

## The NEPA Process: What Do We Need To Do And When?

by Joan E Drake

02-03-2007

### The NEPA Process: What Do We Need To Do And When?

By

Joan E. Drake

Modrall, Sperling, Roehl, Harris & Sisk, P.A.

P.O. Box 2168

Albuquerque, NM 87103-2168

(505) 848-1850

jdrake@modrall.com

*This paper was originally presented at the Rocky Mountain Mineral Law Foundation Special Institute entitled "NEPA and Federal Land Development" and appeared in the Institute Manual as Paper 3 (Rocky Mt Min L Fdn 2006). The article was subsequently published in the Rocky Mountain Mineral Law Foundation Journal, 43 Rocky Mt Min L Fdn J 117 (2006).*

This paper reviews the basic nuts and bolts of the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.* ("NEPA"). The paper describes the types of proposed actions that trigger NEPA, various NEPA documents and the process and timing of procedures to ensure compliance. Where possible, citations to U.S. Supreme Court and Tenth Circuit case law, applicable in the Rocky Mountain region, are included to round out statutory and regulatory requirements.

#### **I. The NEPA Trigger: "Major Federal Action Significantly Affecting the Human Environment"**

NEPA requires the inclusion of a detailed statement "in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment."<sup>1</sup> The statute does not further define the terms "proposal" or "major Federal action significantly affecting the quality of the human environment," or what the "detailed statement" is to consist of, but the Council on Environmental Quality's ("CEQ") regulations, and the specific agency regulations, have attempted to fill in the gaps.

##### **A. What is a "Proposal" that Triggers NEPA?**

What constitutes a proposal that triggers the provisions of NEPA is often a question of timing. Agencies may consider many proposals and projects in various stages of formulation and planning. While Federal agencies are encouraged to apply NEPA early in the project planning process, it is practical to initiate the formal NEPA process only at a stage where a proposal is developed to a point where it can be meaningfully evaluated. The CEQ regulations define a "proposal" subject to the provisions of NEPA to exist at the point where an agency has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing the goal and the effects of those alternatives and implementing the goal can be meaningfully evaluated.<sup>2</sup>

##### **B. What is a "Major Federal Action?"**

The CEQ regulations define "major Federal action" to include actions with effects that may be major and which are potentially subject to Federal control and responsibility.<sup>3</sup> A major Federal action can include failure by officials to act. Actions can include new and continuing activities, including those entirely or partly funded, assisted, conducted, regulated or approved by an agency, and new or revised agency rules, regulations, plans, policies or procedures, as well as legislative proposals.<sup>4</sup> Initiation of judicial or administrative enforcement actions does not trigger NEPA. Further, the Federal agency must have some discretion with respect to the action proposed. Nondiscretionary

actions do not trigger NEPA.

### 1. What is a "Federal" Action?

A "Federal" action is an action taken (or not taken) by a Federal agency or arm of the Federal government. The CEQ describes Federal actions as tending to fall into one of four categories:<sup>5</sup>

1. Adoption of official policy, rules and regulations, and international agreements.
2. Adoption of formal plans upon which future agency actions will be based.
3. Adoption of programs to implement policies, or allocation of agency resources to implement programs or directives.
4. Approval of specific projects, such as construction and management activities located in a defined geographic area, including projects approved by permit or other regulatory decision as well as federal activities and federally assisted activities.

Non-federal projects become "Federal actions" when the project "cannot begin or continue without prior approval of a Federal agency."<sup>6</sup> The key determinant is the Federal government's ability to "exercise discretion over the outcome."<sup>7</sup>

### 2. "Small Handles" Issues

"Small handles" issues arise under NEPA when an agency has statutory authority to approve only a small part of a larger project. The issue then focuses on the proper scope of the NEPA document – should it include only the part of the project over which the agency has approval authority or should it cover the entire project?

The Tenth Circuit concluded the key factor in this analysis is the Federal agency's authority to influence the non-federal activity.<sup>8</sup> In *Hodel*, BLM limited its impact assessment of a right-of-way improvement project to those areas within the right-of-way, and did not address impacts to a nearby wilderness study area.<sup>9</sup> The court held that the agency should have addressed impacts to the wilderness study area because of its control of the area under the Federal Land Policy and Management Act.<sup>10</sup> In order to include the private action within the scope of the federal action, the federal agency must possess actual power to control the non-federal activity. This includes control over the outcome of the private project.<sup>11</sup>

*Hodel* follows the "control and responsibility" line of reasoning established by the Eighth and Fifth Circuits in two 1980 cases.<sup>12</sup> In *Winnebago Tribe*, the Eighth Circuit concluded the Corps did not have either legal control or "but for" control over an entire transmission line because it only permitted a river crossing. The court set out three factors to assess whether "but for" control exists: (1) the degree of discretion over the non-federal project; (2) whether there is federal funding of the private project; and (3) the overall extent of federal involvement in the private project.<sup>13</sup> The court found that none of these factors applied in the case, where the agency's approval authority covered a relatively small portion of the overall project, and there was no federal funding.<sup>14</sup> NEPA does not enlarge the authority of an agency and the agency's statutorily circumscribed discretion did not dictate project-wide review.<sup>15</sup> The agency only had the authority to permit the river crossing and this degree of involvement was insufficient to turn the private project into a federal action.<sup>16</sup>

### 3. What is a "Major" Action?

The CEQ regulations state that the term "major" reinforces, but does not have a meaning independent of, the definition of "significantly," discussed in Section I.D below.<sup>17</sup> Courts have considered whether there is a dual standard or a unitary standard for these two terms.<sup>18</sup> While courts have taken different approaches, the CEQ regulations merged the two terms; thus, the

primary factors in the consideration of whether an action is “major” are similar to those for determination of whether the action is likely to have significant effects on the human environment: the size of the project contemplated, and the intensity and context of the potential impacts.<sup>19</sup>

### **C. What is the “Human Environment?”**

The “human environment,” impacts to which trigger the NEPA process, is a broad term that is “interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment.”<sup>20</sup> While economic or social effects will not, by themselves, trigger NEPA, they must be considered once NEPA is triggered by impacts to the natural or physical environment and the relationship of people with that environment.<sup>21</sup>

Included within the ambit of the “human environment” are physical, cultural and aesthetic values.<sup>22</sup> Agencies have provided guidance to their offices regarding what impacts and resources should be considered in NEPA analyses. For example, the Bureau of Land Management specifies in its NEPA Handbook the following critical elements to be considered: air quality, areas of critical environmental concern, cultural resources, farmlands, floodplains, Native American religious concerns, threatened and endangered species, hazardous and solid wastes, water quality, wetlands and riparian zones, wild and scenic rivers, and wilderness.<sup>23</sup>

### **D. What does “Significantly Affecting” Mean?**

“Significantly” requires consideration of both context and intensity. With respect to context, the significance of an action must be analyzed in several contexts such as society as a whole, the affected region, the affected interests, and the locality.<sup>24</sup> Intensity refers to the severity of the impact.<sup>25</sup> Both short-term and long-term impacts must be considered.

