

January 2003

Pegasus, Workhorse, or Trojan Horse - A Case Study of the Use of the NEPA Process in Grazing Use Decisions on Bureau of Land Management Lands in Wyoming

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WYOMING LAW REVIEW

VOLUME 3

2003

NUMBER 1

PEGASUS, WORKHORSE, OR TROJAN HORSE? A CASE STUDY OF THE USE OF THE NEPA PROCESS IN GRAZING USE DECISIONS ON BUREAU OF LAND MANAGEMENT LANDS IN WYOMING

Valentine D. Sworts, Alan C. Schroeder***

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The sweeping policy goals announced in § 101 of NEPA are thus realized through a set of “action-forcing” procedures that require that agencies take a “hard look” at environmental consequences,” . . . and that provide for broad dissemination of relevant environmental information. Although these procedures are almost certain to affect the agency's substantive decision, it is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process.¹

“You can operate under the same law with different administrations and get dramatically different results,” said Thomas, a member of the Senate Environment and Public Works Committee.²

I. INTRODUCTION

From its uncertain beginnings more than thirty years ago, the National Environmental Policy Act (NEPA) has seemingly become a workhorse for federal environmental planning and decision-making.³ This is particularly true for federal land agencies, such as the Bureau of Land Management (BLM), where NEPA documents have been routinely prepared for decisions

1. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (internal citations omitted).

2. Theo Stein, *Law Reform Group Hosts Babbitt*, Denver Post, Nov. 18, 2000, at 4B.

3. For a description of the murky legislative history of NEPA and the role of the courts in filling in the gaps, see F.R. ANDERSON, *NEPA IN THE COURTS: A LEGAL ANALYSIS OF THE NATIONAL ENVIRONMENTAL POLICY ACT*, 1-14 (1973); William L. Andreen, *In Pursuit of NEPA's Premise: The Role of Executive Oversight in the Implementation of Environmental Policy*, 64 IND. L.J. 205, 212-23 (1989).

ranging from the preparation of national policies regarding coal development or area land use documents (Resource Management Plans (RMPs)) governing overall resource usage to routine site-specific decisions such as whether to renew grazing leases or permits on BLM lands.⁴

NEPA's evolution from mythical Pegasus to a day-to-day workhorse has not been without conflict for public land agencies such as the BLM. As Coggins and Glicksman note, "A lawsuit forced the BLM into a system-wide series of environmental impact statements that changed the nature of livestock grazing regulation; application of NEPA has indirectly destroyed or diluted many property attributes of federal mineral leases; [and] one NEPA decision halted federal coal leasing for years."⁵ The evolution has been particularly slow with respect to public land decisions regarding grazing. Indeed, in December 1998 – in response to changes in the federal regulations and a series of adverse rulings by federal courts – the BLM issued an instruction memorandum to all field officials outlining a strategy for timely completion of the grazing renewal process, a work plan to accomplish permit renewal, and suggestions for implementation of resource health standards and guidelines.⁶

Supporters of NEPA have been effusive in praising its impact on environmental decision-making. One commentator called NEPA one of the "seven great U.S. environmental laws."⁷ Others claimed during its twentieth anniversary that on a "nostalgia scale, the National Environmental Policy

4. For a description of the role of NEPA in land use planning for federal land agencies, see John Randolph, *Comparison of Approaches to Public Lands Planning: U.S. Forest Service, National Park Service, U.S. Fish and Wildlife Service, Bureau of Land Management*, 24 TRENDS 36, 42 (1987) ("All of the [land management] plans integrate the NEPA process and the development of the EIS [Environmental Impact Statement]. NEPA has had a profound effect on the planning of all four agencies, directly in the planning process and indirectly as it has influenced Congressional and administrative mandates for planning."); 2 GEORGE CAMERON COGGINS & ROBERT L. GLICKSMAN, PUBLIC NATURAL RESOURCES LAW § 10F:1, §10G:1 (2d ed. 2002) ("NEPA, especially in its programmatic EIS requirements, directly foreshadowed formal land planning mechanisms" "Instead of killing the evaluation monster it almost inadvertently created, Congress in other statutes since 1969 has reinforced the requirement that the land management agencies assess the environmental consequences of their proposals before acting.") [hereinafter PUBLIC NATURAL RESOURCES]. For a similar summary of its role in BLM decision making, see David C. Williams, *Planning Approaches in the Bureau of Land Management*, 24 TRENDS 27 (1987); PUBLIC NATURAL RESOURCES, § 10F:17 ("The National Environmental Policy Act has had as big an impact on BLM planning as the [Classification and Multiple Use Act].").

5. PUBLIC NATURAL RESOURCES, *supra* note 4, at §10G:1. They continue, "[the NEPA procedures] nevertheless serve the initial planning functions of data gathering and assessment of management options." *Id.*

6. Instruction Memorandum No. 99-039 from the Assistant Director, Renewable Resources and Planning, Bureau of Land Management, to All Field Officials 2-5 (Dec. 23, 1998) [hereinafter Instruction Memorandum I] (on file with the authors).

7. William H. Rodgers, Jr., *The Seven Statutory Wonders of U.S. Environmental Law: Origins and Morphology*, 27 LOY. L.A. L. REV. 1009, 1010 (1994).

Act (NEPA) certainly reaches the consequential, and arguably, the sublime."⁸ Coggins and Glicksman, in contrast, have drawn a more equivocal conclusion, noting on the one hand that NEPA "has been a primary factor in much if not most federal land litigation for more than two decades" and that "[t]he procedures mandated by NEPA have brought about substantive changes of immense magnitude,"⁹ while, on the other, reporting that "[t]he resulting grazing EISs are qualitatively and quantitatively diverse."¹⁰ A more vocal critic has complained:

In theory, EIS laws that are now ubiquitous in national and international legal systems, will, by the gradual, but insistent, accretion of project decisions, inevitably advance the world along the road to sustainable development. Unfortunately, the opposite is true. The widespread existence of NEPA-like laws has created a false sense of environmental security. Instead of advancing sustainability, EIS laws allow a project's unsustainability to be masked by a process that purports to promote sustainability. In the United States, NEPA not only fails to promote sustainable development, it allows decision makers to dress up unsustainable proposals with a veneer of sustainability, providing a false sense of security that the decisions of the government create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic and other requirements of present and future generations of Americans.¹¹

A 1993 survey by the Council of Environmental Quality (CEQ) highlights a different, but related concern.¹² Blaug, writing in 1993, notes that since 1979 the number of Environmental Impact Statements (EISs), the chief workhorse of the NEPA process, fell every year but one. In contrast, the number of Environmental Assessments (EAs) had grown.¹³ This was particularly true for federal land management agencies. Blaug indicates that

8. Donald N. Zillman & Peggy Gentles, *Perspectives on NEPA in the Courts*, 20 ENVTL. L. 505, 505 (1990).

9. PUBLIC NATURAL RESOURCES, *supra* note 4, at §10G:1 (internal citations omitted).

10. *Id.* at § 10F-17, 10F-29.

11. David R. Hodas, *The Role of Law in Defining Sustainable Development: NEPA Reconsidered*, 3 WIDENER L. SYMP. J. 1, 7-8 (Fall 1998) (internal citations omitted).

12. Elisabeth A. Blaug, *Use of the Environmental Assessment by Federal Agencies in NEPA Implementation*, 15 ENVTL PROF. 57 (1993). The Council of Environmental Quality also did a second study on the effectiveness of the NEPA process in 1997. See COUNCIL OF ENVIRONMENTAL QUALITY, THE NATIONAL ENVIRONMENTAL POLICY ACT, A STUDY OF ITS EFFECTIVENESS AFTER TWENTY-FIVE YEARS (January 1997) [hereinafter EFFECTIVENESS STUDY] (on file with the authors).

13. Blaug, *supra* note 12, at 57.

"the U.S. Forest Service estimates that it prepares an average of 12,500 EAs per year, while the Bureau of Land Management cites a figure of approximately 10,000 EAs each year."¹⁴ Thus the EIS has been replaced by a less familiar document, the EA. The 1993 CEQ survey of fifty-two federal agencies' usage of EAs found:

First, agencies rarely use an EA to determine whether an EIS is necessary; second, agencies prepare EAs that are frequently quite lengthy and costly; third, agencies appear to rely heavily on mitigation measures to justify EAs and decisions of findings of no significant impact (FONSIs).¹⁵

The 1993 CEQ survey results fly in the face of the statutory and regulatory requirements described below. Regarding the role of EAs, almost one third of the agencies surveyed indicated that an EA preceded preparation of an EIS less than one percent of the time.¹⁶ Only five agencies indicated that the purpose of preparing an EA was to determine if an EIS was required.¹⁷ The most frequently cited reason given for preparing an EA was to comply with the law. Regarding the NEPA process, thirty-five percent of the respondents indicated that they use different types of EAs. Most agencies indicated that "major EAs" are less detailed, shorter, and have less public involvement than their EIS process; two indicated that their longer EAs and EISs were similar.¹⁸ Fifty-eight percent of the respondents had procedures for involving the public; one quarter had no such procedures.¹⁹ Regarding the use of mitigation to avoid preparation of EISs, two agencies reported that they used mitigation FONSIs eighty and ninety-five percent of the time, respectively. Nineteen of the agencies surveyed indicated that mitigation FONSIs constituted only one percent of their EAs.²⁰

The 1993 CEQ survey suggests that the agencies' real NEPA process use may be significantly different than that outlined in the statutes. The EA, the new document of choice for federal land agencies is a Trojan horse of sorts, a virtually empty vessel, never described in NEPA and only briefly mentioned in the CEQ regulations. This paper's objective is to explore how the NEPA process is being implemented by one particular public land agency, BLM, in considering the environmental impacts for a particular decision, the re-issuance of grazing permits and leases. As we note below, BLM's strategy is still a work-in-progress. Our research captures only a moment in time in this evolution. Our intent is to illustrate the implementa-

14. *Id.*

15. *Id.*

16. *Id.* at 59.

17. *Id.* at 60.

18. *Id.* at 59

19. *Id.*

20. *Id.*

tion of BLM's NEPA strategy and to highlight those aspects that have worked and those that apparently have not.

In Section II, we introduce NEPA, describe the NEPA process under CEQ regulations, and review selected cases that clarify NEPA's requirements. In Section III, we describe the public lands resources managed by BLM, BLM's resistance to utilizing the NEPA process for grazing renewal decisions, and several cases outlining BLM's NEPA responsibilities regarding grazing. In Section IV, we briefly summarize the criteria established in the CEQ regulations and court cases for a properly functioning NEPA process. We then look at BLM's current efforts to implement its NEPA responsibilities. We begin by summarizing several paper policies and strategies, adopted by BLM, to implement NEPA during the research period (1999 through 2001). This section also examines how BLM has implemented its NEPA process on the ground for grazing permit and lease renewal decisions in one state, Wyoming, during two grazing seasons, May 1, 1999, to April 30, 2000, and May 1, 2000, to April 30, 2001. We compile the data for certain variables including: whether an EIS was ultimately prepared and if an EA and FONSI were issued then who prepared it, which standard forms were used, how cumulative impacts were addressed, what alternatives and mitigation decisions were considered, who was consulted in the preparation of these documents, and what outcomes were adopted. Our preliminary research indicated that no EISs were prepared for BLM grazing renewal decisions in Wyoming during the survey period. Given this fact, we focus our attention on three questions: (1) did the EA provide useful information on alternatives, cumulative impacts, and impacts on important or sensitive resources; (2) did the EA process involve both the public as well as state and local agencies in scoping the potential issues and in commenting upon the draft EA, and (3) did the EA influence decisions. In Section V, we summarize what we learned from our analysis.

