Stanford Law School

Comments and Recommendations on NEPA Reform

for the

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I. INTRODUCTION

The White House's Council on Environmental Quality ("CEQ") invited a group of Stanford Law School ("SLS") students to analyze implementation of the National Environmental Policy Act ("NEPA") and develop recommendations to potential reform and modernize administration of this important environmental statute. SLS Policy Lab Class 413P subsequently explored a variety of potential reform ideas and prepared this submission for CEQ's consideration. It is our hope that CEQ and other interested parties will find the analysis and perspectives included in this submittal useful when evaluating potential reforms to the NEPA process. The ideas in this submittal were developed independently, and do not purport to represent the views of CEQ or any other governmental agency.

II. EXECUTIVE SUMMARY

The National Environmental Policy Act of 1969, the statute that launched the "environmental decade" of the 1970s, requires that major federal actions not go forward without first considering their potential environmental impacts. Because it inserts environmental considerations into federal decision-making, NEPA has been hailed as one of the nation's most important environmental laws. At the same time, the law has been criticized on grounds that it imposes costly, dilatory, paper-shuffling requirements on federal agencies and on private parties who are seeking federal permits.

At its heart, NEPA is a simple statute. It aims to enhance the government's environmental performance by compelling managers to produce, consider, and disclose information on the expected environmental impacts of proposed actions. Before an agency undertakes any "major Federal action[ ] significantly affecting the quality of the human environment," NEPA requires that it produce and make publicly available a "detailed statement," known as an Environmental Impact Statement ("EIS"), on the environmental impacts of the proposed action, its alternatives, and any available mitigation measures.[1]

A. NEPA's Role in Improving Federal Decision-Making

An EIS has two primary purposes: to ensure that federal agencies make fully informed decisions in light of the potential environmental consequences of their actions, and to keep the public informed about those consequences and allow them an opportunity to comment on proposed actions that may significantly impact the environment.[2] NEPA does not mandate, however, any particular outcome. It is a statute that focuses on process: federal officials must prepare and present information and analysis regarding the potential environmental consequences of proposed actions to decision-makers before they take action. Public input must be sought for major actions covered by EISs. But NEPA does not require that decision-makers heed the analysis and select, for example, the environmentally preferable alternative.[3]

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[1] Bradley C. Karkkainen, *Toward A Smarter NEPA: Monitoring and Managing Government's Environmental Performance*, 102 COLUM. L. REV. 903, 909 (2002).
[2] Timothy J. Hagerty, *Beyond Section 404: Corps Permitting and the National Environmental Policy Act (NEPA),* SR026 ALI-ABA 133, 135-36 (2009).
[3] *Id*.

For actions that do not appear to have a major potential impact on the environment, NEPA typically requires federal managers to make a more limited, preliminary inquiry to confirm that a proposed decision will not "significantly affect" the environment.[4] Known as environmental assessments ("EAs"), these short form environmental reviews often lead to "Findings of No Significant Impact" (or "FONSIs"). Federal agencies annually conduct approximately 50,000 EAs. In contrast, only about 350 EISs are produced each year.[5]

Proponents suggest that the EA/EIS process produces several beneficial effects. First, NEPA compels agency managers to "[t]hink more carefully about the environment before acting," focusing their attention on environmental consequences that otherwise might not have come to their attention.[6] Prior to NEPA's enactment, information about adverse environmental consequences of proposed actions rarely was available to agency decision-makers.[7] Governmental officials were not required to produce or compile it and it was not clear that they had authority to expend public funds to acquire such information or to consider it in their decision-making.[8]

Second, NEPA emphasizes the importance of developing a robust exposition of potentially serious environmental impacts, and then providing an opportunity for the public to provide input on the adequacy of such disclosures. Toward that end, NEPA requires the lead agency that has primary responsibility for preparing environmental documentation to reach out and consult with the public and with other agencies that have jurisdiction or expertise relating to an identified impact, with all relevant comments (including comments from other agencies) made available to the public. The public information purpose of environmental impact statements is further emphasized in NEPA's implementing regulations, which provide that the statements "shall inform decision-makers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment."[9]

Although NEPA "leaves decision-makers discretion to ignore this information," the law operates most successfully when they "rely on NEPA-generated information to avoid especially harmful projects, choose less environmentally harmful variants, add mitigation measures, or select and design subsequent projects with greater initial sensitivity to environmental concerns identified by past NEPA inquiries."[10] In addition, NEPA can interact with substantive agency requirements to influence permitting decisions: "In other cases, agencies are bound by law or by established agency policy to avoid or mitigate certain kinds of environmental harms, and if the NEPA

[4] A number of "categorical exemptions" have been developed under NEPA. These exemptions cover types of activities that have been determined by rule not to trigger case-specific environmental reviews.
[5] Karkkainen, *supra* note 1; Jim Vines, Stephanie Salek, & Kelsey Desloover, *Reforming NEPA Review of Energy Projects*, King & Spaulding Energy Newsletter (Dec. 2012), http://www.kslaw.com/library/newsletters/EnergyNewsletter/2012/December/article1.html.
[6] *Id*. (internal quotation marks and citation omitted).
[7] *Id.*
[8] *Id.*
[9] 40 C.F.R.§1502.1 (2014).
[10] Karkkainen, *supra* note 1, at 910-11.

analysis reveals these kinds of harms, the combination of substantive mandate and NEPA-generated information may compel the agency to modify its course of action."[11]

B. Calls for NEPA Reform

There is strong, bipartisan policy support for the broad purposes behind NEPA —namely, requiring the disclosure of the potential environmental consequences of a proposed federal action, and its alternatives. With disclosure comes transparency and the opportunity for a meaningful public debate on the wisdom of moving forward with projects that may damage the environment. NEPA has facilitated a vigorous public debate over projects large and small, starting with the Tellico "snail darter" dam project in Tennessee, to the proposed Two Forks dam on the South Platte River in Colorado in the 1980s, the Yazoo Pump project on the Mississippi, to today's proposed XL pipeline. In addition, NEPA's focus on mitigating project impacts on the environment provides a forum for considering how project proponents might most effectively compensate for unavoidable environmental impacts.[12]

NEPA has earned its share of critics, however, primarily due to the reality that NEPA requirements can elongate the federal permitting process by a matter of many months and even years. The project-related costs of delay can be substantial, as can be the cost of preparing an EIS which, for major projects, can cost a million dollars or more. Critics also object to the prescriptive process that has developed around NEPA. Contractors typically take a formulaic approach that can produce documents of extraordinary length and complexity, leading to legitimate questions about whether massive EISs are providing useful information that is, in fact, being reviewed and weighed by decision-makers.[13]

The statutory requirements for NEPA review are clearly costly and time consuming. According to a 2003 federal report, a typical EA requires nine to eighteen months to prepare at a cost of $50,000 to $200,000, and a typical EIS requires *six years* to complete at a cost of $250,000 to $2 million.[14] As noted above, federal agencies initiate approximately 50,000 EAs and 350 EISs per year.[15]

Potential delays and costs do not stop with an agency's performance under the statute. Once an agency prepares an EA and either an EIS or FONSI, NGOs and other stakeholders can initiate litigation under NEPA to challenge the adequacy of the agency's review. As discussed below, commentators tend to exaggerate the litigiousness surrounding NEPA. The 50,000 EAs and 350 EISs per year spawned only 126 new NEPA cases filed each year, on average, between 2001 and 2009.[16] An average of 24 Temporary Restraining Orders and preliminary and permanent

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[11] *Id.*
[12] In recent months, the potential to direct more meaningful analysis of mitigation opportunities has received much-deserved attention. *See generally* David J. Hayes, *Addressing the Environmental Impacts of Large Infrastructure Projects: Making "Mitigation" Matter*, 44 ENVTL. L. REP. 10016 (Jan. 2014).
[13] Karkkainen, *supra* note 1, at 904-05.
[14] Vines, et al., *supra* note 5.
[15] *Id.*
[16] *Id.*

injunctions halting projects were issued each year between 2001 and 2009.[17] Although these numbers are modest, high profile projects are the ones that typically become mired in litigation under NEPA, while other projects arguably avoid litigation because they adopt a "defensive" NEPA posture, producing EISs that are numbingly long and detailed, leaving no stone unturned—at great expense in terms of dollars and time —so as to avoid litigation risk.

The combination of continuing controversy around NEPA and the fact that its regulations and operational approach have remained largely static for the last 40 years[18]—despite tremendous advances in the availability of relevant information and new pathways for public outreach and communications—prompts periodic calls for NEPA reform. These calls tend to divide the NEPA world into two camps: those who believe that NEPA "reform" means that the statute's disclosure obligations should be reduced because it unduly slows down and interferes with permitting decisions, and those who resist any change at all, for fear that it will trigger a reopening of the law and a subsequent erosion of its benefits.

C. Recommendations for NEPA Reform

This paper rejects both poles of the argument. We fully endorse the purposes of NEPA and underscore its importance as a bedrock environmental law. But we also recognize that the NEPA framework can and should be modified to account for both the experiences of the past forty years and recent innovations and updated technologies. Because the process for preparing Environmental Impact Statements for major projects is broadly recognized as the most important focal point for NEPA, and arguably the most challenging to implement in an effective way, our recommendations for NEPA reform focus on the EIS process.

In our view, because NEPA's statutory language and its resulting regulations are so broad, no change in the law is required to modernize the NEPA process. In many cases, new, improved practices can be adopted without requiring the promulgation of new regulations. However, given uneven adoption of consistent practices across agencies, we recommend that the Administration

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[17] *Id*.; In general, NEPA plaintiffs succeed in winning NEPA cases more often than pro-development interests. And NEPA plaintiffs have six years after a "final agency action" to initiate litigation challenging the project, per the Administrative Procedure Act's ("APA") statute of limitations.