Factors to be considered in assessing the intensity of effects include:<sup>26</sup>

1. Beneficial as well as adverse impacts.
2. Degree of effect on public health and safety.
3. Unique characteristics of the geographic area, such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.
4. The degree to which effects are likely to be highly controversial.
5. The degree to which possible effects are highly uncertain or involve unique or unknown risks.
6. The degree to which the action may establish precedent for future actions with significant effects or represents a decision in principle about a future consideration.
7. Relation to other actions with cumulatively significant impacts, even though individual impacts are insignificant. Significance cannot be avoided by terming an action temporary or breaking it down into small component parts.
8. The degree to which the action may adversely affect districts, sites, highways, structures or other objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural or historic resources.
9. The degree to which an action may adversely affect an endangered or threatened

species or its critical habitat.

10. Whether the action threatens a violation of Federal, State or local law or requirements imposed for the protection of the environment.

The “effects” or impacts to be considered include beneficial and detrimental effects, direct effects, indirect effects, secondary effects, and cumulative effects.<sup>27</sup> Direct effects are caused by and occur at the same time and place as the action.<sup>28</sup> Indirect effects are caused by the action but occur later in time or farther removed in distance, and may include growth inducing effects and related effects on air, water and other natural systems.<sup>29</sup> Cumulative impact results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency or person undertakes the other actions, and can result from individually minor but cumulatively significant actions that take place over time.<sup>30</sup>

### **E. Most Common NEPA Triggers**

The most common Federal actions subject to NEPA are construction projects initiated or implemented by Federal agencies, such as civil works, public housing, public roads and the like; projects that require Federal permits, such as for use of public lands or for impacts to resources such as waters of the United States under Section 404 of the Clean Water Act; rights of way and easements across public lands and Indian lands; implementation of management plans such as Forest Management Plans; and approvals of Federal funding or assistance for projects.

Potential impacts to resources of particular concern, such as endangered species and National Register-eligible historic or cultural resource sites, are also common NEPA triggers. Public controversy, if and of itself, can also prompt an agency to initiate the NEPA process, in line with NEPA’s primary objective of informed decision-making. Finally, the sheer size of a project (i.e., new highway versus minor road crossing) and the condition of the resources to be affected (i.e., pristine versus degraded) are also important factors.

## **II. Categorical Exclusions**

An agency’s proposal may be exempt or categorically excluded from compliance with NEPA.<sup>31</sup> “Categorical exclusion” means a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency, and therefore do not require preparation of an Environmental Assessment or Environmental Impact Statement.<sup>32</sup> However, an agency may decide to prepare an EA in its discretion, and must provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect.<sup>33</sup>

Agencies have included in their regulations lists of typically routine actions that are categorically excluded from NEPA. For example, the Department of Interior (“DOI”) has categorically excluded from NEPA, in the absence of extraordinary circumstances, such actions as nondestructive data collection and inventory, educational activities, some hazardous fuels reduction activities, and some post-fire rehabilitation activities.<sup>34</sup> The Department of Agriculture has excluded similar categories of routine actions.<sup>35</sup> The U.S. Army Corps of Engineers’ list of categorical exclusions under its permitting program is quite specific and includes fixed or floating small private piers and docks, minor utility lines and boat launching ramps.<sup>36</sup>

In addition to the categorical exclusions specified by the Department of Agriculture, the United States Forest Service (“USFS”) categorically excludes such actions as repair and maintenance of administrative sites, roads, trails, landline boundaries, recreation sites and facilities, acquisition or sale or exchange (where uses stay the same) of land or interest in land, minor, short-term (one year or less) special uses of National Forest System lands, and new permits under the National

Forest Ski Area Permit Act of 1986.<sup>37</sup>

The USFS recently issued new regulations that provide that approval of a land management plan, plan amendment or plan revision may be categorically excluded from NEPA documentation.<sup>38</sup> The USFS then proposed a categorical exclusion for development, amendment and revision of land management plan components, or portions thereof, unless extraordinary circumstances exist.<sup>39</sup> In December 2005, the USFS also proposed another new categorical exclusion for oil and natural gas exploration and/or development activities on National Forest System lands that are under Federal lease and are within a new oil and/or gas field not to exceed a total of: (a) one mile of new road construction; (b) one mile of road reconstruction; (c) three miles of pipeline installation; and (d) four drill sites (which may include more than one well in order to reduce surface disturbance); provided no extraordinary circumstances exist.<sup>40</sup>

In addition to the categorical exclusions specified by the Department of the Interior, the Bureau of Indian Affairs ("BIA") categorically excludes such actions as operation, maintenance and replacement of existing facilities, rights-of-way inside another right-of-way, permits for geologic mapping, annual logging plans when in compliance with current management plan, some timber stand improvement and timber management projects, resource inventories, and environmental quality monitoring programs.<sup>41</sup> The National Park Service's additional categorical exclusions are found at 46 Fed. Reg. 1042, 1043 (1981).

The BLM has reserved, pending revision, categorical exclusions additional to those specified in DOI's 516 DM 2.3(A)(2).<sup>42</sup> However, the BLM recently issued guidance to its offices regarding five new statutory categorical exclusions that apply only to oil and gas exploration and development established under Section 390 of the Energy Policy Act of 2005.<sup>43</sup>

The DOI's instructions provide that extraordinary circumstances exist for individual actions that otherwise would fall under a categorical exclusion when, for example, they may have significant impacts on public health or safety or resources such as historic or cultural resources, park, recreation or refuge lands and other unique geographic characteristics; they have highly controversial environmental effects or involve unresolved conflicts concerning alternative uses of available resources; they have highly uncertain and potentially significant environmental effects or involve unique or unknown environmental risks; establish a precedent; have significant impacts on endangered species or National Register sites; limit access to and ceremonial use of Indian sacred sites on Federal lands by Indian religious practitioners; or contribute to the introduction or spread of noxious weeds or non-native invasive species.<sup>44</sup>

### **III. The Key Decision: EA or EIS?**

Once it is clear that a proposed action triggers the requirements of NEPA and is not categorically excluded, the next decision is what NEPA document to prepare. The CEQ regulations direct agencies to determine whether, under the agency's own supplemental procedures, the proposal is one which "normally requires an environmental impact statement." If so, an environmental impact statement ("EIS") is prepared. If not, the agency shall prepare an environmental assessment ("EA").<sup>45</sup>

#### **A. What Actions "Normally Require an EIS?"**

The BLM proposed that the following types of actions will normally require the preparation of an EIS: approval of resource management plans, approval of major activity plans for grazing and timber management, recommendations of wilderness proposals, approval of regional coal lease sales schedules and outer continental shelf oil and gas lease sales, approvals of sites for major steam-electric power plants, refineries, and other industrial facilities, rights-of-way for major reservoirs, canal, pipelines, transmission lines, highways and railroads; and some withdrawals from mineral entry involving high interest or high value minerals.<sup>46</sup> However, BLM's NEPA Handbook

notes that such guidance has been reserved, pending revision.<sup>47</sup>

The National Park Service specifies the following types of actions will normally require an EIS: wild and scenic river proposals, wilderness proposals, National Trail proposals, major boundary adjustments, and general management plans for national parks, national recreation areas, national seashores, national lakeshores, and national preserves.<sup>48</sup> The BIA specifies the following actions will normally require an EIS: mining contracts (other than oil, gas and surface coal mines) for new mines or mining units of 640 acres or more, new surface coal mines of 1,280 acres or more or annual full production level of 5 million tons or more, and water developments that would inundate more than 1,000 acres or store more than 30,000 acre-feet or irrigate more than 5,000 acres of undeveloped land.<sup>49</sup>

