possible time in their planning process. This normally occurs within the comment period for the draft EIS. 505 FW 4 provides specific guidance on CEQ referrals.
E. Submit all comments to the appropriate collating office. Do not bypass DOI by submitting comments directly to the requesting Federal or State agency.
F. Service comments should not be released prior to DOI's release of the official Departmental position.

3.5 Coments on Final EISs. CEQ's NEPA regulations [40 CFR 1502.9(b)] require lead agencies to respond to comments made on the draft EIS-and require discussion of responsible opposing views at appropriate points in the final EIS rather than merely appending comments to the document.

A. The Department does not normally comment on final EISs. In other words, the quality review of the document itself should be completed prior to release of the final EIS. "No Comment" responses are not normally required, unless requested on the ES transmittal. The Service comments on final EISs when there are major, unresolved issues about the project itself. For example, the Service may oppose the project or a feature of major importance relative to fish and wildlife resources. A sample DOI letter commenting on a final EIS is found in the Service NEPA Reference Handbook. Generally, comments on a final EIS are justified when one or more of the following criteria occur.
    (1) The Service strongly objects to the selected alternative because it is environmentally unacceptable from the Service's expertise or jurisdictional standpoint, or it fails to incorporate Service recommendations for mitigation or monitoring requirements as an integral part of the project.
    (2) Project modifications proposed since the draft EIS require further comment. This is especially important if the modifications significantly affect the impacts or the analysis of those impacts on fish and wildlife resources, will effect endangered species, or if new permit activities could be involved.
    (3) There is a need to correct the record because there has been a serious failure on the part of the action agency to understand significant Service comments on the draft EIS and that failure is the basis for our opposition to the project or specific project features.

(4) Important new information which would be consequential to the decision making process is available, or erroneous or obsolete data are presented in the final EIS which could significantly affect fish and wildlife resources.

B. If DOI's comments on the draft EIS included "may refer to CEQ" language, but the Service/DOI decided not to refer, DOI's comments on the final EIS should address the reasons for not referring (e.g., major issues were resolved).

C. Service comments on a final EIS should state what the Service specifically wants the lead agency to address in its Record of Decision to rectify the Service's concerns. For example, the Service could ask that specific mitigation measures or the results of section 7 consultation be addressed in the Record of Decision, if not previously included in the selected alternative.

3.6 Format for Comments on Draft and Final EISs.

A. Service comments should be organized to reflect the different statutory review requirements on the document being reviewed. For example, Service comments should be separated as follows: "Environmental Impact Statement Comments," "Section 4(f) Statement Comments," ENDANGERED Species Act Comments," (Fish and Wildlife Coordination Act Comments." The latter two sets of comments should only address statutory requirements, such as section 7 consultation or the FWCA report.

B. Regarding Service comments on a draft EIS, the comments should generally be organized in two sections: "General Comments" and "Specific Comments." A "Summary Comments" section may also be included when the review comments are lengthy. When commenting on final EISs, these sections are usually not indicated since the comments generally address only major unresolved issues regarding the project. The sections are described below.

C. General Comments.

(1) This section should summarize Service concerns with the adequacy and accuracy of the document and present comments of a general nature. The comments in this section should concentrate on the recommended or selected alternative and its impacts. Any previous technical assistance, reports, or planning aid letters provided by the Service on the project should be noted in this section (and attached), if appropriate. For example, Service comments should note any potential reviews that it may make in conjunction with section 10/404 Corps of Engineers permits, any further consultation requirements under section 7 of the Endangered Species Act, and whether the Service may refer the project to CEQ. Other project reviews are addressed in 505 FW 4. CEQ referrals are discussed in 505 FW 5.

(2) If the document is complete in its analysis of potential impacts on fish and wildlife resources of the proposed action and reasonable alternatives, and if the proposed action is acceptable, a simple statement of that fact should be made.

D. **Specific Coments.**

(1) Specific comments should support each of the major concerns raised in the "General Comments." In other words, the action agency should be able to locate and identify the specific justifications for the major problems addressed in the "General Comments" section. Other comments to rectify inadequacies on how fish and wildlife resources are addressed in the EIS are also covered in this section.

(2) The format of this section should follow the organization of the document being reviewed. Page and paragraph numbers should be cited to improve the usability of the comments. The comments Should be written in a constructive tone to help the author of the document modify the next draft or final work. State the problem with specificity rather than a general description of inadequacy. Most importantly, specifically state what needs to be done to rectify the deficiency. Give your precise recommended additions and deletions. As 40 CFR 1503.3 points out, when we choose to criticize a lead agency's predictive methodology we should describe not only the methodology we prefer, but why.

(3) Comments should address significant impacts of the proposed action that may have been overlooked or downplayed. The comments should also be made to assure that alternatives that would benefit or have fewer adverse impacts on fish and wildlife resources be included and adequately presented. Comments on the description of the environment or environmental setting should be made only if a particular component of the environment that will be significantly impacted is not described.

E. **Summary Comments.** When the review comments are lengthy, it may be ,useful to summarize the Service's major concerns and recommendations for rectifying those concerns in this section. Whenever appropriate, this section should close with an offer by the Service to meet with the agency to discuss the Service's comments and concerns. This offer of continued cooperation and assistance is especially important if significant resources are involved or if there are extensive Service comments too difficult to

thoroughly describe in a letter. Specific contacts by titles, addresses, and telephone numbers should be provided.

F. **Collated Responses.** The above format should be used when collating' comments from other bureaus into a Departmental response. However, if lengthy comments are provided by more than one bureau, the comments by the other bureaus can be presented separately within the Departmental response, as long as there are no inconsistencies or differing positions. Differing positions should be resolved between the bureaus. Unresolved issues between bureaus will be resolved at the RED or OEPC level, as appropriate. The Departmental response should be a unified, single consistent response.

3.7 Style for Comments on Draft and Final EISs. Service comments must be clear, specific, succinct, and based on facts, published literature, and expert opinion. Literature sources should be referenced when possible.

A. Presenting a complete, factual analysis is important to convincing the action agency to adopt the Service's recommendations. The tone of the comments should be constructive, objective, and professional. Comments should not contain extraneous information or excessive quotes from the document, have unnecessary descriptions of the proposed action, or give detailed descriptions of the affected environment, or offer unsupported conclusions. Further studies or information should only be requested when necessary for adequate evaluation of the proposed action or alternatives.

B. Do not use a question when commenting. Instead, clearly state the problem and the recommended solution.

C. If the comments are to be ultimately signed by the Secretary, RED, or another official in DOI, do not refer to the Service in the first person. Never use the word "I." You may use phrases such as "The Service suggests," "the Service has advised the Department," etc. Also, be careful not to preempt the Secretary's signature prerogatives. Be clear as to whose position you are referring to. For example, state whether it is a DOI position or a Service position. If you are unsure, assume the latter.

4.1 General Requirements.

A. Interrelated Reviews.

(1) The Council on Environmental Quality's (CEQ) National Environmental Policy Act (NEPA) regulations (40-CFR 1502.25) require to the fullest extent possible, that Federal agencies prepare draft environmental impact statements concurrently with and integrated with environmental impact analyses and related surveys and studies required by the Fish and Wildlife Coordination Act (FWCA), National Historic Preservation Act, Endangered Species Act (ESA), other environmental review laws, and executive orders (ED). Most Federal projects or activities require compliance with these laws and EOs. Similarly, a non-Federal project may require Federal permits, such as section 404 permits for private development in waters of the United States, a Bureau of Land Management (BLM) or Refuge permit or easement for a transmission line crossing, or an Environmental Protection Agency (EPA) point discharge permit under the National Pollution Discharge Elimination System. In any such case, where a private applicant or the State prepares the environmental document, the Federal agency approving the permit or issuing a grant remains responsible for complying with NEPA and other Federal laws, regulations, and EOs. Other project reviews should be reviewed and processed in the same manner, unless-otherwise directed, as environmental reviews.

(2) The Fish and Wildlife Service (Service) has the opportunity and duty to review these documents and others prepared under various environmental protection laws (e.g., 40 CFR 1503.2, section 4(f) of the Department of Transportation Act of 1966). However, even though the Service has additional review opportunities, the Service uses early involvement and coordination to ensure that all interrelated reviews are incorporated within the environmental document. All Service review and approval functions should be coordinated. If the Service fails to point out ESA requirements or neglects to comment on other project involvements, such as section 10/404 permits, the project sponsors and lead Federal agency may have a false impression of our concerns.

B. Segmentation.

(1) The issue of segmentation can involve many different types of proposed Federal projects or permits. However, it has frequently been raised with regard to highway projects. An important

precedent-setting case on highway segmentation is *River v. Richmond Metropo7itan Authority (1973).* The court ruled that the requirements of Federal law may not be avoided by segmentation of a project. The court established three criteria to "prove" segmentation that subsequently have been incorporated into Federal Highway Administration (FHWA) and Corps of Engineers (Corps) NEPA regulations relative to "scope of analysis."

(2) To "prove" segmentation, the following conditions must be shown:

(a) the project was originally perceived as unified and interdependent:

(b) the segments do not have independent utility, and

(c) the segments are not reasonable when considered alone.

(3) One or more of these criteria may be sufficient, although, when all three apply, a better case can be made. If these criteria can be established and if there is sufficient Federal involvement in the planning and construction of the project, segmentation may occur. In this instance, the Service may be able to argue, for example, the need for an environmental impact statement (EIS) for the entire or larger interconnected project. The same logic and approach can be taken if Federal permits are required for some or all of the segments.

4.2 Fish and Wildlife Coordination Act. See also 502 FW.

A. General.

(1) Under provisions of the FWCA (16 U.S.C. 661-667e; 48 Stat. 401, as amended), the Service has the authority to investigate and report on all proposals for work and/or other activities in or affecting the waters of the United States that are sanctioned, permitted, assisted, or conducted by the Federal government. Service comments on an EIS should be consistent with and in support of impact and mitigation analyses provided in FWCA reports, and should reference the FWCA report as appropriate. Ideally, the draft and final FWCA report should be available to the Federal agency prior to its preparation of the draft and final EIS, respectively. However, in unusual circumstances, where the EIS is circulated for review prior to completion of the FWCA reporting process, anticipated impacts and tentative mitigation needs should be identified to the extent possible. A statement should be included in the Service's NEPA comments stating that a more detailed FWCA report is forthcoming.

(2) The FWCA requires Federal construction agencies proposing works to impound, divert, or otherwise modify water bodies to consult with the Service. FWCA reports stem from field

investigations for such water projects as proposed or under study by the Corps and Bureau of Reclamation (BR), as well as for other Corps maintenance and construction activities in navigable waters. Under the Corps and BR procedures to implement the NEPA Regulations, EISs have become an integral part of their planning documentation.

(3) Although EISs are often included with other planning documents, the Service and Department of the Interior (DOI) normally respond to each document separately. This obligation can be met in one letter, provided the comments for each document are presented in separate sections. Due to their unique or complex planning procedures, guidance is provided on the following Federal agency actions.

B. Corps of Engineers Projects

(1) The Corps of Engineers defines their policy and procedures for implementing NEPA in 33 CFR 230. Under these procedures, the Corps integrates NEPA requirements with other planning and environmental review and consultation requirements. NEPA review activities generally occur during Feasibility Studies, which follow Reconnaissance Studies, in the Corps planning process. When an EIS is required, it will occur as a separate section bound in the Feasibility Report. When commenting on these combined documents, which are "ERN-controlled, the FWCA response to the planning document should be separated from the EIS comments, but may be presented in the same letter.

(2) Comments to the Department's Office of Environmental Policy and Compliance (OEPQ should also include the Service's opinion as to the environmental acceptability of the proposed action, and make note of previous Service assistance and comments. Any Service reports or documents referenced must be attached, unless previously submitted to the lead agency. Service comments to OEPC should close with an offer of continued coordination with +he field office (address and telephone number should be provided).

(3) At the termination of Feasibility Studies, the Chief of Engineers prepares a proposed report based on findings of the District Engineer and Division Engineer, which recommends the plan the Chief will propose to Congress for authorization. The proposed Chief's Report is generally two or three pages and summarizes and approves or disapproves the findings and recommendations of the Division and District Engineers. The supporting documents to the proposed Chief's Report vary but usually include the reports of the Division Engineer as well as the District Engineer's Feasibility Report and final EIS.

(4) The Service is required to complete the review of the final EIS within 30 days, but has 90 days to complete the Federal/State agency review of the proposed Chief's Report. These comments are normally contained in one letter, but must be in separate sections. The comments for both reviews should normally be submitted to the Corps within the 30-day period. Should the Service need to make comments on ESA compliance, these comments should be in a separate section of the letter.

(5) Review of the proposed Chief's Report and final EIS should determine whether Service recommendations are included in the Chief's recommendations. Service comments on the proposed Chief's Report should, at a minimum, address the following concerns.

(a) Whether the proposed Chief's Report adequately addresses Service concerns and recommendations (i.e., mitigation, ESA compliance).

(b) Whether the Service supports the Chief's recommended plan.

(6) Comments should present a definite Service position on the proposed Chief's Report and on the project. Where the Service has major unsatisfied concerns, a concise and complete justification of our position, consistent with the FWCA Report, should be provided. Service comments should clearly and forcefully urge the Chief to include modifications deemed necessary to provide for fish and wildlife concerns. When commenting, the Service should recommend specific language changes. "No Comments" on proposed Chief's Reports must also be made in writing to OEPC.

C. **Soil Conservation Service Activities.** See also 504 FW 1.

(1) Soil Conservation Service (SCS) projects also require similar consultation with and reporting requirements by the Secretary of the Interior. This authority was provided in the 1958 amendments to the FWCA, which added a new section (section 12) to the Watershed Protection and Flood Prevention Act of 1954 (P.L. 566).

(2) In December 1979, the Service and SCS signed Channel Modification Guidelines to be used in the planning of all SCS projects or measures where channel modification may be proposed. Respective Service and SCS responsibilities and guidelines for the resolution of issues are defined.

(3) The current edition of the SCS Watershed Protection Handbook outlines SCS procedures to be used to integrate NEPA into their planning process. Like the Corps, SCS now combines documents, in this case, the Watershed Plan and draft EIS. Comments on SCS Watershed Plans combined with EISs should be addressed like those for the Corps of Engineers, as outlined above.

D. **Corps of Engineers/Coast Guard Permits and Licenses Activities.**

(1) The Corps NEPA regulations (33 CFR 230) and Department of the Army regulatory program regulations (33 CFR 320 and 330) should be reviewed. The following guidance is provided regarding the interrelationship of NEPA with permits and licenses.

(a) Where the need for Federal permits or licenses has been identified in an EIS, comments to planning agencies should indicate which permits would require Service review and the likely Service position based on available information. If the Service's comments outline serious concerns or if the Service's likely position would be to recommend denial, the Service should urge the applicant to consult as early as possible with the appropriate Service office (address and telephone number should be provided). Mitigation measures, including project modifications, or proposed permit conditions should be identified in Service comments on the draft EIS.

(b) Despite efforts to have permit requirements identified early in the NEPA process or when site-specific information is lacking, an EIS may still lack an indication of possible permits. If this inadequacy is identified, Service comments on the draft EIS could contain a statement s1milar to the following: "The statement lacks a discussion of (i.e., the requirement for permits) and evaluation of how these actions may affect fish and wildlife resources. Accordingly, these comments do not preclude separate evaluation and comments by the Fish and Wildlife Service, pursuant to the FWCA (16 U.S.C. 661, et seq), if project implementation requires a permit from the U.S. Coast Guard (CG) and/or the Corps, pursuant to sections 9 and 10 of the Rivers and Harbors Act of 1899 and section 404 of the Clean water Act oi 1972, as amended. Please consult with the Field Supervisor, U.S. Fish and Wildlife Service (provide address and telephone number)."

(c) If permits are required for the proposed action, the Service may concur, with or without stipulations, or recommend denial depending on the effects on fish and wildlife resources. For example, for a CG permit for a major bridge replacement, the Service could require features to reduce turbidity during project construction, or that the shoreline area be stabilized with planting suitable for wildlife utilization.

(d) The following general guidance applies to the Service's review of section 10/404 permit applications with regard to NEPA compliance.

(i) Integrating NEPA effectively into the section 10/404 process is a question of "timing." The key elements of the NEPA document (proposal, alternatives, impact assessment) are of little value to the decision maker if it is not prepared and publicly reviewed simultaneously with the permit document.

(ii) The requirements for identifying alternatives under NEPA and section 404 are similar. However, the section 404(b)(1) guidelines require selection of the "least environmentally damaging practicable alternative." NEPA does not require the selection of any particular alternative, only that all reasonable alternatives be identified and analyzed.

(iii) Permit applicants should be made aware early-on of the Corps requirement to comply with NEPA and the section 404(b)(1) guidelines. This should be done through pre-application consultation.

(iv) When an EIS is required, the section 404 process, including the identification of potential alternatives, should commence with the NEPA scoping process.

(v) Ideally, to fulfill the purpose of NEPA, the Corps should receive sufficient information from the applicant to either prepare a draft NEPA document for inclusion with the public notice, or provide public notice for review of the draft environmental document prior to the final decision. Following public review, the final NEPA document and compliance with the section 404(b)(1) guidelines would be completed and the permit decision made.

(2) Bridges on federally-funded highways require the approval of both the FHWA and the CG. Procedures coordinating the actions of these two agencies are found in a 1972 FHWA/CG Memorandum of Agreement (MOA) (refer to DOI Environmental Review Memorandum ER 73-2, April 11, 1973, in the Service NEPA Reference Handbook). The 1972 FHWA/CG MOA assigns the responsibility for preparing the environmental documents to the FHWA. The CG considers the environmental documents and other information in their decision to approve

(with or without conditions) or deny a bridge permit, pursuant to 33 U.S.C. 401, 491, 511 et seq., 525, and acts of Congress.

4.3 Department of Transportation Act of 1966 Activities.

A. Authorities.

(1) The Service and Department review federally-funded activities under the jurisdiction of the Department of Transportation (DOT) under several authorities, including NEPA. These authorities are listed below.

(a) 49 U.S.C. 1653(f), Department of Transportation Act of 1966, section 4(f).

(b) 23 CFR 771 and 777, Federal Highway Administration regulations for implementing section 4(f) of the Department of Transportation Act of 1966. Terms particular to section 4(f) are found in 23 CFR 771.107.

B. **Section 4(f) responsibilities.**

(1) Section 4(f) of the DOT Act declares that the Secretary of DOT shall not approve any program or project requiring use of any publicly-owned land from a public park, recreation area, wildlife or waterfowl refuge, or historical site of national, State, or local significance, unless there is no feasible and prudent alternative, and such program or project includes all possible planning to minimize harm.

(2) Section 4(f) of the Department of Transportation Act of 1966 applies to all DOT activities, including activities under-the purview of the Federal Highway Administrations, the Federal Aviation Administration, Urban Mass Transportation Administration, and the Coast Guard, as well as the Interstate Commerce Commission.

(3) The Secretary of DOT must cooperate and consult with the Secretary of the Interior in developing transportation plans and programs that include measures to maintain and enhance the natural beauty of the lands traversed. DOI procedures for reviewing comments on FHWA proposals are found in DOI Environmental Review Memoranda ER 75-2 and 75-3, July 21, 1975, and August 15, 1975, respectively (refer to Service NEPA Reference Handbook).

(4) Airport projects are subject to provisions of section 4(f), as well as section 16 of the Airway Development Act of 1983 (refer to Service NEPA Reference Handbook). Both Acts address consultation requirements with the Secretary. In general, Service comments relative to section 4(f) and FAA's NEPA document suffice in meeting both requirements.

C. **How to Comment on Section 4(f) Statements.** Section 4(f) statements are generally accompanied with an environmental

document. The Service comments on each document separately, but includes the responses together in the transmitted response to the action agency.

(1) Service section 4(f) comments must indicate the Service position on the adequacy of the statement as it relates to the two provisions.