[18] "NEPA's central provisions are framed in lofty generalities, leaving much discretion to the Council on Environmental Quality (CEQ), the federal courts, and federal agencies to translate its broad mandates into specific operational requirements." Bradley C. Karkkainen, *Whither NEPA?*, 12 N.Y.U. ENVTL. L.J. 333, 334 (2004). Title II of NEPA created the Council on Environmental Quality (CEQ), which is charged with reporting to and advising the President on issues pertaining to the quality of the environment. 42 U.S.C. §§ 4342, 4344 (2014). CEQ may also promulgate regulations that are "binding on all federal agencies and provide formal guidance to the courts for interpreting NEPA requirements." *Trustees for Alaska v. Hodel*, 806 F.2d 1378, 1382 (9th Cir. 1986). In 1978, almost a decade after NEPA was passed into legislation, the Council promulgated the CEQ Regulations, which refined and augmented agency duties under NEPA. The regulations are binding on federal agencies so long as compliance is not inconsistent with other statutory requirements. James T.B. Tripp & Nathan G. Alley, *Streamlining NEPA's Environmental Review Process: Suggestions for Agency Reform*, 12 N.Y.U. ENVTL. L.J. 74, 93 (2003). Federal agencies are supposed to promulgate their own NEPA implementing regulations. If they do not, the CEQ regulations control. *See* Mark A. Chertok, *Overview of the National Environmental Policy Act: Environmental Impact Assessments and Alternatives*, SR045 ALI-ABA 757, 761 (2010). However, the requirements of the CEQ Regulations are not always followed and, interestingly, there has been little litigation over their enforcement upon agencies. Tripp & Alley, 94.

promulgate clear and sharply-defined regulations that incorporate the reforms summarized here, and discussed in the sections that follow.

An outline of our key recommendations follows below. Each topic is addressed more fully in the subsequent narrative sections of this submittal.

IMPROVING FOCUS AND COORDINATION EARLY IN THE EIS PROCESS

- Provide more clarity Regarding NEPA Lead Agency Responsibilities in Reaching out to All Agencies that Have Permitting and Review Responsibilities for the project and Ensuring that (A) the EIS Covers Other Agencies' Interests, in Addition to their Own; and (B) Key Stakeholders, Including Other Agencies, Have an Opportunity to Identify Key Issues and Potential Flaws in Proposed Projects.

- Use the Formal Scoping Process to Identify the Key Environmental Issues that Should be Addressed in an EIS.

- Create an Institutional Mechanism—the Interagency Permitting and Review Council—to Facilitate Meaningful Cross-agency Cooperation at Early Stages of the EIS Process.

PROVIDE CLEAR GUIDANCE ON CROSS-CUTTING POLICY ISSUES, INCLUDING CLIMATE CHANGE AND PROGRAMMATIC EISs

- Require Lead Agencies to Use the Scoping Process to Identify All Potentially Relevant Climate Change-Related Impacts that Should Be Evaluated in an EIS.

- Clarify the Important Role of Programmatic EISs as Planning Tools for Agencies to Streamline EISs.

INTRODUCE MODERN TECHNOLOGY TOOLS AND DISCIPLINE INTO THE EIS PREPARATION PROCESS

- Use the Scoping Process to Identify the Significant Issues that Need to Be Analyzed in an EIS And Encourage Agencies to Present Such Analyses in a Concise Format.

- Set Up Systems to Enable Access by Agencies to Robust, Searchable Databases and Updated GIS Mapping Tools.

- Add Flexible Timing to Facilitate a More Robust Interface with Interested Parties.

- Establish Performance Criteria for EIS Contractors and Award Contracts to Contractors that Use New Tools to Complete EISs in A More Efficient and Cost-Effective Manner.

REDUCE EXPOSURE TO JUDICIAL INTERVENTION BY INSTITUTING REFORMS

- Reforms Recommended Herein Will Materially Reduce The Three Largest Risks Of Judicial Intervention In EISs:

- By improving the EIS process, agencies will have less of an incentive to circumvent their obligations to prepare EISs;
- By drawing non-lead agencies into the EIS preparation process, such agencies will be less likely to file critical comments on EISs; and
- By creating a record of issues that are addressed in detail in an EIS, and those that are not, courts will have a basis for deferring to agency decision-making regarding the scope of EISs.

III. IMPROVING FOCUS AND COORDINATION EARLY IN THE EIS PROCESS

The substance of our recommendations to improve the EIS process begins with a recognition that the NEPA review process should not be viewed in isolation. It is an essential element of the federal permitting and review process. EISs are shaped and overseen by the "lead" agency whose permit approval or other required action has triggered the EIS. For many major projects, however, other federal and state ("cooperating") agencies also will be asked to process permits or reviews of their own later in the process—typically after the lead agency has prepared the EIS. This creates a disconnect insofar as environmental issues relevant to other agencies may be inadequately addressed in the lead agency's EIS, creating the need for more environmental reviews late in the process, or litigation risk, or both. Indeed, it is not uncommon for non-lead agencies to file comments that are critical of the lead agency's EIS, either because the EIS gave short shrift to issues of special concern to the commenting agency or otherwise failed to reflect that agency's experience, data, and/or perspective in the EIS.

This situation creates inefficiencies, at the least, as the lead agency must scramble to react to other agencies' criticisms—*after* the lead agency put together what it hoped would be a comprehensive draft EIS. Moreover, as noted in Section VI, below, this situation can give rise to serious litigation risk, given that courts give special attention to other agencies' critical comments on the sufficiency of an EIS.

The NEPA process works much more effectively if it recognizes, up front, that an EIS should cover the key environmental issues that will arise in all of the agencies' (and not just the NEPA lead agency's) permits and reviews. For instance, the Corps of Engineers may take the lead in preparing an EIS because the project needs a wetlands permit from the Corps, but the same project also may trigger a Bureau of Land Management ("BLM") right-of-way permit, and/or reviews by the U.S. Fish & Wildlife Service ("FWS") under the Endangered Species Act or the Advisory Council for Historic Preservation under Section 106 of the National Historic Preservation Act. The EIS that the Corps prepares for the project should cover the environmental issues important to the BLM's, the FWS's, and the Advisory Council's decisions, as well as the Corps' wetlands-related considerations.

NEPA lead agencies also create inefficiencies and/or litigation risk when they fail to recognize—or simply do not know—that another agency is undertaking an environmental analysis of similar issues in the same region, or another agency is analyzing environmental impacts associated with the same type of project in a different region. The Department of the Interior's Bureau of Ocean Energy Management and the Commerce Department's National Oceanic and Atmospheric Administration provided a recent example of this phenomenon as they simultaneously undertook separate, largely-uncoordinated programmatic EISs evaluating environmental aspects of

potential oil and gas developments in the same sensitive offshore environment in the Arctic. If agencies like these fail to communicate with one another, they miss a valuable opportunity to streamline their work and develop more robust analyses. They also may be opening themselves up to litigation risk by undertaking individual reviews that do not address the full scope of related project impacts, particularly cumulative impacts.

Finally, early outreach to other agencies —and even to key stakeholders—can sometimes identify serious flaws in a proposed project that can be addressed before they are baked into a project description that becomes the focal point of a full-blown EIS. This was one of the highly praised features of the approach that the Interior Department and its land management agency, BLM, have taken to the siting of renewable energy projects on public lands since 2009. Interior has facilitated early reviews of potential utility-scale projects by inviting interested federal and state agencies, along with key stakeholders, into the process early to spot project conflicts that might be addressed through siting or other adjustments. This type of approach enabled the completion of NEPA reviews on dozens of large, complex renewable energy projects that implicated the equities of a number of agencies in record time and with a minimum of litigation. It stands in contrast to the default path—which is taken all too frequently under current NEPA practice—in which serious flaws are identified late in the NEPA process, long after the project proponent can easily make project modifications.

The NEPA modernization recommendations discussed below target these types of permit-related NEPA misfirings in which: (1) the EIS process does not adequately cover the issues that are important to non-lead permitting or reviewing agencies; (2) agencies are preparing EISs in parallel, without coordination, either in the same region and/or for similar types of projects; (3) there is not meaningful engagement among interested agencies and the project proponent and key stakeholders to identify potentially serious issues early in the process so that adjustments can be made to the project; and/or (4) the scoping process is not used to identify the issues that should be the primary focus of the EIS, and those that require little or no attention in the EIS.

In all of these cases, early cross-agency coordination, communication, and continued engagement with the NEPA process will facilitate more cost-effective, informative and litigation-resistant environmental analyses. A more structured approach than is provided by the current NEPA framework is needed, however, to realize these important advantages in a more systematic manner. Among other things, we believe that institutional assistance must be provided to NEPA lead agencies to fundamentally change the nature of early NEPA interactions among agencies, which are so important when setting the course for a successful EIS process.

A. NEPA's Pre-Application and Scoping Processes

1. Pre-Application and Other Early Stage Outreach Efforts

NEPA regulations include hortatory calls for lead agencies to work with other agencies, and key stakeholders (including, presumably, the project proponent) to shape the nature and scope of the EIS before it is irretrievably launched. For example, CEQ's regulations string together good language that calls on lead agencies to request participation from "cooperating agenc[ies] in the NEPA process at the earliest possible time."[19] Likewise, the regulations suggest that agencies should integrate NEPA requirements with other required planning and environmental review

[19] 40 C.F.R. §1501.2(a) (2014).

procedures so that all run concurrently, not consecutively.[20] To reduce delay, agencies are told to "emphasize" interagency cooperation before the EIS is prepared, rather than after the document has been completed.[21] Under 40 C.F.R. § 1507.3(b), agencies are encouraged to undertake an "outreach program," that enables prospective applicants to conduct pre-application consultations with the lead and cooperating agencies, and to facilitate applicants' early understanding of what environmental studies or other information they may need to produce, and what mitigation requirements may be required, under the EIS process.

