

Chapter 4  
WHAT EVERY LAND PROFESSIONAL SHOULD  
KNOW ABOUT NEPA

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**§ 4.01 Introduction**

The National Environmental Policy Act (NEPA)<sup>1</sup> is the principal federal charter for the protection of the environment.<sup>2</sup> The legislation commands every federal agency to consider the effect of its proposed actions before authorizing “major Federal actions significantly affecting the quality of the human environment.”<sup>3</sup> The NEPA obligation is inherently procedural rather than substantive. The statute requires federal agencies to look before they leap, but does not obligate an agency to reach a decision that protects the environment.

That procedural mandate plays a significant role in the permitting and approval of more natural resources development projects than perhaps any other federal law. It requires prior review and analysis of nearly every proposal to develop oil and gas, coal, and other minerals located on federal lands, and nearly every proposal to develop federal minerals located under fee surface. Land professionals commonly encounter NEPA in formulating proposals to develop federal minerals, or when development of fee or state minerals requires a federal permit or a federal authorization such as a right-of-way across federal lands.

This chapter provides a practical overview of NEPA’s statutory and regulatory requirements for the land professional.<sup>4</sup> Section

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<sup>1</sup> 42 U.S.C. §§ 4321-4370f (elec. 2007).

<sup>2</sup> 40 C.F.R. § 1500.1(a) (elec. 2007).

<sup>3</sup> 42 U.S.C. § 4332(2)(C) (elec. 2007).

<sup>4</sup> For additional resources see A. John Davis & Constance K. Lundberg, “NEPA and Oil and Gas Development on Federal Lands: A Primer for Landmen,” *NEPA and Federal Land Development* 14-1 (Rocky Mt. Min. L. Fdn. 2006); Joan E. Drake, “The NEPA Process—What Do We Need to Do and When?,” *NEPA and Federal Land Development* 3-1 (Rocky Mt. Min. L. Fdn. 2006); Denise A. Dragoo, “Compliance With Land Use Planning and NEPA Prior to Issuance of Federal Oil and Gas Leases,” *Regulation and Development of Coalbed Methane* 15A-1 (Rocky Mt. Min. L. Fdn. 2002).

4.02 summarizes the statute and when it applies. Section 4.03 describes the major milestones in the public NEPA process. Section 4.04 examines the applicability and the use of the categorical exclusions from NEPA for oil and gas development on federal lands and minerals provided in the Energy Policy Act of 2005.<sup>5</sup> Section 4.05 provides practical tips on how the land professional can participate more effectively in the NEPA process and help achieve NEPA's aim of promoting "better decisions" by agencies rather than simply "excellent paperwork."<sup>6</sup>

#### § 4.02 NEPA Overview

NEPA declares a national environmental policy to "prevent or eliminate damage to the environment."<sup>7</sup> This substantive policy objective is accomplished through "action-forcing" procedures. NEPA requires federal agencies to take a "hard look" at the environmental consequences of a proposed action.<sup>8</sup> The "hard look" requirement is procedural—it requires federal agencies to "carefully weigh environmental considerations and consider potential alternatives to the proposed action *before* the government launches any major federal action."<sup>9</sup>

NEPA's procedural framework seeks to achieve two goals. First, NEPA provides a mechanism for federal agencies to take into account environmental values by considering the environmentally significant aspects of a proposed action before making a decision on the proposal.<sup>10</sup> Second, NEPA guarantees that the public has a role in the federal decision making process by requiring notice of

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<sup>5</sup> Pub. L. No. 109-58, 119 Stat. 594 (codified at 42 U.S.C. § 15942 (elec. 2007)).

<sup>6</sup> 40 C.F.R. § 1500.1(c) (elec. 2007).

<sup>7</sup> 42 U.S.C. § 4321 (elec. 2007).

<sup>8</sup> 40 C.F.R. § 1502.1 (elec. 2007); *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976); *Citizens for Alternatives to Radioactive Dumping v. U.S. Dep't of Energy*, 485 F.3d 1091, 1098 (10th Cir. 2007).

<sup>9</sup> *Ilio'ulaokalani Coal. v. Rumsfeld*, 464 F.3d 1083, 1093 (9th Cir. 2006) (quoting *Lands Council v. Powell*, 395 F.3d 1019, 1026 (9th Cir. 2005)) (emphasis added).

<sup>10</sup> 40 C.F.R. §§ 1501.2, 1502.2(g) (elec. 2007) (the NEPA process is intended to "serve as the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made"); *Pat River Tribe v. U.S. Forest Serv.*, 469 F.3d 768, 781 (9th Cir. 2006).

proposed actions, public involvement, and opportunities for public comment.<sup>11</sup>

### [1] NEPA is Procedural

NEPA prescribes a process, not an outcome.<sup>12</sup> Although NEPA promotes “fully informed and well-considered decision[s],”<sup>13</sup> nothing requires federal agencies to reach a particular decision or even to mitigate the impacts of their actions.<sup>14</sup> The statute does not impose substantive limits on agency conduct.<sup>15</sup> Once an agency adequately discloses the environmental consequences of a proposed action, NEPA does not place any additional constraints on the implementation of that action.<sup>16</sup> NEPA only “prohibits uninformed—rather than unwise—agency action.”<sup>17</sup> Nothing within the statute, or the regulations promulgated by the agency charged with its implementation,<sup>18</sup> requires an agency to approve—or disapprove—a particular natural resource development proposal.

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<sup>11</sup> 40 C.F.R. § 1500.1(b) (elec. 2007); *Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752, 768-69 (2004).

<sup>12</sup> *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350-51 (1989); *Dep’t of Transp.*, 541 U.S. at 756.

<sup>13</sup> *Strycker’s Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227 (1980); *Citizens’ Comm. to Save Our Canyons v. U.S. Forest Serv.*, 297 F.3d 1012, 1022 (10th Cir. 2002).

<sup>14</sup> *Robertson*, 490 U.S. at 350-51 (stating that as long as the procedural requirements were met, the Forest Service would not have violated NEPA if it decided that the benefits of downhill skiing justified issuance of a special use permit, notwithstanding even 100% loss of the mule deer herd).

<sup>15</sup> *Pennaco Energy, Inc. v. U.S. Dep’t of the Interior*, 377 F.3d 1147, 1150 (10th Cir. 2004) (quoting *Friends of the Bow v. Thompson*, 124 F.3d 1210, 1213 (10th Cir. 1997)).

<sup>16</sup> *Silverton Snowmobile Club v. U.S. Forest Serv.*, 433 F.3d 772, 780 (10th Cir. 2006); see *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976) (stating “[t]he only role for a court is to insure that the agency has taken a ‘hard look’ at environmental consequences”).

<sup>17</sup> *Robertson*, 490 U.S. at 350-51; *N. Alaska Env’tl. Ctr. v. Kempthorne*, 457 F.3d 969, 975 (9th Cir. 2006) (a reviewing court will analyze the agency’s decision under the “arbitrary and capricious” standard).

<sup>18</sup> The Council on Environmental Quality (CEQ) administers NEPA and is responsible for promulgating regulations related to NEPA that are binding on federal agencies. See 42 U.S.C. §§ 4342, 4344(3) (elec. 2007); 40 C.F.R. §§ 1501-1508 (elec. 2007); *Colo. Wild v. U.S. Forest Serv.*, 435 F.3d 1204, 1209 (10th Cir. 2006).

## [2] The “NEPA Trigger”

NEPA requires “all agencies of the Federal Government” to prepare an environmental impact statement (EIS) before authorizing any “major Federal action significantly affecting the quality of the human environment.”<sup>19</sup> NEPA does not apply to every natural resources development project; it applies only to those that involve “federal actions.”

### [a] When NEPA Applies—Federal Action

The statutory trigger for implementing NEPA’s procedural requirements is whether a proposal involves a “federal action.”<sup>20</sup> A “major Federal action” includes those “with effects that may be major and which are potentially subject to Federal control and responsibility.”<sup>21</sup> “Federal action” includes almost anything subject to federal approval, permit, decision, funding, or control. Examples include: federally authorized actions on federal lands, the adoption of agency rules or regulations, the adoption of federal programs or plans; the approval of specific projects; the issuance of federal permits or regulatory decisions; and federally funded or assisted activities.<sup>22</sup> The general rule is that federal action exists if the federal government can “exercise discretion over the outcome” and has “actual power to control the project.”<sup>23</sup>

Actions taken by private entities amount to federal actions subject to NEPA if “federal approval is the prerequisite to the action taken by the private actors” or if federal funding is required.<sup>24</sup> NEPA does not apply to a state or private action that is not subject to federal control, authorization, or funding.<sup>25</sup> However, a state or private action may be indirectly subject to NEPA if the

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<sup>19</sup> 42 U.S.C. § 4332(2)(C) (elec. 2007).

<sup>20</sup> *Id.*

<sup>21</sup> 40 C.F.R. § 1508.18 (elec. 2007).

<sup>22</sup> *Id.*

<sup>23</sup> *Sugarloaf Citizens Ass’n v. FERC*, 959 F.2d 508, 513-14 (4th Cir. 1992) (quoting *Md. Conserv. Council v. Gilchrist*, 808 F.2d 1039, 1042 (4th Cir. 1986) & *Sierra Club v. Hodel*, 848 F.2d 1068, 1089 (10th Cir. 1988)); *Ross v. Fed. Highway Admin.*, 162 F.3d 1046, 1051 (10th Cir. 1998).

<sup>24</sup> *Mayaguezanos por la Salud v. United States*, 198 F.3d 297, 302 (1st Cir. 1999); 40 C.F.R. § 1508.18(a), (b)(4) (elec. 2007).