(a) Does the Service concur that there are no feasible and prudent alternatives to the use of the section 4(f) property? Or should DOI's comments be deferred until additional information is provided?

(b) Does the Service concur that the project includes all possible measures to minimize harm to the section 4(f) property? If not, we should identify the inadequacy and provide any additional measures we feel are needed (i.e., land replacement, landscaping, fencing, facility replacement and/or relocation, and wetland drainage prevention).

(2) The Service's detailed analysis of the two provisos and the propriety of any section 4(f) approval by DOT should be outlined in a separate section of the Service's comments on the EIS or environmental assessment (EA). The separate section should be titled "Section 4(f) Comments The "Summary Comments" section should specifically state that the Service either: does not object, does not object with conditions, or objects to section 4(f) approval at this time because DOT would not consider and/or implement Service recommendations of a reasonable and prudent nature to comply with one or both provisos. A sample DOI letter commenting on a section 4(f) statement/EIS is found in the Service NEPA Reference Handbook.

(3) Service section 4(f) comments should address any inadequacies in the following:

(a) identification of section 4(f) properties in the project's zone of adverse impact; and

determination of the significance of these properties [all Service lands, including hatcheries and refuges, and land acquired with Federal Aid funds and FWCA mitigation lands, are significant in the context of section 4(f)].

(4) identification and evaluation of alternatives to the use of section 4(f) properties;

(5) assessment of environmental impacts;

(6) identification of circumstances where "constructive use" may occur;

(7) mitigation measures; and

(8) consultation and coordination with the Service in the assessment of impacts and in the resolution or tentative

agreement on measures to minimize harm to any Service properties.

D. **When Applicability of Section 4(f) is in Question.**

(1) In some situations, FHWA may question whether section 4(f) is applicable because of the nature of the section 4(f) area or because of the nature of "use." In such situations, Service comments should furnish facts and information, express our opinion, and request a formal opinion relative to the applicability of section 4(f). DOI's position is that section 4(f) applies to the following lands within the jurisdiction of the Service:

(a) all lands authorized, established, or administered as part of the National Wildlife Refuge System;

(b) all lands established or administered as part of the National Fish Hatchery System;

(c) all waters and lands acquired for mitigation purposes under the FWCA; and

(d) all State lands acquired, or developed, or improved for fish and wildlife conservation, restoration, or management with grants under Pittman-Robertson (P/R)-Dingell-Johnson (D/J), section 6 of ESA, and the Anadromous Fish Act of 1965.

(2) DOI Enviro6mental Review Memorandum ER 80-2, June 25, 1980, provides additional information on the applicability of section 4(f) (refer to Service NEPA Reference Handbook).

E. **"Constructive Use."** FHWA and Urban Mass Transit Authority joint regulations define the circumstances under which "constructive uses of certain protected resources would or would not occur (23 CFR 771.135). For example, "constructive use" could mean adverse proximity (indirect) effects of the construction of a highway or airport to a nearby refuge or public park. In such cases, section 4(f) would apply. Service reviews of highway and airport proposals should be aware of this circumstance. If "constructive use" applies, the Service should fully describe the probable impacts ("use") of the section 4(f) properties.

F. **Relationship of Section 4(f) to Grant-in-Aid Programs.**

(1) Fish and wildlife resources managed by the States using P-R or D-J grant-in-aid funds also come under the provisions of section 4(f). The Service is assigned section 4(f) commenting responsibility for DOT-funded projects potentially affecting State and local wildlife management lands (publically-owned) that do not come under the direct management jurisdiction of the Service. If these State-managed lands or streams will be impacted by a federally-funded or permitted highway or airport project, it constitutes a "diversion of funds" as outlined in 50 CFR 80.4 and 80.14, if P-R or D-J funds were used by the State to enhance fish or wildlife resources on these areas. The State DOT is responsible for replacing any P-R/D-J impacted lands

according to these provisions. Service reviewers of such highway or airport projects should be mindful of possible impacts to these lands.

(2) If the Service determines no impact, its comments should state that no lands are involved which were acquired or are managed with Federal grant-in-aid assistance under the Wildlife Restoration Act (P-R Act, Public Law 75-415) or the Fish Restoration Act (D-J Act - Public Law 81-681). Therefore, the Secretary of the Interior's regulations in 50 CFR 80.4 and 80.14 are not applicable. If it is determined that there may be impacts to P-R/D-J lands, the Service's comments should clarify the State's responsibility for diversion of funds.

G. When Service Lands are Involved in Transportation Projects.

(1) National Wildlife Refuge System Lands.

(a) service Refuge Managers should be aware that it is improper to issue a permit for a transportation project granting use of 4(f) lands under our jurisdiction, or in which we have grant-in-aid interest, until the Service, through DOI, has reviewed and commented on the section 4(f) statement, and section 4(f) approval has been granted by DOT. These reviews are either controlled through OEPC and are signed at that level, or they may be controlled and signed at the Service Regional Director level, depending upon the level of impact on section 4(f) lands (see 4.3.K).

(b) In coordinating with a transportation agency relative to proposed use of section 4(f) lands under Service jurisdiction, the Service should determine if there may be feasible and prudent alternatives to use of those lands. The compatibility of the proposed use with the purposes for which the lands were acquired and are being managed must also be determined under the National Wildlife Refuge System Administration Act of 1966. Assuming both findings are satisfactory, the next step is to determine measures to minimize harm that could occur as a result of the proposed action. These required steps should be made known to the transportation agency as early as possible so they may be included in the section 4(f) statement and any NEPA documentation.

(2) National Fish Hatchery System Lands. The words "wildlife" and "refuge" under the DOT Act of 1966 have broader meaning than under the National Wildlife Refuge System Administration Act *[Brooks v. Vo7pe, 460 F.2d 1193, 1194 (9th Cir. 1972)].* It is DOI's position that all lands and interests therein authorized, established, or administered as part of the National Fish Hatchery System are subject to the provisions of section 4(f). However,

such lands are not part of the National Wildlife Refuge System, unless so specified by Congress. This is stated in a DOI Solicitor's Opinion, December 24, 1975; and in a letter from the Secretary, DOI, to Secretary, DOT, June 20, 1980 (refer to Service NEPA Reference Handbook). The protection provided by this Act, and others, such as the Refuge Recreation Act, are extended by regulation to the National Fish Hatchery system (50 CFR 25-29, 31-36, 60, and 70-71).

H. **Protection of Wetlands on Section 4(f) Properties.** See also 507 FW 2, regarding the protection of privately-owned wetlands affected by federally aided highway projects.

(1) The FHWA has agreed that components of the National Wildlife Refuge System (i.e., national wildlife refuges and waterfowl production areas), recreational (but not scenic) segments of Federal wild and scenic rivers, and national parks usually require section 4(f) approval by DOI if any use is required of such lands. This also applies to any Federal or State park or recreation lands acquired under section 6(f) of the Land And Water Conservation Act, section 6 of the ESA, Anadromous Fish Act of 1965, lands acquired or managed under the P-R or D-J grant-in-aid program, and under several other wetlands funding legislation.

(2) In practice, based on section 4(f) and related case law, wetlands that occur on section 4(f) lands usually are afforded a higher degree of protection for proposed use by FHWA than privately-owned wetlands. Mitigation, including the replacement of such lands, generally must be acceptable to the Service before DOI will provide section 4(f) concurrence to FHWA.

I. **Minor Involvement with Public Parks, Recreation Lands, Wildlife and Waterfowl Refuges, and Historic Sites.**

(1) On August 19, 1987, FHWA implemented a nationwide 4(f) evaluation and approval process for federally-aided highway projects with minor involvement with public parks, recreation lands, wildlife and waterfowl refuges, and historic sites (52 FR 31111). For a project to qualify under this streamlined, programmatic approach, the project must entail an improvement to an existing highway, have minor impacts, and have agreement from officials with jurisdiction over the property with regard to the assessment of impacts and proposed mitigation.

(2) DOI has determined that the point of coordination on these proposed projects between the FHWA and the bureaus is at the Regional Director level. The Service Regional Director will coordinate the Service response (i.e., collate field office views) to FHWA on any projects addressed under the nationwide section 4(f) evaluation.

4.4 Endangered Species Act. See also 734 FW.

A. The presence of listed or proposed threatened or endangered species and/or designated or proposed critical habitats in the area to be impacted and the potential impacts of the proposed project on those species or habitats should be fully discussed in agency's environmental documents (i.e., EAs and EISs). Service comments on draft environmental documents should identify potential impacts to those species or habitats which have not been adequately addressed.
B. It is to all parties' benefit that the Service identify potential endangered species and critical habitat conflicts early in the project planning process, such as scoping.
C. The joint Service-National Marine Fisheries Service Interagency Cooperation regulations [50 CFR 402.12(c)] state that consultation, conference, and biological assessment procedures under section 7 may be consolidated with interagency cooperation procedures required by other statutes, such as NEPA. However, satisfying the requirements of NEPA does not in itself relieve a Federal agency of its obligations to comply with their responsibilities under section 7. The following guidance is provided.
    (1) During scoping, the Service should provide the Federal agency with all relevant information on endangered and threatened species. However, this does not relieve the Federal action agency of its requirement to submit a written request for a list of any listed or proposed species or designated or proposed critical habitats, or to develop its own list for Service approval [50 CFR 402.12(c)]. The list should be included in the draft and final environmental document as supporting documents.
    (2) Similarly, where section 7 requires a Federal agency to prepare a biological assessment [50 CFR 402.12(f)], the assessment should be part of the draft and final environmental document.
    (3) Formal section 7 consultation is required when a Federal action may affect listed species or destroy or adversely modify designated critical habitat (50 CFR 402.14). The results of such consultation should be addressed in the draft and final environmental document, or, as appropriate, in the record of decision for an EIS.
D. The Service should ensure that the Federal action agency is also aware of other ESA activities in the area to be impacted, such as recovery plans, recovery actions planned or underway, and any existing or proposed habitat conservation plans, pursuant to section 10(a)(1)(B) of ESA. These activities should be addressed in the action agency's environmental document.

4.5 **Executive Orders 11988 (Flood plain Management) and 11990 (Protection** of Wetlands).

A. EO 11988 affirms that it is national policy to protect and enhance the natural and beneficial values of flood plains and to actively discourage noncompatible development. EO 11990 recognizes that the remaining U.S. wetlands are a valuable national resource. These EOs caution all Federal agencies to do everything possible to preserve remaining wetlands and flood plains by avoiding direct or indirect support of new construction in wetlands wherever there is a practicable alternative.
B. It is Service policy to provide Federal leadership in preserving and restoring the natural and beneficial fish and wildlife values of flood plains and wetlands. Whenever there is a practicable alternative, the Service should not undertake, support, or permit activities under its authorities that would adversely impact flood plains or wetlands. The Service should be-alert during the NEPA planning process for opportunities to protect, restore, and/or enhance fish and wildlife resources values in flood plains and wetlands.
C. Service comments on an EIS should identify and discuss impacts to Flood plain and/or wetland resources. Alternative project elements with less impact to these resources should be suggested, and steps that could be taken to minimize impacts or to restore or enhance natural Flood plain/wetland values should be recommended.
D. If the proposed action does not appear to be in compliance with the EOs, Service comments should state so and recommendations should be made for modifying or abandoning the project.

4.6 Federal Energy Regulatory Commission (FERC). See also 503 FW.

A. For a project license or exemption, FERC regulations require applicants to consult with appropriate State and Federal agencies and affected tribes before submitting an application to FERC. FERC's regulations for implementing NEPA are found in 18 CFR 2, 157, and 380.
B. When FERC decides the application is ready for environmental analysis, it requests public and agency review and comment within 60 days. The Service, through a controlled Departmental process, may issue comments, section 10(j) recommendations, section 4(e) terms and conditions, and section 18 prescriptions for the license. FERC, which has adopted CEQ's NEPA regulations, then prepares a NEPA document for the action.
C. Most licensing decisions are based on EA's. In many cases, FERC provides the public and the Service the opportunity to review and comment on draft EAs. The final EA and finding of no significant impact is issued with the license order.
D. In instances where an EIS is prepared, the Service, DOI, and the public are invited to scoping meetings and have an opportunity to comment on the draft EIS. If Section 4(e), 10(j) or 18 terms, conditions, prescriptions or recommendations are to be revised or submitted along

with NEPA comments, they should-be clearly labeled and separated from the main body of the comment letter.

E. Applicants seeking a preliminary permit do not have to consult with State and Federal agencies prior to filing an application. In these cases, agencies are given 60 days by FERC regulations to provide comments on the Notice of Application. This review is controlled by OEPC. Additional procedures are found in DOI's Environmental Review Memorandum No. ER 90-2, October 3, 1990.

4.7 Other Related Review Procedures. The Service review of environmental documents is often in conjunction with other planning documents. The environmental review procedures should be conducted jointly with the review requirements of the other planning documents. In addition to the other related reviews addressed above, the following Service procedures should be reviewed.

A. Presidential Permits (see 507 FW).
B. Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA) (see 507 FW).
C. Review of Regulations. Service comments on proposed regulations will be collated by the Service Washington Office, unless otherwise directed by the Service or OEPC. Such comments will be coordinated and consistent with Service comments on the environmental document or other project reviews associated with the proposed rule.

5.1 Criteria.

A. Council on Environmental Quality (CEQ) referrals are a formal, third party arbitration process initiated when two or more executive departments of the Federal government come to a total impasse on a major national environmental issue. It is CEQ's policy that referrals reflect an agency's careful determination that a proposed action raises significant and environmental issues of national importance that may be precedent-setting. Determinations of the kinds of proposals that are appropriate for referral will be based on meeting one or more of CEQ's six criteria:

(1) possible violation of national environmental standards or policy,
(2) severity,
(3) geographical scope,
(4) duration,
(5) importance as precedents, and
(6) availability of environmentally preferable alternatives.

B. CEQ referrals are only made after all other concerted attempts at resolution have been made and failed. The nature of CEQ's treatment of a referral is not only commensurate with the significance of the proposed action and its impacts, but with the quality of agency-to-agency attempts at resolution. Procedural agreements, if they exist, with other agencies for resolution of issues (such as memoranda of agreements or consultations) must be utilized first.

C. Action agencies generally allow an extension of the 25-day referral period to permit use of the interagency resolution procedures. The Fish and Wildlife Service (Service) can request extensions at the Regional and/or Washington level. However, if an extension cannot be agreed to, the referral must be completed in the time frame specified in 40 CFR 1504.3(b).

D. When the Service seeks to refer an agency's action to CEQ, the Service must first convince the Department of the Interior (DOI) that the referral is needed to solve the fish and wildlife problem. Ultimately, it is the Secretary who refers the project to CEQ. However, the Service is expected to prepare the referral documents and conduct the briefings within DOI and at CEQ.

E. The agency's action, not the environmental impact statement (EIS), is referred to CEQ. Also, whether the agency's EIS is adequate or not adequate has no particular bearing on the decision to refer. The Service may seek to refer a project when the following conditions occur:

(1) the action is environmentally unacceptable,
(2) the action raises significant and major environmental issues of national importance, and
(3) when reasonable, implement able alternatives (including no action) to the proposed action exist.

5.2 **Procedures.**

A. Service offices proposing referral of an agency's actions to CEQ must comply with the following.
   (1) CEQ NEPA regulations (40 CFR 1504).
   (2) DOI NEPA procedures (516 DM 7.5).
   (3) DOI Environmental Review Memorandum ER 77-2, September 7, 1977.

B. Tentative decisions on the Service's intent to recommend referral should be made as early as possible to allow resolution of the issues. Formal notification of the possibility of referral normally occurs in the Department's comments on the draft EIS to the lead agency.

C. Service Regional offices proposing "may refer to CEQ" language in Service comments on draft EISs must advise the Assistant Director - Ecological Services in accordance with 505 FW 1.6. The Assistant Director - Ecological Services will advise the Department's Office of Environmental Policy and Compliance (OEPQ and the lead agency's Washington Office'. The purpose of advance notification is to facilitate resolution of the issues to avoid referral.

D. Every effort must be made at the field, Regional, and Washington Office levels to resolve fish and wildlife concerns during planning stages of the proposal before elevating the referral issue to the next level in the chain-of-command. All attempts to resolve the problem with the lead agency must be fully documented.

E. Field and Regional Office personnel must be available to come to the Washington Office on short notice to work with Washington Service and Departmental personnel as the referral is being developed for acceptance by the Secretary and DOI.

F. Field installations are responsible for tracking release of a final EIS for a project that may be referred, and shall request advance copies direct from the lead agency. This is an important requirement. By waiting until the final EIS is received through official channels, the 25-calendar day countdown could be too close or passed.

G. The 25-day countdown commences with the Environmental Protection Agency's (EPA) publication of the notice of availability of the final EIS in the Federal Register. In addition, the Division of Habitat Conservation (DHQ will notify the Regional Office by phone as soon as the final EIS is received through OEPC channels.

H. Not later than five calendar days after the notice of availability of the final EIS has been published by EPA in the Federal Register, the Regional Office will notify the Assistant Director - Ecological Services and DHC by telephone as to whether or not they will recommend referral on an action previously identified as potentially referable. DHC shall immediately notify OEPC and appropriate Service Washington Office entities.

I. Not later than ten calendar days after the notice of availability of the final EIS,

the Regional Director shall provide the following referral package to the Assistant Director - Ecological Services:

(1) transmittal memorandum signed by the Regional Director;
(2) draft referral letter to the Federal agency being referred to CEQ;draft
(3) referral letter to CEQ;
(4) supporting statement [refer to 40 CFR 1504.3(2)]; and
(5) chronology of steps taken to resolve issues (to avoid referral), including a list of all meetings with the affected parties, showing coordination with affected parties in attempting to resolve the issues (copies of pertinent letters and memoranda, including comments on environmental documents, should be attached).

J. The referral letter and/or supporting statement must address the six referral criteria (or as many as apply) outlined in 40 CFR 1504.3(c)(2). The Service NEPA Reference Handbook contains samples of the abovementioned items of the **referral package.**
K. The referral package should be sent by overnight express mail or other "fast" method of communications to the Washington Office. The package should include the computer disk for revisions.
L. Immediately upon receipt of the materials, DHC, will coordinate the referral with other affected Service Washington Office entities (e.g., Endangered Species, Fisheries, Refuges, Environmental Contaminants), other affected bureaus in the Department, and any other Federal departments.
M. The Assistant Director - Ecological Services will make recommendations to the Director.
N. Service field and Regional Office personnel will likely be directly involved in briefing the Director and the Office of the Secretary (if the matter is referred to the Department).
O. Upon the Director's acceptance of the referral, approval from the Assistant Secretary for Fish and Wildlife and Parks will be sought.
P. If the Service Washington Office or DOI decision is not to refer, the Regional Director will be informed by the Director, as soon as possible, outlining why the referral was not made.
Q. When DOI concurs in the recommendation to refer a proposed action, the Secretary then signs letters to CEQ and to the lead agency, as outlined in 40 CFR 1504.3(c). The letter to CEQ and a copy of the letter to the lead agency must be delivered not later than the 25th calendar day after EPA's notice of availability of the final EIS in the Federal Register.
R. Negotiations should be underway between the Service/DOI and the Federal agency prior to and during the 25-day period. After delivery of the referral letters to CEQ and the lead Federal action agency, higher level negotiations then commence between the referring and lead agencies and CEQ.

5.3 CEQ Actions.

A. Usually within one month, CEQ will hold a hearing among the affected

agencies. Within one to thee months following the hearing, a written decision will be rendered by letter from-CEQ to the two agencies.

B. CEQ may take a variety of interim measures between the first hearing and their final decision in writing. These measures could include more meetings between the agencies to get more facts, field trips, or public meetings in the affected area. In extremely unusual situations, they may elevate the issue to the President. Exhibit I is a chart showing the chronology of the CEQ referral process.