The USFS identifies classes of actions that require an EIS. Class I actions are those for which an EIS is required by law or regulation, such as a proposal that Congress enact legislation to designate a wilderness or wild and scenic river.<sup>50</sup> Class 2 actions are proposals to carry out or to approve aerial application of chemical pesticides on an operational basis.<sup>51</sup> Class 3 actions are proposals that would substantially alter the undeveloped character of an inventoried roadless area of 5,000 acres or more.<sup>52</sup> An example of a Class 3 action is the approval of a plan of operations for a mine which would cause considerable surface disturbance over 700 acres in a 10,000 acre roadless area.<sup>53</sup> Class 4 is a catch-all category that includes other major proposals significantly affecting the human environment. Examples of Class 4 action include authorizing the BLM to offer the sale of leases for oil and natural gas resources from beneath 400,000 acres of National Forest System lands that have historically demonstrated a relatively high potential for discovery and development of oil and natural gas, and approving the construction and operation of an international gas pipeline beneath a previously undeveloped 30-mile long, 1,000-foot wide corridor within an ecologically sensitive area of National Forest System land.<sup>54</sup>

Many proposed actions do not fit cleanly into one of the categories specified by the agencies. Ultimately, the decision whether to prepare an EA or an EIS is a judgment call on the part of the agency and will be guided by degree of impact, sensitivity of resources affected, and degree of public controversy. Agencies and applicants for agency approvals may decide that preparation of an EIS is a time-saving approach in cases where the call is a close one or where a significant threat of litigation exists.

## **B. The Significance Determination**

An EA leads to one of two determinations; the first possibility is that the proposed action will not result in significant impacts to the human environment, in which case a Finding of No Significant Impact ("FONSI") is prepared which documents the agency's rationale for its decision. The second possibility is that the proposed action will result in significant impacts to the human environment, in which case the agency proceeds to prepare an EIS to inform its decision-making on the proposed action.

The CEQ's regulatory criteria for determination of significance are discussed above in Section I (D). Agencies provide little additional guidance. The BLM's NEPA Handbook states: "To determine significance, impact predictions may be compared to some parameter or maximum/minimum level of effect beyond which the impacts become significant, i.e., a significance threshold. Law, regulation, prior commitments, professional expertise, the manager's best judgment, and public opinion can affect the setting of significance thresholds."<sup>55</sup> Ultimately, the determination is a judgment call by the agency that will be overturned only if found to be arbitrary and capricious.

The judicial standard of review of an agency's FONSI decision is a narrow one. "An agency's decision to issue a FONSI and not prepare an EIS is a factual determination which implicates agency expertise and accordingly, is reviewed under the deferential arbitrary and capricious standard of

review.”<sup>56</sup> In its determination whether an agency’s FONSI was arbitrary or capricious, a reviewing court must determine whether the decision was based on consideration of relevant factors and whether there was clear error of judgment.<sup>57</sup>

In *Boomer Lake Park*, the Tenth Circuit held the agency considered relevant factors such as noise and visual effects, even if not to the level of detail the project’s opponents would have preferred.<sup>58</sup> The court also found the decision was not a clear error of judgment because a variety of environmental factors were considered and mitigation measures were included.<sup>59</sup> The court concluded the agency took the requisite “hard look” at the environmental implications of the proposed road project and assessed all relevant factors.<sup>60</sup>

## **IV. The NEPA Process and Timing**

### **A. Timing**

The NEPA process – preparation of an EA or EIS – should be started as early as possible so that the document can serve practically as an important contribution to the decision-making process and will not be used to rationalize or justify decisions already made.<sup>61</sup> For projects undertaken by Federal agencies themselves, NEPA documents should be prepared at the feasibility analysis stage; for applications for Federal agency permit or approval, NEPA documents should be initiated as soon as the application is received.

There are no prescribed time limits for completion of the NEPA process. The CEQ’s guidance is that a typical EA should be completed within about 3 months and even an EIS on a complex project should take no more than about one year.<sup>62</sup> Those guidelines arguably do not take into account coordination and processes required by related laws and regulations, such as endangered species, discussed in Section V below, or any potential public controversy which could draw out the process.

The CEQ regulations provide that no decision on a proposed action shall be made until the later of the following: 90 days following the publication in the Federal Register of notice of filing a draft EIS or 30 days following publication in the Federal Register of notice of filing a final EIS.<sup>63</sup> These timeframes may run concurrently.<sup>64</sup>

### **B. Scoping**

Scoping is 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.”<sup>65</sup> There is no set timeframe for initiation of scoping, but its purpose is to both inform, and acquire information from, the interested public and affected agencies about the proposed action, potential effects and significant issues to be analyzed by the action agency. Although formal scoping, including public meetings and agency coordination meetings, is most associated with preparation of an EIS, informal scoping can and should occur in EA preparation as well, in order to determine the scope of issues to be addressed.

When an EIS is planned, scoping is formally initiated by the lead agency’s publication of a notice of intent in the Federal Register.<sup>66</sup> The notice of intent briefly describes the proposed action and its possible alternatives, describes the agency’s proposed scoping process, including whether, when and where any scoping meeting will be held, and states the name and address of the agency contact person who can answer questions about the proposed action and the EIS.<sup>67</sup>

As part of the scoping process, the lead agency shall (1) invite the participation of the affected Federal, State, local agencies, any affected Indian tribe, the proponent of the action, and other interested persons; (2) determine the scope and significant issues to be analyzed in depth in the EIS; (3) identify and eliminate from detailed study the issues which are not significant or which

have been covered by prior environmental review; (4) allocate assignments for preparation of the EIS among the lead and cooperating agencies; (5) identify and indicate any other NEPA documents or other environmental assessments being developed or already prepared that are related to but not part of the scope of the EIS under consideration; (6) identify other environmental review and consultation requirements and plan for required analyses and studies concurrent with and to be integrated into the EIS; (7) identify and indicate the relationship between the timing of EIS preparation and the agency's tentative planning and decision-making schedule.<sup>68</sup>

The scoping process should "end" once the issues and alternatives to be addressed in the EIS have been clearly identified. The CEQ's guidance is that, normally, this would occur toward the end of the preparation of the draft EIS.<sup>69</sup> The lead agency should document in its administrative record the agency coordination and public involvement processes undertaken during scoping, the issues and alternatives identified for analysis in the EIS, and those issues and alternatives that were identified and eliminated from further study.

### **C. Lead and Cooperating Agencies and Adoption of EISs**

Often, more than one agency is involved in decision-making on a project. For example, a project may require approval from the BLM for right-of-way across public land and may also require a permit from the U.S. Army Corps of Engineers for fill in waters of the U.S. under Section 404 of the Clean Water Act, or the proposed right-of-way may skirt a National Forest and so the USFS would be interested in the project. In cases where more than one agency has a non-discretionary decision to make regarding the project, each agency must comply with NEPA in its decision-making. A joint EIS may be prepared or one agency (or more) may take the lead in preparing the EIS and the other agency may review and adopt the EIS, following its independent evaluation of the information contained in the EIS.<sup>70</sup>

An agency that adopts another agency's EIS for its own decision-making purposes takes full responsibility for its scope and content. An agency may adopt another agency's EIS without recirculating it if it concludes that its NEPA requirements have been met.<sup>71</sup> An agency may adopt only a portion of another agency's EIS.<sup>72</sup> However, in such cases, an agency which must make a decision on the proposed action, must supplement those portions of the EIS which it feels are inadequate and recirculate the supplemented document.<sup>73</sup>

One or more agencies may be designated as the lead agency(ies) in EIS preparation, with other affected or interested agencies designated as cooperating agencies.<sup>74</sup> Federal, State and local agencies may be cooperating agencies. Lead and cooperating agency status should be coordinated between the agencies during scoping and documented in formal correspondence or memorandum between the agencies.<sup>75</sup> While the lead agency takes primary responsibility for preparation of the EIS, cooperating agencies are required to participate and assist as needed.<sup>76</sup> Lead agencies must ensure that cooperating agencies are given meaningful opportunities to participate in the NEPA process.<sup>77</sup>

Cooperating agencies have a responsibility to participate in scoping and help identify issues germane to any subsequent action it must take on the proposed action. Cooperating agencies may also be assigned portions of impact assessment, alternatives analysis and mitigation evaluation, and are expected to engage in public involvement along with the lead agency.