II. A REVIEW OF NEPA AND THE NEPA PROCESS: GENETIC ENGINEERING

A. A Brief Review of NEPA

NEPA is essentially an exercise of genetic engineering, an attempt to modify how federal agencies do business without changing their underlying enabling acts or substantive obligations. Congress enacted the National Environmental Policy Act in 1969.²¹ NEPA consists of a declaration of pur-

21. National Environmental Policy Act of 1969, Pub. L. 91-190, § 102, 83 STAT. 852 (1970). For a description of the history and evolution of NEPA, see Dinah Bear, *The National Environmental Policy Act, its Origins and Evolutions*, 10 NAT. RESOURCES & ENV'T. 3 (1995); Ray Clark, *NEPA: The Rational Approach to Change*, in ENVIRONMENTAL POLICY AND NEPA: PAST, PRESENT, AND FUTURE 15 (Ray Clark & Larry Canter eds., 1997); Lynton K. Caldwell, *Implementing NEPA: A Non-Technical Political Task*, in ENVIRONMENTAL POLICY AND NEPA: PAST, PRESENT, AND FUTURE 25 (Ray Clark & Larry Canter eds., 1997).

pose and three subchapters. Subchapter I outlines national environmental policy and goals. Subchapter II creates the Council of Environmental Quality. Subchapter III contains a number of miscellaneous provisions including the establishment of a science advisory board to "provide such scientific advice as may be requested by the Administrator [of the Environmental Protection Agency], the Committee on Environment and Public Works of the United States Senate, or the Committee on Science, Space, and Technology, on Energy and Commerce, or on Public Works and Transportation of the House of Representatives."²² We will limit our discussion to the declaration of purpose and the first two subchapters.

1. Declaration of Purpose

Section 2 of NEPA provides:

The purposes of this chapter are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of ecological systems and natural resources important to the Nation; and to establish a Council of Environmental Quality.²³

2. Subchapter I, Policy and Goals

Section 101 of NEPA, the Congressional declaration of a national environmental policy, is somewhat more specific by recognizing the interrelations of man on his environment.²⁴ The declaration of policy notes the

22. 42 U.S.C. § 4365(a) (1994).

23. 42 U.S.C. § 4321.

24. 42 U.S.C. § 4331(a). Subsection (a) declares:

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

profound impact of humans on the environment and the critical import of restoring and maintaining environmental quality to the overall welfare and development of man. It establishes one clear duty on federal agencies – to work in “cooperation with State and local governments, and other concerned public and private organization” – while continuing to employ more ambiguous words such as “general welfare,” “productive harmony,” and “social, economic, and other requirements” in defining potential standards to govern agency action under NEPA.²⁵

Subsection (b) of NEPA’s section 101 gives the federal government “continuing responsibility . . . consistent with other essential considerations of national policy to improve and coordinate federal plans, functions, programs, and resources.”²⁶ Subsection (b) lists six specific ends of this improvement and coordination.²⁷ Unlike the declaration of purpose, this section uses mandatory words such as fulfill, assure, attain, preserve, achieve, and enhance. Still, the language preceding this list refers to “practicable means” and acknowledges that the policy still must be implemented “consistent with other essential considerations of national policy.”²⁸ CEQ regulations provide that “[e]ach agency shall interpret the provisions of the Act [NEPA] as a supplement to its existing authority and as a mandate to view traditional policies and missions in the light of the Act’s national environmental objectives.”²⁹ The regulations interpret the phrase, “to the fullest extent possible,” found in NEPA’s section 102 to mean that “each agency of

25. Section 104, among other things, also indicates that the policy and “action-forcing” elements of NEPA “shall [not] in any way affect the specific statutory obligations of any Federal agency . . . to coordinate or consult with any other Federal or State agency.” 42 U.S.C. § 4334(a).

26. 42 U.S.C. § 4331(b).

27. *Id.* The six requirements are:

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

Id.

28. *Id.*

29. 40 C.F.R. § 1500.6 (2002).

the Federal Government shall comply with that section unless existing law . . . expressly prohibits or makes compliance impossible."³⁰

Subsection (c) of NEPA's section 101 hortatively acknowledges that persons "should enjoy a healthful environment."³¹ It also indicates that each person has a "responsibility to contribute to the preservation and enhancement of the environment."³² We are unaware of any commentator who has suggested that this language imposes any substantive duty on private individuals or entities. Section 102 of this subchapter contains what is often referred to as the "action-forcing" provisions of NEPA.³³ It imposes a number of procedural requirements on federal agencies.³⁴

3. Subchapter II, The Council on Environmental Quality

Section 202 of NEPA establishes the CEQ.³⁵ NEPA gives the CEQ the duties and functions of:³⁶ 1) assisting and advising the President in the preparation of an annual Environmental Report;³⁷ 2) gathering and analyzing for the President "timely and authoritative information concerning the conditions and trends in the quality of the environment;" 3) reviewing, ap-

30. *Id.*

31. 42 U.S.C. § 4331(c).

32. *Id.*

33. *See e.g.*, 40 C.F.R. § 1500.1 ("Section 102(2) contains 'action-forcing' provisions to make sure that federal agencies act according to the letter and spirit of the Act."). *Id.*

34. 42 U.S.C. § 4332. The provisions include that the agency:

A) utilize a systematic, interdisciplinary approach; B) identify and develop procedures in consultation with the Council of Environmental Quality . . . which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision making along with economic and technical considerations; C) include in every recommendation or report or proposal for legislation and other major Federal action significantly affecting the quality of the human environment, a detailed statement of the environmental impacts, alternatives, short-term uses and long-term impacts on productivity, and any irreversible and irretrievable commitments of resources; D) study, develop, and describe appropriate alternatives to recommended courses of action in any proposals which involves unresolved conflicts concerning alternative uses of available resources; E) recognize the worldwide and long-range character of environmental problems, and – when consistent with foreign policy – lend support; F) make information and advice available to states, local governments, institutions, and individuals in restoring, maintaining, and enhancing the quality of the environment; G) initiate and utilize ecological information in the planning and development of resource-oriented projects; and H) assist the CEQ.

Id.

35. 42 U.S.C. § 4342.

36. 42 U.S.C. § 4344.

37. The President is required to annually file this report with Congress. 42 U.S.C. § 4341.

praising, and making recommendations to the President regarding federal programs and activities, based upon the policies in Subchapter I; 4) developing and making recommendations to the President regarding “national policies to foster and promote the improvement of environmental quality to meet the conservation, social, economic, health, and other requirements and goals of the Nation;” 5) conducting surveys and other research “relating to ecological systems and environmental quality;” 6) “document[ing] and defin[ing] changes in the natural environment;” 7) reporting to the President at least once a year the “state and condition of the environment;” and 8) “mak[ing] and furnish[ing] such studies, reports, thereon, and recommendations with respect to matters of policy and legislation as the President may request.”³⁸

President Nixon issued Executive Order 11,514 in March 1970, instructing the CEQ to develop guidelines to assist the federal agencies in complying with NEPA’s requirements.³⁹ The CEQ issued interim guidelines in 1970, proposed guidelines in January 1971, and final guidelines in April of that same year.⁴⁰ The guidelines were revised in 1973 and published in the Code of Federal Regulations.⁴¹ Commentators note, however, that questions arose in the 1970s regarding the CEQ’s authority to impose procedural guidelines on federal agencies and that federal agencies failed to meet deadlines to implement the guidelines anyway.⁴² President Carter subsequently issued Executive Order 11,991 requiring federal agencies to conform to the CEQ regulations.⁴³ The CEQ adopted regulations in 1979.⁴⁴ The 1979 regulations, with the primary exception of the elimination of a requirement that agencies prepare a worst-case scenario in certain circumstances, have remained the governing rules for NEPA implementation.⁴⁵

38. 42 U.S.C. § 4344.

39. Exec. Order No. 11,514, 35 Fed. Reg. 4,247 (Apr. 30, 1970), reprinted in 42 U.S.C. § 4321 (2002). See Bear, *supra* note 21, at 6.

40. Bear, *supra* note 21, at 6; Robert S. Lynch, *The 1973 CEQ Guidelines: Cautious Updating of the Environmental Impact Statement Process*, 11 CAL. W. L. REV. 297, 299-301 (1974).

41. 40 C.F.R. pt. 1500 *et seq.* (1974).

42. Bear, *supra* note 21, at 6, 69.

43. Exec. Order No. 11,991, 3 C.F.R. 123 (1977). Commentators have noted that federal agencies such as the Nuclear Regulatory Commission disputed President Carter’s authority to bind legally independent federal agencies. See Jonathan Poisner, *A Civic Republican Perspective on the National Environmental Policy Act’s Process for Citizen Participation*, 26 ENVTL. L. 53, 71 n.133 (1996).

44. 43 Fed. Reg. 55, 978 (Nov. 29, 1978) (codified at 40 C.F.R. § 1500-1508 (1995)).

45. Poisner, *supra* note 43, at 71. While the CEQ, along with the courts, played a major role in the 1970s development of the NEPA, its subsequent role has been less proactive. See Paul S. Weiland, *Amending the National Environmental Policy Act: Federal Environmental Protection in the Twenty-First Century*, 12 J. LAND USE & ENVTL. L. 275, 285 (1997) (“The ability of the CEQ to play a prominent role in national policymaking has been hampered by the existence of an often hostile political environment within the EOP [Executive Office of the President.]”).

Federal courts have shown great deference to CEQ regulations interpreting NEPA's requirements. In *Andrus v. Sierra Club*, the United States Supreme Court held that a request to Congress for appropriations was not a "proposal for legislation" and therefore did not trigger the NEPA process.⁴⁶ Stating this principle, the majority held that the CEQ regulations were to be given substantial deference. Similarly, in *Robertson v. Methow Valley Citizens Council*, the Supreme Court upheld CEQ's elimination of its previous requirement that certain EISs include a worst-case scenario.⁴⁷ The Court held that "substantial deference is nonetheless appropriate if there appears to have been good reason for the change" in the regulations.⁴⁸

*B. The NEPA Process Under Section 102(C) and CEQ Governing Regulations*⁴⁹

1. A Brief Overview

CATEGORICAL EXCLUSION

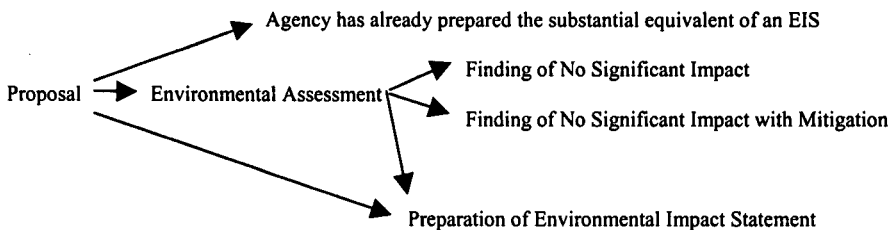


Figure 1: Decision Tree for the NEPA Process

Figure 1 illustrates the basic decision points in the NEPA process under section 102(C). The NEPA process is triggered when a federal agency considers any recommendation or report on proposed legislation or any other major federal action that might significantly affect the quality of the human environment.⁵⁰ At this point, the agency faces three potential decisions. First, it may determine that no EIS is required, either because the proposal has been categorically excluded from the NEPA process⁵¹ or because the

46. *Andrus v. Sierra Club*, 442 U.S. 347, 358-61 (1979).

47. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 333 (1989).

48. *Id.* at 355-56 (internal citations omitted).