Unfortunately, the regulations provide no institutional mechanism to ensure that lead agencies actually implement the recommendation that they engage in early outreach, including pre-application meetings. Just as importantly, the regulations provide no mechanism to prompt (much less compel) non-lead agencies to engage in early interactions with the lead agency and/or stakeholders. The result is that the NEPA lead agency typically takes the path of least resistance and prepares its EIS in a largely solo fashion.

2. Formal Scoping and the Failure to Identify "Significant" Issues

The same phenomenon carries forward into the formal "scoping" process, which the regulations advertise as an important opportunity to help calibrate an EIS to environmental issues that matter or, as stated in CEQ's regulations: "[i]dentifying at an early stage the *significant environmental issues* deserving of study and *deemphasizing insignificant issues*, narrowing the scope of the environmental impact statement accordingly."[22] The regulations assert that "scoping decreases time and resources costs" because "early investment of time and resources to collect information, engage stakeholders, and define parameters for the environmental review process, will prevent duplication of effort and focus the use of time and resources on those issues of greatest importance."[23] Scoping regulations' requirements for public input also are lauded for "allow[ing] different values and interests to be integrated into the project . . . and [to] minimize potential conflict and promotes consensus around environmental impacts."[24] And a good scoping process can help identify over-arching issues that require analysis in an EIS, such as cumulative impacts and potential climate change impacts.[25]

Unfortunately, NEPA's scoping regulations describe the scoping process only in the most general terms. They are not directive, and they include no institutional mechanism for disciplining the process. For example:

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[20] 40 C.F.R. § 1500.02(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.").

[21] 40 C.F.R. § 1500.5 ("Agencies shall reduce delay by: (a) [i]ntegrating the NEPA process into early planning"; "(b) [e]mphasizing interagency cooperation before the environmental impact statement is prepared, rather than submission of adversary comments on a completed document"; "(c) [i]nsuring the swift and fair resolution of lead agency disputes"; and "(d) [u]sing the scoping process for an early identification of what are and what are not the real issues."); *see* 40 C.F.R. § 1501.2 ("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"); *see also* 40 C.F.R §1501.1.

[22] *Id.*

[23] *Id*.

[24] *Id.*

[25] Carissa S. Slotterback, *Scoping implementation in National Environmental Policy Act processes in US transportation agencies*, 14 TRANSP. RESEARCH PART D: TRANSP. & ENV'T 83, 84 (2009).

- 40 C.F.R. § 1500.4 calls on agencies to reduce excessive paperwork by separating significant and insignificant environmental issues during scoping;[26]
- 40 C.F.R. § 1500.5 calls on agencies to reduce delay by identifying what are and are not "the real issues";[27] and
- 40 C.F.R. § 1501.7 calls on agencies to use the scoping process to identify significant issues that require in depth analysis and insignificant issues, which can be eliminated from in depth study.[28]

The result of these overly-general, high-level statements is that lead agencies typically do not undertake a disciplined effort to distinguish between the issues it deems to be "significant" environmental issues that should be the primary focus for an EIS, and the "insignificant issues" that can and should be "deemphasized" in the EIS. It is even rarer for lead agencies to make such a cut in collaboration with other interested agencies, as contemplated by the regulations. Instead, the normal default is for lead agencies to act alone, take a conservative route, and avoid making judgment calls regarding the key issues that should receive the most attention in an EIS. Hence the preparation of bloated EISs that try to "cover the waterfront" and insulate themselves from judicial attack[29] and, in so doing, take years and great expense to produce, often yielding unreadable products that may not add to reasoned decision-making.

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[26] "Agencies shall reduce excessive paperwork by:
. . .
(b) Preparing analytic rather than encyclopedic environmental impact statements (§ 1502.2(a)).
(c) Discussing only briefly issues other than significant ones (§ 1502.2(b)).
. . .
(f) Emphasizing the portions of the environmental impact statement that are useful to decision-makers 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) . . . ." 40 C.F.R. § 1500.4 (emphasis added).

[27] "Agencies shall reduce delay by:
. . .
(b) Emphasizing interagency cooperation before the environmental impact statement is prepared, rather than submission of adversary comments on a completed document (§ 1501.6).
. . .
(d) Using the scoping process for an **early identification of what are and what are not the real issues** (§ 1501.7) . . . ." 40 C.F.R. § 1500.5 (emphasis added).

[28] "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 . . .
(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) . . .
(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 . . . ." 40 C.F.R. § 1501.7 (emphasis added).

[29] Ironically, as discussed below in Section VI, where agencies make a determination of issues that deserve more extensive treatment in an EIS, and those that do not, courts will likely to defer to the agency's judgment. As a result, adopting a shotgun approach on issue coverage may subject EISs to *greater* judicial risk.

B. Recommendations for Improving Focus and Coordination Early in the EIS Process.

In our view, these missed opportunities on the front end of the NEPA process are a major cause of the tremendous frustrations by all parties when EISs are built around projects that have major flaws that could have been (but were not) identified early and adjusted for; that do not adequately cover issues of importance to non-lead agencies and/or key stakeholders; and/or that fail to take advantage of—or even account for—parallel EIS processes that other agencies are undertaking in the same region, or on similar types of projects. Post-EIS cleanup of these shortcomings can be incredibly expensive and time-consuming.[30]

Similarly, because lead agencies typically do not invest serious effort into the scoping process, they lose an early opportunity to design a targeted EIS that focuses more attention on the most important environmental impacts that deserve careful analysis in the EIS, and that gives minimal (or no) attention on those that do not. The result is the "kitchen sink" phenomenon that produces multi-volume EISs that decision-makers do not read, but which can take years and millions of dollars to prepare.

We recommend that the NEPA reform effort address these shortcomings by taking the following three actions:

1. Provide More Clarity Regarding NEPA Lead Agency Responsibilities in Reaching out to all Agencies that Have Permitting and Review Responsibilities for the Project and Ensuring that (A) the EIS Covers Other Agencies' Interests, in Addition to their Own; and (B) Key Stakeholders, Including Other Agencies, Have an Opportunity to Identify Key Issues and Potential Flaws in Proposed Projects.

To better incentivize lead agencies to engage other agencies during the early stages of NEPA review, the regulations and CEQ Guidance should establish requirements for interagency pre-scoping interactions. These interactions should be focused on identifying the critical elements of projects at the pre-application stage (or, at least, at the pre-scoping stage) and identifying serious flaws that should prompt discussions with the project proponent to consider reorienting or re-siting the project. Interactions with other agencies also should identify any related EISs that may be relevant in terms of providing useful information and data, such as EISs that are being undertaken by different agencies in the same region, or EISs that are being completed on similar types of projects in other areas of the country.

More specifically, to ensure that lead agencies engage in these discussions during the pre-scoping process, we recommend:

- A new regulation should include an explicit requirement that the lead agency conduct outreach to gather relevant information early in the EIS process by developing a list of relevant permitting and/or reviewing agencies, stakeholders, and potentially related EISs, and then by contacting and following up with the agencies to solicit their early involvement before the scoping process begins.

[30] *See, e.g.*, Manuel Quinones, *Mining: FWS Pulls Support For Hot-Button Ariz. Copper Project*, GREENWIRE (May 23, 2014).

- As discussed below, we also recommend that this new regulatory responsibility for lead agencies be matched with a new institutional support mechanism (discussed under #3, below) that can facilitate the type of cross-agency interactions needed to make early NEPA engagement productive.

2. Use the Formal Scoping Process to Identify the Key Environmental Issues that Should be Addressed in an EIS

To enable the formal scoping process to operate as intended, and to produce a clear identification of issues of "significance," which deserve thorough treatment in an EIS, and those that can be deemphasized, we recommend that the expected deliverables from the scoping process be articulated more clearly, as follows:

- A new regulation should explicitly require the lead agency to identify the issues that it concludes, in consultation with other agencies, are "significant" and which therefore should receive detailed attention in an EIS, and other issues that do not rise to the "significance" level and should be deemphasized.
- To add discipline and institutional assistance in the process, we recommend that the new regulation require the lead agency to use the scoping process—including the solicitation of public input—to generate a list of the issues that rise to the level of "significance" for these purposes and to share the list with other agencies and to the Interagency Permitting and Review Council, as described below.
- The new regulation should allow for issues to move onto and off of the list of most significant issues during the EIS drafting process, with the lead agency making a brief written record of decisions to treat certain issues as "significant" for EIS purposes.

By proceeding in this way, the EIS preparers will have a road map of the issues that should be a primary focus for the EIS, and those issues that do not require detailed analyses. As described in more detail in Section VI, below, we anticipate that courts will respect and defer to the sorting process, resulting in shorter and more focused EISs that may be less vulnerable to judicial scrutiny than today's over-papered EISs. To that point, the Supreme Court in its unanimous 2004 decision in *Department of Transportation v. Public Citizen*, noted that NEPA incorporates a "rule of reason,"[31] under which agencies are free to determine the extent of EIS preparation "based on the usefulness of any new potential information to the decision-making process."[32] Courts have subsequently employed the rule of reason standard in determining whether a challenged EIS contains an adequate discussion of significant environmental impacts.[33]

[31] *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 754 (2004).
[32] *Id.*
[33] *See League of Wilderness Defenders-Blue Mountains Biodiversity Project v. U.S. Forest Serv.*, 689 F.3d 1060, 1075 (9th Cir. 2012).

3. Create an Institutional Mechanism—the Interagency Permitting and Review Council—to Facilitate Meaningful Cross-agency Cooperation at Early Stages of the EIS Process.

