ORAL ARGUMENT HAS NOT BEEN SCHEDULED

In the United States Court of Appeals
for the District of Columbia Circuit

Docket No. 18-1188

OTSEGO 2000, INC. and JOHN AND MARY VALENTINE,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

ON PETITION FOR REVIEW OF ORDERS ISSUED BY
FEDERAL ENERGY REGULATORY COMMISSION

BRIEF OF PETITIONERS OTSEGO 2000 and JOHN AND MARY VALENTINE

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Initial Brief: November 26, 2018

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), petitioners submit the following:

A. Parties:

This case is a Petition for Review. The parties, amici and entities moving to intervene and participate in this proceeding are as follows:

Petitioners are Otsego 2000 and John and Mary Valentine.

Respondent is FERC.

Dominion Transmission, Inc. intervened before FERC.

The State of New York, acting though the Attorney General, is expected to file an amicus brief on behalf of petitioners.

B. Rulings Under Review:

The rulings under review are the FERC Issuing Certificate to Dominion Transmission, Inc. dated April 28, 2016 Order in Dominion Transmission, Inc., referenced as Docket No. CP14-497-000 and as 155 FERC 61,106 and the FERC Order Denying Rehearing dated May 18, 2018 in Dominion Transmission, Inc. and referenced as Docket No. CP14-497-001 and as 163 FERC 61,228.

C. Related Cases

This matter has not previously been before this Court or any other court, as defined in D.C. Circuit Rule 28(a)(1)(c). Nor is there are other case known to petitioners which raise issues related to the issuance of this certificate.

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Local Rule 15 of the D.C. Circuit Rules and F.R.A.P. 26.1, Otsego2000, petitioner in this matter, states that it is a not-for-profit corporation founded in 1981 to ensure that the Otsego Lake region of New York State remains a masterpiece of nature by protecting and supporting its environmental, scenic, cultural, historic and agricultural resources and its economic wellbeing. Otsego2000 has no parent companies, and no publicly-held corporations have a ten percent or greater ownership interest in the organization.

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GLOSSARY

APA	Administrative Procedure Act
BLM	Bureau of Land Management
CO2e	Carbon dioxide equivalent
Certificate	Certificate of public convenience and necessity
CEQ	Council on Environmental Quality
EA	Environmental Assessment
EIS	Environmental Impact Statement
FERC	Federal Energy Regulatory Commission
Greenhouse Gas	GHG
NGA	Natural Gas Act
NEPA	National Environmental Protection Act
Otsego 2000	Otsego 2000 Inc.
Project	New Market Project
Petitioners	Otsego2000 and John and Mary Valentine

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JURISDICTIONAL STATEMENT

PETITIONERS SATISFY THE JURISDICTIONAL REQUIREMENTS FOR BRINGING THIS PETITION

The Natural Gas Act, 15 U.S.C. secs. 717, *et. seq.*(NGA), requires a Certificate of Public Convenience and Necessity (certificate) from the Federal Energy Regulatory Commission (FERC or Commission) for the construction of facilities used in the transportation of natural gas. 15 U.S.C. sec. 717f(c)(1)(A).

Any organization or person who has intervened in a Commission proceeding may seek rehearing of a Commission order within thirty days of the issuance of that

order. 15 U.S.C. sec. 717r(a). This Honorable Court has jurisdiction to review such FERC orders, but limits reviews to objections "urged before [FERC] in [an] application for rehearing" and denied in an order on the rehearing request. 15 U.S.C. sec. 717r(b). Such judicial review must be sought within sixty days of the final agency action. 15 U.S.C. secs. 717r(b).

Petitioners satisfy these requirements in that they intervened before FERC, sought rehearing of the Order the Commission issued on April 28, 2016 and then timely noticed their intent to seek this Court's review of the denial of the rehearing petition within sixty days of its issuance.

STATEMENT OF THE ISSUES

1. WAS THE FAILURE BY FERC TO EVALUATE INDIRECT AND CUMULATIVE UPSTREAM AND DOWNSTREAM IMPACTS OF GHG EMISSIONS ARBITRARY AND CAPRICIOUS?

2. SHOULD THIS COURT REMAND THIS MATTER TO FERC FOR THE PREPARATION OF AN EIS OR APPROPRIATE ENVIRONMENTAL REVIEW TO EVALUATE THE INDIRECT AND CUMULATIVE IMPACTS OF UPSTREAM AND DOWNSTREAM EMISSIONS. ASSOCIATED WITH THE PROJECT?

3. DID FERC ABUSE ITS DISCRETION IN PURPORTING TO ISSUE A NEW POLICY STATEMENT APPLICABLE TO ALL FUTURE PROJECTS WITHOUT NOTICE OR ANY OPPORTUNITY FOR PUBLIC COMMENT?

STATUTES AND REGULATIONS

Pertinent statutes and regulations appear in the Addendum to this brief.

INTRODUCTION

This is an appeal from Denial of a Petition for Rehearing issued by the Federal Energy Regulatory Commission ("FERC") on May 18, 2018, concerning the application by Dominion Transmission Inc. ("Dominion") for its New Market Project (the "Project"), which would provide for the construction, modification, and expansion of natural gas facilities associated with a large transmission pipeline spanning over 200 miles of New York State The Petitioner is Otsego 2000, Inc. ("Otsego 2000") , along with property owners adjoining a major compressor station expansion of the Project.[1]

Petitioner contends that refusal by a narrow FERC majority to evaluate upstream and downstream greenhouse gas ("GHG") emission impacts of the Project,

[1] The petition for review was filed on behalf of both Otsego 2000, Inc. and adjoining property owners, John and Maryanne Valentine, on whose behalf Oswego 2000 timely filed its petition for re-hearing.

and FERC's attempt to issue a new "policy" making this decision applicable to all future FERC reviews, over the vigorous objection of two if its Commissioners, is erroneous because it directly contravenes Sierra Club v. FERC, 867 F.3d 1357 (D.C. Cir. 2017) ("Sabal Trail"), and other applicable law. This Court should vacate the Order Denying Rehearing and remand the matter to the agency for required environmental review.

STATEMENT OF THE CASE

PROCEDURAL HISTORY AND DECISION BELOW

On November 18, 2015, petitioner Otsego 2000 submitted extensive comments challenging the sufficiency of the environmental review conducted by FERC staff of Dominion's application for the Project and specifically demanding that FERC evaluate the upstream and downstream impacts, including GHG emissions, of the Project. See, Otsego 2000 Letter to FERC dated November 18, 2005 at 14-19.

FERC rejected this request and on April 28, 2016, issued Dominion a Certificate of Public Convenience and Necessity (the "Certificate") under section 7(c) of the Natural Gas Act ("NGA"), 15 U.S.C. sec. 717f (c)(2012), and Part 157 of Commission Regulations, to build the Project, which included the construction of two new compressor stations, significant expansion of an existing compressor

station and modification to other related facilities in six counties in upstate New York. Dominion represented that the Project would provide an additional 112,000 dekatherms per day of firm natural gas transportation service for the Brooklyn Union Gas Company and Niagara Mohawk Power Corporation. See, Order Issuing Certificate at 2.

In issuing the Certificate, FERC refused to require preparation of an Environmental Impact Statement ("EIS") or to substantively analyze the indirect and cumulative impacts of the Project, finding that it was not required to study such impacts either because its approval would not be the cause of such impacts, or they were not foreseeable. Order Issuing Certificate at 24-31. Likewise, FERC refused to perform a substantive analysis of the GHG indirectly caused by its approval, contending that no standard methodology allowed for performance of such an analysis. Id. at 46-47.

On May 31, 2016, petitioner Otsego 2000 filed a Request for Rehearing on its own behalf and on behalf of John and Mary Valentine, arguing that FERC erred by not requiring a comprehensive EIS and, specifically by not evaluating the upstream

and downstream impacts of the New Market Project.[2] See, Order Denying Rehearing at 11-21 recognizing arguments petitioners advanced in seeking rehearing.

Almost two years later, by Order dated May 18, 2018, in a 3-2 vote over the vigorous objection of two of its Commissioners, FERC issued a Denial of the Petition for Rehearing, holding that it was not required to prepare an EIS because the Project's immediate impacts do not meet the threshold test of significance; that Dominion need not receive approval from the Town of Minden Planning Board before proceeding with construction of the Brookman Corners Compressor Station; and that FERC acted properly in failing to consider certain impacts or require additional mitigation measures for the Brookman Corners Compressor Station. Petitioners do not now contest these findings. Id.

At issue here is FERC's further rejection of Petitioners' claim that the agency failed to properly evaluate the indirect and cumulative impacts of upstream and downstream activities resulting from the Project. Id. at 12. The majority improperly limited the Project's geographic scope, and erroneously concluded that such impacts were not "reasonably foreseeable." Id. at 28-29.

[2] FERC rejected Otsego 2000's June 2, 2016 amendment to its Petition for re-filing and thereby found that several other interested parties, including the Valentines, had not timely noticed their intent to seek re-hearing. As resolution of this matter does not affect Petitioners' principal argument, it is not herein challenged. It is clear from the face of the May 31, 2016 petition that Otsego 2000 filed it on the organization's behalf and on behalf of the Valentines.

The FERC majority acknowledged that the Council on Environmental Quality, 40 C.F.R. Parts 1500-1508 ("CEQ"), established under the National Environmental Policy Act, 42 U.S.C. Sec. 4321 *et. seq.* ("NEPA"), advises that a reviewing agency must identify the cumulative effects associated with a particular proposed action. See 1997 CEQ Guidance at 11. The reviewing agency must establish the geographic scope for analysis, establish a time frame for analysis, and identify other actions with the potential to impact the same resources, ecosystem and human communities as the action under review. Id.

Excusing its failure to perform the analysis called for by the CEQ, the FERC majority claimed that the record does not include sufficient information to determine the origin of the gas which will be transported by the pipeline, and found the matter beyond the scope of FERC's review, stating: "the Commission does not have more detailed information regarding the number, location and timing of wells, roads, gathering lines and other appurtenant facilities, as well as details about production methods..." Order Denying Rehearing at 17. In so holding, however, FERC never requested that Dominion provide this information or identify the origin of the gas, the number or location of wells expected to supply the Project with gas or determine whether obtaining such information was impossible or even difficult.

The FERC majority then concluded that because the Project relates in part to the construction and modification of compressor stations—not linear pipeline—it is

appropriate to confine the evaluation of impacts to discrete areas. Id. at 15. Ignoring impacts that may be associated with production, transmission, and consumption of hydro-fractured natural gas, the FERC majority summarily determined that "impacts from natural gas development and from natural gas consumption on a broader scale are appropriately omitted from the EA." Id. at 16. While it is obvious that operating a high pressure pipeline involving new and expanded compressor stations involves the collection of gas from wells over a large area, the majority obtusely found that "given the large geographic scope of the Marcellus and Utica Shale natural gas production areas, the magnitude of analysis requested by Otsego bears no reasonable relationship to the limited magnitude of the New Market Project's 65.4 acres for operation of the facilities." Id. at 16. Extending this tortured rationale, the FERC majority further suggested that impacts associated with extracting gas that is carried in a pipeline within New York are irrelevant if the extraction occurs in a different state. Id. at 16.