<sup>25</sup> *Ka Makani ‘O Kohala Ohana Inc. v. Dep’t of Water Supply*, 295 F.3d 955, 960 (9th Cir. 2002).

action requires a federal authorization, permit, or funding that itself is subject to NEPA.<sup>26</sup>

**[b] Federal Actions Encountered by Land Professionals**

Virtually every activity involving federal lands or federal minerals (including development of federal split estate minerals) that requires approval from a federal agency is potentially subject to NEPA. Many mineral or energy development actions may involve federal lands because the federal government owns about 29% of the 2.27 billion acres that make up the United States. The Bureau of Land Management (BLM) administers a total of 700 million acres of subsurface mineral resources, which includes about 57 million acres of federal minerals under fee surface.<sup>27</sup> Where such lands and minerals exist, NEPA may require analysis before a federal agency may authorize development action.

Examples of major federal actions frequently encountered by land professionals include: the issuance of federal<sup>28</sup> leases; federal authorizations to develop oil and gas, coal, or hard rock minerals on federal lands or to develop federal minerals under fee surface; a BLM approval of an Application for Permit to Drill (APD); a BLM approval of a seismic shoot; a BLM or Forest Service approval of a surface use plan of operations for mineral development;<sup>29</sup> Bureau of Indian Affairs (BIA) and BLM approvals of leasing and development on Indian or allotted oil and gas leases; BIA approval of a minerals development agreement entered into by an Indian tribe with a non-Indian entity;<sup>30</sup> permits for the discharge of dredge or fill materials issued by the Army Corps of Engineers under section 404 of the Clean Water Act;<sup>31</sup> BLM or For-

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<sup>26</sup> *Id.*

<sup>27</sup> See Ezekiel J. Williams & Carolyn L. McIntosh, "The Growing Phenomenon of Challenges to Federal Land Use Plans in Natural Resources Development Litigation," 51 *Rocky Mt. Min. L. Inst.* 11-1, § 11.01[1] at 11-3 to 11-4 (2005).

<sup>28</sup> *Pennaco Energy, Inc. v. U.S. Dep't of the Interior*, 377 F.3d 1147, 1152 (10th Cir. 2004).

<sup>29</sup> *Kern v. BLM*, 284 F.3d 1062, 1067 (9th Cir. 2002).

<sup>30</sup> *Sac & Fox Nation v. Norton*, 240 F.3d 1250, 1263 (10th Cir. 2001); see 40 C.F.R. § 1508.18(b)(4) (elec. 2007).

<sup>31</sup> *Greater Yellowstone Coal. v. Flowers*, 359 F.3d 1257, 1266 (10th Cir. 2004).

est Service rights-of-way for natural gas pipelines;<sup>32</sup> and the preparation or revision of a BLM resource management plan.<sup>33</sup>

**[c] Non-Discretionary Federal Actions Do Not Amount to Major Federal Action**

NEPA is not triggered when a federal agency has no discretion over an action and the agency's role is merely "ministerial."<sup>34</sup> The underlying rationale is that when an agency is already required to take a particular action, "consideration of environmental factors will not—indeed, cannot—affect its decision."<sup>35</sup> For example, the Department of the Interior (DOI) is not required to comply with NEPA when issuing a mineral patent if all statutory prerequisites are satisfied,<sup>36</sup> or if a statute commands an agency to take land into trust for an Indian tribe.<sup>37</sup>

**[d] NEPA Does Not Apply to State or Private Action**

NEPA does not apply to a state or private action that is not subject to federal control, authorization, or funding. For example, a development project that is authorized entirely by the state and that is not subject to any federal permitting, oversight, or control is not subject to NEPA.<sup>38</sup> Hence, a proposal to develop fee or state minerals that does not require federal permits does not trigger NEPA because no major federal action is involved. A state or private action may be indirectly subject to NEPA if it requires a federal authorization, permit, or financing that itself triggers NEPA.<sup>39</sup> Fee mineral development may be indirectly subject to NEPA review—and potentially delayed during the preparation of a NEPA document—if the fee minerals may be accessed only via a federal right-of-way that requires NEPA review.

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<sup>32</sup> Fuel Safe Wash. v. FERC, 389 F.3d 1313, 1317 (10th Cir. 2004).

<sup>33</sup> 43 C.F.R. § 1601.0-6 (elec. 2007).

<sup>34</sup> Sierra Club v. Babbitt, 65 F.3d 1502, 1512 (9th Cir. 1995).

<sup>35</sup> City of New York v. Minetta, 262 F.3d 169, 178 (2d Cir. 2001).

<sup>36</sup> South Dakota v. Andrus, 614 F.2d 1190, 1194 (8th Cir. 1980).

<sup>37</sup> Sac & Fox Nation v. Norton, 240 F.3d 1250, 1263 (10th Cir. 2001); 25 C.F.R. §§ 211.7, 212.7, 225.24 (elec. 2007).

<sup>38</sup> Ka Makani 'O Kohala Ohana Inc. v. Dep't of Water Supply, 295 F.3d 955, 960 (9th Cir. 2002).

<sup>39</sup> See *id.*

### § 4.03 The NEPA Process

If a proposed action triggers NEPA, federal agencies generally undertake a three-tier analysis. First, if the proposed action is one that the agency or Congress has previously determined will not individually or collectively have significant impacts, the proposed action may fall within a categorical exclusion (CE). Actions subject to a CE are exempt from further NEPA analysis.<sup>40</sup> Certain federal oil and gas development activities are categorically excluded from review under NEPA.<sup>41</sup>

Second, if the action is not categorically excluded, and if it is not one that normally requires the preparation of an EIS, an agency may complete a less detailed environmental assessment (EA) to determine whether preparation of an EIS is required.<sup>42</sup> If the agency concludes in the EA that the proposed action will not significantly affect the environment, the agency may issue a finding of no significant impact (FONSI).<sup>43</sup>

Third, if a proposed action may have a significant impact on the human environment, the agency must prepare an EIS.<sup>44</sup> After preparing the EIS, the agency must issue a record of decision (ROD) summarizing which factors from the EIS the agency considered in making its final decision to select a particular alternative.<sup>45</sup> Each step of the NEPA process is discussed in greater detail below, and appears in graphic form at § 4.07, Appendix I.

#### [1] Categorical Exclusions from NEPA

A CE is “a category of actions which do not individually or cumulatively have a significant effect on the human environment.”<sup>46</sup> CEs may be established by regulation or by statute. CEs established by regulation must comply with the procedures outlined in the Council on Environmental Quality (CEQ) regulations. CEs

<sup>40</sup> 40 C.F.R. §§ 1500.4(p), 1500.5(k) (elec. 2007).

<sup>41</sup> See *infra* § 4.04.

<sup>42</sup> 40 C.F.R. §§ 1501.4(b), 1508.9 (elec. 2007).

<sup>43</sup> *Id.* §§ 1501.4(e), 1508.13; *City of Dana Beach v. FAA*, 485 F.3d 1181, 1189 (D.C. Cir. 2007).

<sup>44</sup> 42 U.S.C. § 4332(2)(C) (elec. 2007); 40 C.F.R. §§ 1501.4(c), (d), 1508.3, 1508.11 (elec. 2007).

<sup>45</sup> 40 C.F.R. § 1505.2 (elec. 2007).

<sup>46</sup> *Id.* § 1508.4.

created by statute are subject to the specific requirements set forth in the statute itself. Section 4.04 of this chapter addresses five statutory CEs that apply to federal oil and gas exploration and development.<sup>47</sup> This section of the chapter discusses CEs set forth in federal agency regulations.

The CEQ regulations require agencies to enact regulations that identify actions that do not individually or cumulatively have a significant impact upon the environment.<sup>48</sup> If an action falls within a CE described in a regulation, it is exempt from further NEPA analysis and the agency is not required to prepare an EA or EIS.<sup>49</sup> However, an action that is governed by a CE specified in a regulation (rather than a statute) may still require NEPA analysis in an EA or EIS if there are “extraordinary circumstances” that show the action may cause significant environmental impacts.<sup>50</sup> An agency’s decision to rely on a CE will only be set aside if a court determines that the decision was arbitrary and capricious.<sup>51</sup>

Proper application of a CE can greatly expedite the NEPA process. To determine whether a CE covers a proposed action, or whether the action may be modified to fit within a CE, one must first determine which federal agency is responsible for permitting or authorizing the project. The agency’s regulations, policies, manuals, and other materials should be reviewed to identify the potentially applicable CEs.<sup>52</sup> This can save time and money because if a proposal is subject to an exclusion and extraordinary circumstances do not exist, neither an EA nor an EIS is required.<sup>53</sup> If an exclusion applies, the NEPA process is further

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<sup>47</sup> 42 U.S.C. § 15942 (elec. 2007).

<sup>48</sup> 40 C.F.R. §§ 1508.4, 1500.4(p) (elec. 2007).

<sup>49</sup> *Id.* § 1508.4.

<sup>50</sup> *Id.*

<sup>51</sup> *Citizens’ Comm. to Save Our Canyons v. U.S. Forest Serv.*, 297 F.3d 1012, 1023 (10th Cir. 2002).

<sup>52</sup> Agency specific lists of categorical exclusions can be located at the following: Environmental Protection Agency, 40 C.F.R. §§ 6.505, 6.704 (elec. 2007); U.S. Forest Serv., *Forest Serv. Handbook 1909.15\_30*, available at <http://www.fs.fed.us/emc/nepa/index.htm> (last visited June 19, 2007). Categorical exclusions for the DOI, BIA, BLM, and Bureau of Reclamation can be accessed through the same website. See DOI Departmental NEPA Directive, pt. 516, chs. 2, 10-11, 14, available at [http://elips.doi.gov/app\\_DM/index.cfm?fuseaction=search](http://elips.doi.gov/app_DM/index.cfm?fuseaction=search) (last visited June 19, 2007).