49. 40 C.F.R. § 1508.21 (2002) provides: "NEPA process' means all measures necessary for compliance with the requirements of section 2 and Title I of NEPA."

50. 42 U.S.C. § 4332(2)(C) (1994).

51. CEQ regulations define the term *categorical exclusion* to mean:

a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of the regulations (§ 1507.3) and for which, therefore, neither an environmental assessment nor an environmental impact statement is required.

federal agency determines that an EIS is not required because it has already prepared the substantial equivalent of an EIS.⁵² Second, it may decide that the proposal satisfies NEPA's threshold requirements and immediately begin preparation of an Environmental Impact Statement (EIS). Third, it may determine that additional information must be collected, via an Environmental Assessment (EA), to determine whether an EIS is required. Following preparation and examination of the EA, the agency will issue a Finding of No Significant Impact (FONSI) or determine that the threshold requirements have been met and prepare an EIS.

2. Threshold Requirements Triggering the Preparation of an EIS

a. Covered Action

Four types of proposed federal actions are subject to the NEPA process: Policies, plans, programs, and projects.⁵³ The CEQ regulations provide for the preparation of EISs whenever broad policies, programs, and regulations are being considered:

Environmental impact statements may be prepared, and are sometimes required, for broad Federal actions such as the adoption of new agency programs or regulations (§ 1508.18). Agencies shall prepare statements on broad actions so that they are relevant to policy and are timed to coincide with meaningful points in agency planning and decision-making.⁵⁴

The CEQ regulations also provide that “[a]ctions include the circumstance where the responsible officials fail to act and that failure to act is reviewable by courts or administrative tribunals under the Administrative Procedure Act or other applicable law as agency action.”⁵⁵

40 C.F.R. § 1508.4.

52. *Wyoming v. Hathaway*, 525 F.2d 66, 71-72 (10th Cir. 1975) *cert. denied sub nom. Wyoming v. Kleepe*, 426 U.S. 906 (1976) (stating that process under Federal Insecticide, Rodenticide, and Fungicide Act is substantially equivalent); *Albamians for a Clean Env't v. Thomas*, 26 ERC 2116 (N.D. Ala. 1986) (explaining that the process under Resource Conservation and Recovery Act functional equivalent to NEPA's EIS requirement); *Florida Wildlife Fed'n v. Goldschmidt*, 611 F.2d 547 (5th Cir. 1980) (holding that a negative declaration for a highway project was a substantial equivalent); *but see Sierra Club v. Hodel*, 848 F.2d 1068, 1096 (10th Cir. 1988) (noting that previous studies not substantial equivalent to EIS for proposed road project).

53. 40 C.F.R. § 1508.18(b). See K.S. Weiner, *Basic Purposes and Policies of the NEPA Regulations*, in *ENVIRONMENTAL POLICY AND NEPA: PAST, PRESENT, AND FUTURE* 61, 68 (Ray Clark & Larry Canter eds., 1997). Weiner refers to these as the “four Ps.” *Id.*

54. 40 C.F.R. § 1502.4(b).

55. 40 C.F.R. § 1508.18.

Not every agency activity is a covered action. As one commentator put it, the “action must reach a certain level of ‘formality’ and do not refer to all internal thinking by or among federal officials.”⁵⁶ The CEQ regulations indicate that a “[p]roposal” exists at that stage in the development of an action when an agency subject to the Act has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the effects can be meaningfully evaluated.⁵⁷

b. Impact on Human Environment

To be subject to the NEPA process the proposed federal action must be shown to “significantly affect[] the quality of the human environment.”⁵⁸ The term “human environment” in this context refers to:

[T]he natural and physical environment and the relationship of people with that environment. . . . This means that economic or social effects are not intended by themselves to require preparation of an environmental impact statement. When an environmental impact statement is prepared and economic or social and natural or physical environmental effects are interrelated, then the environmental impact statement will discuss all of these effects on the human environment.⁵⁹

Thus, the courts have held that economic or psychological harm by itself is insufficient to require preparation of an EIS.⁶⁰

c. Significant Impact

Whether a proposed federal action significantly affects the quality of the human environment depends upon its context and intensity.⁶¹ Regard-

56. K.S. Weiner, *supra* note 53, at 68.

57. 40 C.F.R. § 1508.23.

58. 42 U.S.C. § 4332(2)(C) (1994). The statutory language also refers to “major” federal actions in designating which actions are potentially subject to the NEPA process. However, the CEQ regulations provide: “*Major Federal action* includes actions with effects that may be major and which are potentially subject to Federal control and responsibility. Major reinforces but does not have a meaning independent of significantly (§ 1508.27).” 40 C.F.R. § 1508.18.

59. 40 C.F.R. § 1508.14.

60. *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766 (1983) (stating that psychological harm from a potential nuclear accident does not meet the threshold triggering the NEPA process); *Cent. South Dakota Coop. Grazing Dist. v. Sec’y of the U. S. Dept. of Agric.*, 266 F.3d 889 (8th Cir. 2001) (stating that economic harm does not meet the threshold triggering a need to prepare an EIS).

61. 40 C.F.R. § 1508.27. *See also* *Douglas County v. Babbitt*, 48 F.3d 1495 (9th Cir. 1995), *cert. denied*, 516 U.S. 1042 (1996) (explaining that the designation of critical habitat

ing an action's context and intensity, the CEQ regulations provide definitions and examples.⁶² Some terms, such as controversial and future consid-

under Endangered Species Act does not impact the "natural untouched physical environment").

62. 40 C.F.R. § 1508.27(a), (b). These sections read:

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

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

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

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

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

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

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

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

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

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

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

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

erations, used to explain significant impact have become topics of discussion as well.⁶³

d. Cumulative Impacts

In considering a proposed action's significance, the agency must take into account its potential cumulative impacts.⁶⁴ Cumulative impacts refer to those environmental impacts that result from "the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions."⁶⁵ The regulations note that while the individual impact of a particular action might be minor, its cumulative impacts may be significant, thus triggering the NEPA process. The regulations also note that in considering whether the NEPA process applies, the federal agency must take into account cumulative impacts resulting from its own and other (private or public) entities' actions.⁶⁶

3. Environmental Assessment

When a federal agency is considering a proposed action potentially subject to the NEPA process, the proposed action is not subject to a categorical exclusion, and the agency has not already prepared a document substantially equivalent to an EIS but the agency is uncertain whether it requires a full EIS, then the federal agency may choose to prepare an environmental assessment.⁶⁷ An environmental assessment, according to the CEQ regulations, is a concise, public document.⁶⁸

63. "[T]he term 'controversial' apparently refers to cases where a substantial dispute exists as to the size, nature or effect of the major federal action rather than to the existence of opposition to a use, the effect of which is relatively undisputed." *Hanly v. Kleindienst*, 471 F.2d 823, 830 (2d Cir. 1972), *cert. denied sub nom. Hanly v. Attorney Gen. of the U.S.*, 412 U.S. 908 (1973). Compare *Found. for N. A. Wild Sheep v. U. S. Dep't of Agric.*, 681 F.2d 1172, 1182 (9th Cir. 1982) ("[T]he Service received numerous responses from conservationists, biologists, and other knowledgeable individuals, all highly critical of the EA [and its conclusions] . . ."), with *Friends of Endangered Species, Inc. v. Jantzen*, 760 F. 2d 976, 986 (9th Cir. 1985) ("[V]irtual agreement exists among local, state, and federal government officials, private parties, and local environmentalists . . ."). See also William Murray Tabb, *The Role of Controversy in NEPA: Reconciling Public Veto with Public Participation in Environmental Decisionmaking*, 21 WM. & MARY ENVTL. L & POL'Y 175 (1997). Future consideration is defined in 40 C.F.R. § 1508.27(a)-(b).

64. L.W. Canter, *Cumulative Effects and Other Analytical Challenges of NEPA*, in ENVIRONMENTAL POLICY AND NEPA: PAST, PRESENT, AND FUTURE 115 (Ray Clark & Larry Canter eds., 1997).

65. 40 C.F.R. § 1508.7.

66. *Id.*

67. The CEQ regulations indicate that federal agencies shall prepare an EA when required to do so under procedures adopted by their agency and may prepare an EA at any time to assist the agency in its planning process. 40 C.F.R. § 1501.3.

68. 40 C.F.R. § 1508.9(a). The section reads in pertinent part:

a. Content

The CEQ regulations require environmental assessments to supply four pieces of information: 1) a brief discussion of the need for the proposal; 2) alternatives as required by NEPA's section 102(2)(E); 3) the environmental impacts of the proposed action and alternatives, and 4) a listing of agencies and persons consulted.⁶⁹

b. Public Involvement

While the CEQ regulations describing EAs do not specifically mention public involvement, the regulations do require agencies to "[m]ake diligent efforts to involve the public in preparing and implementing their NEPA procedures."⁷⁰ The regulations require the proposing agency to involve the public in the preparation of environmental assessments as much as "practicable."⁷¹ Such involvement includes providing public notice of NEPA-related hearings, public meetings, and the availability of environmental documents and soliciting appropriate information from the public.⁷² The agency should also hold or sponsor public hearings, particularly when substantial controversy or interest exists concerning the proposed action or when requested to do so by another agency having jurisdiction over the action, if that agency's request proves reasons why such a hearing would be helpful.⁷³

4. Finding of No Significant Impact

Following the preparation of an environmental assessment, the federal agency may determine that the proposed action does not require preparation of an EIS. The written finding is known as a Finding of No Sig-

[A] concise public document for which a Federal agency is responsible that serves to:

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

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

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

Id.

69. 40 C.F.R. § 1508.9(b).

70. 40 C.F.R. § 1506.6(a).

71. 40 C.F.R. § 1501.4(b) provides: "If the proposed action is not covered by paragraph (a) of this section, prepare an environmental assessment (§ 1508.9). The agency shall involve environmental agencies, applicants, and the public, to the extent practicable, in preparing assessments required by § 1508.9(a)(1)." *Id.*

72. 40 C.F.R. § 1506.6(b), (d).

73. 40 C.F.R. § 1506.6(c).

nificant Impact or a FONSI. It must briefly present the reasons why the proposed action will not have a significant impact on the human environment.⁷⁴ It should include the environmental assessment or its summary and must indicate any other related environmental document(s). In some cases, an agency will issue a FONSI based upon proposed adoption of mitigation activities that will eliminate or minimize any impact to the human environment.⁷⁵ The CEQ regulations do not specifically describe any additional requirements for these mitigation FONSIs.⁷⁶

5. Environmental Impact Statement

An EIS is "a detailed written statement as required by § 102(2)(C) of the Act."⁷⁷ An EIS "serve[s] as an action-forcing device to insure that the policies and goals defined in the Act are infused into the ongoing programs and actions of the Federal Government."⁷⁸ It should be "analytic rather than encyclopedic;" it should be concise.⁷⁹ Additionally,

It shall provide full and fair discussion of significant environmental impacts and 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 An environmental impact statement is more than a disclosure document. It shall be used by Federal officials in conjunction with other relevant material to plan actions and make decisions.⁸⁰

a. Content

Even though the EA or EIS must be brief, the statutes require that EISs include five specific pieces of information:

- (i) the environmental impact of the proposed action,

74. 40 C.F.R. § 1508.13.

75. See *Cabinet Mountains Wilderness v. Peterson*, 685 F.2d 678 (D.C. Cir. 1982); *Conner v. Burford*, 848 F.2d 1441 (9th Cir. 1988).