5.4 Referral of Federal Energy Regulatory Commission (FERC) Activities.
Although FERC contends that referral of its trial-type proceedings may not necessarily conflict with FERC's obligation to provide a fair hearing, FERC states that it reserves the right not to participate in a CEQ referral. On potential CEQ referrals, DOI may or may not agree with FERC. In any event, the decision to refer a FERC activity to CEQ is up to the referring agency. Resolution of disputes could involve CEQ. FERC's NEPA procedures (52 FR 47897, December 17, 1987, and 18 CFR 380) provide additional guidance on resolving conflicts on FERC matters.

Exhibit 1 is available from the Division of Habitat Conservation (703) 358-2183.

United States Department of the Interior

FISH AND WILDLIFE SERVICE
Washington, D.C. 20240

DIRECTOR'S ORDER NO. 127, Amendment 1

Subject: National Environmental Policy Act Compliance Checklist

Director's Order No. 127, September 1, 2000, is changed as follows:

1. Section 5 is amended to read:

Sec. 5 What is the policy?

a. You must prepare a NEPA Compliance Checklist (Form 3-2185) for most Federal financial assistance actions (including major amendments) that we administer (concur or approve) within the scope of Sections 6, 7, and 8 of this Order. Include the Checklist in the administrative record for the Federal financial assistance action.

b. Modifications to the use of the NEPA Compliance Checklist and modifications pertaining to this policy (e.g., Regional agreements to streamline the review of NEPA Compliance Checklists by the Regional Environmental Coordinators for categorically excluded actions) require prior approval by the Assistant Regional Director for Ecological Services and the Assistant Director for Fisheries and Habitat Conservation.

2. Section 12, subparagraph a, is amended to read:

a. The Service signature approval blocks must include the Regional or Washington Office Environmental Coordinator, as appropriate, for any Federal financial assistance actions for which a Checklist was prepared pursuant to Section 6, subject to Regional modifications as described in Section 5b.

3. Section 14 is amended to extend the termination date to September 30, 2002.

K Adams

Acting DIRECTOR
Deputy

Date: September 28, 2001

United States Department of the Interior

FISH AND WILDLIFE SERVICE
Washington, D.C. 20240

DIRECTOR'S ORDER NO: 127

Subject: National Environmental Policy Act Compliance Checklist

Sec. 1 What is the purpose of this Order? This Order establishes policy and procedures for the preparation of an administrative record for complying with NEPA by Service personnel who administer (concur or approve) Federal financial assistance programs that may be categorically excluded or require the preparation of an environmental document (environmental assessment or environmental impact statement).

Sec. 2 Does this Order supersede other guidance? This Order supersedes guidance in 550 FW 3.3C concerning the discretionary preparation of an environmental action statement for NEPA-related actions when applicable to Service Federal financial assistance actions. All other Service actions remain subject to the administrative record guidance in 550 FW 3.3C for NEPA-related matters.

Sec. 3 To whom does this Order apply? This Order applies to all Service personnel who administer (concur or approve) Federal financial assistance programs that may be categorically excluded or require the preparation of an environmental document pursuant to NEPA.

Sec. 4 What are the authorities for taking this action?

a. National Environmental Policy Act (42 U.S.C. 4321-4347).

b. Council on Environmental Quality regulations (40 CFR 1500-1508) and other CEQ guidance.

c. 516 DM 1-6.

Sec. 5 What is the Policy? You must prepare a NEPA Compliance Checklist for most Federal financial assistance actions (including major amendments) that we administer (concur or approve) within the scope of Sections 6, 7, and 8 of this Order. To meet the requirements of this Order, you may use Form 3-2185 (NEPA Compliance Checklist) or, with prior approval of the Assistant Director for Fisheries and Habitat Conservation, you may use a similar checklist. Include the Checklist in the administrative record for the Federal financial assistance action.

Sec. 6 When should I prepare the NEPA Compliance Checklist? Submit the Checklist to the Service decision maker when:

a. The proposed action is not completely covered by a categorical exclusion (e.g., the proposal cannot meet the qualifying criteria in the categorical exclusion, and "is not" will be checked on the Checklist);

b. The proposed action cannot be categorically excluded because an exception to the categorical exclusion applies (e.g., a "Yes" will be checked on the Checklist);

c. Environmental conditions at or in the vicinity of the site have materially changed, affecting the consideration of alternatives and impacts (applicable to amendments and renewals);

d. There is a need to document a normally categorically excluded action that may be controversial; or

e. Additional internal review and/or documentation of the NEPA administrative record are desirable.

Sec. 7 To which Federal financial assistance programs does this policy apply? This Order applies to Federal financial assistance programs using appropriated funds and permanent indefinite appropriated funds through the Federal Aid Program that we administer (concur or approve) through the:

a. Division of Federal Aid (e.g., Pittman-Robertson and Dingell-Johnson Acts, Clean Vessel Act, Endangered Species Act, National Coastal Wetlands Conservation Grant Program, etc.).

b. Division of North American Waterfowl and Wetlands (e.g., North American Wetlands Conservation Act and coastal grants authorized by the Coastal Wetlands, Planning, Protection, and Restoration Act).

c. Division of Fish and Wildlife Management Assistance (e.g., Partners for Fish and Wildlife Program assistance and fisheries grants).

Sec. 8 Are there programs where this policy does not apply? This Order does not apply to Federal financial assistance actions in foreign countries, except as appropriate, under Executive Order 12114, January 4, 1979, and the Council on Environmental Quality's guidance, July 1, 1997, on the application of NEPA to proposed Federal actions in the United States with transboundary effects.

Sec. 9 How do I determine the level of NEPA compliance for Federal financial assistance actions?

a. To ensure compliance with NEPA, initiate early coordination and consultation with other Federal and State agencies, Indian tribes, and private parties seeking Federal financial assistance from the Service, in accordance with 516 DM 2.2 and 516 DM 6, Appendix 1.3.

b. We may require applicants seeking Federal financial assistance to provide additional information on the proposal and on its environmental effects as necessary to satisfy our requirements to comply with NEPA, other Federal laws, and executive orders, in accordance with 40 CFR 1506.6 and 516 DM 6, Appendix 1.3A.

c. The NEPA Compliance Checklist will document our decision as to whether or not the Federal financial assistance action:

(1) Meets the requirements for coverage under an existing categorical exclusion, in accordance with 516 DM 2, Appendix 1; 516 DM 6, Appendix 1; and the exceptions to categorical exclusions in 516 DM 2, Appendix 2; or

(2) Requires the preparation of an EA or EIS. Exhibit 1 is an Overview of the NEPA Process and Documentation (flow chart).

Sec. 10 When should I prepare and process the Checklist? Ensure that the applicant or Service personnel prepare the Checklist and that appropriate authorities sign it prior to project (e.g., Federal financial assistance) approval. In some cases, the applicant may prepare the Checklist; in other cases, Service personnel. However, we are responsible for the accuracy of the Checklist, final concurrence of the Checklist, and compliance under NEPA. The Checklist is part of the administrative record for a Federal financial assistance action, and you must include it with any documents undergoing public review and ensure that it is available to the public upon request.

Sec. 11 How should differences of opinion regarding NEPA matters be resolved between the State and the Service? Try to resolve differences of opinion between the State and Service regarding the NEPA Compliance Checklist and other NEPA matters informally at the lowest level (e.g., between the State Project Leader and the Service Federal Aid Staff Specialist or Regional Federal Aid Chief). If any issues remain unresolved, refer them to the Assistant Regional Director or Regional Director for resolution with higher level State officials.

Sec. 12 Are there any additional instructions for preparing the NEPA Compliance Checklist?

a. The Service signature approval blocks must include the Regional or Washington Office Environmental Coordinator, as appropriate, for any Federal financial assistance actions requiring the preparation of a Checklist within the scope of Section 6 of this Order.

b. You may attach other supporting documentation and/or an explanation of the "checked" responses, if necessary, to the NEPA Compliance Checklist.

Sec. 13 How can the Service work with State and local governments, local agencies, Indian tribes, and private applicants to reduce paperwork and delays for Federal financial assistance actions?

a. Cooperate with State and local agencies to the fullest extent possible, consistent with 40 CFR 1506.2, to reduce duplication between NEPA and State and local requirements. Such cooperation will include:

(1) Joint planning processes.

(2) Joint environmental research and studies.

(3) Joint public involvement.

(4) Joint preparation of environmental documents.

b. Provide assistance and guidance to the States and other applicants on the preparation of environmental documents and implementation of environmental streamlining measures (516 DM 6, Appendix 1.2 and 1.3).

Sec. 14 What is the effective date of this Order? This Order is effective immediately and is applicable to new grants, amendments, or renewals submitted to the Service on or after this date. Any grant actions currently under review by the Service are subject to the existing guidelines in 550 FW 3.3C. The Order will expire September 30, 2001, unless amended, superseded, or revoked. We will include the provisions of this Order in Part 550 of the Fish and Wildlife Service Manual.

DIRECTOR

Date: September 1, 2000

NEPA COMPLIANCE CHECKLIST

State: **Federal Financial Assistance Grant/Agreement/Amendment Number:**

Grant/Project Name:

This proposal ☐ is; ☐ is not completely covered by categorical exclusion No(s). _____, 516 DM 6 Appendix 1.
(check (✓) one) *(Review proposed activities. An appropriate categorical exclusion must be identified before completing the remainder of the Checklist. If a categorical exclusion cannot be identified, or the proposal cannot meet the qualifying criteria in the categorical exclusion, an EA must be prepared.)*

Exceptions:
Will This Proposal *(check (✓) yes or no for each item below)*:

Yes	No		
☐	☐	1.	Have significant adverse effects on public health or safety.
☐	☐	2.	Have adverse effects on such unique geographic characteristics as historic or cultural resources, park, recreation or refuge lands, wilderness areas, wild or scenic rivers, sole or principal drinking water aquifers, prime farmlands, wetlands, floodplains, or ecologically significant or critical areas, including those listed on the Department's National Register of Natural Landmarks.
☐	☐	3.	Have highly controversial environmental effects.
☐	☐	4.	Have highly uncertain and potentially significant environmental effects or involve unique or unknown environmental risks.
☐	☐	5.	Establish a precedent for future action or represent a decision in principle about future actions with potentially significant environmental effects.
☐	☐	6.	Be directly related to other actions with individually insignificant, but cumulatively significant environmental effects.
☐	☐	7.	Have adverse effects on properties listed or eligible for listing on the National Register of Historic Places.
☐	☐	8.	Have adverse effects on species listed or proposed to be listed on the List of Endangered or Threatened Species, or have adverse effects on designated Critical Habitat for these species.
☐	☐	9.	Have material adverse effects on resources requiring compliance with Executive Order 11988 (Floodplain Management), Executive Order 11990 (Protection of Wetlands), or the Fish and Wildlife Coordination Act.
☐	☐	10.	Threaten to violate a Federal, State, local or tribal law or requirement imposed for the protection of the environment.

(If any of the above exceptions receive a "Yes" check (✓), an EA must be prepared.)

Concurrences/Approvals:
Project Leader: _____ Date: _____

State Authority Concurrence: _____ Date: _____
(with financial assistance signature authority, if applicable)

Within the spirit and intent of the Council of Environmental Quality's regulations for implementing the National Environmental Policy Act (NEPA) and other statutes, orders, and policies that protect fish and wildlife resources, I have established the following administrative record and have determined that the grant/agreement/amendment:

- ☐ **is a categorical exclusion as provided by 516 DM 6, Appendix 1. No further NEPA documentation will therefore be made.**
- ☐ **is not completely covered by the categorical exclusion as provided by 516 DM 6, Appendix 1. An EA must be prepared.**
- ☐ **includes other attached information supporting the Checklist.**

Service signature approval:

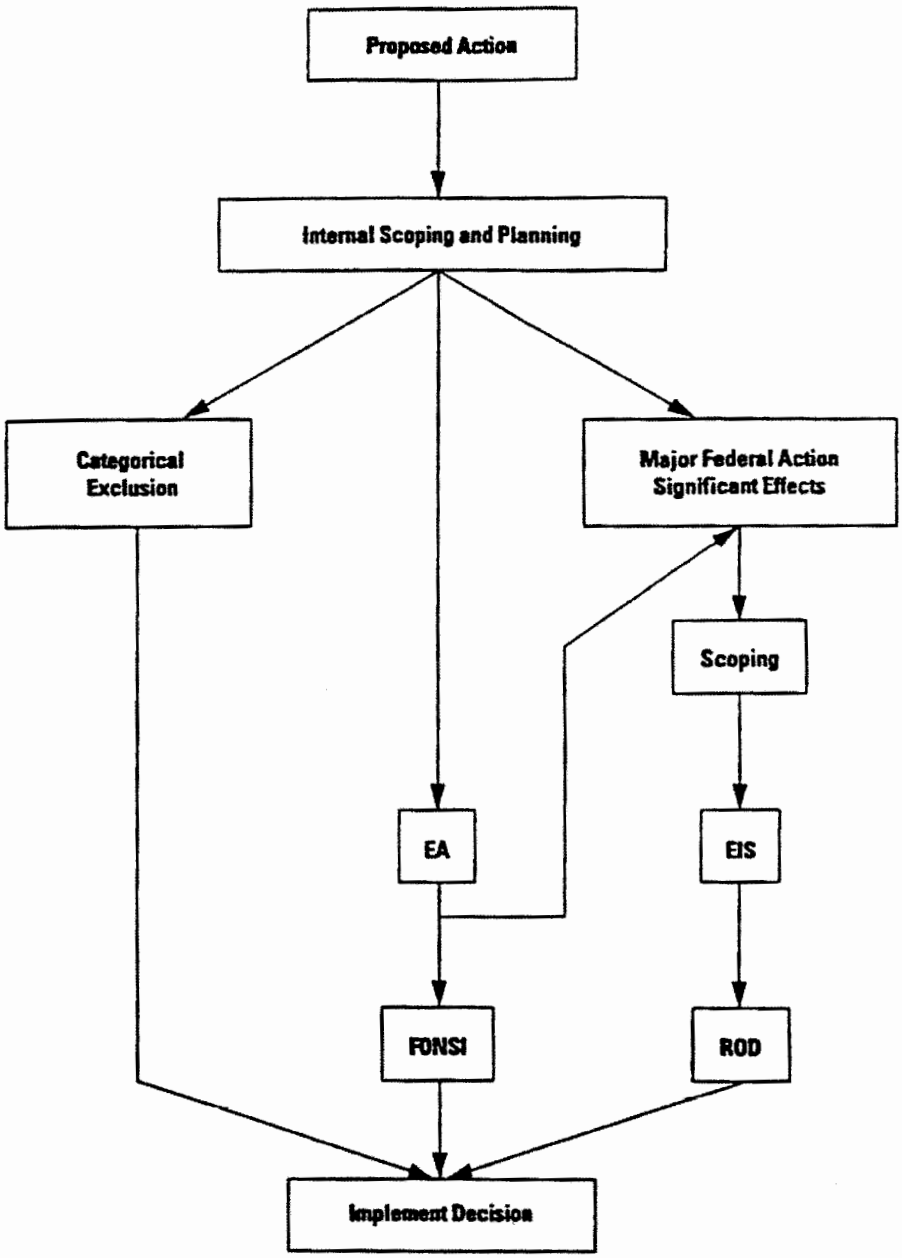
RO or WO Environmental Coordinator: _____ Date: _____

Staff Specialist, Division of Federal Aid: _____ Date: _____
(or authorized Service representative with financial assistance signature authority)

FWS Form 3-2185
08/00

Overview of the NEPA Process and Documentation

NEPA Process



Series: Environmental Quality
Part No. 550: National Environmental Policy Act
Chapter No. 1: Policy and Responsibilities
New or Supersedes: New

Topics	Sections
Overview	1.1 What is the purpose of this chapter? 1.2 What is the scope of this chapter?
NEPA	1.3 What are the purposes of NEPA? 1.4 What are our policies regarding NEPA? 1.5 What are the authorities for complying with NEPA? 1.6 Where can you find the definitions of terms used in this chapter?
Organizational Responsibilities	1.7 What are our organizational responsibilities for complying with NEPA? 1.8 What is the Departmental Quarterly EIS Report, and how do we prepare it? 1.9 What is the Service Reference Handbook?

Overview

1.1 What is the purpose of this Manual Chapter? This chapter establishes policy and provides uniform guidance to Fish and Wildlife Service (Service, we, or our) personnel on responsibilities for implementing the National Environmental Policy Act of 1969, as amended, (NEPA) and related authorities (550 FW 1.4) in planning and implementing our actions and preparing NEPA.

1.2 What is the scope of this Manual Chapter? This chapter applies to all of our divisions and offices involved in planning and implementing our actions and preparing documents in accordance with NEPA. This chapter is to be read in conjunction with documents cited in 550 FW 1.5, which are included in full text in the NEPA Reference Handbook. This chapter does not address our review of actions proposed by other Federal agencies and other related reviews, which are addressed in 505 FW 1-5.

National Environmental Policy Act

1.3 What are the purposes of NEPA? The purposes of NEPA are stated in section 2 of the preamble of NEPA: "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." Two of the purposes have special meaning to us. NEPA's purpose, "to enrich the understanding of the ecological systems and natural resources important to the Nation," is only one of a few such purposes in law that recognizes the importance of ecological systems to Federal planning and decision making. Further, NEPA's purpose, "to promote efforts which will prevent or eliminate damage to the environment," complements our mission (550 FW 1.4).

1.4 What are our policies regarding NEPA?

(A) We will strive to implement the policy in section 101(a) of NEPA, that is: ". . . 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) We shall integrate, in an efficient and reasonable manner, the NEPA purposes (section 2 of NEPA), the NEPA policy (section 101 of NEPA), and the NEPA decision-making process (section 102 of NEPA) into the planning and implementation of our actions. Our NEPA goal is to make better environmental decisions in a cost and time-efficient manner to further our mission to conserve, protect, and enhance fish and wildlife and their habitats for the continued benefit of the American people.

1.5 What are the authorities for complying with NEPA? Major authorities, regulations, procedures, and guidance that establish and promulgate the above purpose are listed below.

A. 42 U.S.C. 4321-4347, National Environmental Policy Act of 1969, as amended.

B. 40 CFR 1500-1508, Council on Environmental Quality Regulations for Implementing the Procedural Requirements of NEPA, July 1, 1986.

C. 48 FR 34263, CEQ's Guidance Regarding NEPA Regulations, July 28, 1983.

D. 46 FR 18026, CEQ's Forty Most Asked Questions Concerning CEQ's NEPA Regulations, March 23, 1981.

E. 43 CFR 46, Department of the Interior Regulations for Implementation of the National Environmental Policy Act of 1969.

F. 516 DM 1-4, 8, Department of the Interior's (Departmental) Manual on the National Environmental Policy Act of 1969.

G. Environmental Memoranda Series, Department of the Interior, Office of Environmental Policy and Compliance (Environmental Statement and Environmental Compliance Memoranda).

H. **Designation of Non-Federal Agencies to be Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act**, CEQ Memorandum, July 28, 1999.

I. **Environmental Justice Guidance Under the National Environmental Policy Act, CEQ, 1998.**

J. **Application of the National Environmental Policy Act to Proposed Federal Actions in the United States with Transboundary Effects**, CEQ, July 1, 1997.

K. **Considering Cumulative Effects Under the National Environmental Policy Act**, CEQ, January 1997.

L. **Incorporating Biodiversity Considerations Into Environmental Impact Analysis Under the National Environmental Policy Act**, CEQ, January 1993.

1.6 Where can you find the definitions of terms used in this Manual Chapter? Terms associated with the NEPA process are defined in the Council on Environmental Quality's NEPA regulations in 40 CFR 1508.

Organizational Responsibilities

1.7 What are our organizational responsibilities for complying with NEPA?

40 CFR 1507.2(a) and 516 DM 3.2. Overall NEPA responsibilities for the Director, Assistant Director – Ecological Services; other Assistant Directors; Regional Directors; Chief, Division of Environmental Review; and Washington and Regional Office Environmental Coordinators are defined in 516 DM 1.4 and 032 FW 5. We have listed additional specific responsibilities relative to 550 FW 1-2 below.