<sup>53</sup> 40 C.F.R. § 1508.4 (elec. 2007).

shortened because the CEQ regulations do not require public involvement in an agency's decision to utilize a CE.<sup>54</sup>

## [2] The Purpose and Need Statement

The purpose and need section in an EIS or EA is a brief statement of “the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action.”<sup>55</sup> It is a statement of the agency's goals or objectives in considering a proposal requiring federal action (e.g., a proposal requesting the BLM's approval of an APD).<sup>56</sup>

Land professionals should consider the purpose and need of a development project at the outset of the NEPA process. Devoting attention to the purpose and need of a proposed action at the beginning of the NEPA process gives form to the subsequent process, and is useful in preparing an effective scoping notice. The purpose and need statement is particularly important because it defines the range of reasonable alternatives that will be analyzed in the NEPA document.<sup>57</sup> Both NEPA and the CEQ regulations require an agency to conduct a detailed analysis of all reasonable alternatives.<sup>58</sup> “Reasonable” alternatives are defined as those that will accomplish the objectives in the agency's proposal—objectives that are identified in the purpose and need statement.<sup>59</sup> “Alternatives that do not accomplish the purpose of an action are not reasonable and need not be studied in detail.”<sup>60</sup>

Some courts have ruled that an agency may take a private applicant's goals into account when identifying the agency's objectives, as long as it is reasonable to do so.<sup>61</sup> Although it is within an

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<sup>54</sup> *Colo. Wild v. U.S. Forest Serv.*, 435 F.3d 1204, 1209 (10th Cir. 2006).

<sup>55</sup> 40 C.F.R. § 1502.13 (elec. 2007).

<sup>56</sup> *See Colo. Envtl. Coal. v. Dombek*, 185 F.3d 1162, 1174 (10th Cir. 1999).

<sup>57</sup> *Id.*; *Native Ecosystem Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1247 (9th Cir. 2005); *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 195 (D.C. Cir. 1991).

<sup>58</sup> 42 U.S.C. § 4332(2)(C)(iii) & (E) (elec. 2007); 40 C.F.R. §§ 1502.2, 1502.14(a) (elec. 2007).

<sup>59</sup> *Citizens Against Burlington, Inc.*, 938 F.2d at 195; *Laguna Greenbelt, Inc. v. U.S. Dep't of Transp.*, 42 F.3d 517, 524 (9th Cir. 1994).

<sup>60</sup> *Citizens' Comm. to Save Our Canyons v. U.S. Forest Serv.*, 297 F.3d 1012, 1030 (10th Cir. 2002).

<sup>61</sup> *See, e.g., Citizens Against Burlington, Inc.*, 938 F.2d at 196.

agency's discretion to define the purpose and need of a project, the agency may not "define its objectives in unreasonably narrow terms."<sup>62</sup> Since the purpose and need statement effectively shapes the scope and structure of the required analysis under NEPA it is a critical element of an EIS or EA.<sup>63</sup>

### [3] Alternatives to the Proposed Action

NEPA requires an agency to consider reasonable alternatives that will achieve the objectives identified in the purpose and need statement. The alternatives section is considered the "heart" of the EIS.<sup>64</sup> Agencies must "rigorously explore and objectively evaluate all reasonable alternatives" to a proposed action, including the "no action" alternative.<sup>65</sup> When a proposed action is submitted by a private proponent, it is easy to identify the no action alternative. " 'No action' in such cases would mean the proposed activity would not take place, and the resulting environmental effects from taking no action would be compared with the effects of permitting the proposed activity or an alternative activity to go forward."<sup>66</sup>

The identification of alternatives is not cursory.<sup>67</sup> The alternatives analysis ensures "that the agency has before it and takes into account all possible approaches to, and potential environmental impacts of, a particular project."<sup>68</sup> If alternatives are eliminated, the agency must "briefly discuss the reasons for their having been eliminated."<sup>69</sup>

Whether a particular alternative is reasonable and should have been analyzed is a frequent issue in NEPA litigation involving

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<sup>62</sup> *City of Carmel-By-The-Sea v. U.S. Dep't of Transp.*, 123 F.3d 1142, 1155 (9th Cir. 1977).

<sup>63</sup> *Navajo Nation v. U.S. Forest Serv.*, 479 F.3d 1024, 1054 (9th Cir. 2007); *Ilio'ulaokalani Coal. v. Rumsfeld*, 464 F.3d 1083, 1097 (9th Cir. 2006) ("The scope of reasonable alternatives that an agency must consider is shaped by the purpose and need statement articulated by that agency.").

<sup>64</sup> 40 C.F.R. § 1502.14 (elec. 2007); *Ilio'ulaokalani Coal.*, 464 F.3d at 1095.

<sup>65</sup> 40 C.F.R. § 1502.14(a), (d) (elec. 2007); *see also* *Custer County Action Ass'n v. Garvey*, 256 F.3d 1024, 1039 (10th Cir. 2001).

<sup>66</sup> CEQ Forty Most Asked Questions, Question 3, 46 Fed. Reg. 18,026 (Mar. 23, 1981) [hereinafter *Forty Questions*].

<sup>67</sup> 42 U.S.C. § 4332(2)(C)(iii) (elec. 2007).

<sup>68</sup> *N. Alaska Envtl. Ctr. v. Kempthorne*, 457 F.3d 969, 978 (9th Cir. 2006).

<sup>69</sup> 40 C.F.R. § 1502.14 (elec. 2007).

natural resources development. The failure to examine a reasonable alternative is grounds for a court to set aside an EIS.<sup>70</sup> However, agencies are not required to analyze alternatives that are remote, speculative, impractical, or ineffective at achieving the stated goals,<sup>71</sup> or that are not significantly distinguishable from alternatives that are actually considered.<sup>72</sup> The practical land professional should recognize the strategic value of a NEPA document that analyzes alternatives in addition to those proposed by the proponent.

#### **[4] The Difference Between an Environmental Assessment and an Environmental Impact Statement**

A critical decision in the NEPA process is whether to prepare a full EIS or a more concise EA. The significance of the environmental effects of the proposed action determines whether an EIS or EA is required. An EIS must be prepared if the proposed action may cause significant effects to the human environment, or if the agency has identified the action as one that requires the preparation of an EIS.<sup>73</sup> An EA satisfies NEPA only if the proposed action will not result in significant environmental effects.

An EIS is prepared in a public process that is subject to at least two (and possibly more) opportunities for public comment. The document must be circulated in draft form, and once it is finalized, the responsible agency selects an alternative in a record of decision, the terms of which are legally enforceable. There is no legal deadline for an agency to complete an EIS, and the preparation of one may consume 12 to 30 months.

In contrast to an EIS, an EA is a concise document which briefly provides a basis for the agency to determine whether the proposed action may have a significant effect on the environment. If the EA establishes that the action may have a significant effect upon the environment, an EIS must be prepared, even if it is uncertain if

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<sup>70</sup> *Ilio'ulaokalani Coal. v. Rumsfeld*, 464 F.3d 1083, 1095 (9th Cir. 2006); *Citizens' Comm. to Save Our Canyons v. U.S. Forest Serv.*, 297 F.3d 1012, 1030 (10th Cir. 2002).

<sup>71</sup> *Custer County Action Ass'n v. Garvey*, 256 F.3d 1024, 1039 (10th Cir. 2001).

<sup>72</sup> *Headwaters, Inc. v. BLM*, 914 F.2d 1174, 1181 (9th Cir. 1990).

<sup>73</sup> 42 U.S.C. § 4332(2)(C) (elec. 2007); 40 C.F.R. §§ 1501.4(c), (d), 1508.3, 1508.11 (elec. 2007).

that effect will occur.<sup>74</sup> If the EA demonstrates that the proposed action will not have a significant effect on the environment (or that any significant effects have been disclosed in an existing EIS), the agency documents that determination in a finding of no significant impact (FONSI). There is no mandatory timeframe for an agency to complete an EA. An EA typically takes less time to prepare than an EIS because it is shorter and the agency may elect to not circulate the EA in draft form for comment.

## **[5] Environmental Assessment**

### **[a] Purpose and Contents of an EA**

An EA is a concise public document that is used to determine whether a proposed action may have a significant effect on the quality of the human environment.<sup>75</sup> An EA includes a brief discussion of the proposed action, reasonable alternatives, the affected environment, environmental consequences of the proposed action and alternatives, possible mitigation measures, and a list of agencies and persons consulted during the review process.<sup>76</sup>

An agency may prepare an EA: (1) to provide evidence and analysis to determine whether a proposed federal action will have a significant impact and to determine whether the preparation of an EIS is necessary; (2) to assist the agency in complying with NEPA when an EIS is not necessary; or (3) to facilitate the preparation of an EIS when the agency determines that one is necessary.<sup>77</sup>

### **[b] Public Involvement in the Preparation of an EA**

Agencies are required to “make diligent efforts to involve the public” during the NEPA process.<sup>78</sup> Unlike an EIS, however, the CEQ regulations do not require an agency to provide an opportunity for public comment on an EA, or even to make a draft EA available for public review. The regulations instruct agencies to “*involve* environmental agencies, applicants, and the public, *to the*

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<sup>74</sup> 40 C.F.R. §§ 1501.4, 1508.9 (elec. 2007).

<sup>75</sup> *Id.* §§ 1501.3, 1508.9.

<sup>76</sup> *Id.* § 1508.9(b).

<sup>77</sup> *Id.* § 1508.9(a)(1)-(3); *Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1238-39 (9th Cir. 2005).

<sup>78</sup> 40 C.F.R. § 1506.6(a) (elec. 2007).

*extent practicable*” in the preparation of an EA.<sup>79</sup> The precise level of public involvement that NEPA requires in the preparation of an EA is not defined. The Ninth Circuit has interpreted this requirement to mean that “[t]he public must be given an opportunity to comment on draft EAs and EIS’s.”<sup>80</sup> Courts outside the Ninth Circuit have held that public comment on a draft EA is not necessary, although in every such case the agency had provided some opportunity for public input (e.g., hosting public hearings or requesting public comment in response to a notice of intent to prepare an EA).<sup>81</sup> Although the minimum level of public comment and participation that is required for an EA is unclear, courts have held that a “complete failure to involve or even inform the public” violates NEPA.<sup>82</sup>

### **[c] Decision on an EA**

Once the EA is complete, if the agency determines that the proposed action will not have significant environmental effects, the agency documents that determination in a finding of no significant impact.<sup>83</sup> The FONSI articulates the agency’s findings and rationale as to why the authorized action will not have a significant effect on the human environment.<sup>84</sup> An agency may rely on mitigation set forth in the EA or FONSI to conclude that the proposed action will not have a significant effect on the environment. The FONSI may be reached even if the EA discloses that actions outside the agency’s control may lead to significant cumulative effects.<sup>85</sup> A properly reached FONSI satisfies the agency’s obligations under NEPA. If the action may cause significant environ-

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<sup>79</sup> *Id.* § 1501.4(e)(2) (emphasis added).