76. See *Greenpeace Action v. Franklin*, 982 F.2d 1342 (9th Cir. 1992) (stating that mitigation measures adequate to eliminate the need for an EIS, even where agency was uncertain as to their efficacy, occur where measures are carefully considered, are based upon scientific studies, and appear reasonably designed).

77. 40 C.F.R. § 1508.11. Please note that EIS and its definitions are used here as an example of what should also be in an Environmental Assessment or EA. The CEQ regulations define EA; however, these regulations mainly refer to an EIS. The focus of this paper is on EAs, as this is the primary document that the BLM uses for grazing permit renewals. Some of the mechanics are similar between both an EIS and an EA.

78. 40 C.F.R. § 1502.1.

79. 40 C.F.R. § 1502.2(a), (c).

80. 40 C.F.R. § 1502.1.

- (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.⁸¹

b. Consultation

Section 102(C) of NEPA requires an agency proposing a covered action to consult with and obtain comments from any federal agency with legal jurisdiction or special expertise with respect to any environmental impacts involved.⁸² The proposing agency is also to obtain the comments and the views of federal, state, and local agencies, "which are authorized to develop and enforce environmental standards" and make these statements available to the President, CEQ, and the public.⁸³

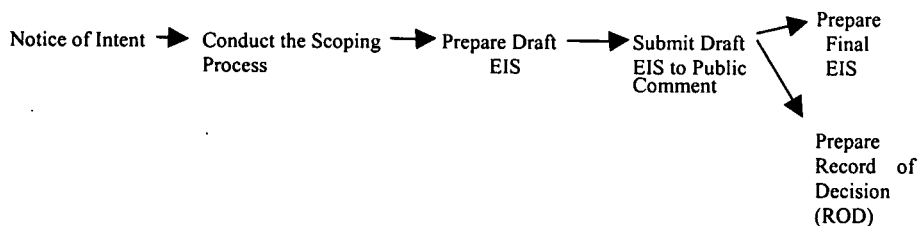


Figure 2: Steps in Preparing an EIS.

c. Steps in Preparing an EIS

Figure 2 outlines the basic steps in preparing an EIS.⁸⁴ First, after deciding to prepare an EIS, the federal agency must publish a notice of intent (NOI) in the Federal Register.⁸⁵ The notice must describe the proposed action and possible alternatives, the agency's proposed scoping process, "including whether, when and where any scoping meeting will be held," and indicate a person within the agency who would answer questions regarding the NEPA process.⁸⁶ Second, the agency must conduct a scoping proc-

81. 42 U.S.C. § 4332(2)(C) (1994).

82. *Id.*

83. *Id.*

84. Where more than one federal agency is involved, the agencies must designate one as the lead agency. The lead agency will be responsible for preparation of the EIS. See 40 C.F.R. § 1501.5 (2002).

85. 40 C.F.R. § 1501.7.

86. 40 C.F.R. § 1508.22. This section also defines the notice of intent.

ess. The CEQ regulations refer to the “scoping process” as “an early and open process for determining the scope of issues to be addressed and for identifying the significant issues related to a proposed action.”⁸⁷ The scoping process includes the involvement of other agencies and considers the impact of the proposed action.⁸⁸

Third, a draft EIS is prepared following scoping. The draft is to be “prepared in accordance with the scope decided upon in the scoping process.”⁸⁹ An interdisciplinary team is to prepare the draft EIS based upon the scope and issues identified in the scoping process.⁹⁰ Fourth, following the preparation of the draft EIS, the agency must invite comment on the document from “any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved or which is authorized to develop and enforce environmental standards.”⁹¹ Fifth, following the copy’s submission to the EPA, the agency will normally issue a final

87. 40 C.F.R. § 1501.7.

88. *Id.* The agency must:

(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.

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

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

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

(7) Indicate the relationship between the timing of the preparation of environmental analyses and the agency’s tentative planning and decision-making schedule.

Id.

89. 40 C.F.R. § 1502.9(a).

90. 40 C.F.R. § 1502.6.

91. 40 C.F.R. § 1503.1(a)(1). It must also request comments from appropriate state and local agencies, affected Indian tribes, any agency that has requested that it be notified, any state clearinghouse, the applicant, if any, and the public. 40 C.F.R. § 1503.1(a)(2)-(4).

EIS.⁹² The final EIS will respond to the comments and discuss “any responsible opposing view which was not adequately discussed in the draft statement and shall indicate the agency’s response to the issues raised.”⁹³ Sixth, at the time the agency issues its final EIS the agency will also publish a record of decision (ROD).⁹⁴ The ROD must: 1) state what the decision is; 2) identify all alternatives considered in reaching the decision and indicate which alternative was considered environmentally preferable (the agency may also discuss and rank alternatives based upon other factors including economic, technical, and the agency’s statutory mission); and 3) indicate whether all practicable means to avoid or minimize environmental harm from the alternative selected were adopted (and if not, why not).⁹⁵ The CEQ regulations also require that the ROD include a discussion of any monitoring and enforcement mechanism implemented for any mitigation scheme that is to be adopted.

d. Tiering

EISs may be prepared at a variety of levels (e.g., policies, plans, programs, or projects). The CEQ regulations provide:

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.⁹⁶

e. Preparer

Neither the statute nor the CEQ regulations discuss who is responsible for preparing EAs. The CEQ regulations provide: “Environmental impact statements shall be prepared using an inter-disciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts The disciplines of the preparers shall be appropriate to the scope and issues identified in the scoping process.”⁹⁷ NEPA

92. 40 C.F.R. § 1506.10.

93. 40 C.F.R. § 1502.9(b).

94. 40 C.F.R. § 1505.2.

95. *Id.*

96. 40 C.F.R. § 1502.20.

97. 40 C.F.R. § 1502.6.

specifically provides that an EIS will not be deemed legally insufficient for any "major Federal action funded under a program of grants to States . . . solely by reason of having been prepared by a State agency or official" with certain conditions.⁹⁸ The CEQ regulations also provide for the designation of a lead agency to supervise any EIS preparation whenever more than one Federal agency "[p]roposes or is involved in the same action"⁹⁹ or "[i]s involved in a group of actions directly related to each other because of their functional interdependence or geographical proximity."¹⁰⁰

*C. Judicial Interpretation of NEPA's General Statutory and Regulatory Requirements: Selected Cases*¹⁰¹

1. Availability of Judicial Review for NEPA Actions and Standing

Commentators have frequently noted that NEPA's impact is as much a result of judicial action¹⁰² (and the drafting of enforceable regulations by the CEQ) as by clear mandates within the Act itself.¹⁰³ A leading example in this regard is a 1971 case, *Calvert Cliffs' Coordinating Committee v. Atomic Energy Commission*.¹⁰⁴ NEPA contains no specific provision

98. 42 U.S.C. § 4332(2)(D) (1994). This section lists the conditions:

- i) the State agency or official has statewide jurisdiction and is responsible for this particular action; ii) the responsible Federal official provides guidance and oversight; iii) the responsible Federal official independently evaluates such statement [the EIS] prior to its approval and adoption, and iv) . . . the responsible Federal official provides early notification to and solicits the views from any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts on such [entity]

Id. "[I]f there is any disagreement on such impacts [on the part of the contacted state or federal land management agency consulted, then the agency must] prepare . . . a written assessment of such impacts and views for incorporation in such detailed statement." *Id.*

99. 40 C.F.R. § 1501.5(a)(1).

100. 40 C.F.R. § 1501.5(a)(2).

101. For a more thorough review of cases interpreting NEPA, see W.M. Cohen & M.D. Miller, *Highlights of NEPA in the Courts*, in ENVIRONMENTAL POLICY AND NEPA: PAST, PRESENT, AND FUTURE 181 (Ray Clark & Larry Canter eds., 1997).

102. Donald N. Zillman & Peggy Gentles, *Perspectives on NEPA in the Courts*, 20 ENVTL. L. 505, 529 (1990) ("[T]he judiciary made NEPA more than it should have been – a legislative acorn turned to mighty oak."); Weiland, *supra* note 45, at 287 ("From a practical point of view, courts have defined the requirements that are placed on the federal agencies by NEPA."). See *supra* note 3 for other references.

103. 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, 181-84 (2000) (stating that NEPA was brought to life as a result of "two great coincidences" – the court decision, *Calvert Cliffs' Coordinating Comm. v. Atomic Energy Comm'n*, and the re-writing of regulations by CEQ, which "became the bible for the federal establishment and for reviewing courts; they became NEPA"). *Id.* at 184.

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

to enforce its requirements.¹⁰⁵ Nevertheless Judge Skelly Wright, writing for the United States Court of Appeals for the District of Columbia, found that “[s]ection 102 of NEPA . . . creates judicially enforceable duties.”¹⁰⁶

Judge Wright makes no reference as to the basis for these judicially enforceable duties. Subsequent courts have indicated that while “[n]either NEPA nor FLPMA [the Federal Land Policy and Management Act] contain provisions allowing a right of action . . . [a] party alleging violations of NEPA . . . can bring an action under the APA [Administrative Procedure Act]” to enforce both.¹⁰⁷

The United States Supreme Court addressed the questions of standing (who may bring an action) based upon an alleged NEPA violation and ripeness (when an action may be brought) in a 1990 case, *Lujan v. National Wildlife Federation*.¹⁰⁸ The plaintiffs sought to challenge the BLM’s land withdrawal review program, carried out under FLPMA.¹⁰⁹ The plaintiffs claimed that the reclassification of certain public lands would open the lands to mining and destroy their natural beauty, thus violating both FLPMA’s withdrawal, multiple-use, and land use planning requirements and NEPA’s requirements that federal agencies prepare an EIS whenever engaged in an action that would significantly affect the quality of the human environment.¹¹⁰ Justice Scalia, writing for the majority, first noted that the plaintiffs did not contend that either FLPMA or NEPA provided any private right of action when violated.¹¹¹ Instead, the plaintiffs based their claim for judicial review on section 10(a) of the federal APA, which gives a right to judicial review to any “person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute.”¹¹² To bring an action under this APA provision, a plaintiff must satisfy two requirements: 1) “some ‘agency action’ that affects him in the specified fashion” and 2) “that he has ‘suffere[ed] legal wrong’ because of the challenged action, or is ‘adversely affected or aggrieved’ . . . ‘within the meaning of a relevant statute.’”¹¹³ When a plaintiff is bringing an action based solely upon APA’s section 10(a), the action must represent a

105. ZYGMUNT J.B. PLATTER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY 602 (1992) (“[T]here is no enforcement mechanism on the face of NEPA. Caldwell and the committee staff presumed that NEPA would be actively enforced by the President, acting through OMB and CEQ, and by Congress.”).

106. *Calvert Cliffs*, 449 F.2d at 1115.

107. *ONRC Action v. Bureau of Land Management*, 150 F.3d 1132, 1135 (9th Cir. 1998) (citations omitted).

108. *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990).

109. See FLPMA discussion, *infra* notes 199-230 and accompanying text.

110. *Lujan*, 497 U.S. at 879.

111. *Id.* at 882.

112. *Id.* (quoting 5 U.S.C. § 702).

113. *Lujan*, 497 U.S. at 882-83.