The FERC majority then claimed that the record did not include meaningful information about potential downstream impacts and that the limited record, largely the consequence of its acceptance of the inadequate EA, supported its conclusion that such impacts "are not reasonably foreseeable for inclusion in the cumulative impact analysis." Id. at 17. The majority wrote "there is nothing in the record that identifies any specific end use or new incremental load downstream of the New

Market Project, much less any end use of new incremental load within the geographic area where the impacts of the New Market Project will be felt…knowledge of these and other facts would indeed be necessary in order for the Commission to fully analyze the effects related to the production and consumption of natural gas." Id.

However, the FERC majority did not explain why the inability to *fully* analyze effects should preclude a *reasonable estimate* of potential impacts to the extent possible, including the estimate of upstream and downstream GHG emissions associated with a known quantity of natural gas. Nor did the majority explain why it did not ask Dominion to supply the data which could have permitted the absent analysis.

Instead, adopting tautological reasoning, the FERC majority simply concluded that "incremental upstream and downstream activities that are the subject of Otsego's rehearing request do not meet the definition of cumulative impacts" and, therefore, that "the April 28 Order and the EA appropriately excluded potential upstream and downstream activities related to the production and consumption of natural gas." Id. at 17. Asserting that an analysis of upstream and downstream impacts of the Project would "muddle its scope of obligations under NEPA" the FERC majority simply defined these impacts away. The thrust of the majority's logic

appears to be that upstream and downstream impacts will be considered as indirect or cumulative effects, only if and when the agency chooses to consider them.

Further, FERC recognized that NEPA requires agencies to consider indirect impacts that are "caused by the action and are later in time or farther removed in distance, but still are reasonably foreseeable." (40 C.F.R. § 1508.8 (2017). To overcome this obstacle, the majority erroneously claimed that no party to the proceeding had argued that downstream or upstream activities are sufficiently causally connected to the Project so as to be deemed indirect impacts of the Project. Id. at 18. However, the claim that no party argued the causality of indirect upstream and downstream impacts is belied by the extensive record below.

FERC also claimed that the Petitioner "fails to show that greenhouse gas emissions from upstream production activities or downstream use of natural gas are an indirect impact of the New Market Project." Id. at 28. However, in drawing this conclusion, the majority did not demonstrate that the Project has no such impacts; instead it claimed only that "the scope of the impacts…is too speculative and thus not reasonably foreseeable." Id. at 29. The majority then conveniently speculated that FERC has no authority to ask the pipeline applicant to study such impacts because the applicant may not even know the source of product it ships or its end use. Id. This presumed uncertainly as to both source and end-use of the product

ostensibly caused the majority to conclude that none of these impacts is reasonably foreseeable, thereby excusing itself from any further inquiry or analysis.

Responding to the dissent's argument that if the nature of the effect is reasonably foreseeable but its extent is not the agency may not simply ignore the effect, the majority simply repeated again that there is a "lack of causation and reasonable foreseeability of effects related to the production and consumption of natural gas." Id. at 34.

With respect to climate change, the FERC majority also rejected Otsego 2000's contention that a "comprehensive analysis of lifecycle emissions, including emissions relating to the production, processing, distribution and consumption of gas associated with Dominion's New Market Project, should be performed..." The majority dismissed models used by the scientific community to assess the impact of greenhouse gas emissions, claiming that none had been accepted as predictive of climate impacts resulting from a given rate or volume of greenhouse gas emissions. Id. at 34-35. However, within the scientific community, impacts resulting from increased greenhouse gas emissions are accepted as a source of potential consequences. The FERC majority failed to explain why an inability to precisely predict the climate consequences of a specific rate or volume of greenhouse gas emissions justifies the total dismissal of such impacts as if they pose no threat at all.

Finally, having decided issues relating to the Project, the Commission went much further. The FERC majority announced that, henceforth, the Commission "would no longer provide upper-bound estimates" of downstream and upstream impacts when conducting NEPA review. Id. at 20. This policy was announced although as discussed above, such an analysis is required by law and has been required. Thus, FERC attempts in its Order Denying Rehearing, to establish a new policy for future actions without necessary rule making or public comment. Ironically, in announcing this new "policy," the majority wrote, "Our decision does not in any way indicate that the Commission does not consider or is not cognizant of the potentially severe consequences of climate change." Id. We submit that this new order accomplishes this result, precisely.

Significantly, two of FERC's five Commissioners strongly dissented from the Order Denying Rehearing. Commissioner LaFleur noted that, in late 2016, FERC began to include analysis of estimated GHG emissions based on total combustion ("full-burn") of the natural gas transported. LaFleur Dissent at 1-2. Likewise, FERC relied on Department of Energy ("DOE") studies to provide general estimates of impacts associated with upstream natural gas production, including production-related GHG emissions. Id. at 2-3. Significantly, in Sierra Club v. FERC, 867 F.2d 1357 (D.C. Cir. 2017) ("Sabal Trail"), this Court found that downstream GHG

emissions resulting from burning transported natural gas is "an indirect impact of the project" and, therefore, must be studied.

As explained by Commissioner LaFleur, the Court's decision in Sabal Trail confirmed that "the Commission must now quantify and consider those impacts as part of its NEPA review." As she noted, the Sabal Trail ruling "clearly signaled that the Commission should be doing more as part of its environmental reviews…Today, however, the majority has changed the Commission's approach for environmental review to do the exact opposite. Rather than taking a broader look at upstream and downstream impacts, the majority has decided as a matter of policy to remove, in most instances, any consideration of upstream or downstream impacts associated with a proposed project." Id.

Rejecting the majority's claim that such impacts were too speculative to note, Commissioner LaFleur found it "reasonably foreseeable, in the vast majority of cases, that the gas being transported by pipelines we authorize will be burned for electric generation or residential, commercial or industrial end uses. In those circumstances, there is a reasonably close causal relationship between the Commission's action to authorize a pipeline project that will transport gas and the downstream GHG emissions that result from burning the transported gas. We simply cannot ignore the environmental impacts associated with those downstream emissions." Id. at 4.

Significantly, Commissioner LaFleur disputed the majority's assertion that the inability to precisely identify end-users justifies FERC disregarding reasonably foreseeable impacts and faulted its attempt to distinguish the Dominion New Market Project from Sabal Trail, stating: "I agree that an identified end-use would enable the Commission to more accurately assess downstream GHG emissions by calculating gross and net GHG emissions as we did in Sabal Trail. However, I reject the view that if a specified end-use is not discernible, we should simply ignore such environmental impacts. In that case, we should disclose what we can, such as a full-burn calculation of GHG emissions." Id. at 4.

Commissioner LaFleur proceeded to explain that Mid States Coalition for Progress v. Surface Transportation Board actually supports her position and was misapplied by the FERC majority. Id.

Further, addressing a fallacy of the majority's approach, Commissioner LaFleur wrote: "The majority's reasoning becomes somewhat circular…as they are essentially arguing that we are not obligated to consider upstream and downstream impacts because there is a lack of causation and reasonable foreseeability of the effects. However, a key reason the Commission lacks the specificity of information to determine causation and reasonable foreseeability is because we have not asked applicants to provide this sort of detail in their pipeline applications." Id. at 5.

Commissioner LaFleur also disagreed with the majority's assertion that if upstream and downstream effects are not indirect or cumulative as contemplated by CEQ, then they are not effects that FERC is required to consider under NEPA's "hard look" standard or the NGA's public interest standard, writing: "I consider the downstream information relevant to our public interest determination under the NGA. NEPA does not circumscribe the public interest standard under the NGA." Id.

With respect to upstream impacts, Commissioner LaFleur wrote: "…I also do not support the [majority] decision to simply exclude all generic upstream information by deeming this information as irrelevant. While it is less clear that upstream effects are caused by the pipeline, I would respond to upstream GHG comments by disclosing whatever data we have using the best available information, such as the DOE studies cited in past orders." Id.

Commissioner Glick separately dissented from the majority's announcement of a new policy that neither the Natural Gas Act ("NGA") nor NEPA require the Commission to consider greenhouse gas emissions from the production or consumption of natural gas." Glick Dissent, p. 2.

Commissioner Glick chastised the majority for adopting an approach which "violates NEPA's requirement that federal agencies take 'a hard look at [the] environmental consequences' of their decisions. Id. Commissioner Glick joined

Commissioner LaFleur in concluding that FERC lacks information sufficient to perform proper downstream and upstream analyses because "the Commission does not *ask* for it." [emphasis in original text]. Id. This failure contravenes NEPA's command that agencies "must use its best efforts to find out all that it reasonably can," citing Barnes v. Dept. of Transp., 655 F.3d 1124, 1136 (9th Cir. 2011). Commissioner Glick lamented that FERC makes no such inquiries and consequently, "should not be able to rely on the lack of 'meaningful information' to satisfy its obligations under NEPA and the NGA to identify the reasonably foreseeable consequences of its actions." Id. at 3.

Commission Glick further disputed the FERC majority's assertion that the Commission is excused from asking for information from the pipeline applicant because there is no indication that it will have information and because states have jurisdiction over the production of natural gas. To the first point, he wrote "there may be cases in which the upstream consequences of the Commission's permitting decisions will not be reasonably foreseeable. But it does not follow that the Commission must conclude, generically, that the environmental effects of upstream production will never be reasonably foreseeable because information about the exact source of natural gas is not specified." To the second point, he wrote, "the natural gas sector is replete with overlapping state and federal authority and there is nothing surprising or uncommon about a state action affecting matters subject to federal

authority and vice-a-versa. The mere fact that other aspects of the causal chain are subject to state regulation, does not vitiate the Commission's obligation to consider those consequences. " Id. footnote at 3; See also Id. at 7-8.

Commissioner Glick stated, "...even where exact information regarding the source of the gas to be transported and the ultimate end use is not available to the pipeline developer, the Commission will often be able to produce comparably useful information based on reasonable forecasts of the greenhouse gas emissions associated with production and consumption." Id. at 4-5.

Emphasizing this point, Commissioner Glick added, "It is particularly important for the Commission to use its "best efforts" to identify and quantify the full scope of the environmental impacts of its pipeline certification decisions given that these pipelines are expanding the nation's capacity to carry natural gas from the wellhead to end-use consumers. Adding capacity has the potential to "spur demand" and, for that reason, an agency conducting a NEPA review must, at the very least, examine the effects that an expansion of pipeline capacity might have on production and consumption. Indeed, if a proposed pipeline neither increases the supply of natural gas available to consumers nor decreases the price that those consumers would pay, it is hard to imagine why that pipeline would be "needed" in the first place." Id. at 5-6. Agreeing with Commissioner LaFleur, he cited "Mid States as supporting his position that "if the *nature* of the effect (i.e., increased emissions) is

clear, the fact that the *extent* of the effect is speculative does not excuse an agency from considering that effect in its NEPA analysis." (internal quotations removed). Id. at 6.