### **D. Environmental Assessments and FONSI s**

An Environmental Assessment, or EA, may be prepared prior to preparation of an EIS or may conclude with a Finding of No Significant Impact, or FONSI, so that an EIS is not needed for the agency's decision-making process. An EA is a creature devised by the Council on Environmental Quality and is not mandated by, or even mentioned in, the NEPA statute itself. The CEQ regulations

define an EA as a concise public document that serves to (1) briefly provide sufficient evidence and analysis for determining whether to prepare an EIS or a FONSI, (2) aid an agency's compliance with NEPA when no EIS is necessary, and (3) facilitate preparation of an EIS when one is necessary.<sup>78</sup> An agency may waive the preparation of an EA and proceed directly to preparation of an EIS if it appears impacts will be significant.

### 1. Content, Format and Length

An EA shall include brief discussions of the need for the proposal, the alternatives to the proposal, the environmental impacts of the proposed action and alternatives, and a listing of the agencies and persons consulted.<sup>79</sup> The CEQ provides no specific format for an EA as it does for an EIS. Agencies may provide formats for their offices to follow.<sup>80</sup>

The CEQ intended an EA to be a concise, brief document that should not contain long descriptions or detailed data, and incorporates by reference background data to support its concise discussion of the proposal and relevant issues.<sup>81</sup> The CEQ has advised agencies to keep the length of EAs to not more than approximately 10 to 15 pages.<sup>82</sup> In cases where public controversy is non-existent or minimal, agencies are more likely adhere to those page limits.

In practice, if an applicant or agency is aware of potential controversy, it is likely the EA will look more like a mini-EIS, with full discussions of the project's purpose and need, description of the alternatives formulation and evaluation process, review of the affected environment and environmental impacts, including a table comparing impacts of alternatives, and a section on public involvement and review. EAs prepared on potentially controversial projects are typically far longer than 10 to 15 pages and can run into several hundreds of pages with appendices. An extreme case in point is the four volume, 2,400+ page EA prepared regarding the proposed use of a pre-existing pipeline to transport gasoline and other petroleum products across Texas.<sup>83</sup> The Fifth Circuit noted "the law only requires that an EA be a 'rough-cut,' 'low budget,' preliminary look at the environmental impact of a proposed project."<sup>84</sup> The *Spiller* court upheld the adequacy of the EA, describing the EA as "exceedingly thorough and comprehensive" and "more akin to a full-blown EIS."<sup>85</sup>

### 2. Scoping, Coordination with Other Agencies, and Adoption

Although formal scoping is not required for preparation of an EA, informal scoping, consisting of coordination with affected agencies and interested persons in correspondence and meetings, is the norm. If more than one agency is involved in decision-making on the proposed action, the agencies can designate lead and cooperating agency roles. An agency may adopt another agency's EA and prepare its own FONSI. The CEQ notes in such circumstances the adopting agency should be guided by the following principles: (1) the adopting agency must independently evaluate the information contained therein and take full responsibility for its scope and content, and (2) if the proposed action meets the criteria set out in 40 C.F.R. § 1501.4(e)(2), a FONSI would be published for 30 days of public review before a final determination is made by the adopting agency on whether to prepare an EIS.<sup>86</sup>

### 3. Public Involvement

One of the aims of NEPA is to provide for meaningful input from the public in order to inform agency decision-making.<sup>87</sup> Thus, public involvement is an important aspect of EA preparation even if the regulations do not provide as formal or prescribed steps as for an EIS.

The CEQ regulations do not require public review of an EA in most instances, but require agencies to "involve environmental agencies, applicants, and the public, to the extent practicable, in preparing

assessments.”<sup>88</sup> Further, the CEQ regulations enumerate the public involvement responsibilities of agencies to: (a) make diligent efforts to involve the public in preparing and implementing NEPA procedures, (b) provide public notice of NEPA-related hearings, public meetings, and availability of EAs and EISs in order to inform interested or affected agencies or persons, (c) hold public hearings when appropriate, (d) solicit appropriate information from the public, (e) explain where interested persons can get information, and (f) make EISs available to the public.<sup>89</sup> Agencies must make EAs available to the public and should provide notice to interested and affected parties.<sup>90</sup>

#### 4. Alternatives Evaluation in EAs

The thoughtful and informed consideration of alternatives is at the heart of the NEPA process, regardless of whether an EA or EIS is prepared. However, agencies are not required to consider in detail alternatives that do not meet the project’s purpose or are infeasible or impractical.<sup>91</sup> Rather, agencies are required to consider a reasonable range of alternatives.<sup>92</sup> These requirements apply equally to EISs as well as EAs.

In *Davis v. Mineta*, 302 F.3d 1104, 1122 (10th Cir. 2002), the Tenth Circuit held that an EA regarding highway construction did not consider a reasonable range of alternatives. Rather, the court found that the many alternatives were improperly rejected because they did not meet the project’s purpose and need. “Alternatives were dismissed in a conclusory and perfunctory manner that do[es] not support a conclusion that it was unreasonable to consider them as viable alternatives in the EA.”<sup>93</sup> As a result, only two alternatives were studied in detail in the EA: the no build alternative, and the preferred alternative. The court held the Federal Highway Administration’s approval was arbitrary and capricious.<sup>94</sup>

Agencies’ regulations regarding consideration of alternatives in EIS’s mirror this standard. For example, the Corps of Engineers regulations state “[o]nly reasonable alternatives need be considered in detail.”<sup>95</sup> The Corps defines reasonable alternatives as those that are feasible, and such feasibility “must focus on the accomplishment of the underlying purpose and need (of the applicant or the public) that would be satisfied by the proposed Federal action (permit issuance).”<sup>96</sup> The EA should note all the alternatives considered, provide defensible rationale (avoid self-serving and post-hoc rationalizations) for rejection of alternatives that clearly do not meet the purpose and need or are otherwise impractical or infeasible, and carry forward for a detailed look all feasible and reasonable alternatives.