A. Assistant Director – Ecological Services. Responsible to the Director for overall management and guidance of Service NEPA-related involvement.

B. Chief, Division of Environmental Review.

(1) Carries out the responsibilities for the Assistant Director for Ecological Services for providing management and guidance of Service NEPA-related involvement.

(2) Informs the Department's Office of Environmental Policy and Compliance of agreements to assume cooperating status or any declinations pursuant to 40 CFR 1501.6 and 1508.5, 43 CFR 46.225, and 516 DM 1.10.

(3) Maintains a record of our notices for the preparation and public review of each environmental impact statement, the record of decision, and a copy of each draft and final EIS.

C. National NEPA Coordinator.

(1) Provides staff support to ensure NEPA responsibilities delegated to the Assistant Director – Ecological Services, and Chief, Environmental Review, are carried out in accordance with CEQ's NEPA regulations, DOI's NEPA procedures, and our NEPA guidance.

(2) Serves as our liaison to CEQ, OEPC, and other Federal agency NEPA staff on NEPA

matters, pursuant to 516 DM 8.

(3) Conducts training and ensures quality control of technical input into NEPA-related training materials for Headquarters, Regional, and field office personnel, including the Regional Environmental Coordinators, on NEPA compliance matters, in coordination with our National Conservation Training Center.

(4) Obtains the statement control number from OEPC for Washington and Regional Office personnel preparing to release draft and final EISs for the purpose of filing with the Environmental Protection Agency and for intra-Departmental distribution.

(5) Prepares the Quarterly Report on EISs, with input from the Regional Environmental Coordinators, in accordance with Departmental procedures in ESM96-3.

(6) Provides technical assistance, quality control, and overview regarding Service-wide compliance with NEPA for our proposals.

D. Regional Director.

(1) Designates an individual in the Regional Office, pursuant to 516 DM 8.2(E), who provides staff assistance to the Regional Director, Assistant Regional Directors, divisions and field offices on NEPA compliance matters.

(2) Ensures quality control of all Service environmental documents submitted by offices and divisions under his/her control.

(3) Ensures that our Regional and field office personnel are adequately trained in NEPA compliance matters.

(4) Submits notices of intent to prepare an EIS to the Federal Register for actions under his/her authority. Provides a copy of the notice to the Department – see memo on document clearance process.

(5) Has signature authority to file EISs with EPA in accordance with Departmental procedures in ESM98-2. This responsibility cannot be delegated below the Regional Director or Acting Regional Director level. Non-delegated EISs must be coordinated with OEPC, and cannot be printed, numbered, or distributed until approved for printing by OEPC.

(6) Designates the EIS Team Leader and approves membership on the interdisciplinary planning team to prepare an EIS.

E. Regional Environmental Coordinator.

(1) Provides staff support to the Regional Director by providing technical assistance to the Assistant Regional Directors, divisions, and field offices on NEPA-related matters, including internal compliance and coordinating environmental reviews. Provides technical assistance in

accordance with CEQ's NEPA regulations, DOI's NEPA procedures, and our NEPA guidance.

(2) Coordinates significant Regional NEPA-related issues on an interagency and intra-Service level. This includes assuring that all of our affected or interested offices are advised of our proposals and their need to provide technical input and assistance.

(3) Coordinates with counterparts in other agencies to resolve Regional NEPA-related conflicts.

(4) Serves as liaison to OEPC on non-delegated EISs, pursuant to Departmental procedures (ESM98-2).

(5) Requests statement control number from PPM or our National NEPA Coordinator prior to filing draft and final EISs with EPA and prior to intra-Departmental distribution.

(6) Participates in conducting training of Regional and field office personnel on NEPA compliance matters, in coordination with the Regional Training Officer and our National Conservation Training Center.

(7) Staff tracks and logs EISs into the DOI OEPC NEPA Tracking Database.

F. Service Divisions and Offices.

(1) Obtains training on NEPA compliance matters whenever involved in the planning of our proposals requiring the preparation of environmental documents. Contacts the Washington or Regional Environmental Coordinator or the National Conservation Training Center for available courses.

(2) Advises our Washington or Regional Environmental Coordinator, as appropriate, whenever an EIS is proposed, and whenever an EA or EIS is prepared. Consults with the Washington or Regional Environmental Coordinator, as appropriate, for guidance and technical assistance on the scoping, preparation, and public review of environmental documents.

1.8 What is the Departmental Quarterly EIS Report, and how do we prepare it? OEPC's ESM96-3 requires each bureau to prepare and submit a quarterly report on EISs to OEPC on January 1, April 1, July 1, and October 1. The Regional Environmental Coordinators will provide input to our Washington Office Environmental Coordinator no later than one week before the above dates. The Washington Office Environmental Coordinator will prepare and submit the report to OEPC through appropriate channels. Now use the NEPA tracking database.

1.9 What is the Service NEPA Reference Handbook? The Service NEPA Reference Handbook, which includes the full texts of various NEPA authorities and related documents cited in this part and in 505 FW 1-3 (Interagency Activities - Environmental Review), is an integral part of and will be read in conjunction with this guidance. Also refer to 505 FW 1.7. You can obtain our NEPA Reference Handbook by accessing http://www.fws.gov/r9esnepa.

Series: Environmental Quality
Part No. 550: National Environmental Policy Act
Chapter No. 2: Compliance Guidance
New or Supersedes: New

Topics	Sections
Overview	2.1 What is the purpose of this chapter?
NEPA Process	2.2 How does the NEPA process apply to the Service? 2.3 What is scoping and how is it used? 2.4 What is the content of environmental documents? 2.5 How do we process and conduct public review of environmental documents? 2.6 How can we improve the effectiveness of NEPA?
Other NEPA-related Guidance	2.7 What other NEPA-related guidance should we be aware of?

Overview

2.1 What is the purpose of this Chapter? This chapter provides uniform guidance to Fish and Wildlife Service (Service, we, or our) personnel on complying with the procedural requirements for preparing environmental impact statements and environmental assessments and for making categorical exclusion determinations in accordance with the National Environmental Policy Act and pertinent regulations, policy, procedures, and guidance.

A. Service NEPA Goal. Refer to 550 FW 1.4.

B. You can find the objectives of the procedural requirements of NEPA in section 102 of the Act. These objectives were reconfirmed in the Supreme Court Decision, Robertson vs. Methow Valley Citizens Council (1989), which stated:

(1) In reaching its decision, the agency shall carefully consider detailed information concerning every significant environmental impact on the human environment.

(2) The public shall play a role in the decision-making process and the implementation of that decision, such as ensuring that monitoring and mitigation plans are executed as prescribed.

C. Relationship to the Council on Environmental Quality's NEPA Regulations and Department of the Interior's NEPA Procedures. This chapter is consistent with CEQ's NEPA regulations (40 CFR 1500-1508) and Departmental NEPA procedures (516 DM 3). This guidance supplements and clarifies, but does not duplicate, the aforementioned regulations and procedures as they relate to our activities.

D. Total Service Internal NEPA Compliance Guidance. For a full understanding of NEPA compliance matters for internal Service activities, use this guidance in conjunction with the CEQ NEPA regulations, Departmental NEPA procedures, references cited in the Service's Manual in 550 FW 1.5 and 550 FW 1 and 3. Refer to our NEPA Reference Handbook, authorized in 550 FW 1.9, for full texts of various NEPA authorities and related documents.

NEPA Process

2.2 How does the NEPA process apply to the Service?

A. Initial Service Planning and NEPA Decisions. The NEPA process focuses on our decision-making process. We must make several critical early and mid-course decisions at the beginning of our NEPA decision-making process. Making early NEPA decisions can be critical to our success and efficiency in implementing an action and can reduce delays and costs. Our major decision points are listed below.

(1) Develop the Proposed Action. 40 CFR 1501.2 and 516 DM 1.16. Developing the proposed action is an early planning activity that precedes the initiation of the NEPA process. Before we can make a determination whether or not an action is categorically excluded, requires the preparation of an EIS, or requires an EA, we must develop a proposed action. The proposed action is not a list of goals, strategies, or objectives. The proposed action is a plan of action, identifying specific actions to be taken and decisions to be made. Quantify the specific actions (e.g., location of facilities, size of facilities, capacity projections, etc.). When developed, our proposed action will considered in the NEPA process (40 CFR 1508.23). When permits or grants are proposed by applicants, we should coordinate early with them to develop the purpose, needs, and proposed action. As a result of the public scoping process (550 FW 2.3), revise the proposed action, as appropriate.

(2) Determine Type of NEPA Compliance. The basic question under NEPA is: "Is the action a major Federal action significantly affecting the quality of the human environment?" If the answer is "yes," then we must prepare an EIS. If the action is covered by a Service/Departmental categorical exclusion, we require no documentation under NEPA, except as required by our NEPA guidance in 550 FW 3.3C. If the action does not require the preparation of an EIS, and is not covered by a Service/Departmental categorical exclusion, or if the impacts of the action are uncertain, you must prepare an EA. **Exhibit 1** is a NEPA decision-making flowchart showing the options and pathways for NEPA compliance for an action.

(a) Categorical Exclusion. 40 CFR 1508, 43 CFR 46, 516 DM 8. Actions that are categorically excluded do not require the preparation of an EA or EIS. Our actions that are categorically

excluded are found in the Departmental Manual in 516 DM 8.5. If circumstances exist in which a normally categorically excluded action may result in significant impacts on the human environment, or if the action is covered by an exception under 43 CFR 46.215 we must prepare an EA or EIS. If a determination is made that our proposed action is a categorical exclusion and the exceptions to the categorical exclusions do not apply, we can implement the action immediately. Refer to 550 FW 3.3C for guidance on establishing an administrative record of a decision to categorically exclude an action and how to prepare an environmental action statement that documents that decision.

(b) Environmental Impact Statement. 40 CFR 1508.11 and 516 DM 8.7. Our proposed actions that normally require the preparation of an EIS prior to their implementation are listed in 516 DM 8.7. Also refer to 550 FW 3.3B for criteria to assist in determining when to prepare an EIS for purposes of NEPA compliance, such as when the original proposed action contains mitigation measures to reach a finding of no significant impact that would otherwise require the preparation of an EIS. Circumstances may exist in which an action normally requiring the preparation of an EIS would not require one. In such circumstances, prepare an EA in accordance with 40 CFR 1501.4(e)(2) and will circulate the FONSI to the affected public for a minimum of 30 days before we sign it and implement the action (516 DM 6, Appendix 1.6B). Normally, we will circulate the final EA with the unsigned FONSI at the same time. Refer to 550 FW 3.3A for guidance on preparing and distributing the record of decision (ROD).

(c) Environmental Assessment. 40 CFR 1508.9 and 516 DM 8.6. The purposes of the EA are to determine if the action will have significant impacts, address unresolved environmental issues, and to provide a basis for a decision on the proposal. Any Service action not fitting (a) or (b) above, or when the impacts of the action are uncertain, or when there are unresolved environmental issues, requires the preparation of an EA. In addition, you may prepare an EA if you determine that it would aid in the planning or decision-making, serve as a vehicle to gain public input or to facilitate interagency coordination, simplify permit approval, or gain other necessary legal clearances. Examples of our actions normally requiring preparation of an EA are also listed in 516 DM 8.6. If an EA determines that the proposal is a major Federal action significantly affecting the quality of the human environment, we must prepare an EIS. Refer to 550 FW 3.3B for guidance on preparing and distributing the FONSI.

(d) Programmatic Document. 40 CFR 1500.4(I) and 1502.20. A programmatic EIS or EA addresses a group of similar or related actions as a whole, rather than one at a time in separate EISs or EAs. A programmatic document can be an effective means for addressing broad cumulative issues and impacts. These documents can address a group of different actions occurring in the same place, or a single action occurring in many different places. Addressing programs, policies, or plans of broad scope, rather than those of narrow scope, can eliminate repetitive discussions of the same issues. Programmatic NEPA documents do not relieve us of our responsibility to prepare site-specific NEPA documents.

B. Lead and Joint Agency. Refer to 40 CFR 1501.5, 1506.2(c), and 516 DM 1.9. A State or

local agency shall be a joint lead agency with the Service if it has State laws or local ordinances promulgating environmental requirements comparable and not in conflict with NEPA and CEQ's NEPA regulations.

C. What are the Benefits and Requirements of a Cooperating Agency? 40 CFR 1501.6 and 1608.5, 550 FW 1.4D and G, and 516 DM 1.10. Also refer to 032 FW and 505 FW 2.2.

(1) Benefit to the Service. The benefits of early coordination in our planning cannot be over-emphasized. A cooperating agency, in the case when we prepare an EIS, can provide meaningful assistance to us through early coordination and cooperation in the planning and implementation of our proposals. A cooperating agency may have jurisdiction by law (40 CFR 1508.15) that requires it to approve, veto, or finance all or part of the proposal; or it may have special expertise (40 CFR 1508.26) that may benefit our planning and implementation of the proposal. Any Federal agency with jurisdiction by law that requests, or is asked by us, to be a cooperating agency, shall be a cooperating agency (40 CFR 1501.6). We encourage our personnel to request other agencies to be a cooperating agency on our proposals to expedite the planning and implementation process by reducing time and costs when other Federal, State, or local planning and decisions are required. The participation of a cooperating agency does not affect our responsibilities as a lead agency or our review and consultation responsibilities, pursuant to other environmental requirements.

(2) Applicability and Eligibility. This guidance applies when we request another agency to be

a cooperating agency on the planning and implementation of our proposal, or when another agency makes a request to us to be a cooperating agency on our proposal. Cooperating agencies should be made aware of our role as lead agency and the role of a cooperating agency, as defined in 40 CFR 1501.5 and 1501.6, respectively. CEQ's NEPA regulations in 40 CFR 1501.6 allow State and local agencies and Indian tribes to be cooperating agencies when such entities have "jurisdiction by law" or "special expertise" on environmental issues addressed in the EA/EIS. These terms are defined in 40 CFR 1508.15 and 1508.26, respectively. We will consider any requests from State and local agencies and Indian tribes to be a cooperating agency, subject to these regulations.

(3) Cooperating Agency Agreements. An agreement should be established in writing between the cooperating agencies and us that specifically states the role of the cooperating agency, including specific tasks to be accomplished, time schedules for completing the tasks, and funds available to the cooperating agency, if appropriate, for the agreed upon product. CEQ's regulations in 40 CFR 1501.6(b)(5) encourage, but do not require, Federal agencies to fund part or all activities performed by a cooperating agency under the agreement. Service funds used for cooperative agency involvement should normally be expended during the scoping stage and not during review and subsequent stages. Refer to 550 FW 1.5G for CEQ's guidance on non-Federal agencies as cooperating agencies.

(4) Reporting. Copies of approved cooperating agreements are maintained by our Regional and Washington Office Environmental Coordinators.

D. Interdisciplinary Planning Team. 40 CFR 1502.6 and 1502.17; and 550 FW 1.7D(6). We will prepare EISs and EAs (if necessary) using an inter-disciplinary approach. Preparers of the document should represent appropriate biological, physical, and economic disciplines necessary to adequately address the key issues and impact analysis. Determine the composition of the team on the basis of significant issues and impacts identified in the early scoping process. The team members can include Federal, State, or other persons with expertise necessary to assist us prepare the EIS or EA.

2.3 What is scoping and how is it used? 40 CFR 1501.7 and 1508.25, and 516 DM 1.11. Scoping is a crucial step in the early planning stage of an environmental document. The objectives of scoping are to identify significant issues and to translate these into the purpose for the action, the needs for the action, the action or actions to be taken, alternatives to be considered in detail, alternatives not to be considered in detail, and impacts to be addressed. Use scoping to design the EIS or EA. Effective scoping should reduce paperwork, delays, and costs; and improve the effectiveness of the NEPA process.

A. Scoping Process. Scoping is a public participation process that begins with the publication in the Federal Register of our notice of intent to prepare an EIS. The scoping process ends with the publication of the Environmental Protection Agency's notice of availability of the draft EIS in the Federal Register. Scoping can be informal or formal, as in the case of an EIS. Scoping is required for an EIS. We encourage public scoping for an EA since it helps satisfy NEPA's purposes in section 101(b). The result of scoping is to streamline our analysis and

Decision-making process by ensuring that we address all important issues are that unimportant issues are eliminated from analysis. Among the issues to consider, our EISs and EAs should also address Indian trust resources and environmental justice concerns, when appropriate. The result of scoping is to focus and streamline the NEPA process. Scoping ends when we issue the draft EIS or EA.

B. Public Participation in Scoping. Initiate public participation in scoping through a number of techniques, such as notices in local newspapers, direct mailings, Federal Register notices, etc. We should carefully consider the affected public and provide reasonable advance notice of public meetings and comment due dates to facilitate effective public participation in our proposal. Include preliminary scoping information in the notice and at the scoping meeting to solicit meaningful public participation. The scoping information should state the objectives of scoping, our proposal (actions), the purpose and needs for the action, and list preliminary alternatives and impacts. We should strive to understand the public concerns, accurately record their comments, and allow adequate time for involvement by the affected public.

C. Scoping Results. The results of scoping shall be available to the affected public. Include a report of the scoping process and results as an appendix to the EIS or EA. Include a summary of the scoping process and results as a separate section at the beginning of our EIS or EA. We should briefly explain in the scoping results any issues and alternatives raised during the scoping process, but eliminated from detailed analysis in the EIS or EA, should briefly be explained in the scoping results. Most importantly, we should incorporate the results of scoping into the design of and analysis in the EIS or EA.

2.4 What is the content of environmental documents?

A. Content of EA and EIS. 40 CFR 1502.10 and 1508.9, and 43 CFR 46 (subparts D and E), 516 DM 1, and SO 3355. **Exhibit 2** is a sample outline of an EA/EIS. Environmental Assessments should be approximately 10-15 pages and be completed in three months or less. In certain circumstances EAs may need to exceed this guidance. In these instances, EAs should be completed in 75 pages or less, and the EA review should be concluded in 180 calendar days. Environmental Impact Statements must not exceed 150 pages in length or 300 pages for unusually complex EISs. Environmental Impact Statements must be finalized within one year from the Notice of Intent (NOI) to the Record of Decision (ROD). Additional guidance on selected components of the outline is provided below.

(1) Purpose. 40 CFR 1502.13 and 43 CFR 46.420. We define purpose as a goal or end to be obtained.

(2) Needs. 40 CFR 1502.13 and 43 CFR 46.420. We define need as a lack of something required, desirable, or useful. Needs can be identified as our needs, as well as the needs of other Federal agencies, States, or private parties. Needs help define and design alternatives. Thus, needs help our decision makers achieve our NEPA goal in 550 FW 1.4 by encouraging the selection of the alternative that best satisfies the identified needs.

(3) Scoping/Public Participation. Summarize the results of scoping and public participation in a separate section in the EA/EIS. We should attach a full report of scoping as an appendix to the EA/EIS. Although we do not require public scoping for the preparation of an EA, we encourage it.

(4) Alternatives, Including the Proposed Action. 40 CFR 1502.14 and 1508.23, and

516 DM 1.16. The CEQ NEPA regulations state that this section is the heart of the EIS. Ensure that the alternatives selected for detailed analysis are reasonable and implementable, are given equal treatment, and provide clear choices for the decision-maker. Each alternative, including the proposed action, must identify the specific actions, operations, and measures to be taken by the Service, the permit applicant, or grantee. Avoid describing alternatives solely on the basis of strategies, goals, or objectives, unless they identify specific actions, operations, and measures. Develop alternatives in consideration of scoping comments, purpose, and needs. The EIS and EA shall include an alternative comprising the proposed action, a no action alternative, and reasonable alternatives that satisfy the purpose and need(s), to the extent practicable.