“final agency action.”¹¹⁴ Applying this rule to the facts, the majority found that the plaintiffs had complained of particular agency actions (e.g., termination of the withdrawal classification of 4,500 acres of BLM land) and the “aggrievement” raised (“recreational use and aesthetic enjoyment”) met the zone of interest test. However, the majority concluded that the plaintiffs had failed to demonstrate that their particular interests were actually affected by this agency action and held that no harm was shown.¹¹⁵

2. Deference to Federal Agencies’ Scientific Expertise and Determinations

a. *Whether to Prepare an EIS*

Federal courts have shown great deference to agency determinations that are based upon scientific expertise, particularly when that expertise is used to determine that an EIS is not required. In *Marsh v. Oregon Natural Resource Council*, nonprofit groups challenged the Army Corps’ permit issuance for dam construction, claiming that the proposed action required preparation of a supplemental EIS based upon new information.¹¹⁶ The United Supreme Court concluded that “[t]he question presented for review in

114. *Id.* at 882. Additionally, to be “adversely affected,” a plaintiff must show “that the injury he complains of (*his* aggrievement, or the adverse effect *upon him*) falls within the ‘zone of interests’ sought to be protected by the statutory provision whose violation forms the legal basis for his complaint.” *Id.* at 883.

115. *Lujan*, 497 U.S. at 891. The Court explains the rationale of its holding:

Respondent alleges that violation of the law is rampant within this program – failure to revise land use plans in proper fashion, failure to submit certain recommendations to Congress, failure to consider multiple use, inordinate focus upon mineral exploitation, failure to provide required public notice, failure to provide adequate environmental impact statements. Perhaps so. But respondent cannot seek *wholesale* improvement of this program by court decree, rather than in the offices of the Department or the halls of Congress, where programmatic improvements are normally made. Under the terms of the APA, respondent must direct its attack against some particular “agency action” that causes it harm. Some statutes permit broad regulations to serve as the “agency action,” and thus to be the object of judicial review directly, even before the concrete effects normally required for APA review are felt. Absent such a provision, however, a regulation is not ordinarily considered the type of agency action “ripe” for judicial review under the APA until the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action applying the regulation to the claimant’s situation in a fashion that harms or threatens to harm him. (The major exception, of course, is a substantive rule which as a practical matter requires the plaintiff to adjust his conduct immediately. Such agency action is “ripe” for review at once, whether or not explicit statutory review apart from the APA is provided.)

Id. (citations omitted).

116. *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360 (1989).

this case is a classic example of a factual dispute the resolution of which implicates substantial agency expertise."¹¹⁷ The court held that the question of whether a supplemental EIS is required in this case is based upon new scientific information, and thus requires great deference. "Accordingly, as long as the Corps' decision not to supplement the FEISS [Final Environmental Impact Supplementary Statement] was not 'arbitrary or capricious,' it should not be set aside."¹¹⁸

Such deference is not unlimited. Judge Skelly Wright found in the 1991 *Calvert Cliffs*' decision that the Atomic Energy Commission was obligated, as a result of the procedural mandates contained in NEPA's section 102, to fully consider the environmental impacts of its decision in its decision-making process.¹¹⁹ He wrote that a court may reverse the decision only if it lacks consideration and a balancing of factors.¹²⁰ In another frequently quoted passage from this decision, the Judge indicates:

[The Commission's] responsibility is not simply to sit back, like an umpire and resolve adversary contentions at the hearing stage. Rather, it must itself take the initiative of considering environmental values at every distinctive and comprehensive stage of the process beyond the staff's evaluation and recommendations.¹²¹

The Supreme Court in *Marsh* made the same point. In reviewing an agency's decision not to prepare an EIS, "the reviewing court must consider whether the decision was based on a consideration of the relevant facts and whether there has been a clear error of judgment. This inquiry must be searching and careful, but the ultimate standard of review is a narrow one."¹²² Thus, the courts have consistently held that the procedural, action-

117. *Marsh*, 490 U.S. at 376.

118. *Id.* at 377.

119. *Calvert Cliffs' Coordinating Comm. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109, 1115 (D.C. Cir. 1971).

120. *Id.* The court held:

We conclude, then that Section 102 of NEPA mandates a particular sort of careful and informed decisionmaking process and creates judicially enforceable duties. The reviewing courts probably cannot reverse a substantive decision on its merits, under Section 101, unless it be shown that the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental values. But if the decision was reached procedurally without individualized consideration and balancing of environmental factors – conducted fully and in good faith – it is the responsibility of the courts to reverse.

Id.

121. *Id.* at 1119. *See id.* at 1119 n.21 for a discussion about public interest.

122. *Marsh*, 490 U.S. at 378 (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971) (internal quotations omitted)).

forcing provisions contained in section 102(C) of NEPA must be rigidly followed. NEPA requires active agency involvement in the gathering and analyzing of the environmental data. Failure to comply with its provisions, including any failure to utilize the information collected in the decision process or to engage in a hard look at this data when making the decisions, can be grounds for reversal.¹²³ The standard of review, however, as the Supreme Court's decision in *Marsh* indicates, is very narrow: "[A]s long as the Corps' decision not to supplement the FEISS was not 'arbitrary or capricious,' it should not be set aside."¹²⁴

3. Substantive Requirements under NEPA

Despite Judge Wright's¹²⁵ and critics' claims to the contrary, the United States Supreme Court has consistently ruled that NEPA has no substantive content.¹²⁶ For example, in *Robertson v. Methow Valley Citizens Council*, a local resident challenged a United States Forest Service decision to issue a special use permit to Methow Recreation for a ski resort.¹²⁷ The plaintiffs brought suit charging that the USFS did not issue a fully developed plan. The United States Supreme Court concluded, "[I]t is now well-settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process."¹²⁸ The process itself requires that agencies take a "hard look" at the environmental consequences.¹²⁹ The majority opinion concludes: "Other statutes may impose substantive environmental obligations on federal agencies, but NEPA merely prohibits uninformed – rather than unwise – agency action."¹³⁰

To summarize, a particular process satisfies NEPA if it can be shown that the environmental information collected is seriously considered in the agency's decision-making process, even though the agency makes its decision based upon other factors as well. The Supreme Court in *Robertson* also suggests that the action-forcing¹³¹ provisions of NEPA:

123. *Calvert Cliffs*', 449 F.2d at 1115.

124. *Marsh*, 490 U.S. at 377.

125. *Calvert Cliffs*', 449 F.2d at 1115.

126. See also *Vermont Yankee Nuclear Power Corp. v. NRDC, Inc.*, 435 U.S. 519, 548-49 (1978); *Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 100-01, 106-08 (1983).

127. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 345-46 (1989).

128. *Robertson*, 490 U.S. at 350.

129. *Id.*

130. *Id.* at 351.

131. *Id.* at 349. The Court explains the two aspects of action-forcing:

The statutory requirement that a federal agency contemplating a major action prepare such an environmental impact statement serves NEPA's "action-forcing" purpose in two important respects. . . . It ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental im-

- “ensure that the agency, in reaching its decision will have available,”
- “carefully consider” detailed environmental impact information when making its decision;
- the process will guarantee that this information is made available to the public; and
- the process will involve this larger public in the decision making and implementation stages.¹³²

If these procedural requirements are satisfied, an agency’s statutory duties are satisfied.

The Fifth Circuit Court of Appeals in *Zabel v. Tabb* addressed a somewhat different but related substantive issue under NEPA: Whether the Act permits agencies to take environmental factors into account in supplementing their traditional, nonenvironmentally-specified responsibilities.¹³³ In this case, the Army Corps of Engineers had refused to issue a permit, based upon nonnavigable (environmental) grounds. The Fifth Circuit held:

The national policy is set forth in plain terms in 101 In rejecting a permit on non-navigational grounds the Secretary of the Army does not abdicate his sole ultimate responsibility and authority. Rather in weighing the application, the Secretary of the Army is acting under a Congressional mandate to collaborate and consider all of these factors.¹³⁴

Thus, federal agencies may (but are not required to) utilize NEPA substantive mandates in carrying out their responsibilities, unless such considerations specifically violate their own statutory duties.

4. Impacts to be Considered in Environmental Documents

Federal courts have addressed the types of information that must be included in EAs or EISs in several cases. Regarding impacts and effects that must be included in EAs or EISs, the Supreme Court has written:

NEPA does not require the agency to assess *every* impact or effect of its proposed action but only the impact or effect on the environment. NEPA was designed to promote human

pects; it also guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decision-making process and the implementation of that decision.

Id. (citations omitted).

132. *Id.* at 349.

133. *Zabel v. Tabb*, 430 F.2d 199, 202-03 (5th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971).

134. *Zabel*, 430 F.2d at 213.

welfare by alerting governmental actors to the effect of their proposed action on the physical environment.¹³⁵

Thus, EAs or EISs need only include impacts or effects on the environment. The Court also defined the terms “environmental effect” and “environmental impact.” It found that their meanings include “a reasonably close causal relationship between a change in the physical environment and the effect at issue.”¹³⁶

The Ninth Circuit Court of Appeals has addressed the need to prepare a unified EA to account for connected and cumulative impacts associated with a proposed action.¹³⁷ In the late 1960s, the United States Forest Service began reconstructing the Yaak River Road in five segments. EAs were prepared for the first four segments (the EA for the last segment was prepared two years after the USFS decided to reconstruct the Road). Regarding the NEPA requirements, the court held, first, that the EAs prepared were inadequate because they failed to discuss the impact on wildlife and were “not intended to evaluate environmental consequences.”¹³⁸ Second, the court rejected the USFS’s claim that the biological assessment (BA) it had prepared under the Endangered Species Act was sufficient to supplement the EA and satisfy the NEPA requirements. The court noted that gaps remained since “[v]arious aspects of the environment were not evaluated in either of these documents” (e.g., impacts on nonendangered species, plant life, or recreation).¹³⁹ Third, the court found, given that “the reconstruction contracts were awarded prior to preparation of the EAs, and by the time the BA was prepared, construction had already begun,” the agency had not engaged in the requisite hard look at the environmental consequences of its action before deciding.¹⁴⁰ Fourth, the court concluded that the EAs failed to include necessary discussion of the connected and cumulative impacts. It quoted the CEQ regulations defining “‘connected actions’ as actions that are ‘closely related and therefore should be discussed in the same impact statement.’”¹⁴¹ Regarding the cumulative impacts, “[b]oth connected actions and

135. *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 772 (1983).

136. *Id.* at 774.

137. *Save the Yaak Comm. v. Block*, 840 F.2d 714 (9th Cir. 1988).

138. *Save the Yaak*, 840 F.2d at 718.

139. *Id.*

140. *Id.*

141. *Id.* at 719 (citing 40 C.F.R. 1508.25(a)(1)(1987)). *Connected actions* under these regulations are those that: “(i) Automatically trigger other actions which may require environmental impact statements”; “(ii) Cannot or will not proceed unless other actions are taken previously or simultaneously”; or “(iii) are interdependent parts of a larger activity and depend on the larger action for their justification.” *Id.* In determining connectedness, the court cited six factors identified in its earlier opinion, *Thomas v. Peterson*, 753 F.2d 754 (9th Cir. 1985): 1) characterization of the road in the EA; 2) the objective statement for the action contained in the EA; 3) rationale given for the rejection of the ‘no action alternative; 4) specific factors included in any benefit-cost analysis; 5) other benefits claimed, and 6) segment-

unrelated, but reasonably foreseeable, future actions may result in cumulative impacts.”¹⁴²

Cumulative impacts were also addressed in a second Ninth Circuit decision, *Sierra Club v. United States Forest Service*.¹⁴³ The court found the EAs were inadequate because they failed to consider cumulative impacts: “Although the Forest Service maintains it discusses the past and future cumulative impacts in its draft EIS for the forest, none of the EAs incorporated these discussions in any way.”¹⁴⁴ The court held that an EIS should have been prepared because of the substantial questions raised concerning the potential adverse effects of this harvest action.

