

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's NEPA 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. The 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 cooperate. 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 Department'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 has 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 the 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 [40 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 Comments 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 Comments.

- (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 (EO). 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 Metropolitan 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 the 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 similar 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 of 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 Administration, 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 Environmental 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 three 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.