The BLM’s NEPA Handbook notes that reasonable alternatives should be considered when there are unresolved conflicts involving alternative uses of available resources, but provides no further guidance on the range of alternatives.<sup>97</sup>

#### 5. Judicial Review of EA Adequacy: The “Hard Look” Doctrine

When EAs have been challenged on grounds of adequacy, courts have held that agencies are required to take a “hard look” at the environmental consequences of their decisions.<sup>98</sup> In *Utah Shared Access Alliance*, the Tenth Circuit held the EA prepared by the Forest Service was adequate because it documented that the agency had taken the “hard look” required by NEPA.<sup>99</sup> The Court discussed the standards under which it reviews an EA:<sup>100</sup>

NEPA requires that we review the record to ascertain whether the agency decision is founded on a reasoned evaluation of relevant factors. *Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 373-74, 104 L.Ed.2d 377, 109 S.Ct. 1851 (1989). Once we are satisfied that an agency’s exercise of discretion is truly informed, we must defer to that informed discretion. *Id.* at 377. It is true here, as it is in every case, that the agency could have discussed the relevant environmental impacts in greater detail. Yet the EA in this case

was hardly superficial, and it was consistent with the fundamental purpose of an EA [as a concise, brief discussion of need, impacts, alternatives and listing of those consulted].

As part of this “hard look,” NEPA requires agencies to consider direct effects, indirect effects, secondary effects, and cumulative effects. However, NEPA does not require an exhaustive discussion of impacts in an EA. Rather, an EA must show the agency considered relevant factors and made a reasoned evaluation.<sup>101</sup> Further, NEPA requires agencies to focus on reasonably foreseeable impacts “rather than distorting the decision-making process by over-emphasizing highly speculative harms.”<sup>102</sup> An EA’s consideration of particular impacts does not need to be detailed (or as detailed as opponents would like) to constitute the requisite “consideration of relevant factors.”<sup>103</sup>

One authority notes that the “hard look” doctrine has been difficult to define.<sup>104</sup> In tracing the roots of the doctrine, Mandelker posits that the doctrine means the courts must insist that agencies engage in reasoned decision-making:

Assumptions must be spelled out, inconsistencies explained, methodologies disclosed, contradictory evidence rebutted, record references solidly grounded, guesswork eliminated and conclusions supported in a ‘manner capable of judicial understanding.’<sup>105</sup>

While this clear a definition has not been articulated in a ruling regarding NEPA, its common sense application is likely to result in an EA (or EIS) that can withstand judicial scrutiny.

## 6. The FONSI

A FONSI is a document prepared by the Federal action agency documenting the agency’s decision that a proposed action will not have a significant effect on the environment, based upon the analysis made in the EA.<sup>106</sup> A FONSI must briefly present the reasons why an action will not have a significant effect on the human environment and for which an EIS will therefore not be prepared.<sup>107</sup> A FONSI must include the EA or a summary of it.<sup>108</sup> The alternative to a FONSI is a conclusion that the proposed action will result in significant impacts to the human environment. In that case, the action agency prepares a Statement of Findings and proceeds to scoping the EIS.

Courts review EAs and FONSI’s under a deferential arbitrary and capricious standard.<sup>109</sup> Courts will consider whether the analysis is superficial or manipulated, if the agency based its decision on presumptions or conclusions rather than facts, lack of documentation, internal inconsistencies, and failure to consider cumulative impacts and secondary impacts. The Tenth Circuit found deficiencies in an EA and FONSI regarding a highway project in *Davis v. Mineta*, 302 F.3d 1104 (10th Cir. 2002). In particular, the court found that the record showed the agency prejudged the NEPA issues, thus diminishing the deference owed to a federal agency in judicial review of a decision to issue a FONSI.<sup>110</sup> In *Davis*, the applicant’s contractor hired to prepare the EA was contractually obligated to prepare the EA and have the FONSI signed by a certain date, thus creating an inherent bias.<sup>111</sup> The court found that various memoranda of meetings and direction provided by the agency implicated the agency in the consultant’s “rush to judgment” and the agency failed to conduct a sufficiently independent review of the contractor’s work.<sup>112</sup> The court further found that, although the applicant hired a law firm to review the EA and that law firm’s memo, which somehow made it into the record, was highly critical of the EA and noted appreciable litigation risks, neither the contractor nor the agency fixed the identified problems.<sup>113</sup>

Under the CEQ regulations, the agency must make a FONSI available to the affected public.<sup>114</sup> Under certain limited circumstances, the agency must make the FONSI available for public review for 30 days before the agency makes its final determination and before the action may begin.<sup>115</sup> Those circumstances are when the proposed action is, or is closely similar to, one which normally

requires the preparation of an EIS, or the nature of the proposed action is without precedent.<sup>116</sup>

## 7. Mitigated FONSIs

Mitigation measures may be taken into account in an agency's determination that the effects of a proposed action are not significant.<sup>117</sup> In such cases, the EA should describe and discuss the need for the mitigation to "assist agency planning and decisionmaking" and to "aid an agency's compliance with [NEPA] when no environmental impact statement is necessary."<sup>118</sup> The appropriate mitigation measures can be imposed as enforceable permit conditions or adopted as part of the agency's final decision.<sup>119</sup>

## **E. Draft EIS**

### 1. Purpose of EIS

An EIS serves as an "action-forcing device" to ensure the objectives of NEPA are fulfilled, provides full and fair discussion of significant environmental impacts and informs decision makers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment.<sup>120</sup> The objective of EIS preparation is informed decision-making rather than the choice of any particular alternative (such as the alternative that minimizes impacts to the environment). NEPA is a procedural statute.

### 2. Content, Format and Length

The content and format of an EIS is specified in the CEQ regulations. The CEQ intended an EIS to be relatively concise, analytic rather than encyclopedic, and focused on the significant issues of concern and reasonable alternatives to be considered by the action agency.<sup>121</sup> The CEQ suggests page limits of less than 150 to 300 pages, and that EISs should be written in plain language so that decision makers and the public can readily understand them.<sup>122</sup> Unfortunately, most EISs tend to be long, rather encyclopedic documents that many commenters complain are difficult to understand.

The CEQ's recommended format includes a cover sheet, summary, table of contents, purpose of and need for action, alternatives including the proposed action, affected environment, environmental consequences, list of preparers, list of those to whom copies of the EIS are sent, index, and appendices (if any).<sup>123</sup> The alternatives section should present the environmental impacts of the proposal and alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decision maker and the public.<sup>124</sup> This section should rigorously explore and objectively evaluate all reasonable alternatives and briefly discuss reasons for elimination of alternatives, devote substantial treatment to each alternative considered in detail so that reviewers may evaluate their comparative merits, include reasonable alternatives not within the jurisdiction of the lead agency, include the no action alternative, identify the agency's preferred alternative, and include appropriate mitigation measures not already included in the proposed action.<sup>125</sup>

The affected environment section succinctly describes the environment of the area to be affected, avoiding useless bulk.<sup>126</sup> The environmental consequences section forms the scientific and analytic basis for the comparisons in the alternatives section. This section includes discussion of direct and indirect effects, possible conflicts between the proposed action and the objectives of Federal, regional, State, local and Indian tribes' land use plans, policies and controls for the area, the relationship between short-term uses of the environment and maintenance and enhancement of long-term productivity, any irreversible or irretrievable commitments of resources, and means to mitigate environmental impacts.<sup>127</sup>

Discussion of appropriate mitigation measures to implement the “action-forcing” function of NEPA is also required.<sup>128</sup> However, that discussion need not be exhaustive or definitive with respect to requirements for mitigation.<sup>129</sup>

### 3. Public Involvement, Circulation and Review of the Draft EIS

An EIS is initiated by publication of a notice of intent in the Federal Register (see Scoping, Section IV(B) above). Scoping and public involvement continues as needed throughout preparation of the draft EIS. The draft EIS is circulated for review and comment to any Federal agency with jurisdiction with respect to any environmental impact involved and any Federal, State or local agency authorized to develop and enforce environmental standards; the applicant (if any); and any requesting person, organization or agency.<sup>130</sup>