5. Alternatives to be Included in Environmental Documents

A 1998 federal district case, *Southern Utah Wilderness Alliance v. Dabney*, addressed the question of whether the National Park Service had adequately proposed and considered alternatives when completing an EA for a backcountry management plan.¹⁴⁵ The draft EA described current policies, alternatives for change, the environmental consequences of each, and the preferred alternative for each problem. “If a near consensus of respondents suggested one alternative over another, and if that alternative met with Park Service mandates and policies, then public preference determined the preferred alternative.”¹⁴⁶ Following circulation of the draft EA, the plan and review of the comments, the Park Service issued a final backcountry management plan. The Plaintiffs challenged this plan, among other reasons, because the EA: “(i) failed to consider an adequate range of alternatives by failing to discuss the alternative of closing many or all of the backcountry roads in the planning area, (ii) failed to discuss the permit system that was eventually adopted, and (iii) failed to adequately analyze impacts of off-road vehicle use in areas other than in the Canyons.”¹⁴⁷ The district court rejected the Plaintiffs’ claim that the alternatives examined were inadequate because NEPA does not specify the range of alternatives that must be studied. Relying on a Ninth Circuit decision, the court indicated that the standard “is whether an [EA’s] selection and discussion of alternatives fosters informed decision-making and informed public participation.”¹⁴⁸ The court found that “[t]he Park Service focused on alternatives that were responsive to the prob-

ing road reconstruction (showing a clear nexus between the road construction and timber sales). *Save the Yaak*, 840 F.2d at 719-20.

142. *Id.* at 721.

143. 843 F.2d 1190 (9th Cir. 1988).

144. *Id.* at 1195.

145. *Southern Utah Wilderness Alliance v. Dabney*, 7 F. Supp. 2d 1205 (D. Utah 1998) *rev’d on other grounds*, *Southern Utah Wilderness Alliance v. Dabney*, 222 F.3d 819 (10th Cir. 2000).

146. *Southern Utah Wilderness Alliance*, 7 F. Supp. 2d at 1208.

147. *Id.* at 1212.

148. *Id.* at 1213 (quoting *California v. Block*, 690 F.2d 753, 767 (9th Cir. 1982)).

lems identified as most critical in the scoping process, and with respect to those problems, the Park Service did consider a full range of alternatives, including complete closure.”¹⁴⁹

The district court in *Dabney* also noted:

The public comment process to be followed by an agency in its preparation of an EA is not prescribed by law. Agencies are merely directed to “involve . . . the public to the extent practicable.” However to be consistent with NEPA’s purpose, the alternatives selected “should serve both to alert the public of what the agency intends to do and to give the public enough information to be able to participate intelligently in the process.” Even under the exacting requirements applicable to the preparation of an EIS, an agency obviously must be allowed “some flexibility to modify alternatives canvassed in the draft EIS to reflect public input.”¹⁵⁰

Applying this rule, the district court held that the Park Service’s selection of an alternative not included in the EA did not violate NEPA when the alternatives examined were sufficient to alert the public of its plans and to give the public enough information to participate intelligently. The continued presence of vehicles in the park had been recognized by the alternatives examined and the “public debate over the alternatives was sufficiently broad to apprise the Park Service of the various public perspectives.”¹⁵¹

Finally, the district court in *Dabney* rejected plaintiffs’ complaint that the Park Service had failed to examine the impact of vehicle use in the planning area other than in the Canyons. The court noted that the plaintiff had failed to submit evidence “that the BMP [Backcountry Management Plan] might have significant environmental effects not already considered in the EA.”¹⁵²

The Eighth Circuit Court of Appeals also has addressed the nature of EA alternatives, prepared in conjunction with a proposed reduction of grazing on United States Forest Service lands.¹⁵³ Citing supporting precedent, the court concluded, “An agency need not consider all policy alternatives in its decision-making . . . [n]or must an agency pursue policy alternatives that are contrary to the pertinent statutory goals . . . or do not fulfill a

149. *Id.*

150. *Id.* at 1213-14 (citations omitted).

151. *Id.* at 1214.

152. *Id.*

153. *Cent. S. Dakota Coop. Grazing Dist. v. Sec. of the U.S. Dept. of Agric.*, 266 F.3d 889 (8th Cir. 2001).

project's purpose."¹⁵⁴ Moreover, the court found that a different standard applies in assessing alternatives, depending upon whether an EIS or an EA is involved. "When an agency has concluded through an Environmental Assessment that a proposed project will have a minimal environmental effect, the range of alternatives it must consider to satisfy NEPA is diminished."¹⁵⁵

6. Standards for Evaluating Mitigation Proposals in Environmental Documents

Federal courts have established two distinct standards when considering the sufficiency of a mitigation proposal in an EIS, an EA and related FONSI.¹⁵⁶ In *Cabinet Mountains Wilderness v. Peterson*, the plaintiffs challenged a USFS decision approving a plan for exploratory mineral drilling in the Cabinet Mountains Wilderness Area in Montana.¹⁵⁷ The plaintiffs claimed that the USFS's failure to prepare an EIS violated NEPA. The USFS had considered several recommendations and had adopted specific mitigation measures before issuing a FONSI. The Court of Appeals for the District of Columbia held that the agency's decision whether to prepare an EIS was governed by the arbitrary and capricious standard.¹⁵⁸ It indicated that four criteria are to be considered when reviewing an agency's decision to not prepare an EIS, based upon a proposed mitigation plan:

[1] whether the agency took a "hard look" at the problem; 2) whether the agency identified the relevant areas of environmental concern; 3) as to the problems studied and identified, whether the agency made a convincing case that the impact was insignificant; and 4) if there was impact of true significance, whether the agency convincingly established that changes in the project sufficiently reduced it to a minimum.¹⁵⁹

The Court of Appeals for the District of Columbia noted that the USFS adopted several specific mitigation measures to compensate for the adverse

154. *Id.* at 897 (citations omitted).

155. *Id.*

156. For a more thorough discussion of the role of mitigation proposal in EAs and EISs, see Albert I. Herson, *Project Mitigation Revisited: Most Courts Approve Findings of No Significant Impact Justified by Mitigation*, 13 *ECOLOGY L.Q.* 51 (1986); David C. Richards, *Robertson v. Methow Valley Citizens Council: The Gray Area of Environmental Impact Statement Mitigation*, 10 *J. ENERGY L. & POL'Y* 217 (1990); Mollie A. Maffei, *Establishing a Standard for the Mitigated Environmental Assessment Under NEPA*, 12 *PUB. LAND L. REV.* 81 (1991). See also *City of Blue Ash v. McLucas*, 596 F.2d 709 (6th Cir. 1979) (stating that NEPA establishes no private cause of action to enforce a private agreement to carry out a mitigation proposal included in an EIS).

157. *Cabinet Mountain Wilderness v. Peterson*, 685 F.2d 678 (D.C. Cir. 1982).

158. *Id.* at 681.

159. *Id.* at 682.

impacts of the proposal. It found that these mitigation measures were incorporated within the proposal and the USFS could redress any violations by revoking or suspending the drilling program.¹⁶⁰ This was sufficient to justify the USFS's issuance of a FONSI.

In *Audubon Society of Central Arkansas v. Dailey*, an environmental organization challenged a decision of the Army Corps of Engineers to issue a permit for fill material to construct a bridge and jogging path in connection with a road extension.¹⁶¹ The Eighth Circuit Court of Appeals also applied the arbitrary and capricious standard in evaluating the Corps' decision not to prepare an EIS. The original permit made no provision for increased traffic as a result of the road extension. The EA indicated an expectation that the city would adopt appropriate traffic control measures to limit adverse environmental impacts. In holding that an EIS must be prepared, the court adopted the following rule:

An agency may certainly base its decision of "no significant impact" on mitigating measures to be undertaken by a third party. In such a case, the mitigating measures need not be a condition of the permit (although this helps), nor even a contractual obligation However, the mitigating measures must be "more than mere vague statements of good intentions." Of course, the result of the mitigating measures must be to render the net effect of the modified project on the quality of the environment less than "significant."¹⁶²

In *Robertson v. Methow Valley Citizens Council*, the United States Supreme Court addressed the nature of mitigation proposals when preparing an EIS.¹⁶³ In preparing its EIS, the USFS had included a number of mitigation strategies. These strategies were primarily "conceptual, [however,] and would be made more specific as part of the design and implementation stages of the planning process. The Study's proposed options regarding off-site mitigation measures were primarily directed to steps that might be taken by state and local governments."¹⁶⁴ The Court of Appeals had held that the EIS was inadequate, among other reasons, because the USFS had an obligation to mitigate the adverse environmental impacts of any major federal action. The Supreme Court disagreed; it repeated its earlier findings that

160. *Id.* The plaintiff had relied on a CEQ publication, *Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations*, 46 Fed. Reg. 18,026 (1981). The court held that this document was not subject to the deference normally afforded to CEQ regulations: "The 'Forty Questions' publication, however, is merely an informal statement, not a regulation, and we do not find it to be persuasive authority." *Cabinet Mountain Wilderness*, 685 F.2d at 682.

161. *Audubon Society of Central Arkansas v. Dailey*, 977 F.2d 428 (8th Cir. 1992).

162. *Dailey*, 977 F.2d at 435-36 (citations omitted).

163. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989).

164. *Id.* at 332

NEPA imposed no substantive requirements on federal agencies. Regarding the mitigation plans, the Court found that agencies have an obligation to discuss possible mitigation activities but no obligation to perform them: "To be sure, one important ingredient of an EIS is the discussion of steps that can be taken to mitigate adverse environmental consequences."¹⁶⁵

There is a fundamental distinction, however, between a requirement that mitigation be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated, on the one hand, and a substantive requirement that a complete mitigation plan be actually formulated and adopted, on the other. In this case, the off-site effects on air quality and on the mule deer herd cannot be mitigated unless nonfederal government agencies take appropriate action. Since it is those state and local governmental bodies that have jurisdiction over the area in which the adverse effects need be addressed and since they have the authority to mitigate them, it would be incongruous to conclude that the Forest Service has no power to act until the local agencies have reached a final conclusion on what mitigating measures they consider necessary. Even more significantly, it would be inconsistent with NEPA's reliance on procedural mechanisms – as opposed to substantive, result-based standards – to demand the presence of a fully developed plan that will mitigate environmental harm before an agency can act.¹⁶⁶

165. *Robertson*, 490 U.S. at 351. The discussion follows:

The requirement that an EIS contain a detailed discussion of possible mitigation measures flows both from the language of the Act and, more expressly, from CEQ's implementing regulations More generally, omission of a reasonably complete discussion of possible mitigation measures would undermine the action-forcing function of NEPA. Without such a discussion, neither the agency nor other interested groups and individuals can properly evaluate the severity of the adverse effects. An adverse effect that can be fully remedied by, for example, an inconsequential public expenditure is certainly not as serious as a similar effect that can only be modestly ameliorated through the commitment of vast public and private resources. Recognizing the importance of such a discussion in guaranteeing that the agency has taken a hard look at the environmental consequences of proposed federal action, CEQ regulations require that the agency discuss possible mitigation measures in defining the scope of the EIS, 40 CFR § 1508.25(b) (1987), in discussing alternatives to the proposed action, § 1502.14(f), and consequences of that action, § 1502.16(h), and in explaining its ultimate decision, § 1505.2(c).

Id. at 351-52. (citations omitted).

166. *Id.* at 352-53.