Connecting the critical issue of climate change to FERC's role in determining whether a project is in the public interest, Commissioner Glick wrote "anthropogenic climate change is among the most serious threats we face as a nation. For that reason, the Commission cannot determine whether a natural gas pipeline is in the "public interest" without considering the effect that granting a certificate will have on climate change." Id. at 7.

Otsego 2000 timely filed its Notice of Appeal from the Order Denying the Petition for Rehearing on its own behalf and on behalf of individuals who live proximate to one of the approved compressor station sites. See, 15 U.S.C. sec. 717r(b). Affidavits establishing standing were submitted with the Notice of Appeal. Petitioners now perfect their appeal.

The Petitioners have standing to sue and, therefore, may challenge any deficiency in the environmental review process. See, Wildearth Guardians v. Jewell, 738 F.3d 298, 306-08 (D.C. Cir. 2013), cited approvingly in Sierra Club v. FERC, 867 F.3d 1357 (D.C. Cir. 2017). Otsego 2000 is a party aggrieved by the FERC order, asserts environmental harm, and has timely filed its Petition for Rehearing

and its Notice of Appeal. Accordingly, this Court has jurisdiction to hear this appeal. Gunpowder Riverkeeper v. FERC, 807 F.3d 267,273-74 (D.C. Cir. 2015).

STATEMENT OF FACTS

Dominion's "New Market Project" spans more than 200 miles of New York State, from the Pennsylvania border to Schenectady, with new or modified facilities located in six counties. The Project includes construction of two new compressor stations, significant expansion of the Brookman Corners compressor station in Minden, NY, and other modifications to support the transport of an additional 112,000 Dekatherms of gas per day through the Dominion Pipeline. The Brookman Corners facility originally contained a single 7410 horsepower turbine that ran only about once a week. However, the project expands it to a large, 18,543 horsepower facility with multiple turbines compressors, reciprocating engine compressors, and other equipment which operate almost constantly. See, Order Issuing Certificate at 2.

In its application, Dominion projected that GHG from the two new compressor stations and expanded compressor station at Brookman Corners could exceed 200,000 tons annually. However, these are only estimates of emissions from direct operation. FERC did not require preparation of an EIS or a substantive analysis of indirect and cumulative effects, including upstream and downstream

greenhouse gas emissions. Instead FERC summarily prepared an EA, which concluded that the Project would have no significant impact.

Concerned by the Brookman Corners expansion and impacts associated with the transport of additional gas, petitioners repeatedly urged FERC to require not only a thorough evaluation of direct impacts, but also an analysis of all upstream and downstream impacts associated with the Project. In the upstream direction, this would include the extent to which the Project promotes gas extraction and hydraulic fracturing, which, in turn, requires additional gas well pad, drilling rigs, gathering lines, processing plants and other activities related to extraction. In the downstream direction, it would include gas consumed through combustion and the extent to which the project induces the development of additional infrastructure and facilities associated with increased dependency on gas, such as power plants, storage facilities and distribution networks. In both directions, impacts associated with the loss of unburned natural gas to the atmosphere by inadvertent leakage or intentional venting would also be assessed.

The FERC record is replete with comments by Petitioner Otsego 2000 and others requesting that the federal agency perform a comprehensive analysis of both upstream and downstream impacts. On December 3, 2014, Otsego 2000 submitted scoping comments regarding the Project on behalf of itself and nearly two dozen other organizations demanding that such impacts be evaluated. Otsego 2000

wrote"...expanding the carrying capacity of Dominion's pipeline would increase demand for extraction operations "upstream" of the Project and result in a foreseeable increase in drilling and fracking in Pennsylvania, Ohio, and West Virginia. Indeed, Dominion states that the Project is designed to create new markets for "Natural gas produced from the Marcellus and Utica shales in the Appalachian region of West Virginia and Ohio...DTI's natural gas pipeline system is uniquely positioned to transport Appalachian production, as its pipelines traverse the areas of significant supply growth." (CP14-497-000 Application, June 2, 2014 at 4.)" Otsego 2000 December 3, 2014 Comments at 11.

Additionally, Otsego 2000 wrote: "A comprehensive build-out analysis of potential "downstream" negative impacts resulting from the increased use of fracked gas in the "new markets" contemplated by Dominion and its partners should also be required. These include, but are not limited to, the likelihood of future power plants, storage facilities, distribution networks and other types of gas infrastructure." Id. at 12. Significantly, Dominion's own announced objectives for the Project—the creation of "new markets" for natural gas—establishes an imperative for FERC to evaluate the indirect and cumulative upstream and downstream consequences.

Relating to climate change, Otsego 2000 wrote: "FERC should require a comprehensive inventory of greenhouse gas emissions attributable to the Project. This should include not only emissions resulting from combustion at compressor

stations and other facilities, but also methane leakage from Dominion's pipeline and various components within the network…This inventory should also include a lifecycle analysis of emissions corresponding to the additional 112,000 DTh/day of gas being transported. Greenhouse gas emissions associated with extraction, distribution, and use of methane that will be transported in the pipeline should also be addressed." Id. at 14.

In November 2015, Otsego 2000 filed additional comments, this time directed to the EA, and continued to demand a comprehensive assessment of upstream and downstream impacts. Criticizing the agency's truncated analysis of indirect and cumulative impacts, Otsego 2000 wrote: FERC staff identified a geographically limited and arbitrary set of projects in the "downstream" direction, including only one pipeline (a seven mile lateral...) and seven other potential commercial users of gas. This was further reduced by limited "regions of influence" such that only air pollutants were considered for those seven commercial gas users…Stating that no "standard methodology" existed, no cumulative analysis of climate change impacts were provided at all." Otsego 2000 November 18, 2015 Comments at 17. Petitioners maintain that this is a far cry from the evaluation of indirect and cumulative upstream and downstream impacts required by NEPA.

In the upstream direction, Otsego 2000 objected to FERC's dismissal of production-related impacts on the erroneous grounds that such actions are outside of

the "region of influence, explaining "Clearly the transport of additional gas in Dominion's pipeline requires additional extraction at the source, regardless of how far away that is." Id. at 18. With respect to methane emissions, Otsego 2000 criticized FERC's misleading response regarding the impacts of high-volume fracking, also known as "unconventional" extraction. The EA stated that "once out of the ground," conventional and unconventional natural gas has "indistinguishable" atmospheric impact. However, Otsego 2000 commented that this conveniently dismisses the fact that during production, unconventional extraction is responsible for much higher emissions of methane into the atmosphere.[3] Id.

Significantly, in its November 2015 comments Otsego 2000 also provided calculations demonstrating the feasibility of estimating upstream and downstream greenhouse gas impacts even if specific knowledge of individual customers and production sites is not available. As explained by Otsego 2000, Dominion's Project involves the transport of 112,000 Dekatherms per day, which corresponds to about 2500 tons of natural gas. When combusted, this produces approximately 6875 tons of carbon dioxide. Over a year, this corresponds to about 2.5 million tons of carbon dioxide. Id. at 22-23. This is comparable to the full-burn assessment of downstream

[3] According to research published by Dr. Robert Howarth of Cornell, at the time of Otsego 2000's comments, methane leakage associated with unconventional gas production is in the range of 3.6% to 7.9%, whereas methane leakage from conventional gas is between 1.7% and 6%. *A Bridge to Nowhere: Methane Emissions and the Greenhouse Gas Footprint of Natural Gas*, Robert W. Howarth, *Energy Science & Engineering*, April 2014.

combustion emissions as described Commissioner LaFleur in her dissent, discussed above.

"Lifecycle" methane emissions, which are inclusive of upstream and downstream impacts, can also be estimated based on leakage rate. It is known that natural gas transported in the Dominion Pipeline originates from Marcellus shale and that production in the Marcellus Shale today occurs predominately by "unconventional" drilling (fracking). Utilizing a value for Global Warming Potential of methane accepted by the Inter-Governmental Panel on Climate Change[4] and relying on research conducted by Dr. Robert Howarth for unconventional natural gas leakage rates[5], Otsego 2000 estimated that over a 20-year timeframe, methane leakage resulting from the Project would contribute an additional 10,750 tons of carbon dioxide equivalents (CO2e) to the atmosphere **daily**. Id. at 23. Over a year, this corresponds to almost 4 million tons of CO2e. Id. Combining combustion and leakage emissions, this totals 6.5 million tons of CO2e annually, dramatically

[4]According to the Inter-Governmental Panel on Climate Change 5th Assessment Report, methane has a Global Warming Potential 86 times greater than carbon dioxide for the first 20 years after it is released into the atmosphere.

[5]Based on a survey of research on methane leakage, Dr. Howarth estimated that leakage rates associated with unconventional shale gas extraction to within a range of 3.6% and 7.9%. In its November 18, 2015 Comments and May 31, 2016 Request for Rehearing, Otsego 2000 used a conservative low-average rate of 5% to estimate greenhouse gas impacts. More recent research by Dr. Howarth suggests that actual leakage rates could be as high as 12%.

dwarfing direct emissions at the Project site. Id. Petitioners reiterated these facts in their Request for Rehearing filed on May 31, 2016.

SUMMARY OF LEGAL ARGUMENT

FERC erred in issuing a Certificate for the Project without considering the indirect and cumulative impacts of GHG emissions. This approach violated binding legal precedent, NEPA and the NGA. In rejecting an analysis of such impacts, FERC engaged in circular reasoning, made more damaging by the surging impacts of climate change. In its Order Denying Petitioners' Request for Rehearing, FERC also announced a new policy to be applied in future decisions rejecting consideration of upstream and downstream GHG emissions in violation of rules for administrative rule-making. Accordingly, the challenged FERC decision must be reversed and the matter remanded for appropriate review, consistent with federal law, before it can be determined whether the instant application does, or does not, further the public interest. Moreover, the announced policy statement regarding future non-consideration of downstream or upstream GHG emissions must be rescinded and subjected to appropriate administrative proceedings.

This Court's review is governed by the Administrative Procedure Act ("APA") which allows a reviewing court to set aside an agency action only if it is

"arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. sect. 706(2)(A).

LEGAL ARGUMENT

A. APPLICABLE LAW

Section 7 of the NGA grants FERC jurisdiction to approve or deny the construction of interstate natural-gas pipelines and related facilities. However, before constructing any such facility, an applicant must receive a certificate of public convenience and necessity. 15 U.S.C. sec. 717f(c)(a)(A). FERC may only issue such a certificate upon a finding that the project will serve the public interest. 15 U.S.C. sec. 717f(e). The NGA requires FERC to inquire into all factors which bear upon the public interest and authorizes it to impose such "reasonable terms and conditions as the public convenience and necessity may require." Fla. Southeast Connection, 162 FERC par. 61, 233 (2018).