Although current regulations encourage coordination among agencies, identification of related EISs, and integration with other required environmental analyses, they provide no institutional mechanism to facilitate such actions. As noted above, NEPA lead agencies have only limited institutional interests in soliciting input from other agencies on EISs that they are charged with preparing. And even in those instances in which a lead agency may affirmatively want to bring in the expertise of other agencies, the other agencies may not be responsive, due to a lack of interest, resources, or shared priorities. Under those circumstances, the lead agency typically has little or no leverage to compel cooperation in the pre-EIS process—even though such early engagement potentially could shave literally years and months or years off the EIS and related permitting processes.

To promote cross-agency coordination throughout the review process, we recommend the establishment of an Interagency Permitting and Review Council that serves as a centralized, expert NEPA resource for lead agencies. Building institutional capacity to support early cross-agency coordination, communication, and continued engagement with EISs will facilitate more cost-effective and informative EIS analyses.

C. Interagency Permitting and Review Council

The premise behind creating an Interagency Permitting and Review Council (Interagency Council) is that effective implementation for most major projects requires meaningful cooperation among agencies. Presently, as discussed above, that neither lead agencies nor other agencies currently have much incentive to work together at early stages of the NEPA process—even though early stage cooperation among the key agencies and stakeholders is the single most important factor in launching and then efficiently implementing NEPA-required EISs and related project permitting and review functions. Establishing an Interagency Council also would have important ancillary benefits by bringing together NEPA and permitting experts from the four agencies that are responsible for preparing the large majority of complex EISs —Interior's BLM; USDA's Forest Service ("USFS"); the Department of Transportation ("DOT"), and the Army Corps of Engineers ("ACOE") —and charging them with working with CEQ and the White House to implement other cross-agency improvements in the administration of NEPA and the permitting process, including the data-sharing and geographic information systems ("GIS") reforms discussed in the following sections of this paper.

Consistent with its title, the Interagency Permitting and Review Council would be the place where NEPA and permitting and review processes come together on a cross-agency basis. It would institutionalize the type of "dedicated team," that the Steering Committee on Federal Infrastructure Permitting and Review Process recently established under the President's Executive Order 13604, entitled "Improving Performance of Federal Permitting and Review of Infrastructure Projects."[34] For purposes of the President's infrastructure initiative, the

[34] *See* STEERING COMMITTEE ON FEDERAL INFRASTRUCTURE PERMITTING AND REVIEW PROCESS, IMPLEMENTATION PLAN FOR THE PRESIDENTIAL MEMORANDUM ON MODERNIZING INFRASTRUCTURE PERMITTING (May 2014), *available at* http://f.datasrvr.com/fr1/414/27051/Infrastructure_Permitting_Implementation_Plan_5-13-14.pdf; *see*

interagency team is called the Interagency Infrastructure Permitting Improvement Center of "IIPIC." We recommend a more permanent, high-level Interagency Permitting and Review Council that can address NEPA and permitting issues that arise across the board, for all types of projects, permits, and reviews.

In terms of its composition, we recommend that the Interagency Council be comprised of seven members: one member from each of the four primary federal permitting agencies (BLM, USFS, DOT, Army Corps); two members selected from among the key regulatory agencies (e.g., EPA, FWS, NOAA), and a representative from CEQ. Each represented agency would select one of its chief permitting and NEPA officers to sit on the Council and report to its Deputy Secretary. CEQ would serve as one co-chair along with a representative from one of the four primary NEPA agencies. The agency co-chair position would rotate once every two years among the four primary permitting agencies.

The Interagency Council would complete its mission of facilitating productive, early stage EIS agency interactions by engaging in the following types of activities:

- As noted above, we have recommended that new NEPA regulations be promulgated which require that NEPA lead agencies engage in outreach to other key agencies and stakeholders in a disciplined and predictable manner. In particular, lead agencies preparing EISs should be required to develop a list of relevant agencies, stakeholders, and potentially related EISs, and then to contact the agencies and solicit their early involvement before the scoping process begins. The Interagency Council would provide a clearinghouse and support function to facilitate these early cross-agency interactions. The lists referred to above would be provided to the Council, and the Council would stand ready to ensure that non-lead agencies respond appropriately to the outreach of lead agencies. The Interagency Council also would be in a position to identify other EISs in the region, or for similar types of projects, and provide that information to the lead agency.
- During the formal scoping process, the Interagency Council will also help ensure that lead agencies adequately identify and distinguish significant and less important issues for further analysis. To that end, the Interagency Council will offer technical assistance in identifying critical issues and provide valuable NEPA expertise to assist with the identification process. In particular, the Interagency Council will help with identification of critical climate change and cumulative impacts, as these impacts are subject to a high degree of uncertainty. The Interagency Council will ensure that they are consistently addressed, and will provide tools to navigate through the uncertainty.
- Finally, the Council will serve more general NEPA purposes, including:
    - Assisting agencies to regularize their use of new tools to improve the process for preparing EISs, including the development of common data bases, more effective use of GIS mapping tools, and the like. (See the discussion in Section V, below.)
    - Overseeing and developing training programs for agency reviewers and NEPA applicants.

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also Exec. Order 13,604, Improving Performance of Federal Permitting and Review of Infrastructure Projects, 77 Fed. Reg. 18,887 (Mar. 12, 2012).

- Regularizing the use of EAs, categorical exclusions and other NEPA tools across the key NEPA implementing agencies.

IV. PROVIDE CLEAR GUIDANCE ON CROSS-CUTTING POLICY ISSUES, INCLUDING CLIMATE CHANGE AND PROGRAMMATIC EISs

While there are a number of substantive areas in which NEPA guidance could be sharpened, two contexts deserve special attention: (1) consideration of climate change impacts on EISs; and (2) the role that programmatic EISs can play in advancing NEPA's goals.

A. Require Lead Agencies to Use the Scoping Process to Identify All Potentially Relevant Climate Change-Related Impacts that Should Be Evaluated in an EIS.

The CEQ released Draft NEPA Guidance on Consideration of the Effects of Climate Change and Greenhouse Gas Emissions in February 2010. The Draft Guidance addresses both climate impacts of projects (e.g., greenhouse gas emissions), and climate impacts on a project (e.g., potential climate change-related siting vulnerabilities).[35] Specifically, the Guidance notes climate change issues may surface regarding consideration of "[t]he relationship of climate change effects to a proposed action or alternatives, including the relationship to proposal design, environmental impacts, mitigation and adaptation measures."[36] The Guidance urges agencies during scoping to identify which climate change impacts may change the project or its environmental impact.[37]

Unfortunately, CEQ has not finalized the Draft Guidance, leaving EIS preparers uncertain of the appropriate scope of climate change considerations.

We urge that this important gap in NEPA guidance be closed. We note, in that regard, that while it is now well accepted that EISs for projects that emit significant amounts of greenhouse gas emissions must consider climate impacts, there are two other types of climate change impacts that also merit analysis in EISs prepared for major projects including direct climate impacts such as sea rise or storm surge on the long-term feasibility of a project, and potential localized environmental harms associated with the project that may be influenced by climate change, such as impacts on protected species, or the like.

We recommend that CEQ revise and issue final Guidance that requires lead agencies to use the scoping process to determine which potential climate impacts call for a more detailed analysis. We note that the Draft Guidance already anticipates this analysis,[38] but the final guidance should clarify that lead agencies must consider all three aspects of climate change: project-related

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[35] CEQ Memorandum for Heads of Federal Department and Agencies on Draft NEPA Guidance on Consideration of the Effects of Climate Change and Greenhouse Gas Emissions (Feb. 18, 2010), *available at* http://www.whitehouse.gov/sites/default/files/microsites/ceq/20100218-nepa-consideration-effects-ghg-draft-guidance.pdf.

[36] *Id.* at 1.

[37] *Id.* at 2 ("Under this proposed guidance, agencies should use the scoping process to set reasonable spatial and temporal boundaries for this assessment and focus on aspects of climate change that may lead to changes in the impacts, sustainability, vulnerability and design of the proposed action and alternative courses of action.")

[38] *Id.* at 6 ("[A]gencies should determine which climate change impacts warrant consideration in their . . . EISs because of their impact on the analysis of the environmental effects of a proposed agency action.").

emissions that may result in climate change, climate change impacts that affect the project's stability, durability, and efficacy, and climate change impacts that alter the project's impact on the environment.[39] Early consideration of climate impacts may help to identify potential fatal flaws early and minimize the risk of duplicative or cost-ineffective EIS development.

B. Clarify the Important Role of Programmatic EISs as Planning Tools for Agencies to Streamline Elements

Landscape-level planning is being increasingly recognized as an important tool in improving permitting decisions on individual projects. When environmental conditions across broad landscapes are evaluated and better understood, better and more efficient siting decisions can be made for individual projects. In addition, landscape-level reviews may help identify important landscape-scale mitigation opportunities that may more effectively compensate for unavoidable project impacts. As summarized in a recent Department of the Interior report:

> "Consideration of the landscape-scale context provides the opportunity to see project development in the context of the larger landscape it will occupy and associated resource values it will affect; enhances the ability to evaluate cumulative effects of multiple projects; expands the capacity to avoid, minimize, and offset project impacts; and allows managers to make avoidance and compensatory mitigation site selection decisions that optimize for multiple resource values."[40]

Agencies have the option of preparing programmatic environmental impact statements ("PEISs") to accompany these types of regional planning exercises. PEISs have several potential advantages. As noted above, a PEIS can provide the framework to identify regionally important resources, including identifying areas that are more sensitive and may not be appropriate for development, and other areas that may be good candidates for future projects. PEISs also may facilitate timely consideration of cumulative impacts, and can be an important tool in addressing climate-related impacts at a point in the planning and decision-making process when such consideration is still meaningful.