(a) No Action Alternative. Describe in detail the specific actions that would take place as a result of not taking the proposed action. The actions can be projected linearly to the planning (future) target date or, the actions can be projected non-linearly to the target date based on reasonably-anticipated projects and activities planned or proposed without the proposed action. In unusual circumstances, we may consider a no-action alternative that is not reasonable when its implementation is otherwise restricted or prohibited by a court decision or legislative statute. In such unusual cases, the no action alternative may still be used as the baseline for comparing the proposed action and other alternatives. Explain the basis for the no action alternative in the EA/EIS.

(b) Preferred Alternative. To avoid confusion, we should normally use the term "preferred" alternative in conjunction with applicant-driven permit or grant actions. For example, we

normally consider the applicant's proposal as the proposed action. However, in some instances, we may identify our "preferred" alternative in the draft/final EA or EIS, to distinguish it from the proposed action and other alternatives. For other than applicant-driven permit and grant actions, the recommended approach is that the final EA or EIS should identify our "proposed" decision. In some cases, the proposed decision could include components of one or more alternatives and/or a combination of several alternatives. This term should not be confused with the requirement to identify the "environmentally-preferable" alternative in the record of decision in 40 CFR 1505.2(b).

(c) Mitigation and Monitoring Measures. Include mitigation and monitoring measures, as appropriate, in each alternative, except the no action alternative.

(d) Summary of Actions by Alternative. Include a brief, concise table at the end of the Alternatives chapter that summarizes the actions by alternative. The table allows the decision maker and the affected public to compare changes in the level of actions between alternatives with the no action alternative. Consider differences in actions when you conduct the analysis of impacts in the subsequent Environmental Consequences chapter of the EIS or EA.

(5) Affected Environment. 40 CFR 1502.15. The description of the affected environment establishes the current environmental conditions we consider to be affected or created by the alternatives, including the proposed action. Focus on the biophysical, social, and economic environments pertinent to the actions addressed in the proposed action and alternatives, and on those impacts addressed in the Environmental Consequences chapter in the EIS or EA, as

determined through the scoping process. Although an Affected Environment chapter is not required by CEQ's regulations as a separate chapter in the EA, we suggest that it be included in our EAs. The Affected Environment chapter should include enough information relative to the proposed actions to assist us to develop the analysis contained in the Environmental Consequences chapter. If necessary, lengthy information or data should be included in an appendix, although you should summarize the results in this chapter.

(6) Environmental Consequences. 40 CFR 1502.15 and 1508.8. This chapter addresses the net difference between the environmental impact of the alternatives, including the proposed action, to the no action alternative. An environmental impact is an effect, not a cause (action). For the purposes of NEPA, the terms "impact" and "effect" mean the same. Address both beneficial and adverse direct and indirect (secondary) impacts in the analysis. We should present the analysis in specific terms, such as number of ducks produced reflected as an increase or decrease, number of fishing visits increased or decreased, tons of soil lost or saved per year, etc. Use the best available science in the analysis of impacts. A conclusion should follow the analysis of each impact topic, particularly when the analysis is extensive or complex. The scope and depth of information in the EA must be sufficient for the decision-maker to reach a conclusion based on the significance of the impacts. Address all significant impacts in detail in the EIS, even if we do not have the in-house expertise to conduct the analysis. In such cases, we may obtain additional expertise from other Federal, State, or local government agencies or from the private sector to adequately address significant impacts. Refer to 550 FW 2.2D regarding necessary expertise on the interdisciplinary planning team.

(a) Impacts to be Addressed. Address direct, indirect, and cumulative impacts, as appropriate. Determine the extent and breadth of impacts to be addressed through formal or informal public scoping, as appropriate. Through scoping, identify impact topics for analysis in each of the alternatives, including the proposed action, and the rationale for their selection should be described. Examples of impact topics are impacts on white-tailed deer, impacts on wetlands habitat, etc. When applicable, other impacts to consider may include minority and low-income populations (ECM95-3 and ECM98-2), Indian trust resources and sacred Indian sites (ECM97-2), transboundary environmental impacts (ESM97-2), and CEQ's guidance on biological diversity cited in 550 FW 1.4K.

(b) Scope of Analysis of Impacts. The scope of analysis of impacts to be addressed in the EIS or EA should be dependent upon whether or not a reasonable, significant link can be established between our proposed action and the impact. This determination should be made during the scoping process and analyzed in the Environmental Consequences chapter.

(c) Cumulative Impact Analysis. In an EIS, prepare a cumulative impact analysis that addresses the proposed action, and a separate analysis for each alternative (if possible). This analysis can be included within each alternative or as a separate analysis at the end of the Environmental Consequences chapter. In an EA, a cumulative impact assessment should be conducted if it is deemed necessary through scoping to make a determination of significance of the proposed action. Refer to CEQ's guidance on considering cumulative effects cited in 550 FW 1.5J.

(d) Impacts of Mitigation. Mitigation measures may also cause impacts, both positive and negative. Analyze any impacts resulting from the mitigation measures in the Environmental Consequences chapter.

(e) Summary of Impacts by Alternative. Insert a brief, concise table should be inserted at the end of the Environmental Consequences chapter that summarizes the impacts by alternative. The table allows the decision maker and the affected public to compare changes in the level of impacts between alternatives with the no action alternative. This table may be useful when making presentations to the decision-maker and the public.

B. What are the differences Between an EA and EIS? 40 CFR 1501.3 and .4, 43 CFR 46 (subparts D and E), 516 DM 8.6, 516 DM 8.7, and 550 FW 3.3B(2). The purposes of an EA are described in 550 FW 2.2A(2)(c). We encourage, but do not require, public scoping for an EA. The content of the EA is reduced by design. The Affected Environment chapter in an EA is suggested, but not required. Otherwise, the format of an EA is similar to that of an EIS. Normally, the text of a final EIS will be less than 150 pages, and for proposals of unusual scope or complexity, will normally be less than 300 pages (40 CFR 1502.7). The text of an EA should normally be 10-15 pages, unless we combine the EA with other planning requirements. The scope and depth of the EA should be "sufficient" for the decision maker to reach a conclusion on the significance of impacts in order to determine if the preparation of an EIS is required. It is not necessary for the EA to address the "relationship between short-term uses of man's environment and the maintenance and enhancement of long-term productivity" and "irreversible or irretrievable

commitments of resources" required in an EIS, as long as the content of the EA can lead to an informed conclusion regarding significance of impacts. Include an assessment of cumulative impacts, if applicable, in the Environmental Consequences chapter of the EA, consistent in scope and depth with the "sufficiency" requirement stated above. If the analysis of impacts in the EA leads us to an informed conclusion that the proposal may significantly affect the quality of the human environment, do not sign the FONSI. No further detailed analysis of alternatives and impacts is required in the EA. At that point, the EA can be made available to the public. We should then prepare and publish a notice of intent to prepare an EIS in the Federal Register (refer to 550 FW 2.5C).

2.5 How do we process and conduct public review of environmental documents?

40 CFR 1508.10 and 550 FW 3. This section addresses the processing and public review of EAs, NOIs, and EISs. The level of public participation can vary substantially between an EA and EIS. Coordination procedures for intra-Departmental review of environmental documents prepared by Departmental bureaus and offices are addressed in DOI ESM98-3.

A. How do we Process the EA?

(1) Our internal approval of an EA should normally be done at the same time the accompanying plan, permit, or rule is approved. If an environmental action statement is prepared, include it with the signature package for approval (refer to 550 FW 3.1C). The approval responsibilities for EAs are in accordance with 032 FW.

(2) The conclusions in the EA and subsequent FONSI or NOI to prepare an EIS should accompany the decision-making package for review and approval by the decision maker for our action. For example, for an EA that accompanies a document for an action to be approved at the Washington Office level, the approval of the EA, FONSI, or NOI to prepare an EIS will occur at the Washington Office level. For an EA that accompanies a document for an action to be approved at the Regional Office level, the approval of the EA, FONSI, or NOI to prepare an EIS will occur at the Regional Office level. The Regional Director may delegate the approval of our actions requiring an EA to the field office level, subject to the coordination provisions in 550 FW 1.7 E and F. When finalized, the EA and FONSI are part of our administrative record for the action.

(3) We normally do not require Departmental clearances or coordination for processing our EAs. Coordinate the preparation of EAs with our Regional or Washington Office Environmental Coordinator, as appropriate.

B. What are the Requirements for Public Review of the EA? 40 CFR 1501.4(e)(1) and (2) and 1506.6(b), and 43 CFR 46.305.

(1) CEQ NEPA regulations and Departmental NEPA procedures require public notification, where appropriate, to allow the affected public to be involved in the EA process. However, no time periods are specified in the CEQ NEPA regulations or Departmental NEPA procedures for the review of the EA. Determine specific time periods for the public review of the EA, as

appropriate.

(2) The EA shall be made available by appropriate notice and/or be circulated to the affected public. In most cases, we will prepare and circulate a draft and final EA. In such cases, the final EA should address the comments of the public, and other Federal, State and local agencies. In cases where an EA is expected to generate few if any comments, we may circulate a single EA to the affected public. In such cases, the EA would normally be referred to as an "EA," rather than a "Final EA." We should circulate the draft and final EA to the public with the accompanying draft and final project documents, such as the plan, permit, or rule. For example, circulate the draft EA with the draft plan, and the final EA with the final plan. Attach all substantive public comments and our response to those comments to the final EA.

(3) The length of the public review period for the EA should normally be the same as the public review period for the accompanying planning and/or decision document, as appropriate. For example, the Endangered Species Act requires a notice in the Federal Register, which initiates a 30-day public review of the draft habitat conservation plan. It is Service policy that this generally applies to all EAs prepared for HCPs that are not large-scale, regional, or exceptionally complex [refer to 550 FW 2.5D(3)]. If an EA was prepared for the action, the notice would also announce the availability of the EA for review in the same review period. In another example, 602 FW 2 requires a 30-day public comment period for a draft refuge comprehensive conservation plan. If we prepare an EA for the CCP, it should be circulated for public review in the same manner and time as the draft CCP, and with the final CCP if substantive changes to the

final EA are made. The public review of the EA should be integrated and concurrent with the public review requirements of the planning documents for the Service proposal. Service personnel should include public participation in the preparation, review, and implementation of the EA in parallel with other Service requirements to reduce delays, reduce costs, and to make a better environmental decision.

(4) CEQ NEPA regulations in 40 CFR 1501.4(e)(2) and subsequent CEQ NEPA guidance require a 30-day review of the FONSI under certain circumstances. Refer to 550 FW 3.3B(4) for a list of the criteria for circulating the FONSI. If an EA was not previously made available for public review, we should make it available for public review at the same time the FONSI is circulated, subject to the 30-day review period.

(5) Public notice of the EA can be made using any appropriate media means to reach the affected public. If an EA is prepared for an action having nationwide implications, you must publish a notice of availability in the Federal Register.

C. How do we Process and Provide Public Notification of the NOI? 40 CFR 1501.7, 1508.22, and 43 CFR 46.435. The NOI to prepare an EIS shall be published in the Federal Register by the Service Washington or Regional Office, as appropriate. Provide a copy of the notice to OEPC, in accordance with DOI ESM98-2, and a copy to the Washington Office Environmental Coordinator. The NOI initiates the scoping process for the EIS, which ends upon issuance of the draft EIS. The notice for the NOI in the Federal Register should indicate the

approximate release date of the draft EIS for public review. The Federal Register notice can also indicate a closing date for comments to be considered in the preparation of the draft EIS. Normally, this would be 30 to 60 days following publication of the notice. We shall consider any comments received in writing or verbally from any public scoping meetings for the EA in the preparation of the draft EIS. We will make every effort to consider comments received after the comment due date given in the NOI, depending upon the schedule for preparing the draft EIS. Where applicable, these procedures may also apply to the public notification for preparing an EA, as appropriate. **Exhibit 3** is an example of an NOI to prepare an EIS in the Federal Register.

D. What are the Requirements for Processing and Providing Public Review of the EIS? 40 CFR 1506.6, 1506.9, 1506.10, and DOI ESM94-8, 95-3, 96-2, and 98-2.

(1) Service and Departmental Clearance. DOI ESM98-2. Regional Offices and Washington Office divisions preparing EISs should contact the Washington Office Environmental Coordinator to obtain additional guidance on whether an EIS is delegated or non-delegated, and to obtain Departmental clearance for publication. Most of our EISs are delegated, meaning that signature authority for the proposed action rests by delegation only with the Assistant Secretary for Fish and Wildlife and Parks or the Service. Refer to DOI ESM98-2 for the criteria by which an EIS is non-delegated, and additional requirements, including restrictions on obtaining a control number. Non-delegated EISs must be approved and filed with EPA by the Assistant Secretary for Policy, Management and Budget. The AS/PMB has assigned this responsibility to OEPC. Evidence of Departmental clearance is required by EPA before EPA will publish the

notice of availability in the Federal Register. The Department will not provide clearance to us until we have indicated that our document has been approved by the Regional Director or Director, and has been printed or is being distributed. Clearance means that you must obtain a "DES" number for a draft EIS, and a separate "FES" number for a final EIS. Write or stamp the clearance number (it does not need to be printed) on the front outside cover of all draft and final EISs sent to EPA for filing, OEPC, and affected or interested offices or bureaus in the Department of the Interior. You are not required to mark the clearance number on EISs distributed to other Federal agencies and the public.

(2) Filing EISs with EPA. DOI ESM95-3, 96-2, and 98-2. Once the EIS has received Departmental clearance, file the EIS as soon as possible with EPA. EPA requires five copies of the EIS. File the five copies of the EIS with EPA by Express Mail to avoid any delays in the publication of the notice. EPA will prepare a notice of availability, which contains the name of the agency, name of the project, location, comment due date, and agency contact person and telephone number. The notice will appear in the Federal Register under EPA's "Environmental Statements, Availability, etc. - Weekly Receipts." EPA will publish the notice on Friday of the week following the week the notice is received. The date of EPA's notice of availability in the Federal Register is counted as the official first day of the comment period. Unless a longer due date is requested in the Service's or Department's letter to EPA, the due date EPA will list in the Federal Register will be a minimum of 45 days for a draft EIS, and a minimum of 30 days for a final EIS, respectively, from the date of publication in the Federal Register. If the last day falls on a weekend or holiday, EPA will select the next working day as the closing date. Do not

delegate the responsibility for filing an EIS below the Regional Director or Director level, as appropriate (550 FW 1.7C). Departmental statement control numbers for draft and final EISs are obtained through the Washington Office Environmental Coordinator (550 FW 1.7D). **Exhibit 4** is an example of a letter for filing a draft/final EIS with EPA.

(3) EIS Review Time Period. 40 CFR 1506.10, 516 DM 1.22, and DOI ESM94-8. This guidance incorporates Departmental procedures and CEQ NEPA regulations regarding the time period for public and agency review of a draft EIS. The time period for public and agency review of the draft EIS will be a minimum of 60 days from the date of transmittal of the draft EIS to EPA, or a minimum of 45 days from the date of EPA's notice of the draft EIS in the Federal Register, whichever is less; and a minimum of 30 days for a final EIS. Normally, EPA will indicate a 45-day time period (minimum required in the CEQ NEPA regulations) in the EPA notice, unless requested by us in writing to be longer. In some cases, the public review period may be longer than the minimal time period prescribed in the CEQ NEPA regulations. For example, a draft EIS for an HCP normally requires a minimal public review period of 90 days. This is consistent with Service policy that requires a 90-day review of a draft HCP which is large-scale, regional, or exceptionally complex.

(4) Service Notice of Availability of Supplemental Information. DOI ESM98-2. We may publish an additional, but separate, notice in the Federal Register containing supplementary information on the proposal. The due date for comments indicated in that notice must be the same as indicated in the EPA notice. **Exhibit 5** is an example of a Service NOA in the Federal

Register for a draft/final EIS.

(5) Intra-Departmental Distribution and Review of EISs. DOI ESM98-3. **Exhibit 6** is an example of a memorandum seeking intra-departmental review of an EIS. The memorandum should be addressed to any bureau in the Department of the Interior that may be affected by the proposal. The number of copies of the EIS to be sent to each bureau will be in accordance with DOI ESM98-3.

E. Who Can Prepare the EIS or EA? 40 CFR 1506.2, 1506.3, 1506.5(c), and 43 CFR 46.105. An EIS can be prepared by us or a contractor, but not normally by theapplicant who is seeking to receive a permit, grant, or approval from us. When a contractor prepares an EIS for us, the contractor shall prepare a disclosure statement for inclusion in the draft and final EIS to ensure the avoidance of any conflict of interest (550 FW 2.5F). Under certain circumstances, an applicant, who is a State agency or official, can be the primary preparer of an EIS if they meet the requirements of section 102(2)(D) of NEPA. An EA can be prepared by us, a contractor, or the applicant.

F. What are the Requirements for Contractors Who Prepare EISs? 40 CFR 1506.5(c). The Service should provide technical assistance to applicants and contractors on NEPA compliance matters. When a contractor prepares an EIS, the contractor shall prepare a disclosure statement

prepared by the Service, or where appropriate the cooperating agency, specifying that the contractor has no financial or other interest in the outcome of the project. **Exhibit 7** is an example of a disclosure statement from a contractor to be included in a draft and final EIS.

G. When should a Supplement be Prepared for an EIS? 40 CFR 1502.6 and 516 DM 1.14. Prepare a supplement for draft or final EISs if: (1) substantial changes are made to the proposed action that materially and substantially affect the analysis of impacts, and (2) significant new circumstances or information becomes available that materially and substantially affect the analysis of impacts. In such cases, you will prepare a supplement when you have determined that the changes will have a material effect on the decision makers choice. We can also prepare a supplement to further the purposes of NEPA.

H. What Additional Requirements should you be Aware of when Conducting Public Participation? 40 CFR 1501.7 (Scoping), 1503 (Commenting), and 1506.6 (Public Involvement). Also refer to 43 CFR 46.305, 301 DM 2; and 550 FW 2.3 and 2.4A(3). Public participation is to be an integral and required part of the NEPA process. We shall make a reasonable and concerted effort to involve affected Federal agencies, States, government officials and agencies, non-governmental organizations, and the public in the NEPA planning, decision making, and implementation process. All substantive public comments to the draft EIS and our response to those comments shall be addressed in the final EIS and attached to the final EIS in accordance with 40 CFR 1503.4. Refer to the referenced CEQ NEPA regulations for guidance on techniques and procedures for public participation in the NEPA process.

I. How should we Handle Public Comments? Each public comment letter or electronic transmission should be numbered and logged (name of originator, date of letter or electronic transmission, and date received). Maintain the original letter and attachments, if any, in a clean manner (without pen and ink markings or marginal comments). The disposition of public comment letters on environmental documents will be in accordance with our records disposition procedures in 283 FW 1-4.

J. What are our Requirements for Addressing Freedom of Information Act Requests? 203 FW 1-2. Environmental documents, defined in 40 CFR 1508.10, should be made available to the public without cost, to the extent practical. Requests for copies of the public comments received by the Service on EAs and EISs, commenter names, home addresses, and other information will be consistent with current Service and Departmental policy. If public requests for public comments on our documents pose unusual circumstances that may outweigh the balance of the privacy interest vs. the public interest, consult the Regional Service FOIA Officer and the Regional Solicitor for advice. Insert the following language in notices of availability of environmental documents for public review.

> All comments received from individuals become part of the official public record. We will handle all requests for such comments in accordance with the Freedom of Information Act and the Council on Environmental Quality's NEPA regulations in 40 CFR 1506.6(f). Our practice is to make comments, including names and home addresses of respondents, available for public review during regular business

hours. Individual respondents may request that we withhold their home address from the record, which we will honor to the extent allowable by law. If you wish us to withhold your name and/or address, you must state this prominently at the beginning of your comments.

K. What are our Requirements for Ensuring Intra-Service Coordination? Preparers of EAs and EISs should ensure that all potentially affected Service programs and offices are coordinated with during the preparation and processing of environmental documents prior to release of such documents for public review.