For its part, NEPA requires a reviewing federal agency to prepare an EIS for every major federal action "significantly affecting the quality of the human environment." 42 U.S.C. sec. 4334(2)(C). Congress enacted NEPA in recognition of "the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influence of...resource exploitation" and "the critical importance of restoring and maintaining

environmental quality..." 42 U.S.C. sec. 4331(a). Congress declared it to be "the continuing policy of the federal government...to use all practical means and measures ... to create and maintain conditions under which man and nature can exist in productive harmony..." Id.

NEPA has twin aims. "First, it places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action. Second, it ensures that the agency will inform the public that it has indeed considered environmental concerns in its decision-making process." Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc., 462 U.S. 87, 97 (1983). The sweeping policy goals announced in NEPA are "realized through a set of action-forcing procedures that require that agencies take a 'hard look' at environmental consequences...and that provide for broad public dissemination of relevant environmental information." Robertson v. Method Valley Citizens Council, 490 U.S. 332, 350 (1989).

Implementing NEPA, federal agencies must take a hard look at direct, indirect and cumulative effects of proposed actions. "Direct effects" are caused by the action and occur at the same time and place. 40 C.F.R. Sec. 1508.8. "Indirect effects", which may include growth- inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems "are caused

by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." 40 C.F.R. Sec. 1508.8(b).

A "cumulative impact" is an impact on the environment which "results from the incremental impact of the action when added to other past, present and reasonably foreseeable actions regardless of what agency (Federal or non-Federal) or person undertakes such action." 40 C.F.R. Sec. 1508.7. NEPA's implementing regulations require that "'high quality' environmental information based on [a]ccurate scientific analysis, expert agency comments, and public scrutiny" be available to public officials and citizens before decisions are made and actions are taken. 40 C.F.R. Sec. 1500.1(b).

The APA affords this Court jurisdiction "to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary and capricious." Theodore Roosevelt Conservation P'ship v. Salazar, 616 F.3d 497, 507 (D.C. Cir. 2010). In exercising this authority, this Circuit has determined that an EIS is deficient, and "the agency action it undergirds is arbitrary and capricious, if the EIS does not contain sufficient discussion of the relevant issues and opposing viewpoints." Nat. Res. Def. Council v. Hodel, 865 F.2d 288, 294 (D.C. Cir. 1988). Alternatively, the same conclusion will follow if the court determines that the agency has not demonstrated "reasoned

decision-making." Del. Riverkeeper Network v. FERC, 753 F.3d 1304, 1213 (D.C. Cir. 2014).

Put another way, an agency action is arbitrary and capricious "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." Motor Vehicle Mfrs. Ass 'n of US., Inc. v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 43 (1983). "The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." Id. It is a "foundational principle" that "a court may uphold agency action only on the grounds that the agency invoked when it took the action." Michigan v. EPA, 135 S. Ct. 2699, 2710 (2015)." See, Montana Environmental Information Center v. US Office of Surface Mining, 274 F.Supp.3d 1074, 1080 (D. Mt. 2017).

B. FERC'S DECISION WAS ARBITRARY AND CAPRICOUS IN FAILING TO CONSIDER UPSTREAM AND DOWNSTREAM GHG EMISSIONS.

1. FERC Ignored this Court's Holding in Sabal Trail.

In refusing to evaluate upstream and downstream GHG emissions, FERC intentionally ignored binding legal precedent. In Sabal Trail, supra, this Court reversed and remanded a FERC order which failed to assess the downstream effects

of GHG emissions from pipelines intended to serve the State of Florida. The Sabal Trail holding was significant, but not aberrational. The Supreme Court had long since held that FERC must evaluate "all factors bearing on the public interest" before issuing a certificate. See, e.g., Fed. Power Comm. v. Transcom Gas Pipe Line Corp., 365 U.S. 1, 8 (1961).

This holding in Sabal Trail is clearly controlling, and warrants reversal and remand in this matter. First, as affirmed in Sabal Trail, FERC was required to consider "the public convenience and necessity" when evaluating Dominion's application to construct and operate the Project. See, 15 U.S.C. sec. 717(f)(e). FERC must balance "the public benefits against the adverse effects of the project, including adverse environmental effects." As in Sabal Trail, FERC was authorized to deny the certificate sought by the applicant on the ground that it was too harmful to the environment. Accordingly, FERC is a "legally relevant cause" of the direct and indirect environmental impacts of the project it approves and, as such, must study and provide public information about those impacts.

Second, in Sabal Trail this Court rejected FERC's assertion that an evaluation of greenhouse gas impacts cannot occur because "it is impossible to know exactly what quantity of greenhouse gases will be emitted as a result of this project being approved." Sabal Trail, 867 F.3d at 1373-74. Recognizing that "several uncertain variables" made that number inexact, this Court held that a "NEPA analysis

necessarily involves some 'reasonable forecasting' and that agencies may sometimes need to make educated assumptions about an uncertain future." Id. With respect to the Project, since FERC had information about the quantum of gas the Dominion pipeline would carry, it should have used that information to estimate the amount of GHG emissions associated with both the production and consumption of natural gas transported in the pipeline. FERC should have made a quantitative estimate of the greenhouse gas emissions or explained more specifically why it could not do so.

Third, this Court specifically held in Sabal Trail that downstream GHG emissions were an indirect effect of the proposed pipeline, triggering NEPA's requirement that FERC estimate the amount of greenhouse gas emissions the Project would enable or to explain why it could not do so. Here, FERC failed to do either by insisting that GHG emissions were something other than an "indirect effect" of its approved action. This unsupported claim does not and cannot absolve FERC of its legal obligation to perform the required analysis.

FERC also blatantly failed to address the incremental or cumulative impact of GHG emissions when added to other past, present and reasonably foreseeable future actions. See, e.g., Wildearth Guardians, 738 F.3d at 309, citing 40 C.F.R. sec. 1508.7. Instead, FERC refused to comply with these legal requirements, simply asserting that these impacts were beyond the scope of its review. In so doing, FERC

defied this Court's decision in Sabal Trail and acted in an arbitrary and capricious manner, as recognized by its two dissenting Commissioners.

2. GHG Impacts are Clearly Foreseeable and Must Be Estimated.

This Court's decision in Sabal Trail is not alone in holding that downstream greenhouse gas emissions must be evaluated as an indirect effect. In San Juan Citizens Alliance v. U.S. Bureau of Land Management, 2018 WL 2994406 (D.N.M. June 14, 2018), BLM argued that "consumption is not an indirect effect of oil and gas production because production is not a proximate cause of GHG emissions resulting from consumption." Id. at *8. The court rejected this analysis, holding that: "this statement is circular and worded as though it is a legal conclusion. However, it is contrary to the reasoning in several persuasive cases that have determined that combustion emissions are an indirect effect of an agency's decision to extract those natural resources." See W. Org. of Res. Councils v. U.S. Bureau of Land Mgnt., No. 16-21 GF-BMM, 2018 WL 1475470, *13 (D. Mont. March 26, 2018) ("In light of the degree of foreseeability and specifically of information available to the agency while completing the EIS, NEPA requires BLM to consider in the EIS the environmental consequences of the downstream combustion of the coal, oil and gas resources potentially open to development under these RMPS.").

In San Juan, supra., the district court specifically held that "it is erroneous to fail to consider, at the earliest feasible stage, the environmental consequences of the downstream combustion of the coal, oil and gas resources potentially open to development under the proposed agency action." Id. at *9. The court found that BLM's action was "arbitrary" due to its failure to estimate the amount of greenhouse gas emissions which will result from consumption of the oil and gas produced as a result of the development of wells in the leased areas. See also Montana Environmental Information Center v. U.S. Office of Surface Mining, 274 F.Supp.3d 1074, 1097-99 (D. Mt. 2017); Dine Citizens Against Ruining Our Env't v. U.S. Office of Surface Mine Reclamation and Enforcement, 82 F.Spp.2d 1201, 1213 (D.Colo. 2015); Wildearth Guardians v. U.S. Office of Surface Mining, Reclamation and Enforcement, 104 F.Supp.3d 1208, 1229-30 (D.Colo. 2015), *order vacated on other grounds and appeal dismissed as moot* at 652 F.3d 717 (10th Cir. 2016).

3. FERC's Failure to Ask for Data Cannot Excuse the Necessary Analysis or Allow FERC to Assume a Zero Impact.

In their dissenting opinions, both Commissioners LaFleur and Glick recognized the failure of the majority's reasoning and noted that FERC itself never required the pipeline applicant to produce data necessary to perform the GHG impacts analysis. Commissioners LaFleur and Glick recognized that any apparent lack of information emerges in part from the Commission's failure to ask that it be

provided. This failure contravenes NEPA's command that agencies "must use its best efforts to find out all that it reasonably can" Barnes v. Dept. of Transp., 655 F.3d 1124, 1136 (9th Cir. 2011).

Although there may be cases in which the upstream consequences of permitting decisions will not be reasonably foreseeable, it does not follow that the Commission must conclude, generically, that the environmental effects of upstream production will never be reasonably foreseeable because information about the exact source of natural gas is not specified. With respect to upstream impacts, the majority's assertion that such information is irrelevant because states have jurisdiction over the production of natural gas is also facially flawed. The natural gas sector is replete with overlapping state and federal authority and there is nothing surprising or uncommon about a state action affecting matters subject to federal authority and vice-a-versa. The mere fact that other aspects of the causal chain are subject to state regulation, does not vitiate the Commission's obligation to consider those consequences. LaFleur Dissent at 3-4.

It has also been established that where precise information regarding the operation of upstream and downstream facilities is not available, this does not mean that the evaluation of potential impacts is inherently speculative as claimed by the majority. With respect to downstream consequences, the gas transported by pipelines which FERC authorizes is burned for electric generation or residential, commercial

or industrial end uses. Regardless of where natural gas is burned, the greenhouse gas emissions from combustion follow a straight-forward chemical conversion by which a predictable quantity of carbon is produced when a known quantity of gas is burned. Therefore, a reasonably close causal relationship exists between the Commission's action to authorize a pipeline project that will transport gas and the downstream GHG emissions that result from burning the transported gas. The consumption of gas is "reasonably foreseeable" and the environmental impacts associated with those downstream emissions may not be ignored. Even if the identity of individual end-users is not known, FERC can and, therefore, must disclose what can be determined using reasonable methods, such as full-burn calculations for example. An inability to precisely identify specific end-users does not allow FERC to summarily disregard these impacts. LaFleur Dissent at 4.

The majority clearly misapplied Mid States Coalition for Progress v. Surface Transportation Board, supra., which supports the position of Petitioners and the dissenting Commissioners. In Mid States, the Court considered whether the Surface Transportation Board performed a sufficient environmental review associated with the construction of rail lines intended to transport coal. The Court concluded that the Surface Transportation Board erred by failing to consider the downstream impacts of the burning of transported coal. Even though the record lacked specificity

regarding the extent to which the transported coal would be burned, the Court concluded that the nature of the impact was clear and must be reported.