Once completed and ready for distribution, the draft EIS is filed with the U.S. Environmental Protection Agency (“EPA”) and the EPA then publishes notice of the filing in the Federal Register.<sup>131</sup> The date the EPA notice appears in the Federal Register initiates the public review period. At the same time the draft EIS is filed the EPA, the agency should start its distribution of the draft EIS to persons and entities on its mailing list, including affected agencies, participants in public meetings and scoping on the project, and anyone who has requested a copy.<sup>132</sup> Except for compelling reasons of national policy, agencies shall allow not less than 45 days for comments on a draft EIS and may allow extensions.<sup>133</sup>

The agency may hold public hearings or public meetings during the public comment period, particularly in situations where there is substantial controversy concerning the proposed action or substantial interest in holding the meeting, or an agency with jurisdiction over the action requests a meeting and the request is supported. The agency should make the draft EIS available for at least 15 days prior to a public hearing.<sup>134</sup>

### **E. Final EIS and Response to Comments**

The final EIS incorporates the agency’s response to comments received on the draft EIS and discusses responsible opposing views not adequately discussed in the draft EIS.<sup>135</sup> An agency responding to comments on a draft EIS shall respond by stating in the final EIS whether it has modified the alternatives; developed and evaluated alternatives not previously given serious consideration by the agency; supplemented; improved or modified its analyses; made factual corrections; and explain why the comments do not warrant further agency response, citing the sources, authorities, or reasons which support the agency’s position and, if appropriate, indicate those circumstances which would trigger agency reappraisal or further response.<sup>136</sup>

### **F. Standards for Adequacy of EIS**

NEPA does not require agencies to reach any particular decision, but to follow certain procedures and take a “hard look” at the environmental consequences of the proposed action.<sup>137</sup> In particular, agencies are required to identify and evaluate the adverse environmental effects of a proposed action.<sup>138</sup>

In *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 376, 109 S.Ct. 1851 (1989), the Supreme Court adopted the arbitrary and capricious standard for review of EISs. However, the Tenth Circuit applies what it calls a “rule of reason” in assessing the adequacy of an EIS.<sup>139</sup> Courts will not “flyspeck” an EIS in determining whether claimed deficiencies are significant enough to defeat NEPA’s goals of informed decision-making and informed public comments.<sup>140</sup> In making its decision, the court reviews the agency’s whole record, including the EIS and supporting analyses

under the Administrative Procedure Act, 5 U.S.C. § 706.<sup>141</sup>

Agencies must include the no-action alternative and must rigorously explore a reasonable range of alternatives.<sup>142</sup> Reasonable alternatives are non-speculative and bounded by some notion of feasibility.<sup>143</sup> The EIS must also discuss alternatives that were eliminated from further consideration and the rationale for their elimination.<sup>144</sup> Courts will assess whether the explanations are reasonable and documented in the record.

In both impact assessment and its rationale for rejection of alternatives, an agency is entitled to rely on its own experts.<sup>145</sup> NEPA does not require examination of every possible environmental consequence, but detailed analysis is required only where impacts are likely.<sup>146</sup> Further, the failure to employ a particular method of analysis does not render an EIS inadequate.<sup>147</sup>

## **G. Supplemental EIS**

Agencies shall prepare supplements to either a draft or final EIS if the agency makes substantial changes in the proposed action that are relevant to environmental concerns, or there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts, or when the agency determines the purposes of NEPA will be furthered by doing so.<sup>148</sup> Supplements are prepared, circulated and filed in the same fashion (exclusive of scoping) as a draft and final EIS.

Agencies may use a non-NEPA document to assist in determining whether new information or changed circumstances require the preparation of a supplemental EA or EIS.<sup>149</sup> For example, a supplemental information report can be used to analyze the significance of new information.<sup>150</sup>

Courts review an agency's decision whether to supplement an EIS under an arbitrary and capricious standard of review.<sup>151</sup> If the question turns on issues of fact that implicate an agency's expertise – i.e., whether new information undermines conclusions contained in a prior EIS – courts will defer to the “informed discretion” of the agency so long as the decision is not arbitrary or capricious.<sup>152</sup>

An agency need not prepare a new EIS to address a proposed action as long as it has already taken a “hard look” at the action's potential environmental consequences.<sup>153</sup> Further, agencies need not prepare a new EIS if there is no “major Federal action” to be taken. For example, on-going implementation of land use and management plans are not “major Federal actions.” Rather, those actions are taken when the plans are approved, therefore, supplemental NEPA analysis is not required unless the plan is amended or revised.<sup>154</sup>

## **H. Decision, Implementation and Monitoring**

NEPA does not require agencies to select the alternative that is least damaging to the human environment. Rather, NEPA is a procedural statute, in that it does “not require agencies to elevate environmental concerns over other appropriate considerations.”<sup>155</sup> However, NEPA does require informed agency decision-making and documentation in the agency's administrative record of the bases for its decisions.

At the time of its decision following preparation of an EIS, the action agency prepares a public record of decision (“ROD”). The ROD is intended to be a concise document that states what the decision is, identifies all alternatives considered by the agency in reaching its decision (specifying the alternative(s) which were considered to be environmentally preferable), identifies and discusses factors that were balanced by the agency in making its decision and state how those considerations entered into its decision, and states whether all practicable means to avoid or minimize

environmental harm from the alternative selected have been adopted and, if not, why not.<sup>156</sup>

Agencies may provide for monitoring to assure that their decisions are carried out, and should do so in important cases.<sup>157</sup> Mitigation and other conditions established in the EIS and committed as part of the decision shall be implemented by the lead agency or other appropriate consenting agency. Appropriate conditions shall be included in grants, permits or other approvals. Agencies should keep cooperating and commenting agencies, as well as the public, informed of the progress in implementing such conditions and the results of monitoring.<sup>158</sup>

## **V. Requirements Imposed by Related Laws and Regulations**

To the fullest extent possible, agencies shall prepare NEPA documents concurrently with and integrated with related surveys and studies required by the Fish and Wildlife Coordination Act (16 U.S.C. 661 *et seq.*), the National Historic Preservation Act of 1966 (16 U.S.C. 470 *et seq.*), the Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*), and other environmental review laws and executive orders. Surveys and coordination required under such statutes and implementing regulations may become the driving factor in determining the timeline for preparation of a NEPA document and may substantially extend the NEPA process in order to ensure compliance can be documented in the EA or EIS. Of particular concern are whether the coordination procedures under Section 7 of the Endangered Species Act are triggered, and whether historic or cultural resources may be affected. Such triggers may significantly extend the timeframe for completion of the NEPA process.

### **ENDNOTES**

1. 42 U.S.C. § 4332(C) (2005).

2. 40 C.F.R. § 1508.23. *See also*, Council of Environmental Quality, Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations ("CEQ Forty Questions"), 46 Fed. Reg. 18026, at Q.8 "Early Application of NEPA."

3. 40 C.F.R. § 1508.18.

4. 40 C.F.R. § 1508.18.

5. 40 C.F.R. §1508.18.

6. *Maryland Conservation Council, Inc. v. Gilchrist*, 808 F.2d 1039, 1042 (4th Cir. 1986) (quoting *Biderman v. Morton*, 497 F.2d 1141, 1147 (2nd Cir. 1974) and *Foundation on Economic Trends v. Heckler*, 244 U.S. App. D.C. 122, 756 F.2d 143, 155 (1985)).