<sup>80</sup> *Citizens for Better Forestry v. U.S. Dep’t of Agric.*, 341 F.3d 961, 970 (9th Cir. 2003) (quoting *Anderson v. Evans*, 314 F.3d 1006, 1016 (9th Cir. 2002)).

<sup>81</sup> *See, e.g., Alliance to Protect Nantucket Sound, Inc. v. U.S. Dep’t of the Army*, 398 F.3d 105, 115 (1st Cir. 2005); *Greater Yellowstone Coal. v. Flowers*, 359 F.3d 1257, 1277-79 (10th Cir. 2004).

<sup>82</sup> *Citizens for Better Forestry*, 341 F.3d at 970.

<sup>83</sup> 40 C.F.R. §§ 1508.13, 1501.4(e) (elec. 2007).

<sup>84</sup> *Id.* § 1508.13.

<sup>85</sup> *Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752, 770 (2004).

mental effects, the agency must prepare an EIS before authorizing the action.<sup>86</sup>

## **[6] Environmental Impact Statement**

### **[a] Purpose and Content of an EIS**

An agency must prepare an EIS if a proposed action may significantly affect the quality of the human environment, or when the agency has determined that the type of project typically requires the preparation of an EIS. The EIS must identify the proposed action, the purpose and need for the proposal, a reasonable range of alternatives, the affected environment, the environmental consequences of the proposed action and alternatives, possible mitigation measures, and a list of preparers and parties consulted during the NEPA process.<sup>87</sup>

An EIS is more than just a “disclosure document”; it is intended to facilitate informed decisions.<sup>88</sup> It must provide a “full and fair discussion of significant environmental impacts and shall inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment.”<sup>89</sup>

### **[b] Public Involvement in the Preparation of an EIS**

Public notice of the intent to prepare an EIS—and the first opportunity for the public to comment on the proposed action—begins with the scoping notice. Scoping is the process in which the agency publishes in the *Federal Register* a notice of its intent to prepare an EIS to consider the proposed action and reasonable alternatives.<sup>90</sup> The scoping notice invites federal, state, and local agencies, affected Indian tribes, the proponent of the action, and the public to participate in the process, including by filing written comments in response to the scoping notice. Agencies may hold public meetings in the scoping process.<sup>91</sup>

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<sup>86</sup>Utah Shared Access Alliance v. U.S. Forest Serv., 288 F.3d 1205, 1207 (10th Cir. 2002).

<sup>87</sup>40 C.F.R. pt. 1502 (elec. 2007).

<sup>88</sup>*Id.* § 1502.1.

<sup>89</sup>*Id.*

<sup>90</sup>*Id.* § 1501.7.

<sup>91</sup>*Id.*

The EIS itself is prepared in two stages: draft and final.<sup>92</sup> A draft EIS must “fulfill and satisfy to the fullest extent possible” the requirements for a final EIS so that the public has a legitimate opportunity to comment on the adequacy of the agency’s analysis in the document.<sup>93</sup> Notice of the availability of the draft EIS must be published, and the agency must request comments from federal agencies with “jurisdiction by law or special expertise” regarding the projected environmental impact.<sup>94</sup> The agency is also required to request comments on the draft EIS from the public, state and local agencies, Indian tribes, other federal agencies, and the applicant.<sup>95</sup> An agency must respond to comments and give meaningful consideration to them, but the agency is not necessarily required to provide a detailed response to comments.<sup>96</sup> Once the EIS is finalized, the agency may request comments on the final EIS before making a decision on the proposed action.<sup>97</sup>

### [c] Decision on an EIS

The agency makes its decision based upon the final EIS by preparing a record of decision (ROD).<sup>98</sup> The ROD must identify which alternative the agency selected, discuss all of the alternatives considered, identify the environmentally preferable alternative, explain how and why the agency reached its decision, and adopt a monitoring and enforcement program to implement any mitigation measures adopted by the agency.<sup>99</sup>

### [7] Mitigation

NEPA does not require a federal agency to mitigate the effects of its actions.<sup>100</sup> An agency must, however, identify measures in

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<sup>92</sup> *Id.* § 1502.9.

<sup>93</sup> *Id.* § 1502.9(a).

<sup>94</sup> *Id.* § 1503.1(a)(1).

<sup>95</sup> *Id.* § 1503.1(a).

<sup>96</sup> *Id.* § 1503.4; *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 814 (9th Cir. 1999) (stating that failure to respond to comments that identify a reasonable yet unexamined alternative is grounds to set aside an EIS); *California v. Block*, 690 F.2d 753, 773 (9th Cir. 1982).

<sup>97</sup> 40 C.F.R. § 1503.1(a) (elec. 2007).

<sup>98</sup> *Id.* § 1505.2.

<sup>99</sup> *Id.*

<sup>100</sup> *Holy Cross Wilderness Fund v. Madigan*, 960 F.2d 1515, 1522 (10th Cir. 1992).

an EIS or EA “to mitigate adverse environmental impacts,”<sup>101</sup> and provide “a reasonably complete discussion” of them.<sup>102</sup> Hence, an agency must consider mitigation and identify potential mitigation measures in the EIS or EA, but NEPA does not itself require the agency to adopt any of those measures.<sup>103</sup> If the agency adopts mitigation or other conditions of approval in the ROD for an EIS, or in the FONSI for an EA, such measures are binding and enforceable against the agency.<sup>104</sup>

### [8] Duty to Supplement NEPA Analysis

The CEQ regulations require an agency to supplement a previously prepared NEPA document in two circumstances. First, if the agency “makes substantial changes in the proposed action that are relevant to the environmental concerns,” it must supplement its NEPA document.<sup>105</sup> Second, if “[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts,” the agency must prepare a supplemental NEPA analysis.<sup>106</sup>

A common claim in NEPA litigation involving natural resources development is that a federal agency has violated its obligation to supplement an existing NEPA document. The U.S. Supreme Court has ruled that agencies “need not supplement an EIS every time new information comes to light after the EIS is finalized.”<sup>107</sup> The obligation to supplement exists only when “there remains major Federal action to occur, as that term is used” in NEPA.<sup>108</sup> If the federal permitting or decision making process is complete, the federal action has been implemented, and there is no ongoing fed-

<sup>101</sup> 40 C.F.R. § 1502.16(h) (elec. 2007).

<sup>102</sup> *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352-53 (1989).

<sup>103</sup> *City of Carmel-by-the-Sea v. U.S. Dep’t of Transp.*, 123 F.3d 1142, 1154 (9th Cir. 1977). Other non-discretionary statutes such as the Endangered Species Act may require an agency to adopt particular mitigation measures in a ROD or FONSI.

<sup>104</sup> 40 C.F.R. §§ 1505.2(c), 1505.3 (elec. 2007); *Tyler v. Cisneros*, 136 F.3d 603, 608 (9th Cir. 1998).

<sup>105</sup> 40 C.F.R. § 1502.9(c)(1)(i) (elec. 2007).

<sup>106</sup> *Id.* § 1502.9(c)(1)(ii).

<sup>107</sup> *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 373 (1989).

<sup>108</sup> *Norton v. S. Utah Wilderness Alliance (SUWA)*, 542 U.S. 55, 72-73 (2004) (internal quotation marks omitted).

eral action remaining, it is doubtful that an agency's duty to supplement may arise.<sup>109</sup>

If there is ongoing federal action, the obligation to supplement exists only when a change in the action or other new circumstances or information indicate that implementation of the action may produce significant environmental effects that were not analyzed in the existing NEPA document.<sup>110</sup> While not every change requires a supplemental EIS, the agency must take the requisite "hard look" at the new information to assess whether it amounts to significant environmental effects outside the scope of the existing NEPA document.<sup>111</sup> An agency may determine whether it must supplement an existing EIS by preparing a document that itself is not an EA or EIS using "non-NEPA procedures."<sup>112</sup> A decision not to supplement an existing EIS or EA will be reversed only when it is arbitrary and capricious.<sup>113</sup> NEPA does not require an agency to involve the public in deciding whether to prepare a supplemental EIS.<sup>114</sup>

### **[9] Tiering and Staged Programmatic/Site-Specific NEPA Analysis**

"Tiering" frequently arises in the preparation of NEPA documents for natural resources development on federal lands. It is the practice of incorporating the environmental analysis from an existing EIS into a subsequently prepared EIS or EA by referencing that prior analysis.<sup>115</sup> The CEQ regulations encourage federal agencies to avoid duplicating paperwork and environmental analysis by tiering.<sup>116</sup> Tiering allows the agency to concentrate on the specific action at hand while incorporating the relevant environ-

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<sup>109</sup> *Id.*

<sup>110</sup> *Id.*; *Marsh*, 490 U.S. at 378-85.

<sup>111</sup> *SUWA*, 542 U.S. at 72-73.

<sup>112</sup> *Pennaco Energy, Inc. v. U.S. Dep't of the Interior*, 377 F.3d 1147, 1151 (10th Cir. 2004).

<sup>113</sup> *Id.* at 1161.

<sup>114</sup> *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 559-60 (9th Cir. 2000).

<sup>115</sup> 40 C.F.R. § 1508.28 (elec. 2007).