For the same reason, FERC may not simply ignore the downstream GHG emissions associated with the burning of natural gas associated with the Project just because the record is incomplete regarding specific end-use. With respect to GHG emissions resulting from methane leakage or venting, greenhouse gas impacts can also be estimated in the upstream and downstream directions, providing for a range of estimates as appropriate to reflect the uncertainty of variables such as leakage rate. This is consistent with NEPA's mandate that a scientific analysis of reasonably foreseeable impacts occur.

Notwithstanding the above, even if the Court were to find that upstream and downstream GHG emissions are not indirect or cumulative effects contemplated by CEQ, those effects should still be considered pursuant to NEPA's "hard look" standard and the NGA's public interest standard. Such information is relevant to FERC's public interest determination under the NGA.

In seeking a rationale for its refusal to perform the analysis of GHG emissions based on an alleged inability to precisely know each and every variable, FERC has erroneously held that such indirect and cumulative impacts simply do not exist. In so doing FERC makes the tacit assumption that the quantity of upstream and

downstream GHG emissions is zero. In so doing, the Commission ignores contemporary scientific teaching and abrogates its responsibility under NEPA and the NGA. Contrary to its claim that it is not denying the potential impacts of climate change, in fact, by refusing to study the potential impacts from increased GHG emissions or consider them as part of its public interest determination, the majority essentially concludes that those climate impacts do not exist.

But, NEPA requires FERC to do better than this. It must use its "best efforts" to identify and quantify the full scope of the environmental impacts of its pipeline certification decisions. Pipeline projects are expanding the nation's capacity to carry natural gas from the wellhead to end-use consumers and adding capacity has the potential to spur demand. Thus, an agency conducting NEPA review must examine the effects that an expansion of pipeline capacity will foreseeably have on production and consumption. As noted by the dissent, if a proposed pipeline neither increases the supply of natural gas available to consumers nor decreases the price that those consumers would pay, it is hard to imagine why that pipeline would be "needed" in the first place.

As noted by Commissioner Glick in his dissent, climate change poses an existential threat to the nation's security, economy, environment, and the health of citizens. We also know that GHG, including carbon dioxide and methane which can be released in large quantities through the production and the consumption of natural

gas, are significant contributors to the growing climate crisis. Accordingly, it is critical that FERC comply with its statutory responsibility to document and consider how its authorization of a natural gas pipeline facility will impact emission of GHG. Plainly stated, it is not possible for the Commission to determine whether a natural gas project is in the "public interest" without considering the climate impact effect that granting a certificate will have.

C. FERC MAY NOT ANNOUNCE NEW POLICY WITHOUT NOTICE AND AN OPPORTUNITY FOR PUBLIC COMMENT

In its Order Denying Petitioners' Request for Rehearing, FERC announced an unprompted departure from prior practice regarding consideration of downstream greenhouse gas emissions from natural gas infrastructure projects. Id. at 28-35. FERC announced a new policy ending such evaluations of upstream or downstream greenhouse gas emissions in the vast majority of future cases. This aspect of the Denial of Rehearing is substantively and procedurally flawed and carries with it tremendous danger.

Moreover, FERC's announcement of a new policy in the context of a single docket without notice that reconsideration of an existing policy violates due process. By its action, FERC announced a major policy change on an issue of nationwide significance in a context that makes it virtually impossible for interested parties to

comment on or secure court review because they were not parties to that proceeding and were not given notice of its intended scope.

In a letter dated July 10, 2018, the New York Attorney General criticized the announced change in policy regarding GHG emissions contained in FERC's Order Denying Rehearing, stating:

> By interjecting and resolving an issue that no one raised, the Rehearing Denial appears designed to avoid judicial review of the FERC majority's decision. Only one party sought rehearing of the FERC certificate of public convenience and necessity at issue. Accordingly, only that party – Otsego 2000, Inc. – can seek judicial review of the Rehearing Denial under Natural Gas Act § 19(b). See 15 U.S.C. §717r(b). Otsego 2000, Inc. represents just one set of interests. The State of New York and others that will be affected by the policy change have therefore had their rights to seek review of this broad policy change curtailed.

The Attorney General went on to discuss such policy announcements in the context of both the New Market Project and the DTE Midstream Appalachia Pipeline Case (FERC Docket Number CP17-409) in which FERC announced a new policy limiting rights of late filing intervenors. The Attorney General of New York wrote:

> These docket-based decisions undermine the legal rights of pipeline impacted communities across the nation.... FERC did not limit its sweeping policy decisions to the projects at hand but declared their decisions applicable to every FERC-regulated pipeline infrastructure project the Commission is or will be reviewing. By rendering these far-reaching determinations in the context of a single project docket, FERC has stripped from impacted

> communities across the nation the ability to challenge them, and therefore have taken from them their rights to fair and timely due process. Individuals and organizations can only legally challenge FERC determinations regarding infrastructure projects if they have intervened in the docket. Communities across the nation that will be impacted, and harmed by these decisions had no reason to know or anticipate that they needed to intervene.

The fundamental unfairness of such a result cannot be disputed. FERC must not be permitted to adopt broad policies applicable to all potentially interested parties without notice, opportunity to be heard and compliance with the APA.

D. THE PROPER REMEDY IS REMAND WITH INSTRUCTIONS

As in other cases in which courts have noted the same or similar errors by the reviewing federal agency, the proper result is a remand. FERC must be directed to withdraw the Certificate issued and to conduct the appropriate environmental review. Absent such review, the Certificate is fatally flawed and any operation proceeding in reliance upon it must be suspended. Further FERC's announcement of a new "policy" to restrict the review of upstream and downstream emissions must be rescinded.

CONCLUSION AND RELIEF SOUGHT

This Court must not allow denial of science, applicable law, and legal precedent to prevail in the face of the profound challenges mankind now faces with respect climate change. FERC acted arbitrarily and capriciously in refusing to

analyze both indirect and cumulative GHG emissions arising from downstream and upstream impacts of the New Market Project, and in unilaterally adopting a "new" policy with respect to review of such impacts going forward. At a time of growing alarm concerning GHG emissions, FERC's blatant attempt to eliminate any meaningful analysis of such emissions in this case and for future decisions must be rejected. This Court should reject FERC's approach and remand this matter for preparation of an analysis of this project which comports with federal law.

Respectfully submitted,

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Dated: November 26, 2018

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of this Court's order as it contains 9,350 words, excluding those parts of the brief exempted by Fed.R.App.P. 32(a)(7(B)(iii) and Circuit Rule 32(e)(1). Microsoft Word computed the word count.

The Brief complies with the Typeface requirements of Fed.R.App.P. 32(a)(5) and the type style requirements of Fed.R.App.P. 32(a)(6) as it has been prepared in a proportionately spaced type face, Times New Roman, in 14 point font.

The brief has been scanned for viruses and is virus free.

Dated: November 26, 2016

MICHAEL H. SUSSMAN, ESQ.

ADDENDUM TO PETITIONERS' BRIEF IN CHIEF

Natural Gas Act, 15 U.S.C. section 717, *et. seq.*

National Environmental Policy Act Act, 42 U.S.C. section 4317, *et. seq.*

Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act, CFR Parts 1500-1508

15 U.S. Code § 717 - Regulation of natural gas companies

(a) Necessity of regulation in public interest
As disclosed in reports of the Federal Trade Commission made pursuant to S. Res. 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.

(b) Transactions to which provisions of chapter applicable
The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, and to the importation or exportation of natural gas in foreign commerce and to persons engaged in such importation or exportation, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

(c) Intrastate transactions exempt from provisions of chapter; certification from State commission as conclusive evidence
The provisions of this chapter shall not apply to any person engaged in or legally authorized to engage in the transportation in interstate commerce or the sale in interstate commerce for resale, of natural gas received by such person from another person within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State, or to any facilities used by such person for such transportation or sale, provided that the rates and service of such person and facilities be subject to regulation by a State commission. The matters exempted from the provisions of this chapter by this subsection are declared to be matters primarily of local concern and subject to regulation by the several States. A certification from such State commission to the Federal Power Commission that such State commission has regulatory jurisdiction over rates and service of such person and facilities and is exercising such jurisdiction shall constitute conclusive evidence of such regulatory power or jurisdiction.

(d) Vehicular natural gas jurisdiction The provisions of this chapter shall not apply to any person solely by reason of, or with respect to, any sale or transportation of vehicular natural gas if such person is—

(1) not otherwise a natural-gas company; or

(2) subject primarily to regulation by a State commission, whether or not such State commission has, or is exercising, jurisdiction over the sale, sale for resale, or transportation of vehicular natural gas.

(June 21, 1938, ch. 556, § 1, 52 Stat. 821; Mar. 27, 1954, ch. 115, 68 Stat. 36; Pub. L. 102–486, title IV, § 404(a)(1), Oct. 24, 1992, 106 Stat. 2879; Pub. L. 109–58, title III, § 311(a), Aug. 8, 2005, 119 Stat. 685.)

The National Environmental Policy Act of 1969, as amended

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

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

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

Purpose

Sec. 2 [42 USC § 4321]. The purposes of this Act are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

TITLE I

CONGRESSIONAL DECLARATION OF NATIONAL ENVIRONMENTAL POLICY

Sec. 101 [42 USC § 4331].

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

(b) In order to carry out the policy set forth in this Act, it is the continuing responsibility of the Federal Government to use all practicable means, consist with other essential

considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may --

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

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

Sec. 102 [42 USC § 4332]. The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act, and (2) all agencies of the Federal Government shall --

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by title II of this Act, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on --

(i) the environmental impact of the proposed action,

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

(iii) alternatives to the proposed action,

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

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

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

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

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

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

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

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

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

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

uses of available resources;

(F) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

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

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

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

Sec. 103 [42 USC § 4333]. All agencies of the Federal Government shall review their present statutory authority, administrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of this Act and shall propose to the President not later than July 1, 1971, such measures as may be necessary to bring their authority and policies into conformity with the intent, purposes, and procedures set forth in this Act.

Sec. 104 [42 USC § 4334]. Nothing in section 102 [42 USC § 4332] or 103 [42 USC § 4333] shall in any way affect the specific statutory obligations of any Federal agency (1) to comply with criteria or standards of environmental quality, (2) to coordinate or consult with any other Federal or State agency, or (3) to act, or refrain from acting contingent upon the recommendations or certification of any other Federal or State agency.

Sec. 105 [42 USC § 4335]. The policies and goals set forth in this Act are supplementary to those set forth in existing authorizations of Federal agencies.