7. *Id.* *See also*, *Sierra Club v. Hodel*, 848 F.2d 1068, 1089 (10th Cir. 1988) *aff'd in part and overruled in part by Sierra Club v. Lujan*, 949 F.2d 362 (10th Cir. 1991); *Defenders of Wildlife v. Andrus*, 627 F.2d 1238, 1245 (D.C. Cir. 1980).

8. *See Sierra Club v. Hodel*, 848 F.2d 1068, 1089 (10th Cir. 1988), *aff'd in part and overruled in part by Sierra Club v. Lujan*, 949 F.2d 362 (10th Cir. 1991).

9. *See id.*

10. *See id.* at 1090.

11. *See id.* at 1089.

12. *See Winnebago Tribe v. Ray*, 621 F.2d 269 (8th Cir. 1980) and *Save the Bay v. U.S. Corps of Engineers*, 610 F.2d 322 (5th Cir. 1980), *cert. denied*, 449 U.S. 900 (1980).

13. See *Winnebago Tribe*, 621 F.2d at 272.
14. See *id.* at 272-73.
15. See *id.*
16. See *id.*
17. 40 C.F.R. § 1508.27(b).
18. See, e.g., *Colorado River Indian Tribes v. Marsh*, 605 F.Supp.1425 (C.D. Cal. 1985) (applying a unitary standard in concluding the term "major" refers to the effects of the action rather than the level of Federal involvement in order to give effect to the intent of NEPA to maintain environmental quality); *but compare Macht v. Skinner*, 916 F.2d 13 (D.C. Cir. 1990) (an action does not constitute a major Federal action if the Federal involvement is "negligible" or "incidental"); see also *South Dakota v. Andrus*, 614 F.2d 1190, 1194 (8th Cir. 1980) (holding a mineral patent, even if it were not a ministerial action, is not a major Federal action because it does not enable the holder to do anything and is not a precondition to mining).
19. See Section I.D below.
20. 40 C.F.R. § 1508.14.
21. 40 C.F.R. § 1508.14.
22. See, e.g., *Maryland-National Capital Park and Planning Commission v. U.S. Postal Service*, 487 F.2d 1029, 1040 (D.C. Cir. 1973).
23. See BLM National Environmental Policy Act Handbook, BLM Handbook H-1790-1 (1988), App. 5, available at [www.ca.blm.gov/pa/planning/h1790-1.html](http://www.ca.blm.gov/pa/planning/h1790-1.html).
24. 40 C.F.R. § 1508.27(a).
25. 40 C.F.R. § 1508.27(b).
26. 40 C.F.R. § 1508.27.
27. 40 C.F.R. § 1508.8.
28. 40 C.F.R. § 1508.8.
29. 40 C.F.R. § 1508.8.
30. 40 C.F.R. § 1508.7.
31. 40 C.F.R. § 1501.4.
32. 40 C.F.R. § 1508.4.
33. 40 C.F.R. § 1508.4.
34. See 516 Department of the Interior Manual (DM) 2.3(A)(2), available at [http://elips.doi.gov/app\\_dm/act\\_getfiles.cfm?relnum=3576](http://elips.doi.gov/app_dm/act_getfiles.cfm?relnum=3576).
35. 7 C.F.R. § 1b.3.

36. 33 C.F.R. § 325 App. B(6).
37. See Forest Service Manual ("FSM") 1950 and Forest Service Handbook ("FSH") 1909.15, both available at [www.fs.fed.us/emc/nepa](http://www.fs.fed.us/emc/nepa).
38. See 70 Fed. Reg. 1,023, 1,056 (2005).
39. See 70 Fed. Reg. 1062, 1065 (2005).
40. See 70 Fed. Reg. 73722 (2005).
41. See 53 Fed. Reg. 10439, 10441-42 (1988).
42. See BLM Handbook H-1790-1, App. 3.
43. See BLM Instruction Memorandum No. 2005-247, issued September 30, 2005, available at [www.blm.gov/nhp/efoia/wo/fy05/im2005-247.htm](http://www.blm.gov/nhp/efoia/wo/fy05/im2005-247.htm).
44. See 516 DM 2 Appendix 2.
45. 40 C.F.R. § 1501.4.
46. See 45 Fed. Reg. 82367, 82368 (1980).
47. See BLM Handbook H-1790-1, App. 6.
48. See 46 Fed. Reg. 1042, 1043 (1981).
49. See 53 Fed. Reg. 10439, 10441 (1988).
50. See FSH 1909.15 § 20.6.
51. See *id.*
52. See *id.*
53. See *id.*
54. See *id.*
55. BLM Handbook H-1790-1, at IV-5.
56. See *Committee to Preserve Boomer Lake Park v. Dept. of Transportation*, 4 F.3d 1543, 1555 (10th Cir. 1993).
57. See *id.*, citing *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 378, 109 S.Ct. 1851, 1861 (1989).
58. See *id.* at 1555-56.
59. See *id.* at 1556.
60. See *id.* See also, *Utahns for Better Transportation v. United States Dept. of Transportation*, 319 F.3d 1207, 1214 (10th Cir. 2003) (finding that an EA contained extensive discussion of effects on a variety of resources, bluntly identified negative as well as positive impacts, and that "[a]ll things considered, the Forest Service had a plausible basis for finding the action would not significantly

affect the human environment”).

61. 40 C.F.R. § 1502.5.

62. See CEQ, Forty Questions, Q.35, 46 Fed. Reg. 18026, 18037 (1981).

63. 40 C.F.R. § 1506.10 (b).

64. 40 C.F.R. § 1506.10 (c).

65. 40 C.F.R. § 1501.7.

66. 40 C.F.R. § 1501.7.

67. 40 C.F.R. § 1508.22.

68. 40 C.F.R. § 1501.7 (a).

69. See CEQ, Guidance Regarding NEPA Regulations, 48 Fed. Reg. 34263 (1983).

70. 40 C.F.R. §§ 1500.4 (n) and 1506.3.

71. 40 C.F.R. §§ 1506.3 (a), (c).

72. 40 C.F.R. § 1506.3.

73. 40 C.F.R. § 1506.3(b).

74. 40 C.F.R. §§ 1501.5 and 1501.6.

75. 40 C.F.R. § 1501.5(c).

76. 40 C.F.R. §§ 1501.5 and 1501.6.

77. See, e.g., *Wyoming v. U.S. Dept. of Agriculture*, 277 F.Supp.2d 1197, 1219 (D. Wyo. 2003), judgment vacated as moot by 414 F.3d 1207 (10th Cir. 2005) (holding USFS failed to comply with NEPA when, among other things, it failed to provide cooperating agencies meaningful opportunity to participate by not providing any maps showing areas subject to proposed roadless rule).

78. 40 C.F.R. § 1508.9.

79. 40 C.F.R. § 1508.9.