Importantly, PEISs can make a subsequent, project-specific EA or EIS process more efficient by developing well-documented support that future project reviews can draw on. In this way, specific projects may "tier" or refer back to programmatic-level analyses, potentially reducing duplication in work and focusing detailed analyses at appropriate stages in the planning and review process.

Thus, PEISs can support the scoping process by identifying key environmental issues that will need further analysis in project-specific environmental impact statements. It can serve as an opportunity to both highlight and explain which issues affect all individual projects within the

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[39] *Id.* ("Climate change can affect the environment of a proposed action in a variety of ways. For instance, climate change can affect the integrity of a development or structure by exposing it to a greater risk of floods, storm surges, or higher temperatures. Climate change can increase the vulnerability of a resource, ecosystem, or human community, causing a proposed action to result in consequences that are more damaging than prior experience with environmental impacts analysis might indicate.").

[40] JOEL P. CLEMENT, ET AL., ENERGY AND CLIMATE CHANGE TASK FORCE, A STRATEGY FOR IMPROVING THE MITIGATION POLICIES AND PRACTICES OF THE DEPARTMENT OF THE INTERIOR 1, 9-10 (Apr. 2014), *available at* http://www.do8i.gov/news/upload/Mitigation-Report-to-the-Secretary _FINAL_04_08_14,pdf ; *see also* Hayes, *supra* note 12.

program and address why other issues are not critical or deserving of more detailed analysis. Even in situations in which a single agency is taking an action, a PEIS may be able to serve as a useful planning tool by serving as a source of data, standardized best management practices, and guidance for future development.

Despite their usefulness as resource planning tools, and their potential to rationalize and expedite project-specific decisions across broad landscapes, PEISs are not used as frequently as they could or should be. In addition, when they are pursued, PEIS drafters do not always take full advantage of the powerful, landscape-scale analyses that they can provide.

The lack of clear NEPA guidance is partly to blame for these failures. As confirmed in a comprehensive 2003 review of the NEPA process, agencies do not know when or how to optimally use PEISs.[41] Simply put, CEQ's PEIS-related regulations provide little guidance as to when a PEIS is appropriate or how and by whom one should be developed. CEQ provides a general discussion of the purpose of tiering and its potential to streamline the NEPA process but it does not develop these broad statements into clear definitions that would aid in practical application.[42] CEQ's answers to its "Forty Most Asked Questions" provide more detail about programmatic analyses but the information is relatively outdated and ill-equipped to support an agency attempting to address major issues like climate change.[43] This overall lack of guidance means that agencies have been all over the map in terms of developing PEISs that are useful, and those that are not.

The energy sector provides a number of examples of both effective and poorly developed landscape-scale PEISs. For example, in 2006, the BLM prepared a PEIS and a related record of decision ("ROD") to address potential wind energy project impacts across 11 states in the West.[44] Unfortunately, the wind energy PEIS and ROD were both so general as to be virtually

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[41] THE NEPA TASK FORCE, MODERNIZING NEPA IMPLEMENTATION: REPORT TO THE COUNCIL ON ENVIRONMENTAL QUALITY 36-37, 39 (2003), *available at* http://ceq.hss.doe.gov/ntf/report/finalreport.pdf.

[42] 40 C.F.R. § 1502.20 ("Agencies are encouraged to tier their environmental impact statements to eliminate repetitive discussions of the same issues and to focus on the actual issues ripe for decision at each level of environmental review (Sec. 1508.28). Whenever a broad environmental impact statement has been prepared (such as a program or policy statement) and a subsequent statement or environmental assessment is then prepared on an action included within the entire program or policy (such as a site specific action) the subsequent statement or environmental assessment need only summarize the issues discussed in the broader statement and incorporate discussions from the broader statement by reference and shall concentrate on the issues specific to the subsequent action. The subsequent document shall state where the earlier document is available. Tiering may also be appropriate for different stages of actions. (Section 1508.28)."); 40 C.F.R. § 1508.28 ("Tiering is appropriate when the sequence of statements or analyses is: (a) from a program, plan, or policy environmental impact statement to a program, plan, or policy statement or analysis of lesser scope or to a site- specific statement or analysis. (b) From an environmental impact statement on a specific action at an early stage (such as need and site selection) to a supplement (which is preferred) or a subsequent statement or analysis at a later stage (such as environmental mitigation). Tiering in such cases is appropriate when it helps the lead agency to focus on the issues which are ripe for decision and exclude from consideration issues already decided or not yet ripe."). Some agencies have provided their own explanations of the tiering process. *See, e.g.*, 33 C.F.R. § 230.13 (2014) (ACOE's tiering regulations) & 23 C.F.R. § 771.111 (2014) (DOT's tiering regulations).

[43] Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, 46 Fed. Reg. 18,026, as amended (Mar. 23, 1981), *available at* http://energy.gov/nepa/downloads/forty-most-asked-questions-concerning-ceqs-national-environmental -policy-act.

[44] BLM, WIND ENERGY FINAL PROGRAMMATIC ENVIRONMENTAL IMPACT STATEMENT (June 2005), *available at* http://www.windeis.anl.gov/documents/fpeis/index.cfm; BLM, RECORD OF DECISION FOR IMPLEMENTATION OF A

useless in terms of providing a basis for identifying specific areas in which wind energy should be developed, or in mitigating for wind project impacts.

In contrast, BLM finalized a PEIS and a ROD in 2012 that analyzed potential landscape-scale solar project deployments across 6 southwestern states.[45] The solar PEIS (sometimes called the "Western Solar Plan") included a high-level analysis that distinguished among public lands that were deemed to be unsuitable for solar development, other lands that appeared to be desirable for such development (referred to as "solar energy zones"), and "variance" lands in which developers would need to bear a burden of proving their appropriateness for solar projects. The Western Solar Plan also introduced the concept of matching landscape-scale mitigation planning with solar energy zones, as a way to expedite project permitting and achieve more meaningful mitigation impacts.[46] The Western Solar Plan demonstrated the strong leveraging power that programmatic EISs can provide in planning activities across broad landscapes.

Updated and more detailed regulations would support more effective and meaningful uses of PEISs. Specifically, we recommend that NEPA regulations be amended to better define the relationship between a PEIS and a project-level EIS and explain when tiering is both appropriate and useful. Guidelines describing when and how to develop a PEIS, and the roles and responsibilities of the agencies involved in the process, would also be helpful. We further recommend that the regulations clarify where and when issues may be deferred during the planning process and require a PEIS that defers issues to define the timeline, scale, and depth of the deferral and subsequent analysis.[47]

V. INTRODUCE MODERN TECHNOLOGY TOOLS AND DISCIPLINE INTO THE EIS PREPARATION PROCESS

As discussed above, NEPA plays a critical role in informing decision-makers about the potential environmental consequences of agency actions. Given that agencies have been preparing EISs for forty years, one might assume that the process has become more efficient over time, with agencies routinely using modern tools such as readily-searchable databases to avoid duplicating environmental analyses previously prepared by other agencies for similar types of projects, or for projects in the same region, and potentially impacting similar environmental resources. Likewise, one might assume that GIS mapping tools that are well populated with relevant data would provide an informational and presentational backbone for virtually all EISs. And when it comes to getting public input, an observer might assume that agencies are taking full advantage of electronic communications, including webinars and other internet-based tools, to share

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WIND ENERGY DEVELOPMENT PROGRAM AND ASSOCIATED LAND USE PLAN AMENDMENTS (Dec. 2005), *available at* http://windeis.anl.gov/documents/docs/WindPEISROD.pdf.

[45] BLM, FINAL SOLAR ENERGY DEVELOPMENT PROGRAMMATIC ENVIRONMENTAL IMPACT STATEMENT (SOLAR PEIS) (July 2012), *available at* http://solareis.anl.gov/Documents/fpeis/index.cfm; BLM, APPROVED RESOURCE MANAGEMENT PLAN AMENDMENTS/RECORD OF DECISION (ROD) FOR SOLAR ENERGY DEVELOPMENT IN SIX SOUTHWESTERN STATES 2, 37 (Oct. 2012), *available at* http://solareis.anl.gov/documents/docs/Solar_PEIS_ROD.pdf.

[46] Hayes, *supra* note 12, at 10019.

[47] THE NEPA TASK FORCE, *supra* note 41, at 42.

information and obtain input from the public at the scoping stage of a project, and then to more efficiently present solicit and receive public comments on draft portions of EISs.

Unfortunately, this is not the case. EISs frequently are prepared by single agencies, working with and through contractors, in a virtual vacuum that typically involves preparing EISs as unique, one-of-a-kind products from the "ground up." The same type of inefficiencies identified in Section III, above—including the failure to work cooperatively across agencies and to use the pre-application and scoping processes to focus the EIS on significant issues—carry through to the EIS process itself. The result is that, if anything, EISs for major projects have become even more inefficient, expensive and slow, over time. As noted above, modern EISs typically take 4.6 years to complete, span between 200 and 2,000 pages, and generally cost between $250,000 and $2 million.[48] And outliers are common, with some EISs covering thousands of pages across several volumes, in formats that can be impenetrable to agency decision-makers and the interested public.

This section proposes four straightforward reforms that would both streamline the EIS preparation process and produce a more effective product without compromising on environmental outcomes. These reforms work together with and build on other proposed reforms in this paper. The four proposed reforms involve: (1) using the scoping process to identify the significant issues that need to be analyzed in an EIS and encouraging agencies to present such analyses in a concise format; (2) setting up systems to enable access by agencies to robust, searchable databases and updated GIS mapping tools; (3) adding flexible timing to facilitate a more robust interface with interested parties; and (4) establishing performance criteria for EIS contractors and awarding contracts to contractors that use new tools to complete EISs in a more efficient and cost-effective manner.