L. How do we Establish and Maintain the Administrative Record for NEPA Documents? The office originating the NEPA documents for an action should at a minimum maintain the following permanent administrative record of NEPA compliance: draft and final EA, FONSI, NOI to prepare an EIS, draft and final EIS, and ROD. Also refer to 550 FW 1.7B.

2.6 How can we Improve the Effectiveness of NEPA?

A. Reducing Paperwork and Delays. 40 CFR 1500.4 and 1500.5. During the scoping process (550 FW 2.3), make every effort to reduce paperwork and delays by addressing only important or significant issues, not addressing insignificant issues, integrating the NEPA requirements with other consultation and review requirements, using incorporation by reference (40 CFR 1502.21), tiering (40 CFR 1502.20), adoption (40 CFR 1506.3, and 550 FW 2.6B), joint processing with

other Federal and State requirements, combining NEPA documents with other planning documents, and parallel processing of environmental requirements (550 FW 2.6C).

B. Adoption. 40 CFR 1506.3, 43 CFR 46.120, and 43 CFR 46.320. We can adopt another Federal agency's EA or EIS, or another Federal agency can adopt a Service EA or EIS to streamline the NEPA compliance process. The key components to streamlining the NEPA process when we adopt another agency's NEPA document are: (1) the document to be adopted must adequately comply with Departmental/Service NEPA procedures/guidance; (2) we should be a cooperating agency with the other Federal agencies in the preparation of their EA/EIS, in accordance with 40 CFR 1501.6; (3) the other Federal agency's EA/EIS must adequately address our actions and alternatives being considered; and (4) the other agency's EA/EIS must meet the NEPA standards prescribed in 40 CFR 1506.3. This requires close coordination between the involved agencies. **Exhibit 8** is a flowchart of the adoption process.

C. Parallel Processing and Integration of the NEPA Process with Other Environmental Requirements. 40 CFR 1502.25. To the fullest extent possible, the Service shall prepare environmental documents concurrently with and integrated with other environmental impact analyses, related surveys and studies, and planning and decision making requirements. For many Service proposals, parallel processing should ensure concurrent processing of the planning process for the proposal with the requirements under section 404 of the Clean Water Act, section 7 of the Endangered Species Act, NEPA, section 106 of the National Historic Preservation Act, and other requirements. See Title 41 of the FAST Act and EO 13807.

D. Assistance and Guidance to Applicants. 40 CFR 1506.5(a); 516 DM 8.4; and 550 FW 2.5D(5). You should assist applicants for permits, grants, and approvals in the preparation of environmental documents for our proposals. When applicable, we may require applicants for permits, grants, and approvals to provide additional information on the proposal and on its environmental effects as may be necessary to satisfy our requirements to comply with NEPA, other Federal laws, and executive orders.

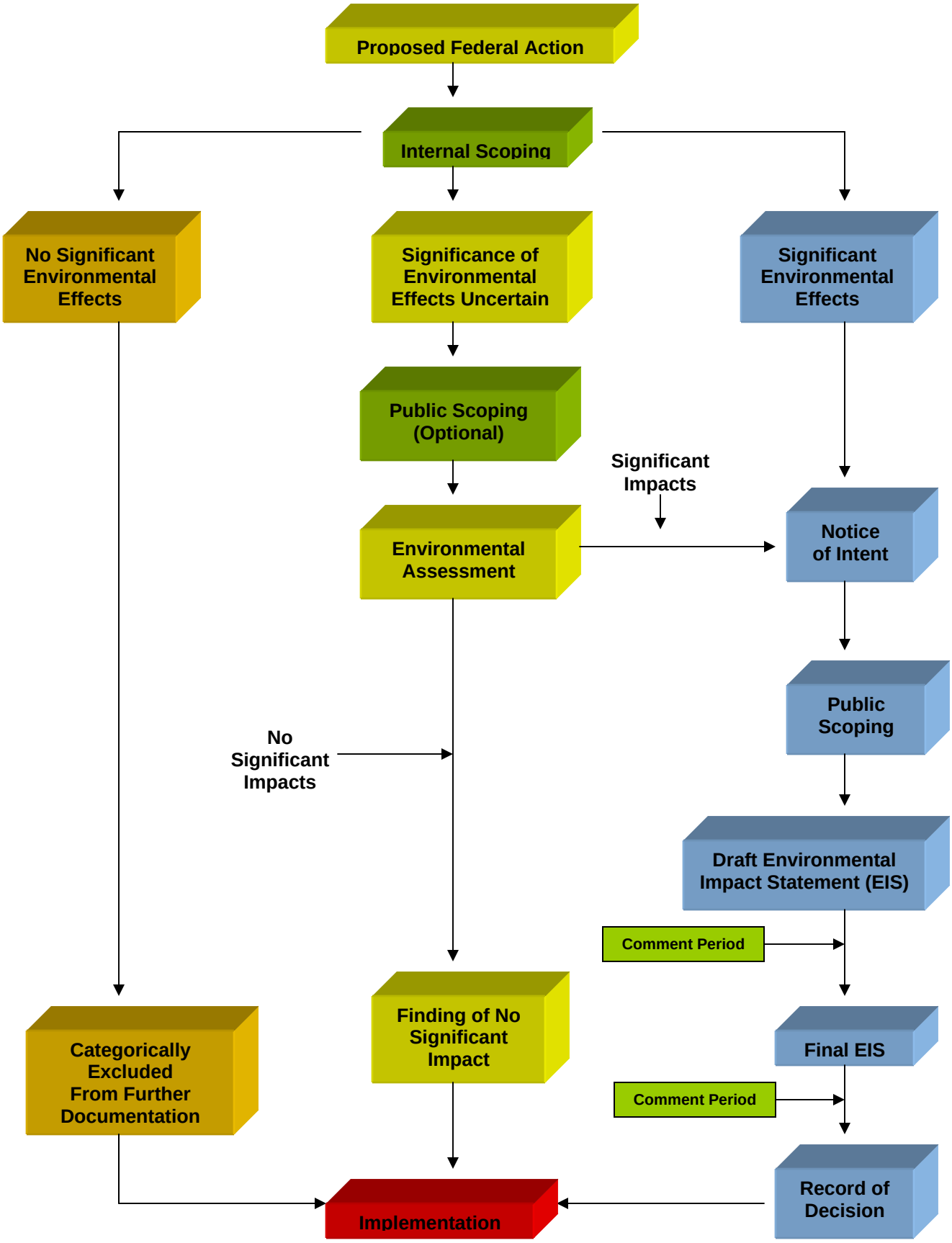
Other NEPA-related Guidance

2.7 What Other NEPA-Related Guidance should we be Aware of?

A. Record of Compliance. 318 DM 1. The issuance of regulations and policy normally requires the preparation of a Record of Compliance. The ROC contains a section on NEPA compliance for the action. This section of the ROC will summarize compliance with NEPA. When a Service action is categorically excluded, the ROC should state which categorical exclusion(s) applies.

B. Emergency Actions. 40 CFR 1506.11, 43 CFR 46.150, DOI ESM97-3. CEQ's NEPA regulations allow agencies to take emergency actions that would have significant environmental impact without NEPA compliance so long as the agency consults with CEQ. The use of an emergency action is very limited by design, is rarely taken by the Service, and applies only in cases where an EIS would otherwise have been prepared. The process is not applicable to an action covered by an EA.

NEPA DECISION MAKING



SAMPLE OUTLINE OF EA/EIS

Cover Sheet

Summary (optional in EA)

Table of Contents (optional in EA)

1.0 Purpose of the Proposed Action

2.0 Needs for the Action

3.0 Scoping/Public Participation (optional in EA, but suggested)

4.0 Alternatives Including the Proposed Action
- 4.1 Alternative A (Proposed Action)
- 4.2 Alternative B (No Action)
- 4.3 Alternative C (continue listing all reasonable alternatives)
- 4.4 Summary of Actions by Alternatives (compare actions in a table)

5.0 Affected Environment (optional in EA, but suggested)

6.0 Environmental Consequences (use same impact topics for each alternative)
- 6.1 Alternative A (Proposed Action)
  - A. Wetland Habitat Impacts
  - B. White-Tailed Deer Impacts
  - C. Economic Impacts
- 6.2 Alternative B (No Action)
  - A. Wetland Habitat Impacts
  - B. White-Tailed Deer Impacts
  - C. Economic Impacts
- 6.3 Alternative C
  - A. Wetland Habitat Impacts
  - B. White-Tailed Deer Impacts
  - C. Economic Impacts
- 6.4 Summary of Environmental Consequences by Alternative (compare impact topics in a table)

7.0 List of Preparers

8.0 List of Agencies, Organizations, and Persons Contacted

9.0 Appendices (optional in EA/EIS, but suggested to keep above text easily readable)

10.0 Index (optional in EA)

(greater management flexibility under a special rulemaking). Additional alternatives may be identified through the upcoming series of public scoping sessions for analysis in the draft EIS.

A scoping newsletter details the EIS process; issues and alternatives identified to date; locations, dates, and times of open houses, and how to become involved. A 16-page booklet with answers to citizens' questions about grizzly bear recovery in the Bitterroot Ecosystem is available and will be inserted in the newsletter. Individuals who previously requested information on grizzly bear recovery in the Bitterroot Ecosystem will receive copies.

Other interested persons can obtain copies of these materials and be placed on the mailing list by writing to Dr. John Weaver (see **ADDRESSES** section).

Dated: May 25, 1995.

Terry T. Terrell,

Deputy Regional Director, Region 6.

[FR Doc. 95–13488 Filed 6–1–95; 8:45 am]

BILLING CODE 4310–55–M

Notice of Intent To Prepare an Environmental Impact Statement for a Permit Application to Incidentally Take the Endangered Karner Blue Butterfly in the State of Wisconsin

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of intent and meetings.

SUMMARY: The U.S. Fish and Wildlife Service (Service) is issuing this notice to advise the public that an Environmental Impact Statement (EIS) will be prepared regarding an application from the Wisconsin Department of Natural Resources (WDNR), Madison, Wisconsin, for a permit to allow the incidental take of the Karner blue butterfly *(Lycaeides melissa samuelis)* in the State of Wisconsin with an accompanying habitat conservation plan (HCP). This notice describes the conservation plan (proposed action) and possible alternatives, invites public participation in the scoping process for preparing the EIS, and identifies the Service official to whom questions and comments concerning the proposed action may be directed. Three public scoping meetings will be held in the State of Wisconsin on the following dates at the indicated locations and times:

1. June 27, 1995; Wisconsin Rapids, WI at City Hall, 444 W. Grand Ave., Council Chambers; 3 p.m. to 6 p.m.

2. June 28, 1995; Siren, WI at the Burnett County Government Center, 7410 Cty. Rd. K, Room 165; 3 p.m. to 6 p.m.

3. June 29, 1995; Eau Claire, WI at the South Middle School, 2115 Mitscher Ave., Auditorium; 3 p.m. to 6 p.m.

There will be a presentation at 3 p.m. at each meeting which will address the Karner blue butterfly, the background and history of the HCP development process, the information available on the presence of this species in Wisconsin, activities which may be affected by their presence, and strategies to conserve the species while allowing land use activities to continue. Submission of written and oral comment and questions will be accepted at the scoping meetings. Written comments regarding EIS scoping also may be submitted by August 30, 1995, to the address below.

FOR FURTHER INFORMATION CONTACT: Janet M. Smith, Field Supervisor, U.S. Fish and Wildlife Service, 1015 Challenger Court, Green Bay, Wisconsin 54311.

SUPPLEMENTARY INFORMATION: The Karner blue butterfly was listed by the Service as an endangered species in December, 1992. Because of its listing as endangered, the Karner blue butterfly population is protected by the Endangered Species Act's (Act) prohibition against ''taking.'' The Act defines ''take'' to mean: to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in such conduct. ''Harm'' is further defined by regulation as any act that kills or injures wildlife including significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavior patterns, including breeding, feeding, or sheltering (50 CFR 17.3).

However, the Service may issue permits to carry out prohibited activities involving endangered and threatened species under certain circumstances. Regulations governing permits for endangered and threatened wildlife are at 50 CFR 17.22, 17.23, and 17.32.

The WDNR is preparing to apply to the Service for an incidental take permit pursuant to Section 10(a)(1)(B) of the Act, which authorizes the issuance of incidental take permits to non-Federal landowners. The largest populations of the Karner blue butterfly in the nation occur in this State. This permit would authorize the incidental take of the Karner blue butterfly, and, possibly, associated threatened or endangered species addressed in the HCP, during the course of conducting otherwise lawful land use or development activities on public and private land in the State of Wisconsin. Although public and private entities or individuals have participated in development of the HCP and may benefit by issuance of an incidental take permit, the WDNR has accepted the responsibility of coordinating preparation of the HCP, submission of the permit application and coordination of the preparation and processing of an EIS for Service review and approval. The action to be described in the HCP is a program that will ensure the continued conservation of the Karner blue butterfly in the State of Wisconsin, while resolving potential conflicts that may arise from otherwise lawful activities that may involve this species and its habitat on non-Federal lands in the State of Wisconsin. The environmental impacts which may result from implementation of a conservation program described in the HCP or as a result of implementing other alternatives will be evaluated in the EIS. The WDNR and more than 30 other persons or entities are involved in the process of information gathering, development and preparation of the Section 10(a)(1)(B) permit application, NCP, and the EIS, which is being developed concurrently.

Development of the HCP will involve a public process that includes open meetings of the HCP team and its advisory subcommittees. Those involved in this effort include other State and Federal agencies; counties; towns; industries, utilities, foresters, lepidopterists and biologists; and representatives of various environmental and recreational use organizations. Conservation strategies to be applied to the lands will differ depending on the landowner, ownership objective and management capability. It is anticipated that implementation of the conservation strategies will be through an implementation agreement or cooperative agreement entered into by the landowner and the WDNR.

Alternatives

I. Statewide HCP and Incidental Take Permit (Proposed Action)

This alternative, the proposed action, seeks to address all lands which constitute potential Karner blue butterfly habitat and associated land uses in the State of Wisconsin, whether publicly or privately owned or large or small in size. Such lands include utility, highway and railroad rights-of-way; private and publicly owned forest lands; other publicly owned lands such as parks, fisheries and wildlife areas, and recreational use areas; and private and publicly owned land subject to other

land uses including agriculture and development. This approach seeks to address conservation through a ''grassroots'' landowner effort. Individual conservation strategies of landowners may include:

1. Forest management and production strategies designed to assure no net loss of Karner blue butterfly habitat. However, specific areas of habitat may change;

2. Continued management of habitat through a maintenance and management scheme. Information on this species to date indicates that it is dependent on a disturbance regime, whether natural or otherwise. The species is found in such areas as tank trails on military training areas, timber sale or timber regeneration areas, highway or utility rights-of-way, and agricultural lands. There is evidence that some past and current practices in agriculture, forest management, military operations, right-of-way management, and wildlife management have been beneficial to the species. A ''protection'' strategy alone may result in the loss of habitat due to the natural maturation of other vegetation;

3. Barrens management which entails a scheme designed to maintain or restore barrens communities which may constitute habitat for a variety of species including the Karner blue butterfly;

4. Right-of-way maintenance regimes designed to minimize adverse effects on the Karner blue butterfly or enhance habitat through modification in mowing or clearing regimes, or burning;

5. Agricultural practices designed to maintain habitat; and

6. Other practices or strategies designed to maintain and, possibly, enhance habitat as science or practice confirms their effectiveness.

This alternative would incorporate the concept of ''adaptive management.'' As science and conservation strategies evolve or demonstrate a need to change, the landowners would adapt or modify the conservation strategy as needed. Therefore, as science and information progress, so may the conservation strategies and efforts under the HCP and permit.

This alternative seeks authority for a long-term incidental take permit. The HCP will assure continued conservation measures as well as monitoring and reporting procedures, as required for issuance of an incidental take permit by the Service.

Service issuance of an incidental take permit will authorize land use activities to proceed without violating the Act. Landowners may participate in the HCP through cooperative agreements, certificates of inclusion, involvement in one of the several WDNR private lands assistance programs, other cooperative programs by partners or participants in this conservation effort, or exemption from regulation based on the conservation program established under the HCP and permit. A coarse estimate of potential Karner blue butterfly habitat in the State would include about 25 percent of its acreage. About 12 percent may have a high potential to be Karner blue butterfly habitat.

II. Development of an HCP and Application for an Incidental Take Permit by one Landowner or a Consortium of Landowners or Organizations Not Constituting a Statewide Effort

This alternative may involve a single landowner, such as the WDNR or an industrial forest landowner. It may also involve a group of landowners, such as several industrial forest landowners or utilities. Any conservation strategy addressed in the proposed action alternative could be applied by the landowners involved under the same or similar facts or motives. Conservation strategies not discussed earlier could also be developed.

This alternative requires separate HCP development and application processes. Naturally, this approach would require separate permit review processes by the Service with the necessity of conducting separate environmental impact review procedures and documents.

Implementation and oversight would not likely involve the WDNR, which is the endangered resource regulatory agency for the State of Wisconsin, but would require oversight and implementation as described in the implementation agreements and permits.

III. Development of Short-term Incidental Take Permits

This alternative would seek to address the conservation program for this species for a period which is shorter than that anticipated in the proposed action alternative, which could extend for up to 30 years for willing landowners. Conservation strategies may be the same or similar as in the proposed action alternative, with the possibility of addressing the same land ownership, or some smaller element of land ownership.

IV. No Action Alternative

Under the No Action Alternative, no section 10(a)(1)(B) permit(s) would be issued and activities involving the take of the Karner blue butterfly would remain prohibited under Section 9 of the Act. Activities that would avoid the take of the butterfly could continue. Proposed activities on non-Federal land that may affect the butterfly would require submitting an individual section 10(a)(1)(B) permit application to the Service. If a Federal action (e.g., proposed roadway) would affect the butterfly, incidental take could be allowed through the Section 7 consultation process and development of an incidental take statement if the action were determined to not jeopardize the continued existence of the species.

Issue Resolution and Environmental Review

The primary issue to be addressed during the scoping and planning process for the HCP and EIS is how to resolve potential conflicts between development or land management practices and listed (Federal or State) species in the State of Wisconsin. A tentative list of issues, concerns and opportunities has been developed. There will be a discussion of the potential effect, by alternative, which will include the following areas:

(1) Karner blue butterfly and its habitat.

(2) Other federally listed endangered or threatened species in the state of Wisconsin.

(3) State listed endangered and threatened species in the State of Wisconsin.

(4) Effects on other species of flora and fauna.

(5) Socioeconomic effects.

(6) Use of state, county and local public lands for Karner blue butterfly conservation.

(7) Use of privately owned lands for Karner blue butterfly conservation.

(8) Use of Federal lands.

Environmental review of the permit application will be conducted in accordance with the requirements of the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321 *et seq.*), National Environmental Policy Act regulations (40 CFR Parts 1500–1508), other appropriate Federal regulations, and Service procedures for compliance with those regulations. This notice is being furnished in accordance with Section 1501.7 of the National Environmental Policy Act, to obtain suggestions and information from other agencies, tribes, and the public on the scope of issues to be addressed in the statement. Comments and participation in this scoping process are solicited.

The draft environmental impact statement should be available to the public in the spring of 1996.

William F. Hartwig,

Regional Director, Region 3, U.S. Fish and Wildlife Service, Fort Snelling, MN.

[FR Doc. 95–13622 Filed 6–2–95; 8:45 am]

BILLING CODE 4310–55–M

Notice of Availability of a Draft Recovery Plan for the June Sucker for Review and Comment

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of document availability and public comment period.

SUMMARY: The U.S. Fish and Wildlife Service (Service) announces the availability for public review of a draft recovery plan for the June sucker *(Chasmistes lioris)*, a fish inhabiting Utah Lake and the Provo River in Utah. The Service solicits review and comment from the public on this draft recovery plan.