80. See, e.g., BLM NEPA Handbook H-1790-1, at Ch. IV.

81. See CEQ, Forty Questions, Q.36, at 46 Fed. Reg. 18026, 18037.

82. See *id.*

83. See *Spiller v. White*, 352 F.3d 235 (5th Cir. 2003).

84. See *id.* at 240 (citing *Sabine River Authority v. U.S. Dept. of Interior*, 951 F.2d 669, 677 (5th Cir. 1993)).

85. See *id.*

86. See CEQ, Guidance Regarding NEPA Regulations, 48 Fed. Reg. 34263 (1983).

87. See *Committee to Preserve Boomer Lake Park v. Dept. of Transportation*, 4 F.3d 1543, 1554 (10th Cir. 1993).
88. 40 C.F.R. § 1501.4 (b).
89. 40 C.F.R. § 1506.6.
90. See CEQ, Forty Questions, Q.38; see also BLM Handbook H-1790-1, at Ch. IV, ¶ 4(b).
91. See *All Indian Pueblo Council v. United States*, 975 F.2d 1437, 1444 (10th Cir. 1992) (NEPA does not require an agency to analyze the environmental consequences of alternatives it has in good faith rejected as too remote, speculative, impractical or ineffective).
92. See *Colorado Environmental Coalition v. Dombeck*, 185 F.3d 1162, 1174-76 (10th Cir. 1999) (agencies must consider the no action alternative and a range of reasonable alternatives); see also *Greater Yellowstone Coalition v. Flowers*, 359 F.3d 1257, 1277 (10th Cir. 2004) (an agency's obligation is to consider reasonable alternatives).
93. *Davis v. Mineta*, 302 F.3d 1104, 1122 (10th Cir. 2002).
94. See *id.*
95. 33 C.F.R. Part 325 App. B.9.b.5.
96. *Id.*
97. See BLM Handbook, Chap. IV, ¶¶ 1(i) and 2(a).
98. See, e.g., *Utah Shared Access Alliance v. United States Forest Service*, 288 F.3d 1205, 1213 (10th Cir. 2002).
99. See *id.* at 1213.
100. *Id.*
101. See *id.* at 1213.
102. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 356, 109 S.Ct. 1835, 1849 (1989).
103. See *Committee to Preserve Boomer Lake Park v. Dept of Transportation*, 4 F.3d 1543, 1556 (10th Cir. 1993) (upholding an EA when it did not analyze visual impacts in detail, but did note some may find a proposed causeway aesthetically displeasing, and did address other issues raised by opponents).
104. See DAN MANDELKER, NEPA LAW AND LITIGATION, § 3.7, at 3-13 to 3-17.
105. *Id.* (quoting *E.I. DuPont de Nemours & Co. v. Train*, 541 F.2d 1018, 1038 (4th Cir. 1976) *aff'd in part and rev'd in part*, 430 U.S. 112 (1977)).
106. 40 C.F.R. § 1501.4.
107. 40 C.F.R. § 1508.13.
108. 40 C.F.R. § 1508.13.

109. Judicial standards for review of the significance determination in a FONSI are reviewed in Section III.B above.

110. *Davis v. Mineta*, 302 F.3d 1104, 1112 (10th Cir. 2002).

111. *See id.*

112. *See id.* at 1112-13.

113. *See id.* at 1113.

114. 40 C.F.R. § 1501.4 (e) (1).

115. 40 C.F.R. § 1501.4 (e) (2).

116. 40 C.F.R. § 1501.4 (e) (2).

117. *See Park County Resource Council, Inc. v. U.S. Dept. of Agriculture*, 817 F.2d 609, 621 (10th Cir. 1987), *overruled on other grounds by Village of Los Ranchos de Albuquerque v. Marsh*, 956 F.2d 970 (10th Cir. 1992); *see also Cabinet Mountains Wilderness/Scotchman's Peak Grizzly Bears v. Peterson*, 685 F.2d 678, 683 (D.C.Cir. 1982); and *Friends of the Earth v. Hintz*, 800 F.2d 822, 837-38 (9th Cir. 1986).

118. 40 C.F.R. §§ 1501.3 (b) and 1508.9 (a)(2).

119. *See* CEQ, Forty Questions, Q.39, 46 Fed. Reg. 18026, 18037-38 (1981); *see also Park County*, 817 F.2d at 621 (mitigation measure incorporated in lease stipulations for oil and gas leases).

120. 40 C.F.R. § 1502.1.

121. 40 C.F.R. § 1502.2.

122. 40 C.F.R. §§ 1502.7 and 1502.8.

123. 40 C.F.R. § 1502.10.

124. 40 C.F.R. § 1502.14.

125. 40 C.F.R. § 1502.14.

126. 40 C.F.R. § 1502.15.

127. 40 C.F.R. § 1502.16.

128. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351, 109 S.Ct. 1835 (1989); *see also* CEQ's definition of mitigation as including avoiding, minimizing rectifying, reducing or eliminating, and compensating for impacts at 40 C.F.R. § 1508.20.

129. *See id.* at 353.

130. 40 C.F.R. §§ 1502.19, 1503.1, and 1506.6.

131. 40 C.F.R. § 1506.9.

132. 40 C.F.R. §§ 1503.1, 1502.19.

133. 40 C.F.R. §§ 1506.10 (c) and (d).
134. 40 C.F.R. § 1506.6 (c).
135. 40 C.F.R. § 1502.9 (b).
136. 40 C.F.R. § 1503.4 (a). *See also*, CEQ, Forty Questions, Q.29, 46 Fed. Reg. 18026, 18035 (1981) (addressing agency's response to a comment that raises a new alternative not previously considered in the draft EIS).
137. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350, 109 S.Ct. 1835 (1989); *see also* Section IV(d)(5) above discussing the "hard look" doctrine.
138. *See id.*
139. *See, e.g., Lee v. U.S. Air Force*, 354 F.3d 1229, 1237 (10th Cir. 2004).
140. *See Utahns for Better Transportation v. U.S. Dept. of Transportation*, 305 F.3d 1152, 1163 (10th Cir. 2002), *reversed on other grounds by Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 124 S.Ct. 2373 (2004).
141. *See id.* at 1164.
142. 40 C.F.R. § 1502.14; *see also* CEQ, Forty Questions Q.1 – 7, 46 Fed. Reg. 18020, 18026-18028 (1981).
143. *See Colorado Environmental Coalition v. Dombeck*, 185 F.3d 1162, 1174 (10th Cir. 1999); *Vermont Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 551, 98 S.Ct. 1197 (1978).
144. 40 C.F.R. § 1502.14 (a).
145. *See, e.g., Custer County Action Assoc. v. Garvey*, 256 F.3d 1024, 1036 (10th Cir. 2001).
146. *See Utahns for Better Transportation*, 305 F.3d at 1176 (citations omitted).
147. *See Utah Shared Access Alliance v. U.S. Forest Service*, 288 F.3d 1205, 1212 (10th Cir. 2002).
148. 40 C.F.R. § 1502.9 (c).
149. *See id.*
150. *See, e.g., Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 383-85 (1989); *see also Friends of the Bow v. Thompson*, 124 F.3d 1210, 1218-19 (10th Cir. 1997).
151. *See Marsh*, 490 U.S. at 375-76.
152. *See id.*
153. *See Pennaco Energy, Inc. v. U.S. Dept. of the Interior*, 377 F.3d 1147, 1151 (10th Cir. 2004).
154. *See Norton v. South Utah Wilderness Alliance*, 542 U.S. 55, 73, 124 S.Ct. 2373, 2385 (2004).
155. *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 97, 103 S.Ct. 2246 (1983); *see also Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350, 109 S.Ct. 1835 (1989).

156. 40 C.F.R. § 1505.2.

157. 40 C.F.R. § 1505.3.

158. 40 C.F.R. § 1505.3.