<sup>116</sup> *Id.* § 1502.20.

mental analysis from another EIS. Tiering to a document that itself has not been subject to NEPA review is inappropriate.<sup>117</sup>

Tiering often arises when an agency prepares a programmatic EIS followed by subsequent site-specific EISs or EAs that are within the scope of the programmatic EIS. This occurs when the BLM prepares a programmatic EIS for a federal land use plan that analyzes foreseeable natural resources development and other activities within the plan area over a 10- to 15-year period. Such an EIS is programmatic; it does not contain site-specific analysis of the activities anticipated in the EIS. When oil and gas or other development actions are proposed, the agency prepares an EA or EIS to analyze the proposed action on a site-specific basis. The site-specific EA or EIS tiers to the programmatic environmental analysis in the EIS for the land use plan.<sup>118</sup>

Another example is when an agency prepares a programmatic EIS to analyze the effects of timber sales or other actions over a 10-year period. When the agency subsequently conducts an individual timber sale, it may prepare an EA that evaluates the site-specific effects of the timber sale, and tiers to the broader discussion of environmental effects in the programmatic statement.<sup>119</sup>

When an agency makes decisions at two levels, i.e., at a programmatic or planning level and at a site-specific level, it is appropriate for it to make its NEPA analysis either programmatic or site-specific.<sup>120</sup> A programmatic EIS must provide “sufficient detail to foster informed decision-making,” but ‘site-specific impacts need not be fully evaluated until a critical decision has been made to act on site development.’<sup>121</sup>

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<sup>117</sup> Muckleshoot Indian Tribe v. U.S. Forest Serv., 177 F.3d 800, 812 (9th Cir. 1982).

<sup>118</sup> See generally Williams & McIntosh, *supra* note 27, § 11.02, at 11-7 to 11-16.

<sup>119</sup> See Portland Audubon Soc’y v. Lujan, 884 F.2d 1233, 1235 (9th Cir. 1989).

<sup>120</sup> N. Alaska Env’tl. Ctr. v. Kempthorne, 457 F.3d 969, 975-77 (9th Cir. 2006); Ecology Ctr., Inc. v. U.S. Forest Serv., 192 F.3d 922, 923 n.2 (9th Cir. 1999).

<sup>121</sup> Friends of Yosemite Valley v. Norton, 348 F.3d 789, 800 (9th Cir. 2003) (quoting N. Alaska Env’tl. Center v. Lujan, 961 F.2d 886 (9th Cir. 1992)).

## § 4.04 Energy Policy Act of 2005 Categorical Exclusions

### [1] Overview

Section 390 of the Energy Policy Act of 2005 established five categorical exclusions from NEPA for oil and gas exploration and development activities conducted on federal lands managed by the Department of the Interior or the Secretary of Agriculture.<sup>122</sup> The Section 390 CEs apply to the development of federal oil and gas resources leased under the Mineral Leasing Act of 1920.<sup>123</sup> The Section 390 CEs do not apply to Indian minerals, state or fee minerals, or other oil and gas resources that are not leased under the Mineral Leasing Act of 1920.<sup>124</sup>

The statutory CEs are subject to a “rebuttable presumption” of applicability.<sup>124.1</sup> This means that if “a proposed activity meets the criteria of any of the five categories for categorical exclusion, it is also presumed that no further NEPA analysis is required.”<sup>125</sup> A party challenging the applicability of a Section 390 CE has the burden of establishing that one or more of the statutory criteria for exclusion has not been met.<sup>126</sup> For example, Section 390 categorically excludes the placement of a pipeline in an approved right-of-way corridor if the corridor was approved within the previous five years.<sup>127</sup> To rebut the presumption that the exclusion applies, one must demonstrate that more than five years have passed since the corridor was approved.

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<sup>122</sup> 42 U.S.C. § 15942 (elec. 2007); *see generally* Carolyn L. McIntosh, “NEPA and the Energy Policy Act of 2005,” *NEPA and Federal Land Development* 6-1 (Rocky Mt. Min. L. Fdn. 2006). U.S. Representative Nick Rahall (D. W.Va.) proposed legislation on May 16, 2007, to repeal the Section 390 CEs. *See* H.R. 2337, 110th Cong. § 1 (2007). The legislation is pending in Congress, as of July 10, 2007.

<sup>123</sup> 42 U.S.C. § 15942 (elec. 2007).

<sup>124</sup> *See id.*

<sup>124.1</sup> *Id.* § 15942(a).

<sup>125</sup> Forest Serv. Nov. 22, 2005, Letter to Regional Foresters, at 2, *available at* [http://www.fs.fed.us/geology/mgm\\_energy.html](http://www.fs.fed.us/geology/mgm_energy.html) [hereinafter Forest Serv. Nov. 22, 2005 Guidance].

<sup>126</sup> 42 U.S.C. § 15942(a) (elec. 2007).

<sup>127</sup> *Id.* § 15942(b)(4); *see infra* § 4.04[6].

## [2] BLM and Forest Service Interpretations of the Section 390 Categorical Exclusions

The BLM and the Forest Service have interpreted the Section 390 CEs in guidance documents.<sup>128</sup> Because the Section 390 CEs are statutory, the BLM and Forest Service have determined that internal agency restrictions on the use of regulatory CEs, and restrictions in the CEQ regulations for use of CEs (such as the extraordinary circumstances exception), do not limit the use of the Section 390 CEs.<sup>129</sup> According to the BLM,

if one or more of five statutorily-created CXs [categorical exclusions] applies to a proposed activity, Field Officials are not to use the existing CX review process or apply the extraordinary circumstances in 516 Departmental Manual . . . Field Offices are advised not to prepare a NEPA document in lieu of appropriately applying the statutory CXs.<sup>130</sup>

The Forest Service concurs.<sup>131</sup> Although no reported judicial decisions yet address the issue, it appears that a party cannot rebut the presumption that a Section 390 CE applies by showing that “extraordinary circumstances” exist within the meaning of the CEQ regulations.

The Section 390 CEs do not apply to: (1) Indian leases; (2) federal petroleum reserves; (3) geothermal leases; or (4) private or outstanding rights.<sup>132</sup> Although the Section 390 CEs exempt specific actions from NEPA review, all other applicable laws, regulations, and policies apply.<sup>133</sup> Agencies must comply with applicable environmental laws, regulations, best management practices, en-

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<sup>128</sup> Forest Serv. Nov. 22, 2005 Guidance, *supra* note 125, at 2; BLM Inst. Mem. No. 2005-247, att. 2, at 2-1 (Sept. 30, 2005), *available at* <http://www.blm.gov/nhp/efoia/wo/fy05/im2005-247.htm> [hereinafter BLM Inst. Mem. No. 2005-247].

<sup>129</sup> Forest Serv. Nov. 22, 2005 Guidance, *supra* note 125, at 2; BLM Inst. Mem. No. 2005-247, *supra* note 128, att. 2, at 2-1.

<sup>130</sup> BLM Inst. Mem. No. 2005-247, *supra* note 128, att. 2, at 2-1 to 2-2.

<sup>131</sup> Forest Serv. Nov. 22, 2005 Guidance, *supra* note 125, at 2.

<sup>132</sup> *Id.* at 2; Forest Serv. Supplemental Guidance, Mar. 13, 2006, Letter to Regional Foresters, at 3, *available at* [http://www.fs.fed.us/geology/mgm\\_energy.html](http://www.fs.fed.us/geology/mgm_energy.html) [hereinafter Forest Serv. Mar. 13, 2006 Supp. Guidance].

<sup>133</sup> BLM Bull. No. 2007-073, at 2.

dangered species consultation or mitigation, or other protective measures that the BLM or Forest Service may find necessary.<sup>134</sup>

For example, the “BLM field staffs will continue to conduct field exams, inspections, and enforcement for every [APD] or right-of-way filed by the oil and gas industry.”<sup>135</sup> The BLM will also continue “to conduct internal interdisciplinary reviews of these permit applications and will attach any protective conditions of approval necessary to ensure adequate protection of the environment,” which includes consultation with the U.S. Fish and Wildlife Service (FWS), state game and fish agencies, state historic preservation officers, and other government entities.<sup>136</sup> The BLM is also required to follow current land use plan decisions and mitigation requirements contained in prior EISs and EAs.<sup>137</sup>

The Forest Service has stated that use of Section 390 CEs “in no way limits or diminishes the Forest Service’s substantive authority or responsibility regarding review and approval of a SUPO [surface use plans of operations] conducted pursuant to 36 C.F.R. 228.107-108.”<sup>138</sup> Authorized forest officers are required to ensure that leasehold operations on National Forest System lands minimize surface resource effects, including impacts on cultural and historical resources and fisheries.<sup>139</sup> The Forest Service may require best management practices to ensure that the impacts of actions authorized under the Section 390 CEs are minimized.<sup>140</sup>

### **[3] Categorical Exclusion 1—Individual Surface Disturbance of Less Than Five Acres**

The first categorical exclusion (CE 1) excludes the following from analysis under NEPA:

Individual surface disturbances of less than 5 acres so long as the total surface disturbance on the lease is not greater than 150 acres

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<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> Forest Serv. Nov. 22, 2005 Guidance, *supra* note 125, at 2.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

and site-specific analysis in a document prepared pursuant to NEPA has been previously completed.<sup>141</sup>

Three factors must be present for CE 1 to apply: (1) the individual five-acre disturbance threshold cannot be exceeded; (2) the total unreclaimed surface disturbance limit cannot exceed 150 acres; and (3) a previously completed NEPA document must include a site-specific analysis of oil and gas exploration or development.<sup>142</sup>

The authorized agency decision maker must determine whether the proposed action will disturb less than five acres on the site. The “five-acre limit should be applied separately to each action requiring discrete agency action, such as each APD, even though for processing efficiency purposes the operator may submit for review a large Plan of Development (POD) addressing many wells.”<sup>143</sup> The calculation should also include all surface disturbance associated with off-lease activities as long as they are authorized pursuant to the Mineral Leasing Act.<sup>144</sup> For example, if a proposal includes drilling two or more wells, each well is counted separately and may disturb up to five acres of land. The agency must include surface disturbances for construction of the well pad, roads, utilities, and production facilities in the total calculation.<sup>145</sup> The Forest Service has determined that “[p]roposed impacts to existing unreclaimed disturbed areas do not count towards the individual surface five-acre disturbance constraint (e.g., maintenance of an existing road would not be counted).”<sup>146</sup>

The 150-acre limit applies separately to each lease, even if the lease is communitized or unitized with additional leases.<sup>147</sup> The authorized officer must determine whether the “current unreclaimed surface disturbance readily visible on the entire leasehold is not greater than 150 acres,” including the action under consid-

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<sup>141</sup> 42 U.S.C. § 15942(b)(1) (elec. 2007).