TITLE II

COUNCIL ON ENVIRONMENTAL QUALITY

Sec. 201 [42 USC § 4341]. The President shall transmit to the Congress annually beginning July 1, 1970, an Environmental Quality Report (hereinafter referred to as the "report") which shall set forth (1) the status and condition of the major natural, manmade, or altered environmental classes of the Nation, including, but not limited to, the air, the aquatic, including marine, estuarine, and fresh water, and the terrestrial environment, including, but not limited to, the forest, dryland, wetland, range, urban, suburban and rural environment; (2) current and foreseeable trends in the quality, management and utilization of such environments and the effects of those trends on the social, economic, and other requirements

of the Nation; (3) the adequacy of available natural resources for fulfilling human and economic requirements of the Nation in the light of expected population pressures; (4) a review of the programs and activities (including regulatory activities) of the Federal Government, the State and local governments, and nongovernmental entities or individuals with particular reference to their effect on the environment and on the conservation, development and utilization of natural resources; and (5) a program for remedying the deficiencies of existing programs and activities, together with recommendations for legislation.

Sec. 202 [42 USC § 4342]. There is created in the Executive Office of the President a Council on Environmental Quality (hereinafter referred to as the "Council"). The Council shall be composed of three members who shall be appointed by the President to serve at his pleasure, by and with the advice and consent of the Senate. The President shall designate one of the members of the Council to serve as Chairman. Each member shall be a person who, as a result of his training, experience, and attainments, is exceptionally well qualified to analyze and interpret environmental trends and information of all kinds; to appraise programs and activities of the Federal Government in the light of the policy set forth in title I of this Act; to be conscious of and responsive to the scientific, economic, social, aesthetic, and cultural needs and interests of the Nation; and to formulate and recommend national policies to promote the improvement of the quality of the environment.

Sec. 203 [42 USC § 4343].

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

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

Sec. 204 [42 USC § 4344]. It shall be the duty and function of the Council --

1. to assist and advise the President in the preparation of the Environmental Quality Report required by section 201 [42 USC § 4341] of this title;
2. to gather timely and authoritative information concerning the conditions and trends in the quality of the environment both current and prospective, to analyze and interpret such information for the purpose of determining whether such conditions and trends are interfering, or are likely to interfere, with the achievement of the policy set forth in title I of this Act, and to compile and submit to the President studies relating to such conditions and trends;
3. to review and appraise the various programs and activities of the Federal Government in the light of the policy set forth in title I of this Act for the purpose of determining the extent to which such programs and activities are contributing to the achievement of such policy, and to make recommendations to the President with respect thereto;

4. to develop and recommend to the President national policies to foster and promote the improvement of environmental quality to meet the conservation, social, economic, health, and other requirements and goals of the Nation;
5. to conduct investigations, studies, surveys, research, and analyses relating to ecological systems and environmental quality;
6. to document and define changes in the natural environment, including the plant and animal systems, and to accumulate necessary data and other information for a continuing analysis of these changes or trends and an interpretation of their underlying causes;
7. to report at least once each year to the President on the state and condition of the environment; and
8. to make and furnish such studies, reports thereon, and recommendations with respect to matters of policy and legislation as the President may request.

Sec. 205 [42 USC § 4345]. In exercising its powers, functions, and duties under this Act, the Council shall --

1. consult with the Citizens' Advisory Committee on Environmental Quality established by Executive Order No. 11472, dated May 29, 1969, and with such representatives of science, industry, agriculture, labor, conservation organizations, State and local governments and other groups, as it deems advisable; and
2. utilize, to the fullest extent possible, the services, facilities and information (including statistical information) of public and private agencies and organizations, and individuals, in order that duplication of effort and expense may be avoided, thus assuring that the Council's activities will not unnecessarily overlap or conflict with similar activities authorized by law and performed by established agencies.

Sec. 206 [42 USC § 4346]. Members of the Council shall serve full time and the Chairman of the Council shall be compensated at the rate provided for Level II of the Executive Schedule Pay Rates [5 USC § 5313]. The other members of the Council shall be compensated at the rate provided for Level IV of the Executive Schedule Pay Rates [5 USC § 5315].

Sec. 207 [42 USC § 4346a]. The Council may accept reimbursements from any private nonprofit organization or from any department, agency, or instrumentality of the Federal Government, any State, or local government, for the reasonable travel expenses incurred by an officer or employee of the Council in connection with his attendance at any conference, seminar, or similar meeting conducted for the benefit of the Council.

Sec. 208 [42 USC § 4346b]. The Council may make expenditures in support of its international activities, including expenditures for: (1) international travel; (2) activities in implementation of international agreements; and (3) the support of international exchange programs in the United States and in foreign countries.

Sec. 209 [42 USC § 4347]. There are authorized to be appropriated to carry out the provisions of this chapter not to exceed $300,000 for fiscal year 1970, $700,000 for fiscal

year 1971, and $1,000,000 for each fiscal year thereafter.

Council on Environmental Quality
Executive Office of the President

REGULATIONS

For Implementing The Procedural Provisions Of The

NATIONAL ENVIRONMENTAL POLICY ACT

Reprint
40 CFR Parts 1500-1508
(2005)

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

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

§1500.1 Purpose.

(a) The National Environmental Policy Act (NEPA) is our basic national charter for protection of the environment. It establishes policy, sets goals (section 101), and provides means (section 102) for carrying out the policy. Section 102(2) contains "action-forcing" provisions to make sure that federal agencies act according to the letter and spirit of the Act. The regulations that follow implement section 102(2). Their purpose is to tell federal agencies what they must do to comply with the procedures and achieve the goals of the Act. The President, the federal agencies, and the courts share responsibility for enforcing the Act so as to achieve the substantive requirements of section 101.

(b) NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA. Most important, NEPA documents must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail.

(c) Ultimately, of course, it is not better documents but better decisions that count. NEPA's purpose is not to generate paperwork—even excellent paperwork—but to foster excellent action. The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment. These regulations provide the direction to achieve this purpose.

§1500.2 Policy.

Federal agencies shall to the fullest extent possible:

(a) Interpret and administer the policies, regulations, and public laws of the United States in accordance with the policies set forth in the Act and in these regulations.

(b) Implement procedures to make the NEPA process more useful to decisionmakers and the public; to reduce paperwork and the accumulation of extraneous background data; and to emphasize real environmental issues and alternatives. Environmental impact statements shall be concise, clear, and to the point, and shall be supported by evidence that agencies have made the necessary environmental analyses.

(c) Integrate the requirements of NEPA with other planning and environmental review procedures required by law or by agency practice so that all such procedures run concurrently rather than consecutively.

(d) Encourage and facilitate public involvement in decisions which affect the quality of the human environment.

(e) Use the NEPA process to identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment.

(f) Use all practicable means, consistent with the requirements of the Act and other essential considerations of national policy, to restore and enhance the quality of the human environment and avoid or minimize any possible adverse effects of their actions upon the quality of the human environment.

§1500.3 Mandate.

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

eral agencies for implementing the procedural provisions of the National Environmental Policy Act of 1969, as amended (Pub. L. 91–190, 42 U.S.C. 4321 *et seq.*) (NEPA or the Act) except where compliance would be inconsistent with other statutory requirements. These regulations are issued pursuant to NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*) section 309 of the Clean Air Act, as amended (42 U.S.C. 7609) and Executive Order 11514, Protection and Enhancement of Environmental Quality (March 5, 1970, as amended by Executive Order 11991, May 24, 1977). These regulations, unlike the predecessor guidelines, are not confined to sec. 102(2)(C) (environmental impact statements). The regulations apply to the whole of section 102(2). The provisions of the Act and of these regulations must be read together as a whole in order to comply with the spirit and letter of the law. It is the Council's intention that judicial review of agency compliance with these regulations not occur before an agency has filed the final environmental impact statement, or has made a final finding of no significant impact (when such a finding will result in action affecting the environment), or takes action that will result in irreparable injury. Furthermore, it is the Council's intention that any trivial violation of these regulations not give rise to any independent cause of action.

§1500.4 Reducing paperwork.

Agencies shall reduce excessive paperwork by:

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

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

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

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

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

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

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

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

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

(j) Incorporating by reference (§1502.21).

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

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

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

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

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

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

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

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

§1500.5 Reducing delay.

Agencies shall reduce delay by:

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

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

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

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

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

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

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

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

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

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

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

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

§1500.6 Agency authority.

Each agency shall interpret the provisions of the Act as a supplement to its existing authority and as a mandate to view traditional policies and missions in the light of the Act's national environmental objectives. Agencies shall review their policies, procedures, and regulations accordingly and revise them as necessary to insure full compliance with the purposes and provisions of the Act. The phrase "to the fullest extent possible" in section 102 means that each agency of the federal government shall comply with that section unless existing law applicable to the agency's operations expressly prohibits or makes compliance impossible.

PART 1501—NEPA AND AGENCY PLANNING

Sec.

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

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

§1501.1 Purpose.

The purposes of this part include:

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

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

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

(d) Identifying at an early stage the significant environmental issues deserving of study

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

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

§1501.2 Apply NEPA early in the process.

Agencies shall integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts. Each agency shall:

(a) Comply with the mandate of section 102(2)(A) to "utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment," as specified by §1507.2.

(b) Identify environmental effects and values in adequate detail so they can be compared to economic and technical analyses. Environmental documents and appropriate analyses shall be circulated and reviewed at the same time as other planning documents.

(c) Study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources as provided by section 102(2)(E) of the Act.

(d) Provide for cases where actions are planned by private applicants or other non-federal entities before federal involvement so that:

(1) Policies or designated staff are available to advise potential applicants of studies or other information foreseeably required for later federal action.

(2) The federal agency consults early with appropriate state and local agencies and Indian tribes and with interested private persons and organizations when its own involvement is reasonably foreseeable.

(3) The federal agency commences its NEPA process at the earliest possible time.

§1501.3 When to prepare an environmental assessment.

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

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

§1501.4 Whether to prepare an environmental impact statement.

In determining whether to prepare an environmental impact statement the federal agency shall:

(a) Determine under its procedures supplementing these regulations (described in §1507.3) whether the proposal is one which:

(1) Normally requires an environmental impact statement, or

(2) Normally does not require either an environmental impact statement or an environmental assessment (categorical exclusion).

(b) If the proposed action is not covered by paragraph (a) of this section, prepare an environmental assessment (§1508.9). The agency shall involve environmental agencies, applicants, and the public, to the extent practicable, in preparing assessments required by §1508.9(a)(1).

(c) Based on the environmental assessment make its determination whether to prepare an environmental impact statement.

(d) Commence the scoping process (§1501.7), if the agency will prepare an environmental impact statement.

(e) Prepare a finding of no significant impact (§1508.13), if the agency determines on the basis of the environmental assessment not to prepare a statement.

(1) The agency shall make the finding of no significant impact available to the affected public as specified in §1506.6.

(2) In certain limited circumstances, which the agency may cover in its procedures under §1507.3, the agency shall make the finding of

no significant impact available for public review (including state and areawide clearinghouses) for 30 days before the agency makes its final determination whether to prepare an environmental impact statement and before the action may begin. The circumstances are:

(i) The proposed action is, or is closely similar to, one which normally requires the preparation of an environmental impact statement under the procedures adopted by the agency pursuant to §1507.3, or

(ii) The nature of the proposed action is one without precedent.