A. Use the Scoping Process to Identify the Significant Issues that Need to Be Analyzed in an EIS and Encourage Agencies to Present Such Analyses in a Concise Format

The reform that may have the most significant impact on improving the quality of EISs is the reform discussed above in Section III—namely, using the scoping process to sort through the issues that should be evaluated in an EIS and then to identify the "significant" issues that should be analyzed in an EIS, and distinguish them from the secondary issues that can be deemphasized.[49] Narrowing the issues that the EIS must cover in detail to the significant environmental issues will markedly reduce the length and cost of preparing EISs, while producing documents that are more readable and effective.

While narrowing the issues that receive in-depth coverage in an EIS is a necessary step in improving the EIS process, more discipline also is needed in how agencies present their analyses in EISs. CEQ's regulations anticipate that agencies will construct concise, readable documents, with most EISs, according to the regulations, being less than 150 pages,[50] and with "[p]roposals

[48] THE NEPA TASK FORCE, *supra* note 41, at 66.
[49] As discussed above, we recommend that the lead agency go about this process in a disciplined way, and create a record during the scoping process that briefly explains the basis for selecting the issues that will receive primary attention in the EIS, so that courts have a basis for deferring to the agency's issue sorting process.
[50] 40 C.F.R. § 1502.7.

of unusual scope or complexity . . . normally be[ing] less than 300 pages."[51] In the same vein, CEQ's regulations suggest that EISs "shall be analytic rather than encyclopedic."[52]

Obviously, CEQ's guidance has become the exception, rather than the rule, in an age of bloated EISs. The question of whether page limits should be enforced is a topic that frequently arises in the context of potential NEPA reforms. A 2003 report to CEQ on NEPA modernization, for example, listed strict EIS page limits as an additional area of consideration that was not recommended at the time.[53] Some have expressed concerns that limits on agencies will make environmental review less effective.[54] Agency lawyers may fear that shorter EISs will leave them more vulnerable to lawsuits.

We recommend that after agencies adopt our proposed new scoping regulations and begin to produce EISs that are better tailored to the issues that deserve extended analysis in an EIS, the Interagency Council should revisit the question of whether additional guidance should be provided regarding expected page limits for EISs. The issue should be combined with an equally important evaluation of the readability and effectiveness of EISs: do EISs present their analyses and conclusions in a format that enables decision-makers to quickly grasp the essence of the analyses? Are graphs, charts, and summaries used effectively in EISs? As all reviewers of complex documents know, the quality of the presentation in an EIS can be as important as the quantity of material set forth in an EIS. Both must receive attention as part of a serious NEPA reform initiative.

B. Set up Systems to Enable Access by Agencies to Robust, Searchable Databases and Updated GIS Mapping Tools

As noted above, agencies and their contractors typically work in "silos" as they prepare EISs. They rarely look across other agencies to determine whether relevant analyses of environmental impacts pertinent to the project at issue already has been undertaken (or may even be underway, on a parallel track) by other agencies. And on the limited occasions when agencies or contractors are inclined to make such inquiries, they find it tough going: there currently is no centralized database of searchable EISs, much less a database that is sorted by environmental issue, region, or type of project. This leads to costly, time consuming, and unnecessarily redundant efforts. EIS drafters often reinvent the wheel because they are unaware of or do not have access to the directly relevant analyses that have been completed by others.

The same is true when it comes to the effective use of GIS-based mapping tools. GIS-based maps embedded with location-specific environmental information can present highly relevant information in an easily digestible format that illuminates accompanying narrative analyses. The USGS has long been a leader in developing GIS-based maps, and the Federal Geographic Data Committee ("FGDC") has provided a cross-agency mechanism to facilitate adoption of compatible GIS standards across the federal government. Meanwhile, private parties such as

[51] *Id.*
[52] 40 C.F.R. § 1502.2.
[53] THE NEPA TASK FORCE, *supra* note 41, at 94.
[54] *See, e.g.*, Letter from Prof. Robert W. Adler, et al., to Members of the United States Senate, Strike Harmful Streamlining Provisions in S.601, (Apr. 8, 2013).

Google and ESRI have brought GIS-based tools into the mainstream, continually making their use more accessible and useful.

Despite these advances, most EISs underutilize GIS mapping tools when presenting their analyses of potential environmental impacts. Just as there are few searchable databases of previous EIS analyses, so too is there no easy access for most agencies to GIS mapping services. In addition, while resource agencies have gathered large treasure troves of relevant, location-specific environmental data, much of that data have not uploaded into a GIS-ready format.

This is an unacceptable state of affairs. Priority attention needs to be given to creating easy access to searchable databases of prior EISs and related environmental analyses so that EIS preparers do not need to duplicate efforts and can focus on updating relevant analyses, rather than starting from scratch. Likewise, cabinet secretaries should direct their agencies to routinely convert environmental data into a GIS-compatible format, and they should establish a shared GIS mapping service that all agencies can cost-effectively access when preparing EISs.

There has been some movement in these directions, but improvements have been limited. For example, the Environmental Protection Agency posts Portable Document Format (PDF) copies of both recent draft and recent final EISs on its website.[55] This represents some forward movement, although the PDF format limits agencies' ability to easily mine information from these documents.

In addition, in connection with the Administration's infrastructure permitting initiative, some agencies that have begun to produce searchable EISs, and the Steering Committee on Federal Infrastructure Permitting and Review Process Improvement recently called for development of a government-wide data sharing policy and the expanded availability of IT and GIS tools to assist with NEPA and permitting processes.[56] And with regard to GIS mapping services, the FGDC and Departmental Chief Information Officers ("CIOs") have discussed launching a centralized GIS mapping service, rather than creating siloed mapping services in multiple Departments.

While these are good initial steps, we recommend the current fledgling and fragmented attempts to facilitate information sharing and mapping services be transformed into an organized, government-wide NEPA reform initiative. To prevent redundant work, we recommend that CEQ or the newly created Interagency Council create a centralized EIS database that is more comprehensive than the one EPA currently runs and require that agencies submit documents and data to it. This would make EIS drafting more efficient by making it easier to build on past EISs. The Interagency Council can also help agencies make full use of the database by providing a forum for collaboration on EISs to help avoid redundancy. Steps that could maximize the functionality of this database include:

- All EISs should be comprehensively tagged along several dimensions. These dimensions should include the following: locations (region, state, county, etc.); agency or agencies; impacts analyzed (change in stream temperature, change in stream flow rate, destruction of sage grouse habitat, etc.); project type (pipeline permit, highway funding, etc.).

[55] *See* EPA ENVIRONMENTAL IMPACT STATEMENT DATABASE, http://www.epa.gov/compliance/nepa/eisdata.html? (last visited June 15, 2014).
[56] *See* STEERING COMMITTEE ON FEDERAL INFRASTRUCTURE PERMITTING AND REVIEW PROCESS, *supra* note 34, at 23-27.

- All of the data collected for an EIS should be uploaded with the EIS. Seeing all the data collected for an EIS will prove much more helpful than EPA's current practice, which allows access only to data presented in appendices for the major points in an EIS.
- The data should be uploaded in reusable formats. Drafters should not only upload PDF appendices that allow users to look at the data. They should also upload spreadsheet files and GIS files containing the data. This way, the data can be reused and reinterpreted both by decision-makers analyzing the first EIS and by later EIS drafters. Another benefit of requiring GIS maps is that decision-makers will be better able to visualize and analyze data when EISs are submitted.
- Related documents should be uploaded with EISs where possible. If an EIS cites to a public domain study or government document, a copy of that study or document should be uploaded with the EIS or linked to in it. This will cut down on time spent searching for useful documents.
- All of these data should be uploaded, publicly available, and searchable both by internal keywords and the tags placed on EISs. Every step making this data more accessible and useful will make EIS drafting more efficient and less redundant, which will cut both costs and time. This will allow more focus on NEPA's goal: informing decision-makers so they can take actions armed with knowledge of environmental impacts.

Not surprisingly, current NEPA regulations, which were developed before many of these tools were invented, do not require agencies to take any of these steps.[57] Accordingly, to ensure consistent adoption of these tools across the agencies, we recommend that the Administration promulgate new regulations to create a central, easily accessible repository of searchable EIS databases with appropriate tagging, etc. New regulations also should establish guidelines for capturing environmental data in a GIS format and providing a central service for agencies to easily access GIS mapping tools with relevant data layers. The regulations should formalize the proposed Interagency Permitting and Review Council, and use it as the institutional structure to provide input on and oversee the use of these new tools.

C. Add Flexible Timing to Facilitate a More Robust Interface with Interested Parties

The current NEPA process for obtaining public input in the EIS process is quite stilted. CEQ's regulations at 40 C.F.R. § 1506.6 calls on agencies to "[m]ake diligent efforts to involve the public in preparing and implementing their NEPA procedures" and to "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." Once the EIS is underway, however, NEPA regulations anticipate that the responsible agency will release a draft EIS in one fell swoop, and take in all comments on the draft at one time.[58] By providing only a

[57] For example, the regulations governing timing of EPA action state that the agency shall publish notice of Environmental Impact Statements in the Federal Register each week. 40 C.F.R. § 1506.10. That regulation was last updated during the Carter Administration, so it should come as no surprise that online databases are not mentioned. For its part, the Department of Energy's regulations state that it will send final EISs to agencies, clearinghouses, and interested persons. 10 C.F.R. § 51.118. Simply put, regulations have not been updated for the digital age.