<sup>142</sup> *See id.*

<sup>143</sup> Forest Serv. Nov. 22, 2005 Guidance, *supra* note 125, at 3; *see also* BLM Inst. Mem. No. 2005-247, *supra* note 128, att. 2, at 2-2.

<sup>144</sup> Forest Serv. Mar. 13, 2006 Supp. Guidance, *supra* note 132, at 3.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> Forest Serv. Nov. 22, 2005 Guidance, *supra* note 125, at 3; BLM Inst. Mem. No. 2005-247, *supra* note 128, att. 2, at 2-2.

eration.<sup>148</sup> The officer must include surface disturbances from any prior right-of-way authorized to support lease development in the total calculation.<sup>149</sup> The 150-acre threshold applies only to surface disturbances that are “associated with oil and gas activities and associated rights-of-ways regardless of surface ownership. It does not include disturbance from other activities.”<sup>150</sup> Activities that do not have any surface disturbance (e.g., an above-ground pipeline) are not included in the 150-acre calculation.<sup>151</sup>

CE 1 may be used only when previous site-specific NEPA analysis has been completed. A site-specific NEPA analysis can be in any form, including “an exploration and/or development EA/EIS, an EA/EIS for a specific [plan of development], a multi-well EA/EIS, or an individual permit approval EA/EIS.”<sup>152</sup> The NEPA document must consider the exploration for or development of oil and gas (not just leasing) within the same general area, but it need not analyze the specific proposed activity.<sup>153</sup>

A Section 390 CE 1 cannot be used to side-step mitigation measures that are already in place. Any action approved under CE 1 must contain the same or better mitigation measures than were included in the prior NEPA document.<sup>154</sup> One should review the requirements of applicable existing NEPA documents to identify mitigation requirements.

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<sup>148</sup> Forest Serv. Nov. 22, 2005 Guidance, *supra* note 125, at 3; BLM Inst. Mem. No. 2005-247, *supra* note 128, att. 2, at 2-2.

<sup>149</sup> Forest Serv. Nov. 22, 2005 Guidance, *supra* note 125, at 3; BLM Inst. Mem. No. 2005-247, *supra* note 128, att. 2, at 2-2.

<sup>150</sup> Forest Serv. Mar. 13, 2006 Supp. Guidance, *supra* note 132, at 4.

<sup>151</sup> *Id.*

<sup>152</sup> Forest Serv. Nov. 22, 2005 Guidance, *supra* note 125, at 3; BLM Inst. Mem. No. 2005-247, *supra* note 128, att. 2, at 2-2 to 2-3.

<sup>153</sup> Forest Serv. Nov. 22, 2005 Guidance, *supra* note 125, at 3; BLM Inst. Mem. No. 2005-247, *supra* note 128, att. 2, at 2-3. If a prior NEPA document analyzed the site-specific impacts of 3D geophysical exploration within a particular oil and gas field, a Category 1 CE may apply to subsequent 3D geophysical activities within the same field, assuming the other two statutory requirements are satisfied. BLM Inst. Mem. No. 2005-247, *supra* note 128, att. 2, at 2-3.

<sup>154</sup> Forest Serv. Nov. 22, 2005 Guidance, *supra* note 125, at 4; BLM Inst. Mem. No. 2005-247, *supra* note 128, att. 2, at 2-5.

#### [4] Categorical Exclusion 2—Drilling at an Existing Well Location

The second categorical exclusion (CE 2) excludes the following from review under NEPA:

Drilling an oil and gas well at a location or well pad site at which drilling has occurred previously within 5 years prior to the date of spudding the well.<sup>155</sup>

CE 2 has broad potential application but two factors must exist: (1) the well must be drilled at an existing location or well pad; and (2) drilling must have occurred at the location within the past five years. First, the agency must determine whether the proposed activity (drilling) will occur at an oil and gas well pad that was previously used for drilling. A “well pad” is defined as “a previously disturbed or constructed well pad used in support of drilling a well.”<sup>156</sup> “Drilling” refers to any drilled well including injection, water source, or other service well.<sup>157</sup> An operator may disturb or expand an existing well pad to facilitate the drilling of a new well, so long as it is tied to the original location or well pad.<sup>158</sup> However, CE 2 “does not extend to new well sites merely in the general vicinity of the original location or well pad.”<sup>159</sup>

Second, drilling must have occurred within five years prior to the date of spudding the proposed well. The five-year period begins when the most recent previous drilling activity is completed.<sup>160</sup> If an operator delays spudding a new well, and more than five years passes between the previous well completion and spudding, an operator must suspend its operations until the agency completes the required NEPA review and issues a new decision on the APD.<sup>161</sup>

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<sup>155</sup> 42 U.S.C. § 15942(b)(2) (elec. 2007).

<sup>156</sup> Forest Serv. Nov. 22, 2005 Guidance, *supra* note 125, at 4; BLM Inst. Mem. No. 2005-247, *supra* note 128, att. 2, at 2-3.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

### [5] Categorical Exclusion 3—Drilling Within a Developed Field

The third Section 390 categorical exclusion (CE 3) excludes the following from NEPA review:

Drilling an oil or gas well within a developed field for which an approved land use plan or any environmental document prepared pursuant to NEPA analyzed such drilling as a reasonably foreseeable activity, so long as such plan or document was approved within 5 years prior to the date of spudding the well.<sup>162</sup>

Each of the following requirements must exist for CE 3 to apply: (1) the proposed drilling must occur within a developed oil or gas field; (2) drilling must have been analyzed as a reasonably foreseeable activity in a previously prepared land use plan or any NEPA document; and (3) the land use plan or NEPA document must have been finalized or supplemented within five years of spudding the well.<sup>163</sup>

First, the proposed well must be located within a developed oil and gas field. A “developed field” is defined as “any field in which a ‘confirmation’ well has been completed,” usually after the third well.<sup>164</sup>

Second, the pending APD must be within the reasonably foreseeable development scenario in any existing land use plan or NEPA document.<sup>165</sup> The reasonably foreseeable development scenario is an estimate of the number of wells that may be drilled over a period of time and typically appears as an appendix to a BLM resource management plan or Forest Service forest plan. The NEPA document can be of any type that analyzed drilling, including that supporting a land use plan.<sup>166</sup> The BLM and Forest Service may rely on a NEPA document prepared by another agen-

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<sup>162</sup> 42 U.S.C. § 15942(b)(3) (elec. 2007).

<sup>163</sup> Forest Serv. Nov. 22, 2005 Guidance, *supra* note 125, at 5; BLM Inst. Mem. No. 2005-247, *supra* note 128, att. 2, at 2-4.

<sup>164</sup> BLM Inst. Mem. No. 2005-247, *supra* note 128, att. 2, at 2-4; Forest Serv. Mar. 13, 2006 Supp. Guidance, *supra* note 132, at 4 (the Forest Service defers to the BLM Field Office for the definition of a “developed field”).

<sup>165</sup> Forest Serv. Mar. 13, 2006 Supp. Guidance, *supra* note 132, at 4.

<sup>166</sup> *Id.*

cy.<sup>167</sup> According to the Forest Service, “[i]f the proposed well is in the general vicinity of the predicted development disclosed in the prior NEPA document, it fits this category.” If drilling was reasonably foreseeable in either the land use plan EIS or a subsequent developmental EA or EIS, the requirement is met. “As long as the development foreseen does not exceed the surface disturbance analyzed in the prior NEPA document, no additional NEPA documentation is required because of changes in the density of development.”<sup>168</sup> The same or better mitigation measures than are included in the site-specific NEPA document must be applied to any action approved under a CE 3.<sup>169</sup>

Third, the existing NEPA document must have been completed within five years before spudding the well.<sup>170</sup> The five-year count-down begins when the applicable NEPA document was finalized, or supplemented, whichever is later.<sup>171</sup> If the five-year limitation is exceeded, the APD will expire and the operator must suspend its preparations for drilling operations until the agency complies with NEPA and approves a new APD.<sup>172</sup>

#### **[6] Categorical Exclusion 4—Placement of a Pipeline in an Approved Right-of-Way**

The fourth Section 390 categorical exclusion (CE 4) excludes:

Placement of a pipeline in an approved right-of-way corridor, so long as the corridor was approved within 5 years prior to the date of placement of the pipeline.<sup>173</sup>

Two factors are required for CE 4 to apply: (1) the proposed pipeline must be placed in an approved right-of-way corridor; and (2) the corridor must have been approved within the last five years.<sup>174</sup>

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<sup>167</sup> BLM Inst. Mem. No. 2005-247, *supra* note 128, att. 2, at 2-4.

<sup>168</sup> Forest Serv. Nov. 22, 2005 Guidance, *supra* note 125, at 6.

<sup>169</sup> BLM Inst. Mem. No. 2005-247, *supra* note 128, att. 2, at 2-2.

<sup>170</sup> Forest Serv. Mar. 13, 2006 Supp. Guidance, at 5.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> 42 U.S.C. § 15942(b)(4) (elec. 2007).

<sup>174</sup> Forest Serv. Nov. 22, 2005 Guidance, *supra* note 125, at 6-7; BLM Inst. Mem. No. 2005-247, *supra* note 128, att. 2, at 2-4 to 2-5.