§1501.5 Lead agencies.

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

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

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

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

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

(1) Magnitude of agency's involvement.

(2) Project approval/disapproval authority.

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

(4) Duration of agency's involvement.

(5) Sequence of agency's involvement.

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

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

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

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

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

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

§1501.6 Cooperating agencies.

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

(a) The lead agency shall:

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

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

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

(b) Each cooperating agency shall:

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

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

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

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

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

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

§1501.7 Scoping.

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

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

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

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

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

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

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

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

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

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

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

(2) Set time limits (§1501.8).

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

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

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

§1501.8 Time limits.

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

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

(b) The agency may:

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

(i) Potential for environmental harm.

(ii) Size of the proposed action.

(iii) State of the art of analytic techniques.

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

(v) Number of persons and agencies affected.

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

(vii) Degree to which the action is controversial.

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

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

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

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

(iii) Preparation of the draft environmental impact statement.

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

(v) Preparation of the final environmental impact statement.

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

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

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

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

PART 1502—ENVIRONMENTAL IMPACT STATEMENT

Sec.

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

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

§1502.1 Purpose.

The primary purpose of an environmental impact statement is to serve as an action-forcing device to insure that the policies and goals defined in the Act are infused into the ongoing programs and actions of the federal government. It shall provide full and fair discussion of significant environmental impacts and shall inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment. Agencies shall focus on significant environmental issues and alternatives and shall reduce paperwork and the accumulation of extraneous background data. Statements shall be concise, clear, and to the point, and shall be supported by evidence that the agency has made the necessary environmental analyses. An environmental impact statement is more than a disclosure document. It shall be used by federal officials in conjunction with other relevant material to plan actions and make decisions.

§1502.2 Implementation.

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

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

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

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

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

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

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

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

§1502.3 Statutory requirements for statements.

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

On proposals (§1508.23).

For legislation and (§1508.17).

Other major federal actions (§1508.18).

Significantly (§1508.27).

Affecting (§§1508.3, 1508.8).

The quality of the human environment (§1508.14).

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

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

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

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

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

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

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

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

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

§1502.5 Timing.

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

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

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

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

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

§1502.6 Interdisciplinary preparation.

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

§1502.7 Page limits.

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

§1502.8 Writing.

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

§1502.9 Draft, final, and supplemental statements.

Except for proposals for legislation as provided in §1506.8 environmental impact statements shall be prepared in two stages and may be supplemented.

(a) Draft environmental impact statements shall be prepared in accordance with the scope decided upon in the scoping process. The lead agency shall work with the cooperating agencies and shall obtain comments as required in part 1503 of this chapter. The draft statement must fulfill and satisfy to the fullest extent possible the requirements established for final statements in section 102(2)(C) of the Act. If a draft statement is so inadequate as to preclude meaningful analysis, the agency shall prepare and circulate a revised draft of the appropriate portion. The agency shall make every effort to disclose and discuss at appropriate points in the draft statement all major points of view on the environmental impacts of the alternatives including the proposed action.

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

(c) Agencies:

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

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

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

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

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

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

§1502.10 Recommended format.

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

(a) Cover sheet.

(b) Summary.

(c) Table of contents.

(d) Purpose of and need for action.

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

(f) Affected environment.

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

(h) List of preparers.

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

(j) Index.

(k) Appendices (if any).

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

§1502.11 Cover sheet.

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

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

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

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

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

(e) A one paragraph abstract of the statement.

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

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

§1502.12 Summary.

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

§1502.13 Purpose and need.

The statement shall briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action.

§1502.14 Alternatives including the proposed action.

This section is the heart of the environmental impact statement. Based on the information and analysis presented in the sections on the Affected Environment (§1502.15) and the Environmental Consequences (§1502.16), it should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public. In this section agencies shall:

(a) Rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.

(b) Devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits.

(c) Include reasonable alternatives not within the jurisdiction of the lead agency.

(d) Include the alternative of no action.

(e) Identify the agency's preferred alternative or alternatives, if one or more exists, in the draft statement and identify such alternative in the final statement unless another law prohibits the expression of such a preference.

(f) Include appropriate mitigation measures not already included in the proposed action or alternatives.

§1502.15 Affected environment.

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

§1502.16 Environmental consequences.

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

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

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

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

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

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

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

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

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

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

§1502.17 List of preparers.

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

§1502.18 Appendix.

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

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

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

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

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

§1502.19 Circulation of the environmental impact statement.

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

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

(b) The applicant, if any.

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

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

§1502.20 Tiering.

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

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

§1502.21 Incorporation by reference.

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

§1502.22 Incomplete or unavailable information.

When an agency is evaluating reasonably foreseeable significant adverse effects on the human environment in an environmental impact statement and there is incomplete or unavailable information, the agency shall always make clear that such information is lacking.

(a) If the incomplete information relevant to reasonably foreseeable significant adverse impacts is essential to a reasoned choice among alternatives and the overall costs of obtaining it are not exorbitant, the agency shall include the information in the environmental impact statement.

(b) If the information relevant to reasonably foreseeable significant adverse impacts cannot be obtained because the overall costs of obtaining it are exorbitant or the means to obtain it are not known, the agency shall include within the environmental impact statement: (1) A statement that such information is incomplete or unavailable; (2) a statement of the relevance of the incomplete or unavailable information to evaluating reasonably foreseeable significant adverse impacts on the human environment; (3) a summary of existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environment; and (4) the agency's evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community. For the purposes of this section, "reasonably foreseeable" includes impacts which have catastrophic consequences, even if their probability of occurrence is low, provided that the analysis of the impacts is supported by credible scientific evidence, is not based on pure conjecture, and is within the rule of reason.

(c) The amended regulation will be applicable to all environmental impact statements for which a Notice of Intent (40 CFR 1508.22) is published in the FEDERAL REGISTER on or after May 27, 1986. For environmental impact statements in progress, agencies may choose to comply with the requirements of either the original or amended regulation.

[51 FR 15625, Apr. 25, 1986]

§1502.23 Cost-benefit analysis.

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

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

§1502.24 Methodology and scientific accuracy.

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

§1502.25 Environmental review and consultation requirements.

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

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

PART 1503—COMMENTING

Sec.

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

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

§1503.1 Inviting comments.

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

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

(2) Request the comments of:

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

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

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

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

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

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

§1503.2 Duty to comment.

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

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

§1503.3 Specificity of comments.

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

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

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

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

§1503.4 Response to comments.

(a) An agency preparing a final environmental impact statement shall assess and consider comments both individually and collectively, and shall respond by one or more of the means listed below, stating its response in the final statement. Possible responses are to:

(1) Modify alternatives including the proposed action.

(2) Develop and evaluate alternatives not previously given serious consideration by the agency.

(3) Supplement, improve, or modify its analyses.

(4) Make factual corrections.

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

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

(c) If changes in response to comments are minor and are confined to the responses described in paragraphs (a)(4) and (5) of this section, agencies may write them on errata sheets and attach them to the statement instead of rewriting the draft statement. In such cases only the comments, the responses, and the changes and not the final statement need be circulated (§1502.19). The entire document with a new cover sheet shall be filed as the final statement (§1506.9).

PART 1504—PREDECISION REFERRALS TO THE COUNCIL OF PROPOSED FEDERAL ACTIONS DETERMINED TO BE ENVIRONMENTALLY UNSATISFACTORY

Sec.

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

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

§1504.1 Purpose.

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

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

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

[43 FR 55998, Nov. 29, 1978]

§1504.2 Criteria for referral.

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

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

(b) Severity.

(c) Geographical scope.

(d) Duration.

(e) Importance as precedents.

(f) Availability of environmentally preferable alternatives.

[43 FR 55998, Nov. 29, 1978]

§1504.3 Procedure for referrals and response.

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

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

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

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

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

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

(c) The referral shall consist of:

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

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

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

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

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

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

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

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

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

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

(2) Be supported by evidence.

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

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

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

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

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

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

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

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

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

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

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

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

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

PART 1505—NEPA AND AGENCY DECISIONMAKING

Sec.

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

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

§1505.1 Agency decisionmaking procedures.

Agencies shall adopt procedures (§1507.3) to ensure that decisions are made in accordance with the policies and purposes of the Act. Such procedures shall include but not be limited to:

(a) Implementing procedures under section 102(2) to achieve the requirements of sections 101 and 102(1).

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

and assuring that the NEPA process corresponds with them.

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

(d) Requiring that relevant environmental documents, comments, and responses accompany the proposal through existing agency review processes so that agency officials use the statement in making decisions.

(e) Requiring that the alternatives considered by the decisionmaker are encompassed by the range of alternatives discussed in the relevant environmental documents and that the decisionmaker consider the alternatives described in the environmental impact statement. If another decision document accompanies the relevant environmental documents to the decisionmaker, agencies are encouraged to make available to the public before the decision is made any part of that document that relates to the comparison of alternatives.

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

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

(a) State what the decision was.

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

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

§1505.3 Implementing the decision.

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

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

(b) Condition funding of actions on mitigation.

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

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

PART 1506—OTHER REQUIREMENTS OF NEPA

Sec.

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

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

§1506.1 Limitations on actions during NEPA process.

(a) Until an agency issues a record of decision as provided in §1505.2 (except as provided in paragraph (c) of this section), no action concerning the proposal shall be taken which would:

(1) Have an adverse environmental impact; or

(2) Limit the choice of reasonable alternatives.

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

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

(1) Is justified independently of the program;

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

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

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

§1506.2 Elimination of duplication with State and local procedures.

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

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

(1) Joint planning processes.

(2) Joint environmental research and studies.

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

(4) Joint environmental assessments.

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

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

§1506.3 Adoption.

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

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

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

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

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

§1506.4 Combining documents.

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

§1506.5 Agency responsibility.

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

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

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

§1506.6 Public involvement.

Agencies shall:

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

(b) Provide public notice of NEPA-related hearings, public meetings, and the availability of environmental documents so as to inform those persons and agencies who may be interested or affected.

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

(2) In the case of an action with effects of national concern notice shall include publication in the FEDERAL REGISTER and notice by mail to

national organizations reasonably expected to be interested in the matter and may include listing in the 102 Monitor. An agency engaged in rulemaking may provide notice by mail to national organizations who have requested that notice regularly be provided. Agencies shall maintain a list of such organizations.

(3) In the case of an action with effects primarily of local concern the notice may include:

(i) Notice to state and areawide clearinghouses pursuant to OMB Circular A–95 (Revised).

(ii) Notice to Indian tribes when effects may occur on reservations.

(iii) Following the affected state's public notice procedures for comparable actions.

(iv) Publication in local newspapers (in papers of general circulation rather than legal papers).

(v) Notice through other local media.

(vi) Notice to potentially interested community organizations including small business associations.

(vii) Publication in newsletters that may be expected to reach potentially interested persons.