[58] 40 C.F.R. § 1503.1. "(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 . . .

single opportunity for comments on a multi-volume draft EIS that typically has been fully baked by the time the entire draft is ready for release, the public has only a limited opportunity to have meaningful input on the draft EIS.[59]

We recommend revising the NEPA regulations to allow lead agencies to release portions of the draft EIS in segments, so as to allow for rolling public comments, and to better provide an opportunity for EIS preparers to incorporate public comments on the draft.

D. Establish Performance Criteria for EIS Contractors and Award Contracts to Contractors that Use New Tools to Complete EISs in a More Efficient and Cost-Effective Manner

Agencies and project proponents typically hire third party contractors to prepare EISs and related documentation. The status quo provides contractors with little or no incentive to apply new tools to draw on the content of other EISs, to use GIS mapping services, to use internet-based techniques to solicit input from other agencies or the public, or the like. Indeed, to the contrary, many litigation wary agencies and project proponents have come to expect that when contractors prepare EISs, the process will be slow, expensive, and include a large volume of original analyses on a broad array of potential environmental impacts. Contractors are only too happy to satisfy these expectations.

NEPA reforms will be slow to take hold unless current EIS contractor practices change. Simply put, contractors need to become part of the solution, rather than being identified as part of the problem, as they are now.

We recommend that the Interagency Permitting and Review Council work with leading EIS contractors to flesh out the reforms recommended in this submittal and solicit their assistance in implementing the reforms, based on their experience in working with agencies, information services, and the like. Following these collaborative discussions, the Interagency Council should take steps to incentivize contractors to adopt NEPA reforms. By way of example, contractors that demonstrate a willingness and flexibility to push forward with reforms that improve EISs' speed, cost-effectiveness and focus should be rewarded with new work. And, over time, contractors that take a "business as usual" approach to preparing EISs should find that they are no longer doing business with the government.

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(2) Request comments of . . . [a]ny agency which has requested that it receive statements on actions of the kind proposed . . .
(4) Request comments from the public . . . ."

[59] Although pro forma comments also may be allowed when the final EIS is released, those post-EIS comments rarely have an impact on the Record of Decision that typically follows release of the final EIS—the key opportunity for input is at the draft EIS stage. 40 C.F.R. § 1503.1. "(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."

VI. REDUCE EXPOSURE TO JUDICIAL INTERVENTION BY INSTITUTING REFORMS

A. Background

NEPA is principally a procedural rather than a substantive statute and, as a result, it provides a convenient hook for opponents of projects to bring legal challenges when agencies fail to follow the steps laid out in the statute and in subsequent agency regulations. Section 102(2) contains the procedural mandates, which include the basis for Environmental Impact Statements.[60] In *Calvert Cliffs' Coordinating Committee, Inc. v. Atomic Energy Commission*,[61] Judge Skelly Wright of the D.C. Circuit set an imposing tone for procedural review of agency actions under NEPA:

> Of course, all of these Section 102 duties are qualified by the phrase 'to the fullest extent possible.' We must stress as forcefully as possible that this language does not provide an escape hatch for foot-dragging agencies; it does not make NEPA's procedural requirements somehow 'discretionary.' Congress did not intend the Act to be such a paper tiger. Indeed, the requirement of environmental consideration "to the fullest extent possible" sets a high standard for the agencies, a standard which must be rigorously enforced by the reviewing courts.[62]

Following the landmark *Calvert Cliffs'* decision, other federal courts took up the mantel of enforcing NEPA's procedural requirements and "created, in effect, a virtual 'common law' of detailed NEPA procedural requirements."[63] Much of that "common law" was subsequently codified in regulations issued by the CEQ. Other agencies issued their own regulations governing procedures under NEPA, which they were then bound to follow, and which could serve as further hooks for litigation.[64]

Although the courts have consistently provided a forum to hear claims regarding alleged procedural defects in preparing NEPA-required environmental reviews, the Supreme Court has "slammed the door" on attempts to use NEPA as the basis for challenging substantive policy

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[60] 42 U.S.C. 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—
. . .
(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.").

[61] *Calvert Cliffs' Coordinating Comm., Inc. v. U. S. Atomic Energy Comm'n*, 449 F.2d 1109 (D.C. Cir. 1971).

[62] 449 F.2d at 1114.

[63] Richard Lazarus, *The National Environmental Policy Act in the U.S. Supreme Court: A Reappraisal and a Peek Behind the Curtains*, 100 GEO. L.J. 1507, 1518 (2012).

[64] *See Parker v. United States*, 448 F.2d 293 (10th Cir. 1971); *Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Ry. Co.*, 284 U.S. 370 (1932).

choices made by decision-makers.[65] In *Stryker's Bay Neighborhood Council v. Karlen*, a case involving challenges to a low-income housing project planned by the U.S. Department of Housing and Urban Development, the Court held that "once an agency has made a decision subject to NEPA's procedural requirements, the only role for a court is to insure that the agency has considered the environmental consequences; it cannot interject itself within the area of discretion of the executive as to the choice of the action to be taken."[66]

The combination of the courts' openness to hearing procedural challenges under NEPA, and the general view that the NEPA process includes a number of procedural trip wires has led to a common perception that procedurally-based challenges under NEPA are frequent, and often successful in delaying or blocking projects for which EISs have been prepared under NEPA.

This perception is not, in fact, accurate. Less than one percent of the federal actions generating environmental reviews under NEPA are challenged in court and, in the large majority of those cases, courts have either dismissed the case or upheld the procedural adequacy of the challenged NEPA reviews.[67] According to annual NEPA litigation surveys published by CEQ, fewer than 175 NEPA cases have been filed each year since 2001.[68] Only ninety-four were filed in 2011 (the latest year for which the survey has been published), resulting in only twenty-one remands or injunctions.[69] Eighty-seven were filed in 2010, with only sixteen remands or injunctions.[70] When agencies abide by the procedures set forth by NEPA and its attendant regulations, courts follow general principles of administrative law and typically show great deference to agency fact-finding and decision-making.[71]

B. Attempts to Limit Judicial Review: A Misguided "Reform"

Although the courts are rarely sympathetic to NEPA-based challenges, the misperception that NEPA provides an easy avenue to delay or block projects on non-substantive, procedural grounds has led to two unfortunate results: (1) attempts to restrict or eliminate judicial review under NEPA; and (2) a tendency by lawyers and consultants to invest an extraordinary amount of time and money in "over-papering" EIS's to insulate them from judicial challenges.

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[65] Oliver A. Houck, *Is That All? A Review of The National Environmental Policy Act, An Agenda for the Future by Lynton Keith Caldwell*, 11 DUKE ENVTL. L. & POL'Y F. 173, 180 (2000) (book review).
[66] 444 U.S. 223, 227-28 (1980) (internal quotation marks omitted).
[67] ROBERT G. DREHER, NEPA UNDER SIEGE: THE POLITICAL ASSAULT ON THE NATIONAL ENVIRONMENTAL POLICY ACT 15 (2005), *available at* http://www.arcticgas.gov/sites/default/files/documents/2005-nepaundersiege.pdf.
[68] NATIONAL ENVIRONMENTAL POLICY ACT – LITIGATION, http://ceq.hss.doe.gov/legal_corner/litigation.html (last visited June 6, 2014).
[69] 2011 LITIGATION SURVEY, http://energy.gov/sites/prod/files/2013/09/f2/2011_NEPA_Litigation_Survey_Final.pdf (last visited June 6, 2014).
[70] 2010 LITIGATION SURVEY, http://energy.gov/sites/prod/files/2013/09/f2/2010_NEPA_Litigation_Survey_Final.pdf (last visited June 6, 2014).
[71] Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (setting an arbitrary and capricious standard for judicial review of agency findings); s*ee also Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378 (1989) ("When specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive."); *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983) ("[A] reviewing court must remember that [the agency] is making predictions, within its area of special expertise, at the frontiers of science. When examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential.").

On a relatively regular basis, for example, some factions in Congress attempt to redress NEPA's perceived litigation problem by reducing or cutting off judicial review under transportation legislation, energy legislation, or other statutory contexts in which NEPA reviews often are required. The Department of the Interior testified recently (in June 2014), for example, against a congressional proposal (H.R. 4293) that would exclude new natural gas pipelines and compressors from NEPA review. Because the legislation would completely override NEPA, it is unlikely to become law. However, more stealthy attacks on NEPA can, and have, become law. To illustrate, the Healthy Forests Restoration Act of 2003,[72] limited judicial review of USFS and BLM projects aimed toward reducing hazardous fuels, by creating a "special administrative review process" that petitioners must exhaust before bringing claims in federal court—creating a new burden petitioners before final agency decision—and by curtailing courts' ability to issue preliminary injunctions.[73]

A 2006 Report from a Task Force established by the U.S. House of Representatives Resources Committee to present recommendations for reforming NEPA reflects the antipathy by some in Congress toward judicial review under NEPA. In order to address what the Task Force viewed as "needless litigation brought only to delay or derail projects" which caused "overall negative effects on federal government decision-making,"[74] it recommended "amend[ing] NEPA to create a policy declaration on litigating under the statue," limiting litigation to cases in which all of the following elements are present:

- A clear demonstration that an agency made a decision without using the best available information and science.
- An aggrieved party has been involved throughout the process in order to have standing in an appeal.
- Challenges should have been filed within 180 days of notice of a final decision on the federal action.[75]

These types of restrictions on judicial review, particularly the first two of the three elements, arguably would severely curtail the ability of stakeholders affected by agency decisions to bring lawsuits even when agencies were clearly in violation of NEPA or their own regulations. Constraining normal statutes of limitations and establishing new standing requirements would be marked departures from long-standing rights under well-established administrative law principles. With regard to standing, for example, plaintiffs typically have standing—whether or not they participated in the EIS process—as long as they can show "injury in fact" because of the government's action, that they are within the zone of interest of NEPA, and that they are not asserting a generalized grievance.[76]

Although NEPA tends to attract Congressional proposals that depart from well-established principles of judicial review, it should be noted that there might be room for some common sense and less radical Congressional tweaking of NEPA. The recently-enacted Water Resources

[72] Pub. L. No. 108-148, 117 Stat. 1898 (2003).
[73] *Id.* § 105 & 106.
[74] DREHER, *supra* note 67, at 9.
[75] *Id.* at 18-19.
[76] 13B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3531.10 (3d ed. 2014).