7. Context and Intensity in Assessing Significant Impacts to the Human Environment

In *National Parks & Conservation Association v. Babbitt*, an environmental group filed suit under NEPA, challenging the National Park Service's decision – without first preparing an EIS – to permit an increasing number of cruise ships to enter into a national park.¹⁶⁷ The National Park Service's FONSI found that “the modified alternative . . . can be implemented with no significant adverse effect to natural and cultural resources documented by the environmental assessment.”¹⁶⁸ It further found that “the mitigation strategies included in this action would significantly reduce environmental effects resulting from vessel entries.”¹⁶⁹ Regarding the question of significant impact, the Ninth Circuit Court of Appeals held that context and intensity must be considered.¹⁷⁰

The court found that Glacier Bay was a unique resource and that there was a high degree of uncertainty and controversy surrounding the proposed action. The EA itself described some of the environmental effects as uncertain or unknown.¹⁷¹ The court noted that the term “controversy” refers to a “substantial dispute [about] the size, nature, or effect of the major Federal action.”¹⁷² Parties cannot establish the existence of controversy post hoc (i.e., when no controversy existed at the time the agency acted). Nevertheless:

A substantial dispute exists when evidence, raised prior to the preparation of an EIS or FONSI . . . casts serious doubt upon the reasonableness of an agency's conclusions

167. *National Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722 (9th Cir. 2001).

168. *Id.* at 729.

169. *Id.*

170. *Id.* at 731. The Ninth Circuit Court of Appeals utilized the regulations to explain its holding:

Whether there may be a significant effect on the environment requires consideration of two broad factors: “context and intensity.” . . . Context simply delimits the scope of the agency's actions, including the interests affected. Intensity relates to the degree to which the agency action affects the locale and interests identified in the context part of the inquiry. Here, the context is Glacier Bay National Park, its natural setting, its variegated non-human inhabitants, and its pure but fragile air quality; intensity must be established in this case by using three of the standards enumerated in §1508.27: (1) the unique characteristics of the geographic area; (2) the degree to which VMP Alternative Five's possible effects on the human environment are highly uncertain; and (3) the degree of controversy surrounding those possible effects.

Id. (internal citations omitted).

171. *Id.* at 732.

172. *Id.* at 736 (quoting *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998)).

NEPA then places the burden on the agency to come forward with a well-reasoned explanation demonstrating why those responses disputing the EA's conclusions do not suffice to create a public controversy based on potential environmental consequences.¹⁷³

The agency's explanation must be convincing and contemporaneous. In this case, the National Park Service received 450 comments substantially challenging the methodology and data of the proposed action, of which eighty-five percent opposed the alternative selected.¹⁷⁴ The National Park Service's response, in the face of this uncertainty and controversy, was to simply implement the alternative and then study the results. Such a response is inadequate. The Ninth Circuit Court of Appeals required the National Park Service to prepare an EIS before permitting an increase in vessels within the Bay.¹⁷⁵

III. BLM STATUTORY REQUIREMENTS, GRAZING, AND ITS EARLY RESPONSE TO NEPA: MULISH BEHAVIOR?

A. BLM Public Rangelands

1. Overview

The BLM may have been somewhat mulish in its early response, but the BLM has the onerous task of overseeing millions of public land acreage. In fiscal year 1999, the BLM administered more than 264 million acres of public land, mostly located in Alaska and the eleven western states (Arizona, California, Colorado, Idaho, Montana, New Mexico, Nevada, Oregon, Utah, Washington, and Wyoming).¹⁷⁶ Over 164 million acres of BLM holdings in the continental United States are designated as rangelands.¹⁷⁷ These

173. *Id.* at 736 (internal quotations and citations omitted).

174. *Id.* at 736.

175. *Id.* at 736-37.

176. BUREAU OF LAND MANAGEMENT, ANNUAL REPORT 1999, available at <http://www.blm.gov/nstc/blmannual/pdf/annual99.pdf> (last visited June 18, 2002) [hereinafter ANNUAL REPORT]; BUREAU OF LAND MANAGEMENT, STRATEGIC PLAN, FY2000-FY2005 (2000), available at <http://www.blm.gov/nhp/info/stratplan/strat0105.pdf> (last visited June 18, 2002) [hereinafter STRATEGIC PLAN]. BLM's current website indicates that BLM now manages 262 million acres of public lands. BUREAU OF LAND MANAGEMENT, BLM FACTS, available at <http://www.blm.gov/nhp/text/facgts/index.htm> (last visited June 18, 2002).

177. ANNUAL REPORT, *supra* note 176, at 56; STRATEGIC PLAN, *supra* note 176, at 19. Estimates of total BLM public lands used for grazing also vary by source. For example, a 1998 BLM document indicates that "[t]he BLM manages 165 million acres of rangelands in the continental United States and another 5 million acres of reindeer range in Alaska." BUREAU OF LAND MANAGEMENT, STEWARDSHIP ASSETS, available at <http://lm0005.blm.gov:80/narsc/blmannual/annual98/stewardship.html>. (last visited by Feller in a 1995 article indicated that 159 million acres of BLM land were authorized to be used for public grazing: Joseph L. Feller, *Til the Cows Come Home: The Fatal Flaw in the Clinton*

rangelands provide forage for the livestock of more than 17,000 operators.¹⁷⁸ In fiscal year 1999 BLM issued 18,568 grazing permits or leases.¹⁷⁹ These permits represented 12,994,883 animal unit months (AUMs) during the fiscal year.¹⁸⁰ The BLM reports that “[a]bout 88 percent of the cattle produced in Idaho, 64 percent of the cattle in Wyoming, and 63 percent of the cattle in Arizona graze at least part of the year on public rangelands.”¹⁸¹

2. The Health of BLM’s Rangeland

Critics often charge that BLM rangeland is in poor health.¹⁸² A 2002 Scoping Notice for “Meeting Rangeland Health Standards on Public Lands in the Sweetwater River Watershed,” prepared by the Wyoming Lander BLM office, indicates for this watershed:

The primary factor identified for uplands not meeting the health standards [established by BLM’s revised grazing regulations] is livestock grazing which has resulted in a change in plant composition, increased bare ground, accelerated soil erosion, poor plant vigor and a lack of biological diversity in some areas. The primary factor identified for riparian areas not meeting the rangeland health standards is livestock grazing during the hot season, defined as the period from June thru (sic) September The presence of water and green vegetation makes riparian areas attractive and most important to domestic livestock grazing the adjacent drier uplands. More than 80% of this riparian acreage on public land has been assessed as not functioning properly, thus unable to meet the rangeland health standard. The areas have been damaged physically and biologically to a large extent by uncontrolled season-long grazing or hot sea-

Administration's Public Lands Grazing Policy, 25 ENVTL. L. 703, 703 (1995) [hereinafter Feller I]; Feller cites the Bureau of Land Management, U.S. Dep’t of the Interior, Rangeland Reform ’94 Draft Environmental Impact Statement at 3-5 (1994) as his source).

178. STRATEGIC PLAN, *supra* note 176, at 19.

179. BLM, PUBLIC REWARDS FROM PUBLIC LANDS, FISCAL YEAR 1999, available at <http://www.blm.gov/nhp/pubs/rewards/2000/commercial.htm> (last visited June 18, 2002).

180. *Id.* An “Animal Unit” (AU) is “[a] standardized unit of measurement for range livestock that is equivalent to one cow, one horse, five sheep, five goats, or four reindeer, all over 6 months of age.” An “Animal Unit Month” (AUM) is “[a] standardized unit of measurement of the amount of forage necessary for the complete sustenance of one animal unit for a period of one month; also a unit of measurement of grazing privileges that represents the privilege of grazing one animal unit for a period of one month.” WYOMING BUREAU OF LAND MANAGEMENT, INFORMATION ABOUT: PUBLIC LAND TERMS, WYNEW-0011 (9/95), Available at [http://www.wy.blm.gov/information/fai/wynf.0011\(95\).pdf](http://www.wy.blm.gov/information/fai/wynf.0011(95).pdf) (last visited June 18, 2002).

181. STRATEGIC PLAN, *supra* note 176, at 19.

182. Feller I, *supra* note 177; DEBRA L. DONAHUE, THE WESTERN RANGE REVISITED 42-46, 114-60 (1999). Donahue cites Noss and Cooperrider’s claim that “livestock grazing is the ‘most insidious and pervasive threat to biodiversity on rangelands.’” *Id.* at 115.

son grazing used by livestock. Current degraded riparian area conditions require grazing management changes to ensure the long-term health and productivity of these important resources.¹⁸³

BLM issued a report in 2000 that summarized the rangeland health of its 153,726,082 acres, located in 20,626 grazing allotments.¹⁸⁴ Of the allotments surveyed, 4,128 allotments, representing 27,306,373 acres, met all rangelands standards created under the 1994 revisions of BLM grazing regulations, or were deemed to be making significant progress toward meeting them.¹⁸⁵ These numbers represent approximately 82% of the allotments surveyed and almost 66% of the public lands assessed. In Wyoming, 329 allotments, representing 3,591,981 acres met all rangeland standards or were making significant progress towards achieving them. This is more than 62% of the allotments and 51% of the lands examined. The survey found that nationally 172 allotments were not meeting the rangeland standards or making significant progress as a result of livestock grazing. In Wyoming, BLM found 40 allotments, representing 677,129 acres of public lands that fell into this category.

TOTAL	ACCOMPLISHMENTS					
	<i>CATEGORY A</i> Rangelands meeting all standards or making significant progress toward meeting the standards.		<i>CATEGORY B</i> Rangelands not meeting all standards or making significant progress toward meeting the standards, but appropriate action has been taken to ensure significant progress toward meeting the standards (livestock is a significant factor).		<i>CATEGORY C</i> Rangelands not meeting standards or making significant progress toward meeting the standards, and no appropriate action has been taken to ensure significant progress toward meeting the standards (livestock is a significant factor).	
STATE	Allot No.	Acres	Allot No.	Acres	Allot No.	Acres
ARIZONA	204	1,922,567	6	115,163	2	2,624
CALIFORNIA	203	2,839,390	31	740,076	4	96,860
COLORADO	598	1,796,819	114	831,056	1	17,395
IDAHO	146	1,341,474	84	1,197,805	31	742,411
MONTANA						
DAKOTA	1,684	2,613,154	66	328,099	67	292,108
NEVADA	73	5,121,334	28	2,349,962	6	929,786
NEW MEXICO	591	3,092,473	37	368,258	0	0

183. WYOMING BLM, LANDER FIELD OFFICE, SCOPING NOTICE FOR MEETING RANGELAND HEALTH STANDARDS ON PUBLIC LANDS IN THE SWEETWATER RIVER WATERSHED (May 13, 2002), available at <http://www.wy.blm.gov/Information/fai/fai.html> (last visited June 18, 2002), <http://www.wy.blm.gov/nepa/docs/sweetwater-sn.pdf> (last visited June 18, 2002).

184. BLM, WHAT WE DO – STANDARDS AND GUIDELINES IMPLEMENTATION, available at <http://www.blm.gov/nhp/what/00standards.htm> (last visited June 18, 2002). See *infra* Table 1.