(viii) Direct mailing to owners and occupants of nearby or affected property.

(ix) Posting of notice on and off site in the area where the action is to be located.

(c) Hold or sponsor public hearings or public meetings whenever appropriate or in accordance with statutory requirements applicable to the agency. Criteria shall include whether there is:

(1) Substantial environmental controversy concerning the proposed action or substantial interest in holding the hearing.

(2) A request for a hearing by another agency with jurisdiction over the action supported by reasons why a hearing will be helpful. If a draft environmental impact statement is to be considered at a public hearing, the agency should make the statement available to the public at least 15 days in advance (unless the purpose of the hearing is to provide information for the draft environmental impact statement).

(d) Solicit appropriate information from the public.

(e) Explain in its procedures where interested persons can get information or status reports on environmental impact statements and other elements of the NEPA process.

(f) Make environmental impact statements, the comments received, and any underlying documents available to the public pursuant to the provisions of the Freedom of Information Act (5 U.S.C. 552), without regard to the exclusion for interagency memoranda where such memoranda transmit comments of Federal agencies on the environmental impact of the proposed action. Materials to be made available to the public shall be provided to the public without charge to the extent practicable, or at a fee which is not more than the actual costs of reproducing copies required to be sent to other federal agencies, including the Council.

§1506.7 Further guidance.

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

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

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

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

(1) Research activities;

(2) Meetings and conferences related to NEPA; and

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

§1506.8 Proposals for legislation.

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

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

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

(1) There need not be a scoping process.

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

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

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

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

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

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

§1506.9 Filing requirements.

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

§1506.10 Timing of agency action.

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

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

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

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

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

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

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

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

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

§1506.11 Emergencies.

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

§1506.12 Effective date.

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

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

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

PART 1507—AGENCY COMPLIANCE

Sec.

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

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

§1507.1 Compliance.

All agencies of the federal government shall comply with these regulations. It is the intent of these regulations to allow each agency flexibility in adapting its implementing procedures authorized by §1507.3 to the requirements of other applicable laws.

§1507.2 Agency capability to comply.

Each agency shall be capable (in terms of personnel and other resources) of complying

with the requirements enumerated below. Such compliance may include use of other's resources, but the using agency shall itself have sufficient capability to evaluate what others do for it. Agencies shall:

(a) Fulfill the requirements of section 102(2)(A) of the Act to utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on the human environment. Agencies shall designate a person to be responsible for overall review of agency NEPA compliance.

(b) Identify methods and procedures required by section 102(2)(B) to insure that presently unquantified environmental amenities and values may be given appropriate consideration.

(c) Prepare adequate environmental impact statements pursuant to section 102(2)(C) and comment on statements in the areas where the agency has jurisdiction by law or special expertise or is authorized to develop and enforce environmental standards.

(d) Study, develop, and describe alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources. This requirement of section 102(2)(E) extends to all such proposals, not just the more limited scope of section 102(2)(C)(iii) where the discussion of alternatives is confined to impact statements.

(e) Comply with the requirements of section 102(2)(H) that the agency initiate and utilize ecological information in the planning and development of resource-oriented projects.

(f) Fulfill the requirements of sections 102(2)(F), 102(2)(G), and 102(2)(I), of the Act and of Executive Order 11514, Protection and Enhancement of Environmental Quality, Sec. 2.

§1507.3 Agency procedures.

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

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

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

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

(i) Which normally do require environmental impact statements.

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

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

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

ments and environmental impact statements which address classified proposals may be safeguarded and restricted from public dissemination in accordance with agencies' own regulations applicable to classified information. These documents may be organized so that classified portions can be included as annexes, in order that the unclassified portions can be made available to the public.

(d) Agency procedures may provide for periods of time other than those presented in §1506.10 when necessary to comply with other specific statutory requirements.

(e) Agency procedures may provide that where there is a lengthy period between the agency's decision to prepare an environmental impact statement and the time of actual preparation, the notice of intent required by §1501.7 may be published at a reasonable time in advance of preparation of the draft statement.

PART 1508—TERMINOLOGY AND INDEX

Sec.

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

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

§1508.1 Terminology.

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

§1508.2 Act.

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

§1508.3 Affecting.

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

§1508.4 Categorical exclusion.

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

§1508.5 Cooperating agency.

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

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

§1508.6 Council.

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

§1508.7 Cumulative impact.

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

§1508.8 Effects.

"Effects" include:

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

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

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

§1508.9 Environmental assessment.

"Environmental assessment":

(a) Means a concise public document for which a federal agency is responsible that serves to:

(1) Briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact.

(2) Aid an agency's compliance with the Act when no environmental impact statement is necessary.

(3) Facilitate preparation of a statement when one is necessary.

(b) Shall include brief discussions of the need for the proposal, of alternatives as required by section 102(2)(E), of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.

§1508.10 Environmental document.

"Environmental document" includes the documents specified in §1508.9 (environmental assessment), §1508.11 (environmental impact statement), §1508.13 (finding of no significant impact), and §1508.22 (notice of intent).

§1508.11 Environmental impact statement.

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

§1508.12 Federal agency.

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

§1508.13 Finding of no significant impact.

"Finding of no significant impact" means a document by a federal agency briefly presenting the reasons why an action, not otherwise excluded (§1508.4), will not have a significant effect on the human environment and for which an environmental impact statement there fore will not be prepared. It shall include the environmental assessment or a summary of it and shall note any other environmental documents related to it (§1501.7(a)(5)). If the assessment is included, the finding need not repeat any of the discussion in the assessment but may incorporate it by reference.

§1508.14 Human environment.

"Human environment" shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment. (See the definition of "effects" (§1508.8).) This means that economic or social effects are not intended by themselves to require preparation of an environmental impact statement. When an environmental impact statement is prepared and economic or social and natural or physical environmental effects are interrelated, then the environmental impact statement will discuss all of these effects on the human environment.

§1508.15 Jurisdiction by law.

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

§1508.16 Lead agency.

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

§1508.17 Legislation.

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

§1508.18 Major federal action.

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

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

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

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

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

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

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

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

§1508.19 Matter.

"Matter" includes for purposes of Part 1504:

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

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

§1508.20 Mitigation.

"Mitigation" includes:

(a) Avoiding the impact altogether by not taking a certain action or parts of an action.

(b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation.

(c) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment.

(d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.

(e) Compensating for the impact by replacing or providing substitute resources or environments.

§1508.21 NEPA process.

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

§1508.22 Notice of intent.

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

(a) Describe the proposed action and possible alternatives.

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

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

§1508.23 Proposal.

"Proposal" exists at that stage in the development of an action when an agency subject to the Act has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the effects can be meaningfully evaluated. Preparation of an environmental impact statement on a proposal should be timed (§1502.5) so that the final statement may be completed in time for the statement to be included in any recommendation or report on the proposal. A proposal may exist in fact as well as by agency declaration that one exists.

§1508.24 Referring agency.

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

§1508.25 Scope.

"Scope" consists of the range of actions, alternatives, and impacts to be considered in an environmental impact statement. The scope of an individual statement may depend on its relationships to other statements (§§1502.20 and 1508.28). To determine the scope of environmental impact statements, agencies shall consider 3 types of actions, 3 types of alternatives, and 3 types of impacts. They include:

(a) Actions (other than unconnected single actions) which may be:

(1) Connected actions, which means that they are closely related and therefore should be discussed in the same impact statement. Actions are connected if they:

(i) Automatically trigger other actions which may require environmental impact statements.

(ii) Cannot or will not proceed unless other actions are taken previously or simultaneously.

(iii) Are interdependent parts of a larger action and depend on the larger action for their justification.

(2) Cumulative actions, which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement.

(3) Similar actions, which when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental consequencies together, such as common timing or geography. An agency may wish to analyze these actions in the same impact statement. It should do so when the best way to assess adequately the combined impacts of similar actions or reasonable alternatives to such actions is to treat them in a single impact statement.

(b) Alternatives, which include:

(1) No action alternative.

(2) Other reasonable courses of actions.

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

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

§1508.26 Special expertise.

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

§1508.27 Significantly.

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

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

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

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

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

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

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

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

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

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

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

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

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

§1508.28 Tiering.

"Tiering" refers to the coverage of general matters in broader environmental impact statements (such as national program or policy statements) with subsequent narrower statements or environmental analyses (such as regional or basinwide program statements or ultimately site-specific statements) incorporating by reference the general discussions and concentrating solely on the issues specific to the statement subsequently prepared. Tiering is appropriate when the sequence of statements or analyses is:

(a) From a program, plan, or policy environmental impact statement to a program, plan, orpolicy statement or analysis of lesser scope or to a site-specific statement or analysis.

(b) From an environmental impact statement on a specific action at an early stage (such as need and site selection) to a supplement (which is preferred) or a subsequent statement or analysis at a later stage (such as environmental mitigation). Tiering in such cases is appropriate when it helps the lead agency to focus on the issues which are ripe for decision and exclude from consideration issues already decided or not yet ripe.

Index to Parts 1500 Through 1508

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

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

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

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

PURPOSE

Sec. 2 [42 USC § 4321].

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

TITLE I

Congressional Declaration of National Environmental Policy

Sec. 101 [42 USC § 4331].

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

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

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

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

Sec. 102 [42 USC § 4332].

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance

with the policies set forth in this Act, and (2) all agencies of the federal government shall —

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by title II of this Act, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on —

(i) the environmental impact of the proposed action,

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

(iii) alternatives to the proposed action,

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

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

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

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

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

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

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

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

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

(E) study, develop, and describe appropriate alternatives to recommended courses of

action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(F) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

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

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

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

Sec. 103 [42 USC § 4333].

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

Sec. 104 [42 USC § 4334].

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

Sec. 105 [42 USC § 4335].

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

TITLE II

COUNCIL ON ENVIRONMENTAL QUALITY

Sec. 201 [42 USC § 4341].

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

Sec. 202 [42 USC § 4342].

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

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

Sec. 203 [42 USC § 4343].

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

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

Sec. 204 [42 USC § 4344].

It shall be the duty and function of the Council —

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

Sec. 205 [42 USC § 4345].

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

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

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

Sec. 206 [42 USC § 4346].

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

Sec. 207 [42 USC § 4346a].

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

Sec. 208 [42 USC § 4346b].

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

Sec. 209 [42 USC § 4347].

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

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

42 USC § 4372.

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

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

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

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

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

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

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

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

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

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

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

42 USC § 4373.

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

42 USC § 4374.

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

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

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

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

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

42 USC § 4375.

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

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

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

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

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

THE CLEAN AIR ACT § 309*

§ 7609. Policy review

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

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

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

Executive Order 11514—Protection and enhancement of environmental quality

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(f) Coordinate federal programs related to environmental quality.

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

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

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

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

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

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

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

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

NEPAnet:

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

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

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

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

Sec. 1506.9 Filing requirements.

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

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

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

[70 FR 41148, July 18, 2005]