DATES: Comments on the draft recovery plan must be received on or before August 4, 1995 to receive consideration by the Service.

ADDRESSES: Persons wishing to review the draft recovery plan may obtain a copy by contacting the Field Supervisor, Ecological Services, Lincoln Plaza, Suite 404, 145 East 1300 South, Salt Lake City, Utah 84115. Written comments and materials regarding this draft recovery plan should be sent to the Field Supervisor at the Salt Lake City address given above. Comments and materials received are available on request for public inspection, by appointment, during normal business hours at the above address.

FOR FURTHER INFORMATION CONTACT: Henry Maddox (see **ADDRESSES** above) at telephone (801) 524–4430.

SUPPLEMENTARY INFORMATION:

Background

Restoring an endangered or threatened animal or plant to the point where it is again a secure, self-sustaining member of its ecosystem is a primary goal of the Fish and Wildlife Service's (Service) endangered species program. To help guide the recovery effort, the Service is working to prepare recovery plans for most of the listed species native to the United States. Recovery plans describe actions considered necessary for conservation of the species, establish criteria for the recovery levels for downlisting or delisting them, and estimate time and cost for implementing the recovery measures needed.

The Endangered Species Act of 1973 (Act), as amended (16 U.S.C. 1531 *et seq.*), requires the development of recovery plans for listed species unless such a plan would not promote the conservation of a particular species. Section 4(f) of the Act, as amended in 1988, requires that public notice and an opportunity for public review and comment be provided during recovery plan development. The Service will consider all information presented during a public comment period prior to approval of each new or revised recovery plan. The Service and other Federal Agencies also will take these comments into account in the course of implementing approved recovery plans.

The June sucker *(Chasmistes lioris)* occurs only in Utah Lake and the Provo River in central Utah, although the species historically occupied the Spanish Fork River and possibly other tributaries of Utah Lake. This once common fish has declined in abundance due to a variety of human activities that have significantly altered the lake and river habitat in which the species occurs.

The June sucker was listed under the Act as an endangered species on March 31, 1986 (51 FR 10857), due to the precipitous decline in this once common fish. The species decline is believed to result from significant alterations in the species' lake and river habitat. Dams and water diversions constructed on the rivers flowing into Utah Lake have reduced water flows, altered flow regimes within the river, and dramatically increased fluctuations in the level of the lake. Increased pollution and nutrient inflow caused by urban development surrounding Utah Lake, have degraded water quality within the lake and destroyed shoreline vegetation. In addition, several species of nonnative predacious fish that may prey upon juvenile June suckers have been introduced into Utah Lake. The combination of these factors has apparently reduced the survival of young fish to the point that most fish found today are between 20 and 43 years old.

The goal of the recovery plan is increase reproduction and survival of young June sucker to increase population numbers and ensure the species' survival. Recovery actions recommended to facilitate recovery of the species include identification of habitat requirements, coordination of efforts to restore required water flows and other appropriate habitat conditions, and identification and amelioration of the effects of predation by nonnative fish species.

Public Comments Solicited

The Service solicits written comments on the recovery plan described. All comments received by the date specified in the DATES section above will be considered prior to approval of the recovery plan.

Authority

The authority for this action is Section 4(f) of the Endangered Species Act, 16 U.S.C. 1533 (f).

Dated: May 23, 1995.

Terry T. Terrell,

Deputy Regional Director, Denver, Colorado.

[FR Doc. 95–13572 Filed 6–2–95; 8:45 am]

BILLING CODE 4310–55–M

Klamath River Basin Fisheries Task Force; Meeting

AGENCY: U.S. Fish and Wildlife Service, Interior.

ACTION: Notice of meeting.

SUMMARY: Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (5 U.S.C. App. I), this notice announces a meeting of the Klamath River Basin Fisheries Task Force, established under the authority of the Klamath River Basin Fishery Resources Restoration Act (16 U.S.C. 460ss *et seq.*). The meeting is open to the public.

DATES: The Klamath River Basin Fisheries Task Force will meet from 8:00 a.m. to 5:30 p.m. on Tuesday, June 20, 1995, and from 8:00 a.m. to 1:00 p.m. on Wednesday, June 21, 1995.

PLACE: The meeting will be held at the Oregon Institute of Technology (Shasta Conference Center), 2301 Campus Drive, Klamath Falls, Oregon 97603.

FOR FURTHER INFORMATION CONTACT: Dr. Ronald A. Iverson, Project Leader, U.S. Fish and Wildlife Service, P.O. Box 1006 (1030 South Main), Yreka, California 96097–1006, telephone (916) 842–5763.

SUPPLEMENTARY INFORMATION: The principal agenda items at this meeting of the Klamath River Basin Fisheries Task Force will be to recommend a flow study approach for the Klamath River Basin; to recommend projects for funding through Federal and State and fishery restoration grants in the 1996 fiscal year; to decide how to proceed with a draft restoration plan amendment addressing issues on the upper Klamath River Basin; to solicit nominations for awards to recognize private landowner efforts towards restoration of anadromous fish in the Klamath Basin.

EXAMPLE OF LETTER FOR FILING DRAFT/FINAL EIS WITH EPA

U.S. Environmental Protection Agency
Office of Federal Activities
EIS Filing Section
Mail Code 2252-A
401 M St., SW
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 five (5) copies of a *(draft/final)* environmental impact statement for *(title of proposal).*

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).* [Note: If the comment period is to be longer than the minimum periods required in the CEQ regulations, please so indicate to EPA.]

Sincerely,

FWS DIRECTOR or
REGIONAL DIRECTOR *[for delegated EIS]*

or

Willie R. Taylor *[for non-delegated EIS]*
Director, Office of Environmental
Policy and Compliance

Enclosures

cc: OEPC (4 copies)
DOI Natural Resources Library (2 copies)

Note: If you are hand delivering your EIS, you will make your delivery to:

U.S. Environmental Protection Agency
Office of Federal Activities
EIS Filing Section
Mail Code 2252-A
401 M St., SW
Washington, D.C. 20460

Please check in with the building security guard and call the EIS Filing Section on 202/564-2400.

EXAMPLE OF NOA OF DRAFT/FINAL EIS

DEPARTMENT OF THE INTERIOR
(BUREAU)

Notice of Availability of *(Draft/Final)* Environmental Impact Statement

AGENCY: *(Bureau)*, Department of the Interior

ACTION: Notice of Availability of a *(draft/final)* environmental impact statement (EIS) for the proposes *(title)*

*DATE: Comments will be accepted until *(date)*

*ADDRESS: Comments should be sent to *(office and address)*

FOR FURTHER INFORMATION CONTACT: *(office and address)*

SUPPLEMENTAL INFORMATION: A limited number of individual copies of the EIS may be obtained from *(the above contact and 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).*

_____
Date

_____
Willie R. Taylor *[for non-delegated EIS]*
Director, Office of Environmental
Policy and Compliance

or

FWS DIRECTOR or
REGIONAL DIRECTOR *[for delegated EIS]*

* Include only for draft EIS
** Include if appropriate to this notice

EXAMPLE OF MEMORANDUM TO DOI ENTITIES ON THE AVAILABILITY OF DRAFT/FINAL EIS

Memorandum

To: Director, Bureau of Land Management
Director, National Park Service
Commissioner, Bureau of Reclamation
[list other affected bureaus, as appropriate]

From: Director [or Regional Director, as appropriate]

Subject: Draft/Final Environmental Impact Statement for [name project]

Attached is/are [insert number] copies of the subject draft/final environmental impact statement for your review [delete the word "review" for a final EIS] and information.*

If you have any comments or questions regarding the proposal, please contact [list name, address, and telephone number].

Attachments

cc: FWS Office of Congressional and Legislative Affairs
FWS Office of Public Affairs
other affected/interested FWS offices

*The number of copies submitted to the bureaus will be in accordance with DOI ESM98-3.

EXAMPLE OF EIS DISCLOSURE STATEMENT

for Plum Creek Timber Company, L.P.,
Concerning the preparation of an EIS
For the Cascades Habitat Conservation Plan

I, **Kenneth J. Raedeke**, of **Raedeke Associates, Inc**. have made inquiry and to the best of my knowledge and belief declare that executing the contracted work of preparing the EIS for the Cascades habitat Conservation Plan does not represent an actual or potential conflict of interest and that **Raedeke Associates, Inc.** does not have any financial or other interest in the outcome of this project.

I understand the term "conflict of interest" to mean that because of other activities or relationships with other persons, the contractor is unable or potentially unable to render impartial assistance or advice to the Government, or the contractor's objectivity in performing the contract work is or might be otherwise impaired, or the contractor may have an unfair competitive advantage. I understand the phrase "no financial or other special interest in the outcome of this project" to include any financial benefits such as promise of future construction or design work on the project, as well as indirect benefits the consultant is aware of other than the enhancement of the contractor's professional reputation.

Signed: _____
Kenneth J. Raedeke

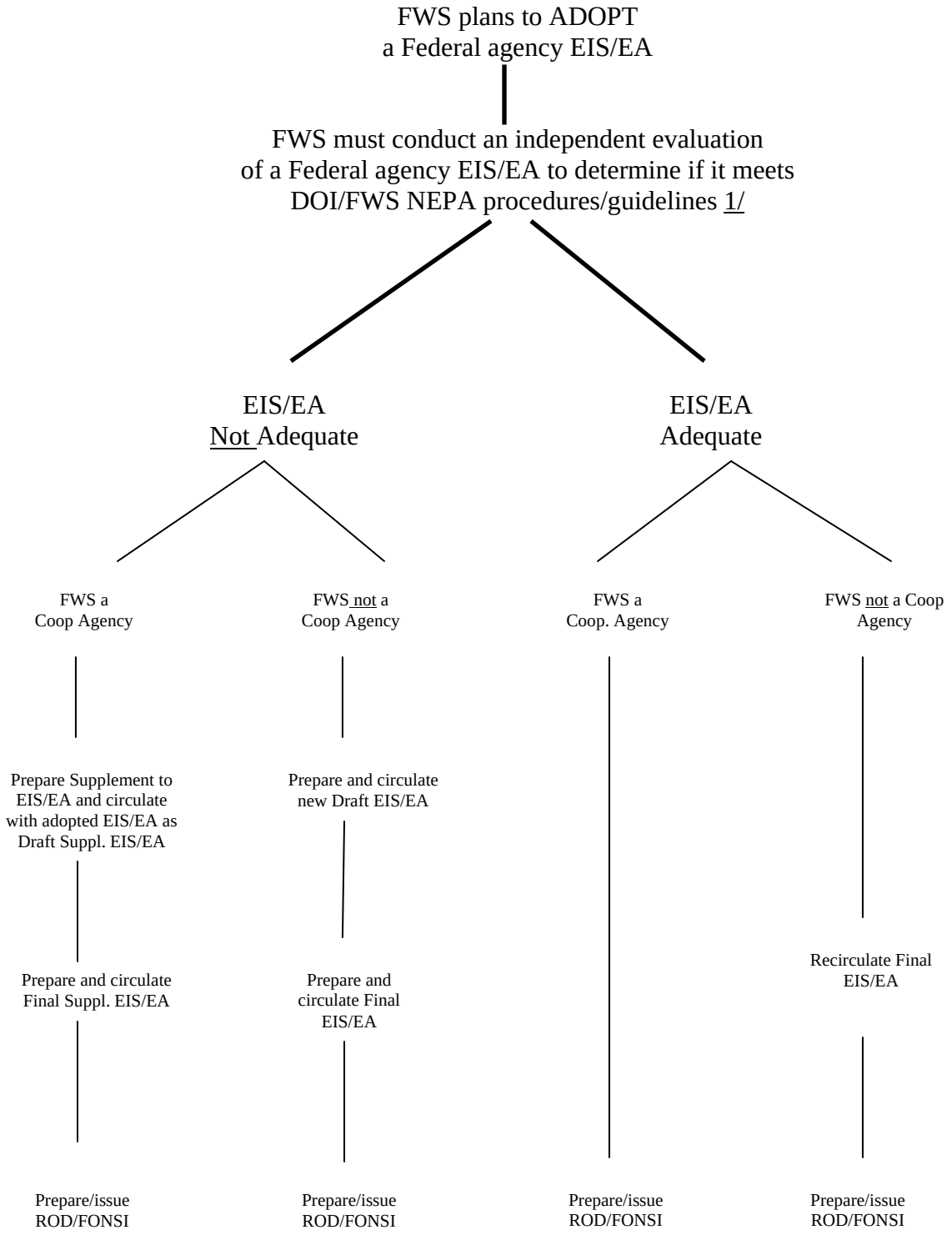
Employers Name: Raedeke Associates, Inc.

Address: 5711 NE 63rd Street
Seattle, Washington 98115

Telephone Number: (206) 525-8122

ADOPTION PROCESS

(40CFR 1506.3)



1/ The independent evaluation must ensure that the adopted and/or supplemental document meets DOI/FWS NEPA procedures and guidelines. The adopted document must (1) adequately reflect significant issues raised during scoping, (2) adequately address the public comments on the draft/final EIS/EA, (3) include FWS actions and alternatives to be considered by the FWS decision make, and (4) adequately address the impacts of the proposed action and alternatives. The independent evaluation must meet DOI/FWS NEPA requirements in 516 DM 1-6, 30 AM 2-3, and 550 FW 3.

CHECKLIST FOR THE CONTENTS OF A
RECORD OF DECISION (ROD)

Record of Decision Title: _____
_____

Final EIS Title (if different from the above ROD title): _____
_____

Reviewer: _____

Date of Final EIS:_____ Date of ROD:_____

DECISION

1. Does the ROD state what the decision was? 1505.2(a)
yes/no page(s)___

2. Does the ROD identify all alternatives considered by BPA in reaching its decision? 1505.2(b)
yes/no page(s)___

3. Does the ROD specify which alternative or alternatives were considered to be environmentally preferable and why? 1505.2(b)
yes/no page(s)___

4. Does the ROD (i)identify and (ii) discuss all relevant factors including any essential considerations of national policy which were balanced by the agency in making its decision? 1505.2(b)
yes/no page(s)___

5. Does the ROD state how those factors identified and discussed in question 4 entered into BPA=s decision? 1505.2(b)
yes/no page(s)___

6. If the chosen alternative was not environmentally preferable alternative, does the ROD state why an environmentally preferable alternative was not chosen? 1505.2(b): 15500.2(f)
yes/no page(s)___

MITIGATION

7. Does the ROD state whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted? 1505.2(c)
yes/no page(s)___

8. Does the ROD identify all practicable means to avoid or minimize environmental harm for the

alternative selected which were identified in the EIS but which were not adopted? 1505.2 (c)

yes/no page(s)___

9. Does the ROD state the reasons why the mitigation measures identified in question 8 were not adopted? 1505.2(c)

yes/no page(s)___

MONITORING AND ENFORCEMENT

10. Does the ROD state whether a monitoring and enforcement program is applicable for any mitigation? 1505.2(c)

yes/no page(s)___

11. Does the ROD state whether any applicable monitoring and enforcement program has been adopted? 1505.2(c)

yes/no page(s)___

12. Does the ROD summarize monitoring and enforcement programs which have been adopted? 1505.2(c)

yes/no pages(s)___

MISCELLANEOUS

13. Is the ROD concise? 1505.2

yes/no page(s)___

14. Does the ROD state on its face how it will be made publically available? 1505.2

yes/no page(s)___

15. Does the ROD state on its face that no decision has been made until the later of the following dates: (1) ninety (90) days after publication of the notice for a draft EIS: (2) thirty (30) days after publication of the notice for a final EIS? 1506.10(b)

yes/no page(s)___

16. (a) Endangered and threatened species and critical habitat. If any of the alternatives have been the subject of an FWS biological opinion (which means it has been determined that one or more alternatives may or will affect an endangered or threatened species or critical habitat either adversely or beneficially), does the ROD state that the FWS will be notified of the final determination on whether to proceed with the proposed activity or program? (Proposed) 50 CFR 402.16(a)

yes/no page(s)____

(b)Heritage Conservation. If the decision is or includes taking an action which would adversely affect a property on or eligible for the National Register of Historic Places, does the ROD state (1) that a memorandum of agreement has been prepared between (i) the Federal

agency, (ii) the State Historic Preservation Officer and (iii) the Executive Director of the Advisory Council on Historic Preservation, and (2) that the terms of the memorandum of agreement will be carried out? 36 CFR 800.6(c)(3)

yes/no page(s)___

(c) A-95. If any of the alternatives include taking an action which is direct Federal development and/or Federal assistance, does the ROD (1) state how clearinghouse will be notified of actions taken (implementing, timing, postponement, abandonment, etc.), and (2) explain any actions taken contrary to Clearinghouse recommendations? OMB Circular A-95. Part II. Section 5(b)(4)

yes/no page(s)___

(d) Coastal zones. If the decision is or includes taking an action which (1) is a development project in the coastal zone, (2) directly affects the coastal zone, (3) is listed in an approved coastal management program as requiring a consistency determination, (5) is the same as or similar to actions for which a consistency determination has been prepared in the past, or (6) has been subject to a thorough consistency assessment, does the ROD state that State coastal management agencies have been provided with consistency information at least 90 days prior to the date of the decision, or that both the Federal agency and the State agency have agreed to an alternative period. 15 CFR 930.34(b) and 930.41(c)

yes/no page(s)___

(e) Flood plains. If the decision is or includes taking an action in a flood plain, does the ROD include (1) an explanation of why Athe only practicable alternative consistent with the law and with the policies set forth in (the flood plains Executive Order) requires siting in a flood plain@, and (2) a statement that the action is designed or modified ›to minimize potential harm to or within the flood plain@ (consistent with agencies implementing procedures)? Executive Order 11988, Flood plain Management, Section 2(a)(2)(42 FR 26951, May 25, 1977)

yes/no page(s)___

(f) Wetlands. If the decision is or includes undertaking or providing assistance for new construction located in wetlands, does the ROD include a finding A(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@ (taking into account economic, environmental and other pertinent factors)? Executive Order 11990, Protection of Wetlands, Section 3(a) (42 FR 26961, May 25, 1977)

yes/no page(s)___

(g) Farmlands. If the decision is or includes taking an action which converts prime or unique farmlands to other uses, does the ROD include a finding that there was no practicable alternative to such conversion (taking into account economic, environmental and other pertinent factors such as the agency mission)? NEPA Section 101(b)(4): August 11, 1980 (45 FR 59189, September 8, 1980)

yes/no page(s)___

CHECKLIST FOR THE CONTENTS OF A
FINDING OF NO SIGNIFICANT IMPACT (FONSI)

FONSI Title: _____
_____

Environmental Assessment (EA) Title: _____
_____

Reviewer: _____

Date of EA;_____ Date of FONSI_____

PART 1: CEQ REGULATIONS, 1508.13

1. Does the FONSI include the EA, or a summary of the EA? !508.13
yes/no page(s)

2. If the FONSI includes the EA, does the FONSI incorporate by reference discussions in the EA rather than repeat those discussions? 1508.13
yes/no page(s)

3. Does the FONSI present the reasons why an action will not have a significant effect on the human environment? 1508.13
yes/no page(s)

4. Does the FONSI state whether any other documents are relate to it? 1508.13
yes/no page(s)

PART 2: PUBLIC AVAILABILITY

5. Does the FONSI indicate how it will be made available to the affected public? 1501.4(e)(1)
yes/no page(s)

6. Does the FONSI state whether it has been prepared on an action which
- is, or is similar to, one which normally requires the preparation of an EIS, or
yes/no page(s)

- is without precedent? 1501.4(e)(2)
yes/no page(s)

7. If the action is or is similar tom one which normally require-s an EIS, or is one without

precedent, does the FONSI state whether it will be available for public review for 30 days before the agency makes its final determination whether to prepare an EIS? 1501.4(e)(2)

yes/no page(s)