An approved right-of-way corridor includes “any type of corridor or right-of-way (whether on or off lease) approved under any authority or vehicle of the [agency].”<sup>175</sup> The right-of-way does not have to be currently in use or occupied.<sup>176</sup> New pipeline may be placed in any approved right-of-way corridor, including “an existing road bed or along a power line right-of-way.”<sup>177</sup> Taking into consideration the practical reality of placing new pipeline, the responsible official may authorize, within his discretion, additional disturbance or width outside the existing right-of-way corridor to ensure the safe and proper placement of new pipeline.<sup>178</sup> However, the creation of a new right-of-way completely outside an existing corridor is not allowed.<sup>179</sup>

The five-year limitation is calculated from the most recent date that a decision authorized the use of the corridor.<sup>180</sup> “The time period extends to the date placement of any portion of the new pipeline is concluded, provided that placement activities began within the five-year constraint.”<sup>181</sup> If the operator delays and does not begin to place the pipeline until five years have passed since the corridor was approved, the agency must conduct the appropriate NEPA review before the proposed right-of-way use can occur.<sup>182</sup>

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<sup>175</sup> Forest Serv. Nov. 22, 2005 Guidance, *supra* note 125, at 6; BLM Inst. Mem. No. 2005-247, *supra* note 128, att. 2, at 2-5.

<sup>176</sup> Forest Serv. Mar. 13, 2006 Supp. Guidance, *supra* note 132, at 5.

<sup>177</sup> Forest Serv. Nov. 22, 2005 Guidance, *supra* note 125, at 6; BLM Inst. Mem. No. 2005-247, *supra* note 128, att. 2, at 2-5.

<sup>178</sup> *Id.*; Forest Serv. Mar. 13, 2006 Supp. Guidance, *supra* note 132, at 5.

<sup>179</sup> Forest Serv. Nov. 22, 2005 Guidance, *supra* note 125, at 6; BLM Inst. Mem. No. 2005-247, *supra* note 128, att. 2, at 2-5 (“Other types of new right-of-way applications cannot be excluded from NEPA analysis under this exclusion, for example, above ground power lines, or new roads; however, existing right-of-way corridors, such as roads, may be used for new pipeline or pipeline conduit in an existing roadbed.”)

<sup>180</sup> Forest Serv. Nov. 22, 2005 Guidance, *supra* note 125, at 7; BLM Inst. Mem. No. 2005-247, *supra* note 128, att. 2, at 2-4.

<sup>181</sup> Forest Serv. Nov. 22, 2005 Guidance, *supra* note 125, at 7.

<sup>182</sup> *Id.*; BLM Inst. Mem. No. 2005-247, *supra* note 128, att. 2, at 2-5.

### [7] Categorical Exclusion 5—Minor Maintenance

The fifth Section 390 categorical exclusion (CE 5) excludes:

Maintenance of a minor activity, other than any construction or major renovation [of] a building or facility.<sup>183</sup>

This exclusion applies to actions such as the “maintenance of a well, wellbore, road, wellpad, or production facility having surface disturbance.”<sup>184</sup> It does not cover construction or major renovation, such as adding a compressor building or a processing plant, or constructing or reconstructing a road.<sup>185</sup>

### [8] BLM Use of the Section 390 Categorical Exclusions

The BLM uses the Section 390 CEs where possible. In fiscal year 2006, approximately 15% of all approved APDs relied on Section 390 CEs.<sup>186</sup> During the first half of fiscal year 2007 that number jumped, and approximately 36% of all APDs approved by the BLM utilized one of the Section 390 CEs.<sup>187</sup> The BLM anticipates that the trend will continue to increase as more land use plans and development EISs are completed.<sup>188</sup> CE 3 is the most common CE used, accounting for approximately 70% of all APDs approved during the first half of fiscal year 2007 under a Section 390 CE.<sup>189</sup> BLM anticipates that the overall utilization of Section 390 CEs may decline as existing NEPA documents pass the five-year mark.<sup>190</sup>

### § 4.05 Effective Participation in the NEPA Process

Many federal actions subject to NEPA are proposed by private entities rather than federal agencies, such as applicants for federal permits to develop oil, gas, minerals, or other natural resources. Although there is a role for the private applicant in the NEPA process, it is not widely known. A careful review of the CEQ NEPA

<sup>183</sup> 42 U.S.C. § 15942(b)(5) (elec. 2007).

<sup>184</sup> Forest Serv. Nov. 22, 2005 Guidance, *supra* note 125, at 7; *see also* BLM Inst. Mem. No. 2005-247, *supra* note 128, att. 2, at 2-5.

<sup>185</sup> *Id.*; Forest Serv. Mar. 13, 2006 Supp. Guidance, *supra* note 132, at 5.

<sup>186</sup> Telephone interview with Tom Hare, BLM, in Washington, D.C. (May 24, 2007).

<sup>187</sup> *Id.* (unofficial numbers).

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

regulations and other authorities demonstrates that the private proponent of a federal action has a unique role in the environmental review process that lies between the general public and the responsible agency.<sup>191</sup> A proponent of a federal action can participate in early planning with the agency,<sup>192</sup> draft and submit a proposal and purpose and need statement to the agency;<sup>193</sup> suggest time limits for the agency's analysis;<sup>194</sup> recommend and fund the preparation of the environmental analysis by a third party contractor;<sup>195</sup> work with the agency to prepare project proposals and other information;<sup>196</sup> provide comments to the agency;<sup>197</sup> and generally share information with the agency in an open fashion so as to further NEPA's goal of "excellent action" based on "high quality" "scientific analysis, expert agency comments, and public scrutiny."<sup>198</sup>

### [1] The Proposed Action

A private party (e.g., a land professional) can initiate the NEPA process by submitting a proposal for a major federal action directly to an agency. By starting the dialogue with an agency and proposing action, the proponent has the advantage of drafting a proposal and defining the contours of the action from the start. The proponent's proposal, with modification by the agency, may become the proposed action in an EIS or EA.<sup>199</sup> The proposal should fully describe the action in detail, including pictures, charts, and technical information; identify reasonably foreseeable direct and

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<sup>191</sup> See generally Ezekiel J. Williams, "The Role of the Project Proponent in the NEPA Process," *NEPA and Federal Land Development* 5-1, 5-3 to 5-4 (Rocky Mt. Min. L. Fdn. 2006).

<sup>192</sup> 40 C.F.R. § 1501.2(d) (elec. 2007).

<sup>193</sup> Dep't of the Interior NEPA Manual, 516 DM 4.10(A)(3), available at [http://www.elips.doi.gov/elips/DM\\_word/3614.doc](http://www.elips.doi.gov/elips/DM_word/3614.doc).

<sup>194</sup> 40 C.F.R. § 1501.8(c) (elec. 2007).

<sup>195</sup> See Forty Questions, *supra* note 66, Question 16. Ass'ns Working for Aurora's Residential Env't v. Colo. Dep't of Transp., 153 F.3d 1122, 1127 (10th Cir. 1998).

<sup>196</sup> 40 C.F.R. §§ 1506.1(b), 1501.2(d), 1501.7(a)(1) (elec. 2007).

<sup>197</sup> *Id.* § 1503.1(a)(3).

<sup>198</sup> *Id.* § 1500.1.

<sup>199</sup> *E.g.*, Dep't of the Interior, NEPA Manual, 516 DM 4.10(A)(3) (stating that for proposals by a private entity, proposed action "means a non-Federal entity's planned activity which falls under a Federal agency's authority to issue permits, licenses, grants, rights-of-way, or other common Federal approvals, funding, or regulatory instruments"), available at [http://elips.doi.gov/elips/DM\\_word/3614.doc](http://elips.doi.gov/elips/DM_word/3614.doc).

indirect environmental effects; and explain whether environmental effects will be minimized or avoided through permitting, mitigation, and reclamation.<sup>200</sup> By submitting a detailed proposal the proponent can assist the agency in spotting significant issues and minimize insignificant ones.<sup>201</sup> The applicant should consider incorporating voluntary mitigation measures into the proposal to avoid adverse environmental impacts and to minimize controversy surrounding the action.

## [2] The Purpose and Need Statement

The purpose and need statement outlines the agency's goals or objectives in conducting the NEPA process.<sup>202</sup> Meeting the nation's need for energy, minerals, and other natural resources is a valid objective. When federal action is proposed by a private applicant (e.g., requesting Forest Service approval of a surface use plan of operations for mineral development), some courts have ruled that the agency may take the proponent's goals into account when identifying the agency's objectives, as long as it is reasonable to do so.<sup>203</sup> For example, the Tenth Circuit has ruled that when "the action subject to NEPA review is triggered by a proposal or application from a private party, it is appropriate for the agency to give substantial weight to the goals and objectives of that private actor."<sup>204</sup> Some courts have held, however, that agencies are prohibited from defining the goals of their actions in terms that are so unreasonably narrow that they can only be accomplished by one alternative (e.g., the proponent's proposed action).<sup>205</sup>

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<sup>200</sup> See 40 C.F.R. §§ 1502.14, 1502.16, 1506.5 (elec. 2007).

<sup>201</sup> *Id.* § 1500.1(b) ("Most important, NEPA documents must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail.").

<sup>202</sup> See *supra* § 4.03[2].

<sup>203</sup> *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991); *Roosevelt Campobello Int'l Park Comm'n v. EPA*, 684 F.2d 1041, 1046-47 (1st Cir. 1982).

<sup>204</sup> *Citizens' Comm. to Save Our Canyons v. U.S. Forest Serv.*, 297 F.3d 1012, 1030 (10th Cir. 2002); *Colo. Env'tl. Coal. v. Dombeck*, 185 F.3d 1162, 1175 (10th Cir. 1999) ("Agencies also are precluded from completely ignoring a private applicant's objectives.").