Reform and Development Act, for example, initially included proposed NEPA provisions that were broadly objectionable[77] but, following a long process of negotiation and compromise, the final legislation included sensible language that reflects many of the administrative reforms recommended in these comments, including calling on agencies to undertake coordinated project reviews,[78] to adopt programmatic approaches that "eliminate[] repetitive discussions of the same issues,"[79] and to establish of an electronic database for reporting under NEPA.[80]

C. Reducing Exposure to Judicial Intervention by Instituting NEPA Reforms

As discussed above, generalized concerns about judicial review of EISs have prompted agencies to overcompensate by preparing "encyclopedic" and "overly detailed and lengthy EISs."[81] Ironically, this litigation avoidance tactic misses the mark. While litigation risk under NEPA tends to be exaggerated, there are three specific litigation vulnerabilities that are not addressed by over-papered EISs, but which can be shored up by instituting the reforms described in this submittal. Those three vulnerabilities are:

(1) When agencies seek to avoid the cost and delays of preparing EISs by proceeding with EAs and FONSIs, they risk court disapproval.

(2) When agencies fail to draw in interested agencies early in the NEPA process, they risk getting critical comments from disgruntled agencies late in the NEPA process.

(3) When agencies fail to distinguish among significant and insignificant issues, they risk having courts second-guess the adequacy of the analysis devoted to insignificant issues.

Unlike many generalized litigation fears, these circumstances represent actual litigation vulnerabilities, as explained below. In each case, the reforms recommended in this submittal should reduce these potential litigation risks.

1. EAs versus EISs

Although concerns about judicial review tend to be overblown, such concerns can have a deleterious impact on the EIS process by driving EIS drafters to produce documents that are unnecessarily and counterproductively long and impenetrable. As one NEPA scholar noted: "To safeguard against litigation challenging the adequacy of the environmental impact statement . . . , agencies often substitute quantity for quality, producing large, costly, and uninformative documents."[82] With the goal of producing "bullet proof" documents capable of withstanding

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[77] Adeline Rolnick, *Five Ways the Water Resources Development Act Harms Wildlife*, NATIONAL WILDLIFE FEDERATION (Apr. 4, 2013), http://blog.nwf.org/2013/04/five-ways-new-water-legislation-harms-wildlife/.
[78] H.R. 3080, 113th Cong. § 1005(c)(2) (2014), *available at* https://www.govtrack.us/congress/bills/113/hr3080/text.
[79] *Id*. § (f)(1)(A).
[80] *Id.* § (g)(5)(A). It should be noted that the final WRDA legislation also reduces the statute of limitations for claims seeking judicial review of an approval of a permit or project by a Federal agency to three years. *Id.* § (k)(1)(A).
[81] Karkkainen, *supra* note 1, at 918 nn.62-63.
[82] *Id.* at 903.

legal challenges, EIS's can reach thousands of pages, and the most important issues and analyses can become lost in the volumes of boilerplate and/or useless material.[83]

One of the unfortunate results of making the EIS process much longer and more complex than may be necessary or appropriate is that some agencies go to great lengths to avoiding EISs where possible, leading to what is now an overwhelming predominance of EAs and FONSIs in NEPA practice.[84] This tendency exposes agencies to a new and arguably greater litigation risk: deciding not to undertake an EIS despite it being necessary to do so (that is, when a major federal action will "significantly affect" the environment).[85] At least for the first nineteen years following NEPA's passage, "disagreement about whether a proposed action [had] 'significant effects' [was] the most frequent reason for NEPA litigation"[86] – and that trend seems to have continued up to today. In a study of NEPA litigation involving the USFS from 1970 to 2001, 55% of the cases brought at the District Court level involved claims by the plaintiff that an EA or an EIS should have been prepared but was not; 35% of appellate cases disputed the decision not to prepare an EA or EIS.[87]

The reforms set forth in this submittal should significantly improve the EIS preparation process and enable it to proceed in a materially more timely and cost-effective manner. If the reforms have this anticipated effect, agencies may be more willing to move forward with EISs in borderline cases, rather than taking what historically has been a significant litigation risk by attempting to fulfill NEPA's requirements through an EA and FONSI.

2. Reducing Critical Comments from Other Agencies

Another area in which agencies' tendencies to take NEPA short cuts can increase litigation risk involves lead agencies' failure to account for the concerns of other agencies early in the EIS process. When all relevant agencies are not folded into an EIS process early, they may file comments during the EIS's public comment period that criticize the EIS's failure to address issues that they deem to be relevant. Judges tend to give those agencies deference just as they give deference to the lead agency's fact-finding and expertise.[88] In fact, "the supportive or critical nature of comments from agencies with environmental expertise often predicts the outcome of NEPA litigation."[89] Although courts are hesitant (and, as explained above, forbidden by law) to substitute their own substantive judgments for the agency that prepared the EIS, "courts frequently conclude that an agency's EA or EIS violated NEPA by failing to address and respond to issues raised in adverse agency comments, or by failing to sufficiently remedy inadequacies highlighted by adverse comments."[90] That is why it is critical for all agencies with a stake in the proposed action, or relevant expertise, to participate in the scoping and drafting

[83] *Id.* at 918.
[84] *Id.* at 920.
[85] 42 U.S.C. § 4332(2)(C) (2012).
[86] Dina Bear, *NEPA at 19: A Primer on an "Old" Law with Solutions to New Problems*, 19 ENVTL. L. REP. 100060, 100064 (1989), *available at* http://elr.info/sites/default/files/articles/19.10060.htm.
[87] Shorna R. Broussard & Bianca D. Whitaker, *The Magna Charta of Environmental Legislation: A Historical Look at 30 Years of NEPA-Forest Service Litigation*, 11 FOREST POL'Y & ECON. 134, 138 (2009).
[88] Michael C. Blumm & Marla Nelson, *Pluralism and the Environment Revisited: The Role of Comment Agencies in NEPA Litigation*, 37 VT. L. REV. 5 (2012).
[89] *Id.* at 7.
[90] *Id.* at 11.

processes as the EIS is being prepared.

Through our reform suggestions in this paper, we address this vulnerability by bringing potentially critical agencies on board earlier in the planning process. With the institutional assistance of the new Interagency Permitting and Review Council, lead agencies should be able to flush out serious concerns by other agencies early in the process and address them. If the system is working properly, it should be very rare that other federal agencies file formal comments on a draft EIS. They will no longer be on the outside, looking in, but instead will have been involved in working with the lead agency through the pre-application process, the scoping process, and the drafting process.

3. Focusing EISs on Significant Issues

With regard to the scoping process, we have recommend above that agencies use scoping to identify issues of "significance," which should be analyzed in depth in an EIS, and those that can be deemphasized because they are less important. Our proposed scoping reform should provide a better defense against judicial attack because courts are likely to defer to the agency's sorting judgment – and its determinations as to which issues are the most important – just as courts defer to agency fact finding and decisions within the agency's expertise. In that regard, courts have interpreted their oversight of federal agencies under NEPA to include "ensur[ing] that the agency has taken a 'hard look' at the potential environmental consequences of the proposed action. . . . [Courts] employ a rule of reason standard to determine whether the EIS contains a reasonably thorough discussion of the significant aspects of the probable environmental consequences."[91] A more precise sorting regulation could serve (1) to clarify what it means for an agency to take a "hard look" at potential environmental consequences, and (2) to give agencies the express power to determine, within the bounds of rationality, what are the "*significant* aspects of the probable environmental consequences."

As noted above, current NEPA regulations indicate that agencies should identify, and analyze in depth, the significant environmental issues at stake in the proposed action, and to deemphasize the insignificant issues. As recommended above, however, the regulations should be revised to be more directive and compulsory. In particular:

- A new regulation should explicitly require the lead agency to identify the issues that it concludes, in consultation with other agencies, are "significant" and which therefore should receive detailed attention in an EIS, and other issues that do not rise to the "significance" level and should be deemphasized.
- To add discipline and institutional assistance in the process, we recommend that the new regulation require the lead agency to use the scoping process—including the solicitation of public input—to generate a list of the issues that rise to the level of "significance" for these purposes and to share the list with other agencies and to the Interagency Permitting and Review Council, as described below.

[91] *League of Wilderness Defenders-Blue Mountains Biodiversity Project v. U.S. Forest Serv.*, 689 F.3d 1060, 1075 (9th Cir. 2012)(citations and internal quotations omitted).

- The new regulation should allow for issues to move onto and off of the list of most significant issues during the EIS drafting process, with the lead agency making a brief written record of decisions to treat certain issues as "significant" for EIS purposes.

VII. CONCLUSION

There is a clear pathway for the Administration to adopt sensible NEPA reforms that will bring administration of NEPA into the 21st century, while advancing the original purposes of the statute. Over the past forty years, we have gained significant experience in administering NEPA. We now have a track record of experimentation and best practices that provides the basis for instituting cross-governmental, common sense NEPA reforms that will deliver EISs that provide decision-makers with pertinent and informative evaluations of the potential environmental impacts of major projects on a timely and cost-effective basis. We hope that CEQ will consider moving forward with the proposed suite of reforms described in this paper.