PART 3: SUBJECTIVE FONSI STANDARDS

8. Does the FONSI include only brief discussion of other than significant issues, with only enough discussion to show why more study is not warranted? 1502.2(b)

yes/no page(s)

9. Is the FONSI brief? 1508.13

yes/no page(s)

PART 4: LEGAL STANDARD OF REVIEW

10. Does the FONSI show that the agency ›reasonably concluded@ that the project will have no significant adverse environmental consequences? City of Davis v. Coleman, 521 f.2d 661, 673 (9th Cir. 1975)(emphasis original). Does the FONSI show that the alternatives including the proposed action will not significantly degrade some human environmental factor?

yes/no page(s)

11. An EIS is required whenever a proposed action Amay cause significant degradation of some human environmental factors.@ City of Davis v. Coleman, 521 F.2d 661, 673 (9th Cir. 1975) (emphasis original). Does the FONSI show that the alternative including the proposed action will not significantly degrade some human environmental factor?

yes/no page(s)

12. Is the FONSI prepared according to the agency=s own guidelines? Portela v. Pierce, 650 F. 2d 210, 213 (9th Cir. 1981).

yes/no page(s)

13. Does the FONSI show that it precedes the agency=s final decision on the proposed action? (FONSI pitfall #1)

yes/no page(s)

14. Neutral facts do not support a FONSI. Do facts stated in the FONSI show how they support a finding of no significance? (FONSI pitfall #4)

yes/no page(s)

15. Mitigation measures.

-A(C)hanges in the project are not legally adequate to avoid an impact statement unless they permit a determination that such impact as remains, after the change, is not significant.@ Cabinet Mountains Wilderness/Scotchman=s Peak Grizzly Bears v. Peterson, 685 F.2d 678 (D.C. Cir. 1982). Does the FONSI show that the agency is committed to the mitigation measures reduce

impacts below the threshold of significance?

yes/no page(s)

-Agencies Ashould not rely on the possibility of mitigation as an excuse to avoid the EIS requirement.@ Cabinet Mountains Wilderness/Scotchman=s Peak Grizzly Bears v. Peterson , 685 F. 2d 678 (D.C. Cir. 1982)(emphasis added). Does the FONSI show that the agency is committed to the mitigation measures (i.e. that proposed action will not be taken without measures)? (FONSI pitfall #3)

yes/no page(s)

16. Are all alternatives which were discussed in the EA appear in the FONSI? (FONSI pitfall #2).

yes/no page(s)

17. Impacts may be both beneficial and adverse. A significant effect may exist even of the Federal agency believes that on balance the effect will be beneficial. 40 C.F.R. * 1508.27(b)(1). Does the FONSI show that beneficial, as well as adverse impacts will not be significant? (FONSI pitfall #6)

yes/no page(s)

18. Does the FONSI present the reasons why the action will not have a significant effect on the human environment? 40 C.F.R. * 1508.13. (FONSI pitfall #5)

yes/no page(s)

19. Are all effects described in the EA taken into account in the FONSI? (FONSI pitfall #7)

yes/no page(s)

20. Are all environmental standards the sole evidence of non-significance? (FONSI pitfall #8)

yes/no page(s)

END

FEDERAL AID
NEPA WORKSHEET

NOTE: THIS IS A WORKSHEET TO BE FILLED IN DURING PROJECT PLANNING. THIS IS NOT AN EA. BECAUSE THIS IS A PLANNING TOOL, YOU SHOULD HANDWRITE AND ATTACH INFORMATION.

(Applicable Section of EA Outline in which to use information)

1. What need is causing you to act? (Why do anything?) What is the purpose? (IA)

2. What is the Acontext@ for any action(s)? Background, laws, goals, directives, interrelationships which affect or force your action? (IB, ID)

3. Provide a map and general vicinity description. (IC)

4. Who cares about this kind of action? Who can help give information? Who can answer questions? What public involvement is needed? Who (groups or individuals) has expressed an interest so far? (IE)

5. What are alternative ways of accomplishing the purpose? What are all of my options. (IIB)

6. What alternatives can be eliminated? Why? (IIA)

7. What, in some detail, are the actions (activities or cause agents) of each remaining viable alternative?

8. Which resources will be affected by the specific activities of the alternatives? Answer each Ayes@ or Ano@ (IIIA)

Wildlife_____	Air Quality_____	Economy_____
Vegetation_____	Topography_____	Cultural/Historical Resources _____
Soils_____	Geology_____	Aesthetics_____
Water Quality_____	Sociology_____	Land Use_____

9. For each alternative, list the activities which would have no important effect on the environment. (IIA)

10. Will this project: (IV A, B, C)

(Yes or No)

(A) be performed in any area in which threatened or endangered species are present? _____ May it affect the endangered or threatened species. _____

(B) potentially affect flood plain or wetland area through development, modification or destruction of these areas? _____

(C) be expected to have organized opposition or generate substantial public controversy? _____

(D) include the introduction or exportation of any species not presently or historically occurring in the receiving location? _____

(E) affect any known archaeological, historical or cultural site or alter the aesthetics of subject area? _____

(F) include use of any chemical toxicant? _____

(G) impact on any designated or proposed wild or scenic rivers, trails, or wilderness areas? _____

(H) result in any discharge which will conflict with Federal or State air or water quality regulations? _____

(I) affect any prime or unique farmland, forest land or ecologically critical areas as designated by Federal, State, or local authorities _____

(J) require any Federal or State permits? _____

11. If all the answers are Ano@ in the column above, and if the alternatives are entirely within the categorical exclusions, cease the assessment and prepare a categorical exclusions statement identifying the exclusions which apply.

12. If you marked Ayes@ to any of the above, what public involvement is required? (ID)

13. What is your public involvement plan? What are state processes for obtaining public input?

14. Describe in detail the resources that would be affected in important ways by the

actions of each alternative (all marked Ayes@ in question 8). Consider only those features of each resource which would be affected by the actions. (IIIB)

15. Describe in detail the impacts on the resources which would result from the important activities under each alternative. (IVB)

Altern. A	Altern. B	Altern. C
1. activity & consequences	1.	1.
2. activity & consequences	2.	2.
3. activity & consequences	3.	3.

16. DECIDE IF ANY OF THESE CONSEQUENCES ARE AIMPORTANT ENOUGH@ TO require an EIS. If so, consult with your Federal Aid Coordinator. If not, continue with this assesment.

17. Prepare a consequence table. This will summarize (in quantified form) the impacts which you described under question 15. (IVC)

EXAMPLE

ALTERNATIVES

	Vegetation	Water Soils	Wildlife	Historic
Altern. A	_____	_____	_____	_____
Altern. B	_____	_____	_____	_____
Altern. C	_____	_____	_____	_____

18. List the standards or criteria you will use to make your selection among the alternatives. Standards could be such things as detrimental effects, beneficial results, technologic and economic feasibility, compatibility with goals, directives, laws, etc. (IICI)

19. Based on the standards used above, prepare a comparative matrix showing how the various alternatives will meet your chosen standards. Use the following rating system:

++exceeds standards
+meets standards
0 neutral
-does not meet standards
Bserious deficit

ALTERNATIVES	Environmental effects	Technological feasibility	State needs or goals
Alternative A			
Alternative B			
Alternative C			
Alternative D			

20. Discuss which alternative best meets the standards, and select your proposed action or preferred alternative.

THIS COMPLETES YOUR NEPA PLANNING WORK. TO PREPARE YOUR EA, PLACE THIS INFORMATION INTO THE EA FORMAT AS INDICATED BY THE EA OUTLINE SECTION NUMBER ON THE RIGHT-HAND SIDE OF THESE PAGES. IF ALL ACTIVITIES ASSOCIATED WITH THE ALTERNATIVE SELECTED ARE ELIGIBLE FOR CATEGORICAL EXCLUSION, NO EA IS REQUIRED.

REFUGES

ENVIRONMENTAL CHECKLIST

Proposed action:_____

Submitted by:_____

Field Station or Office:_____

ACTIONS	EFFECTS SHORT TERM	EFFECTS LONG TERM	EFFECTS QUANTIFIED
Wetlands			
Uplands			
T&E Species			
Other Wildlife			
Cultural Resources			
Historical Resources			
Water Quality			
Water Quantity			
Air Quality			
Social			
Economic			
Cumulative			
Controversial			

*Quantify the effects

NEPA COMPLIANCE DECISIION

_____ Action categorically excluded from NEPA
_____ Start environmental Assesment (EA)

By:_____ _____
Project Leader Date

Back to Table of Contents

ENVIRONMENTAL IMPACT CHECKLIST
FOR
SOME OF THE MORE COMMON SOCIAL CONCERNS

SOCIAL CONCERN	EFFECT		COMMENTS
	POS	NEG	
Impacts ro minority and low income populations			
Changes in ethnic or racial composition			
Influx or outflow of temporary workers			
Community disruption or disintegration			
Changes in land use patterns			
Changes in lifestyles			
Changes in social interactions, family ties, kinship patterns			
Displacement/relocation of business			
Changes in the ability to provide and deliver social services			
Changes in aesthetics or perceived environmental quality			
Changes in public health, safety, or perceived well-being			
Displacement of community facilities			
Changes in public vehicular access			
Changes in public pedestrian access			
Changes in recreation			
Changes in leisure-time activities			
Changes in local employment opportunities			
Changes in community tax base			
Changes in commerce, recreation, or related services			
Impacts to Native American Trust Resources			

Other			

Fish and Wildlife Service
Department of Transportation Project
Section 4 (f) Review Checklist

	YES	NO
A. Transportation Project Impacts on 4(f) Resources		
1. Will recreational resources be significantly impacted?		
2. Will historic/archeological on resources be significantly impacted?		
3. Does the project involve segmentation of actions?		
4. Will secondary development be promoted by the project and affect section 4(f) resources?		
5. Will secondary development impacts on section 4(f) resources be environmentally adverse?		
6. Will there be Aconstructive use@ of any section 4(f) resources?		
7. Will the project affect FWCA mitigated lands/waters?		
8. Will the project affect National Wildlife Refuge System lands?		
9. Will the project affect National Fish Hatchery System lands?		
10. Is there segmentation of transportation projects?		
11. Are there other projects now in the area, or planned, that may affect section 4(f) resources?		
12. Will Scenic Byways be affected?		
13. Will National Recreational Trails be affected?		
14. Will the project affect Federal Aid acquired or managed lands?		

B. General Comments

		YES	NO
1.	Do the Service comments identify that feasible and prudent alternatives to the use of section 4(f) resources have been identified and evaluated by FHWA?		
2.	Do the Service comments indicate the adequacy of the section 4(f) statement?		
3.	Do the Service comments indicate whether FHWA has identified proper mitigation measures for the project?		
4.	Do the Service comments identify existing planning inadequacies and provide additional mitigating measures, if needed?		
5.	Do the Service comments address inadequacies in the FHWA's document?		
6.	Are all section 4(f) resources in the project area identified by FHWA?		
7.	Has the project's significance on section 4(f) resources been properly determined?		
8.	Has FHWA consulted/coordinated with the Service to minimize harm to any affected Service property?		
9.	Is a Presidential Permit required?		
10.	If required, has the Presidential Permit been issued?		
11.	Has compliance with section 106 of the National Historic Preservation Act been completed?		
12.	Has compliance with E.O.13007 concerning Indian Sacred Sites been completed?		

C. Summary Comments Concerning Section 4(f) Approval

1. Service concurs that there are no feasible and prudent alternatives to the use of section 4(f) resources [or the converse].

2. Service concurs that the project includes all possible measures to minimize harm to the use of section 4(f) resources [or the converse].

ENVIRONMENTAL IMPACT CHECKLIST
FOR
ECONOMIC CONCERNS

ECONOMIC VALUE	EFFECT		COMMENTS
	YES	NO	
Recreation Value			
Ecological Value			
Commercial Value			
Subsistence Value			
Intangible Value			
Economic Impact Values			
Employment			
Consumer Income			
Business Income/costs			
Private Property Values			
Tax Revenues			
Distribution of Effects			
Types of Businesses			
Population Affected			
Tribal Governments			
Other Affected Agencies			
Local			
County			
State			
Federal			

Other			

ENVIRONMENTAL ASSESSMENT

TABLE OF CONTENTS

1.0 PURPOSE FOR THE PROPOSED ACTION……

2.0 NEED FOR THE ACTION……..

3.0 ALTERNATIVES INCLUDING PROPOSED ACTION……...

3.1 ALTERNATIVE A……
3.2 ALTERNATIVE B……
3.3 ALTERNATIVE C……
3.4 SUMMARY OF ACTIONS BY ALTERNATIVES……

4.0 AFFECTED ENVIRONMENT……...

5.0 ENVIRONMENTAL CONSEQUENCES……...

5.1 HABITAT IMPACTS……
5.2 GAME ANIMAL IMPACTS……
5.3 ENDANGERED AND THREATENED SPECIES IMPACTS……
5.4 SUMMARY OF ENVIRONMENTAL CONSEQUENCES BY ALTERNATIVE……

6.0 LIST OF PREPARERS……

7.0 REFERENCES……..……

8.0 APPENDICES……..…….

APPENDIX 1……..……..
APPENDIX 2……..……..
APPENDIX 3……..……..
APPENDIX 4……..……..

TABLE OF CONTENTS

VOLUME I - Text

Summary xi

Chapter 1 - Introduction

SECTION ONE - PURPOSE AND NEED
- Introduction 1
- Purpose and Need for Action (Defined Separately) 3
- Need for Preparing an EIS 3
- Overview of the Planning Process 3
- Other Agencies 4

SECTION TWO - LONG-RANGE GOALS AND OBJECTIVES
- Introduction 5
- Basis of Hart Mountain NAR Goals 5
- Hart Mountain NAR Goals 5
- Basis of Long-Range Objectives 6
- Long-Range Objectives of Hart Mountain NAR 7

SECTION THREE - ISSUES (SCOPING)
- Identification of Issues 13
- Issues, Concerns and Opportunities (Impacts and Alternatives) 14
  - Issue 1 - Wildlife 14
  - Issue 2 - Wildlife Habitat 14
  - Issue 3 - Livestock Grazing Management 15
  - Issue 4 - Recreational Opportunities 15
  - Issue 5 - Wilderness and Research Natural Area Review 16
  - Issue 6 - Local Economy 16
- Issues Eliminated from Detailed Study (Impacts and Alternatives) 17

Chapter 2 - Alternatives

Introduction 19

SECTION ONE - ALTERNATIVE DEVELOPMENT
- Definitions 21
  - Alternative 21
  - Mitigation 21
- Alternative Development 22
  - Overview of Development Process 22
    - Sources of Direction and Information 23

SECTION TWO - ALTERNATIVES CONSIDERED IN DETAIL
- Features Common to All Alternatives 27

- Alternative A - Baseline Management (No Action) 29
  - Habitat Management 29
  - Wildlife Population Management 35
  - Public Use Management 35
  - Special Areas Management 39

Alternative B - Featured Species Management 41
Habitat Management 41
Wildlife Population Management 47
Public Use Management 48
Special Areas Management 50

Alternative C - Habitat Restoration 53
Habitat Management 53
Wildlife Population Management 60
Public Use Management 61
Special Areas Management 63

Alternative D - Ecosystem Management (Proposed Action) 67
Habitat Management 67
Wildlife Population Management 71
Public Use Management 72
Special Areas Management 75

Alternative E - Custodial Maintenance 79
Habitat Management 79
Wildlife Population Management 80
Public Use Management 80
Special Areas Management 82

Comparison of Alternatives 84

SECTION THREE - ALTERNATIVES CONSIDERED, BUT NOT GIVEN DETAILED STUDY 87

Chapter 3 - Affected Environment

Introduction 89

SECTION ONE - REFUGE ECOSYSTEM
Habitat 91
Location, Elevation, and Landforms 91
Climate 92
Soils 92
Water Quality 93
Air Quality 93
Vegetation and Watershed Qualities 93
Wildlife 115
Featured Species 115
Species Richness 124
Feral Horses 129
Special Area Management 131

SECTION TWO - SOCIO-ECONOMIC COMPONENTS (Separate Discussions)
Public Use and Facilities 133
Opportunities 133
Facilities 137
Livestock Grazing Program 138
Economic Conditions 138
Cultural Resources 140

Chapter 4 - Environmental Consequences

Introduction 141

Alternative A - Baseline Management
- Effects on Habitat 151
- Effects on Wildlife 156
- Effects on Special Area Management 158
- Effects on Recreation Opportunities 159
- Effects on the Livestock Grazing Program 160
- Socio-Economic Impacts (Separate Discussions) 160
- Effects on Cultural Resources 160

Alternative B - Featured Species Management
- Effects on Habitat 161
- Effects on Wildlife 168
- Effects on Special Area Management 171
- Effects on Recreation Opportunities 171
- Effects on the Livestock Grazing Program 173
- Socio-Economic Impacts (Separate Discussions) 173
- Effects on Cultural Resources 174

Alternative C - Habitat Restoration
- Effects on Habitat 175
- Effects on Wildlife 183
- Effects on Special Area Management 185
- Effects on Recreation Opportunities 186
- Effects on the Livestock Grazing Program 187
- Socio-Economic Impacts (Separate Discussions) 188
- Effects on Cultural Resources 188

Alternative D - Ecosystem Management
- Effects on Habitat 189
- Effects on Wildlife 195
- Effects on Special Area Management 197
- Effects on Recreation Opportunities 198
- Effects on the Livestock Grazing Program 200
- Socio-Economic Impacts (Separate Discussions) 200
- Effects on Cultural Resources 200

Alternative E - Custodial Maintenance
- Effects on Habitat 203
- Effects on Wildlife 207
- Effects on Special Area Management 210
- Effects on Recreation Opportunities 210
- Effects on the Livestock Grazing Program 211
- Socio-Economic Impacts (Separate Discussions) 211
- Effects on Cultural Resources 212

Summary of Impacts of Alternatives 213

Relationship between Short-term Uses of the Environment and Long-tern Productivity 219

Irreversable and Irretrievable Commitment of Resources 219

Unavoidable Adverse Impacts 220

Chapter 5 - Consultation and Coordination

Public Involvement 221

List of Agencies and Individuals Receiving a copy of this EIS 225

List of Preparers 231

Glossary 233

Literature Cited 249

Index 271

United States Department of the Interior

FISH AND WILDLIFE SERVICE
Washington, D.C. 20240

FEB 07 2018

In Reply Refer To:
FWS/AES/DER/BER/067297

Memorandum

To: Service Directorate

From: Principal Deputy Director

Subject: Implementation of Executive Order 13807 "Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects" and Secretarial Order 3355 "Streamlining National Environmental Policy Act Reviews and Implementation of Executive Order 13807"

This memorandum serves to transmit Executive Order 13807 and Secretarial Order 3355 and remind you of the importance of compliance with these orders. Secretarial Order 3355 requires bureaus serving as lead agency to finalize Environmental Impact Statements (EIS) within one year of issuance of the Notice of Intent (NOI) to prepare an EIS. The Final EIS must also not be more than 150 pages, or 300 pages for unusually complex projects.

These time and page limits are triggered for any project covered by an NOI to prepare an EIS issued after August 31, 2017, regardless of the type of action being analyzed. Furthermore, it is the expectation of the Deputy Secretary's office that all ongoing EIS project timelines, even if the NOI was issued before August 31, 2017, achieve the one year goal or reduce the completion time. Timelines and page numbers exceeding these limits require Departmental approval.

Those actions that involve an EIS that may exceed the time and page limits must provide a waiver request either with the NOI package or as soon as possible if the NOI has already been published in the Federal Register. The U.S. Department of the Interior's Office of Environmental Policy and Compliance is developing a database to track EISs and, eventually, Environmental Assessments (EA) as part of the implementation of the Secretarial Order. The database is anticipated to be operational in March. Staff will be expected to enter EIS and, eventually EA, information into the database once it is available.

If you have questions, please contact Ms. Gina Shultz, Deputy Assistant Director – Ecological Services at 703-358-1985.

Attachments