<sup>205</sup> *Simmons v. U.S. Army Corps of Eng'rs*, 120 F.3d 664, 669 (7th Cir. 1997); *Van Abbema v. Fornell*, 807 F.2d 633, 638 (7th Cir. 1986) (stating that an agency cannot

The private proponent of a federal action subject to NEPA should draft a purpose and need statement and include it in its proposal. The statement should identify the objectives of the proposed action (e.g., meeting the demand for domestic natural gas supplies by drilling natural gas wells on a federal oil and gas lease).<sup>206</sup>

### [3] Reasonable Alternatives

It is the agency's obligation to identify the range of reasonable alternatives.<sup>207</sup> A proponent may prepare written materials that explain whether it believes particular alternatives are reasonable, technically feasible, economically practicable, consistent with the purpose and need statement, and the like.<sup>208</sup> The benefit of analyzing alternatives is that the proponent has the opportunity to present the agency with additional information that it may not have considered. The proponent can ensure that the agency is equipped with the relevant information available to make an informed decision. Materials provided to the agency should be added to the administrative record.

### [4] Preparation of NEPA Documents by Contractors

Proponents of federal actions may voluntarily fund the preparation of an EA or EIS by a third party contractor or consultant.<sup>209</sup> Although it is the federal government's responsibility to prepare NEPA documents, a third party contract can greatly expedite the process.<sup>210</sup>

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restrict its analysis to those "alternative means by which a particular applicant can reach his goals").

<sup>206</sup> *Citizens' Comm. to Save Our Canyons*, 297 F.3d at 1030; *Citizens Against Burlington, Inc.*, 938 F.2d at 199.

<sup>207</sup> See *supra* § 4.03[3].

<sup>208</sup> CEQ guidance states that "[r]easonable alternatives include those that are practical or feasible from the technical and economic standpoint and using common sense, rather than simply desirable from the standpoint of the applicant." Forty Questions, *supra* note 66, Question 2a.

<sup>209</sup> *Id.* Question 16; 40 C.F.R. § 1506.5(c) (elec. 2007).

<sup>210</sup> See Forty Questions, *supra* note 66, Question 16.

**[a] Selection of the Contractor**

For an EIS, the agency “must select the consulting firm, even though the applicant pays for the cost of preparing the EIS.”<sup>211</sup> The requirement that the agency select the contractor, however, does not preclude a proponent from soliciting candidates for the agency’s consideration, even though the decision is ultimately within the agency’s hands.<sup>212</sup> The agency must guide the consultant’s work, independently evaluate the work product, and ultimately be responsible for the content of the EIS.<sup>213</sup>

Unlike an EIS, a private party can select the contractor for an EA. Once it is determined that the preparation of an EA is appropriate, the proponent can hire a specific contractor and agency approval is not required.<sup>214</sup> However, the agency must “make its own evaluation of the environmental issues and take responsibility for the scope and content of the environmental assessment.”<sup>215</sup>

**[b] The Third Party Contract**

In order to comply with the CEQ regulations and agency policies, an applicant for federal action should enter into a contract with the contractor that spells out the arrangement.<sup>216</sup> The CEQ describes this arrangement as a “third party contract” because the agency is the “third party” to the contract between the contractor and the proponent.<sup>217</sup> The contract should state that: (1) the proponent is funding the contractor’s preparation of the NEPA document for the agency; (2) the contractor is working under the direction and control of the agency; and (3) the agency will independently evaluate the contractor’s work.<sup>218</sup> A copy of the contract should be given to the agency for the administrative record.

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<sup>211</sup> *Id.*

<sup>212</sup> *Id.* (“If a federal agency uses ‘third party contracting,’ the applicant may undertake the necessary paperwork for the solicitation of a field of candidates under the agency’s direction.”); BLM NEPA Handbook H-1790-1, app. 7 (1988), available at <http://www.blm.gov/nhp/efoia/wo/handbook/h1790-1.pdf>.

<sup>213</sup> 40 C.F.R. § 1506.5(c) (elec. 2007).

<sup>214</sup> *See id.* § 1506.5(b).

<sup>215</sup> *Id.* § 1506.5(b).

<sup>216</sup> *See* Forty Questions, *supra* note 66, Question 16.

<sup>217</sup> *Id.*

<sup>218</sup> *See* 40 C.F.R. § 1506.5(b) (elec. 2007).

### [c] Conflicts of Interest

To avoid an actual or perceived conflict of interest, the CEQ regulations require a consultant preparing an EIS to “execute a disclosure statement . . . specifying that [it has] no financial or other interest in the outcome of the project.”<sup>219</sup> This conflicts of interest provision is interpreted “broadly to cover any known benefits other than general enhancement of professional reputation.”<sup>220</sup> Potential financial benefits include “any financial benefit such as a promise of future construction or design work on the project, as well as indirect benefits the consultant is aware of. . . .”<sup>221</sup> Although the regulations do not expressly require a disclosure statement for an EA, it is advisable to execute a statement anyway, affirming that the consultant does not have a financial or other interest in the outcome of the project. The conflict statement should be included in the administrative record.

A consulting firm is not disqualified from preparing a NEPA document for an agency when the firm was previously “involved in developing initial data and plans for the project” so long as that prior involvement between the proponent and the consultant is disclosed to the agency.<sup>222</sup> A consultant that prepares a NEPA document may later bid for future work on the project if, at the time it prepares the EIS or EA, it does not have a “promise” that it will receive that future work.<sup>223</sup> In resolving allegations of conflicts of interest by NEPA contractors, courts have inquired whether the alleged conflicts compromised “the objectivity and integrity of the NEPA process.”<sup>224</sup>

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<sup>219</sup> *Id.* § 1506.5(c); See Forty Questions, *supra* note 66, Question 17a.

<sup>220</sup> Forty Questions, *supra* note 66, Question 17a.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*; Ass’n Working for Aurora’s Residential Env’t v. Colo. Dep’t of Transp., 153 F.3d 1122, 1128 (10th Cir. 1998) (“A contractor with an agreement, enforceable promise or guarantee of future work has a conflict of interest.”) (quoting 42 U.S.C.A. § 4332; 40 C.F.R. § 1506.5(c)).

<sup>224</sup> Citizens Against Burlington, Inc. v. Bussey, 938 F.2d 190, 202 (D.C. Cir. 1991) (quoting Forty Questions, 46 Fed. Reg. at 18,031).

### [5] Public Comment

Public involvement is a fundamental aim of the NEPA process.<sup>225</sup> The purpose of NEPA is to ensure that “federal agencies are informed of environmental consequences before making decisions and that the information is available to the public.”<sup>226</sup> Public involvement in the NEPA process can take a variety of forms, including individual notice, public notice, hearings, meetings, and opportunities for comment on draft and final NEPA documents.<sup>227</sup>

An agency must provide notice and an opportunity for comment during the EIS process. An agency will request comments on a draft EIS at the initial “scoping” stage and, under certain circumstances, on the final EIS before it reaches a decision.<sup>228</sup> The CEQ regulations require an agency to “request comments from the applicant, if any.”<sup>229</sup>

Any comments submitted to an agency are public documents.<sup>230</sup> Typically, agencies will provide copies of comments to the proponent of the action upon request. Applicants for federal actions should consider requesting copies of such comments. This provides an opportunity to review information submitted by other agencies or third parties, which may help the proponent prevent future controversies or conflicts.

The proponent of a proposed action may respond to comments received by the agency. The proponent should send a letter to the agency that responds to particular comments, setting forth factual, technical, environmental, or other information the proponent thinks should be considered along with the comments. It is within the agency’s discretion whether to rely on the information submitted by the proponent. If the agency relies on the submis-

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<sup>225</sup> Dep’t of Transp. v. Pub. Citizen, 541 U.S. 752, 768-69 (2004).

<sup>226</sup> Citizens for Better Forestry v. U.S. Dep’t of Agric., 341 F.3d 961, 970-71 (9th Cir. 2003).

<sup>227</sup> See 40 C.F.R. § 1503.1(a) (elec. 2007).

<sup>228</sup> *Id.* §§ 1501.7, 1503.1.

<sup>229</sup> *Id.* § 1503.1(3).

<sup>230</sup> *Id.* § 1506.6(f).

sion it must “independently evaluate” any information it chooses to rely on.<sup>231</sup>

### **[6] The Administrative Record**

A proponent can request that an agency add material to the administrative record, including, but not limited to, studies, technical information, factual material, responses to comments, and correspondence. All the proponent has to do is submit a letter with the supplemental information that requests the agency to add the material to the administrative record.

The benefit of ensuring that all relevant documents are included in the administrative record is that such information can be referenced in court if the NEPA process is litigated. Once final agency action occurs, an agency’s compliance with NEPA is subject to judicial review in a U.S. district court under the Administrative Procedure Act.<sup>232</sup> When a court reviews a federal agency decision, it determines whether the action was arbitrary and capricious based upon the full administrative record that was before the agency when it made its decision.<sup>233</sup> Documents added to the record by the proponent may be relied upon in court to defend the reasonableness of the agency’s decision. As a matter of NEPA litigation strategy, it is far better to have useful information in the record than to articulate why the same information is unnecessary.

### **§ 4.06 Conclusion**

Land professionals typically encounter NEPA as the proponent of a federal action associated with natural resources development. Although the proponent has a concrete interest in the outcome of a NEPA process, the proponent must rely on the agency to comply with the statute. A land professional can promote the efficient administration of the environmental review process by understanding each stage and participating meaningfully. In this manner, a participant can help to improve the agency’s decision-

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<sup>231</sup> *Id.* § 1506.5(a).

<sup>232</sup> 5 U.S.C. § 706(2)(A) (elec. 2007); *Edwardsen v. U.S. Dep’t of the Interior*, 268 F.3d 781, 791 (9th Cir. 2001) (reviewing the DOI’s NEPA compliance in authorizing offshore oil and gas development under the APA).

<sup>233</sup> *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971); *Nevada v. Dep’t of Energy*, 457 F.3d 78, 87 (D.C. Cir. 2006).

making which is, of course, the “fundamental purpose of the NEPA process, the end to which the EIS is a means.”<sup>234</sup>

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<sup>234</sup>CEQ, Preamble to Final NEPA Regulations, 43 Fed. Reg. 55,978, 55,979 (Nov. 29, 1978).

§ 4.07 Appendix I

**The NEPA Process:**