185. See *supra* the text accompanying note 184.

OREGON / WASHINGTON	119	1,539,408	12	163,535	15	161,212
UTAH	181	3,447,773	36	883,596	6	92,570
WYOMING	329	3,591,981	132	2,353,913	40	677,129
STATE TOTAL	4,128	27,306,373	546	9,331,463	172	3,012,095

State	CATEGORY D Rangelands not meeting all standards or making significant progress toward meeting the standards due to causes other than livestock grazing.		CATEGORY E Total number of allotments and acres assessed.		CATEGORY F Total number of allotments and acres not assessed.		CATEGORY G	
	Allot #	Acres	Allot #	Acres	Allot #	Acres	Allot #	Acres
AZ	3	21,584	215	9,863,406	632	2,061,938	847	11,925,344
CA	25	256,640	263	4,282,090	448	3,932,966	711	8,215,056
CO	44	256,493	757	5,381,274	1,631	2,901,763	2,388	8,283,037
ID	31	215,522	292	8,413,526	2,015	3,497,212	2,307	11,910,738
MT/DK	30	63,168	1,847	4,856,779	3,161	3,296,529	5,008	8,153,308
NV	4	87,175	111	37,227,106	679	8,488,257	790	45,715,363
NM	14	69,157	642	7,151,191	1,055	3,529,888	1,697	10,681,079
OR/WA	14	222,653	160	12,071,044	1,928	2,086,808	2,088	14,157,852
UT	15	270,765	238	13,939,384	1,114	4,694,704	1,352	18,634,088
WY	26	402,081	527	9,025,113	2,905	7,025,104	3,432	16,050,217
STATE TOTAL	206	1,865,238	5,052	112,210,913	15,568	41,515,169	20,620	153,726,082

Table 1: BLM Lands Meeting Rangeland Standards.

B. Substantive Laws Governing Grazing on BLM Lands

1. The Taylor Grazing Act

Prior to 1934, grazing on federal public lands¹⁸⁶ was virtually unregulated.¹⁸⁷ Indeed federal public lands were essentially treated as “open

186. The term *public lands* has many, sometimes conflicting, meanings. See PUBLIC NATURAL RESOURCES, *supra* note 4, at § 1:8. For purposes of this article, we rely on the definition for public lands outlined in the Federal Land Policy and Management Act. “The term ‘public lands’ means any land and interest in land owned by the United States within the several States and administered by the Secretary of the Interior through the Bureau of Land

access” resources, available to anyone who wanted to graze cattle on them. The United States Supreme Court ratified this practice in 1890 when it held that grazers had an implied license to place their livestock on federal public land.¹⁸⁸ Congress also restricted existing users’ efforts to control access by passing the Unlawful Inclosures Act in 1885.¹⁸⁹ The Unlawful Inclosure Act prohibits the fencing of public land without a lawful claim and makes it a crime to prevent access to public lands “by force, threats, intimidation, or by any fencing or inclosing, or any other unlawful means”¹⁹⁰

Both critics and supporters of early efforts to regulate grazing on federal public lands acknowledge that the existing homestead and management practices over the arid West’s public lands were not working.¹⁹¹ Representative Taylor from Colorado, explaining his actions in drafting the Taylor Grazing Act, wrote:

I fought for the conservation of the public domain under Federal leadership because the citizens were unable to cope with the situation under existing trends and circumstances. The job was too big and interwoven for even the States to handle with satisfactory coordination. On the western slope of Colorado and in nearby States I saw waste, competition, overuse, and abuse of valuable range lands and watersheds eating into the very heart of western economy. Farms and ranches everywhere in the range country were suffering.

Management without regard to how the United States acquired ownership” 43 U.S.C. § 1702(e) (1986). Readers may fairly argue that excluding forest reserves from our definition of public lands distorts the history of regulation of grazing on federally owned lands. Indeed, the United States Supreme Court in 1911 upheld the Secretary of Agriculture’s issuance of regulations and fee setting for grazing on forest reserve lands under the Forest Reserve Act of 1897. *See* United States v. Grimaud, 220 U.S. 506 (1911). Our simple response is that this paper is concerned only with federally owned lands meeting the definition of public lands found in FLPMA and managed by the BLM.

187. George Cameron Coggins et al., *The Law of Public Rangeland Management I: The Extent and Distribution of Federal Power*, 12 ENVTL. L. 535, 535-36 (1982) [hereinafter RANGELAND MANAGEMENT I]. Congress reserved some federal lands for particular purposes (e.g., national parks, monuments, and national forests). These authors note that designation of these early parks and monuments was essentially ad hoc and homo- (“pleasuring ground”) rather than eco-centric. The authors point out that “[m]ost national forests were withdrawn from the public domain between 1891 and 1907.” *Id.* at 544 n.58 (citing the Forest Reservation provisions of the General Revision Act of 1891, ch. 561, 26 Stat. 109 (codified as amended at 16 U.S.C. § 471 (1976))).

188. *Buford v. Houtz*, 133 U.S. 320 (1890).

189. 43 U.S.C. § 1061 *et seq.* (1986).

190. 43 U.S.C. § 1063. This does not mean that ranchers, during the period prior to 1934, did nothing to limit others’ grazing on public lands. For a less romantic but more descriptive account of ranchers’ efforts to control usage of public rangelands, *see* Valerie Weeks Scott, *The Range Cattle Industry: Its Effect on Western Land Law*, 28 MONT. L. REV. 155 (1967).

191. E. PEPPER, *THE CLOSING OF THE PUBLIC DOMAIN* 134-68 (Stanford University Press 1951).

The basic economy of entire communities was threatened. There was terrific strife and bloodshed between the cattle and sheep men over the use of the range. Valuable irrigation projects stood in danger of ultimate deterioration. Erosion, yes even human erosion, had taken root. The livestock industry, through circumstances beyond its control, was headed for self-strangulation. Moreover, the States and the counties were suffering by reduced property values and decreasing revenues.¹⁹²

In response to these conditions, Congress enacted the Taylor Grazing Act in 1934.¹⁹³ The Taylor Grazing Act represented a temporary solution, prior to final disposal. The Act does not cover all public lands – only those that are “chiefly valuable for grazing and raising forage crops.”¹⁹⁴

Section 3 of the Taylor Grazing Act authorizes the Secretary of the Interior “to issue or cause to be issued permits to graze livestock on such grazing districts” and to establish “payment annually of reasonable fees in each case to be fixed or determined from time to time in accordance with governing law.”¹⁹⁵ Section 15 of the Act provides for the issuance of grazing leases for isolated or disconnected tracts “upon such terms and conditions as

192. *Id.* at 217 (citation omitted). See Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968). Hardin labeled problems of overuse identified in this setting. He argued that absent ownership or management rights and responsibilities, users would seek to capture as much of the benefits of an open access resource as possible without regard to the impact of their actions on other current or future users. With respect to grazing on public lands prior to 1934, “[t]he judicial and congressional efforts to guarantee general access to the public lands guaranteed a race for the forage that quickly deteriorated into prolonged overgrazing and ecosystem destruction.” George Cameron Coggins & Margaret Lindberg-Johnson, *The Law of Public Rangeland Management II: The Commons and the Taylor Act*, 13 ENVTL. L. 1, 32 (1982) [hereinafter RANGELAND II].

193. 43 U.S.C. § 315. Section 1 of the Act provides:

In order to promote the highest use of the public lands pending its final disposal, the Secretary of the Interior is authorized, in his discretion, by order to establish grazing districts or additions thereto and/or to modify the boundaries thereof, of vacant, unappropriated, and unreserved lands from any part of the public domain of the United States (exclusive of Alaska) . . . , and which in his opinion are chiefly valuable for grazing and raising forage crops

Id.

194. *Id.*

195. 43 U.S.C. § 315b. The Department of the Interior established the Grazing Division in 1934 to oversee management of federal rangelands under its control. The Grazing Division became the Grazing Service in 1939. It was later merged with the General Land Office – the division responsible for handling federal land sales – in 1946 to become the present Bureau of Land Management (BLM). RANGELAND II, *supra* note 192, at 61.

the Secretary may prescribe”¹⁹⁶ Both Sections 3 and 15 establish preferences regarding who may receive the resulting permits or leases.¹⁹⁷

Commentators disagree regarding the substantive standards, if any, imposed on the Secretary of Interior in designating or managing grazing districts or isolated public lands leased for grazing. The preamble established three goals: 1) stopping injury to the public grazing lands by preventing overgrazing and soil deterioration; 2) providing for their orderly use; and 3) stabilizing the livestock industry dependent upon the public range. Section 1 of the Act added a fourth goal: “promot[ing] the highest use of the public lands pending its final disposal.”¹⁹⁸

It remains well-settled law that the Taylor Act gives permittees and lessees only revocable licenses to graze on BLM rangelands.¹⁹⁹ The most

196. 43 U.S.C. § 315m.

197. Section 2 provides:

The Secretary of the Interior is authorized to issue or cause to be issued permits to graze livestock on such grazing districts to such bona fide settlers, residents, and other stock owners as under his rules and regulations are entitled to participate in the use of the range, upon payment annually of reasonable fees in each case to be fixed or determined from time to time in accordance with governing law. . . . Preference shall be given in the issuance of grazing permits to those within or near a district who are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights, as may be necessary to permit the proper use of lands, water or water rights owned, occupied or leased by them. . . . Such permits shall be for a period of not more than ten years, subject to the preference right of the permittees to renewal in the discretion of the Secretary of the Interior, who shall specify from time to time numbers of stock and seasons of use. . . . So far as consistent with the purposes and provisions of this subchapter, grazing privileges recognized and acknowledged shall be adequately safeguarded, but the creation of a grazing district or the issuance of a permit pursuant to the provisions of this subchapter shall not create any right, title, interest, or estate in or to the lands.

43 U.S.C. § 315b. Section 15 gives a preference to:

[O]wners, homesteaders, lessees, or other lawful occupants of contiguous lands to the extent necessary to permit proper use of such contiguous lands, except, that when such isolated or disconnected tracts embrace seven hundred and sixty acres or less, the owners, homesteaders, lessees, or other lawful occupants of lands contiguous thereto or cornering thereon shall have a preference right to lease the whole of such tract, during a period of ninety days after such tract is offered for lease, upon the terms and conditions prescribed by the Secretary

43 U.S.C. § 315m. Thus, itinerant sheepherders and out-of-state cattle barons were forced off the public lands with the sweep of the President’s pen.

198. 43 U.S.C. § 315.

199. For a complete discussion of this point, see PUBLIC NATURAL RESOURCES, *supra* note 4, at §§ 19:3 – 19:6. Section 3 of the Act provides: “[G]razing privileges recog-

recent case to address this point is *Hage v. United States*.²⁰⁰ The Court of Claims held that the Hages had obtained water, ditch rights-of-way, and limited forage rights as a result of other, nongrazing federal statutes. However, the court rejected the Hages' claim that the government took their property when it revoked their grazing permits. Citing several earlier cases,²⁰¹ the court concluded: "[T]he plaintiffs could not hold a valid property interest in the grazing permits. Thus their fee lands and water rights must be valued independently of any value added by any appurtenant grazing permits or grazing preferences."²⁰²

2. The Federal Land Policy and Management Act

Congress passed the Federal Land Policy and Management Act (FLPMA) in 1976.²⁰³ FLPMA is often called the Department of the Interior's organic act.²⁰⁴ FLPMA significantly changed the rules of the game for public lands management. First, it shifts federal policy from disposal to retention of federally owned public land. "[P]ublic lands [are to] be retained in Federal ownership, unless as a result of the land use planning procedure . . . ,

nized and acknowledged shall be adequately safeguarded, but the creation of a grazing district or the issuance of a permit pursuant to the provisions of this subchapter shall not create any right, title, interest, or estate in or to the lands." 43 U.S.C. § 315b. The Federal Land Policy and Management Act (FLPMA) contains similar language. "Nothing in this Act shall be construed as modifying in any way law existing on October 21, 1976, with respect to the creation of right, title, interest or estate in or to public lands . . . by issuance of grazing permits and leases." 43 U.S.C. § 1752(h). The lack of any vested right does not give the BLM or the USFS absolute freedom to modify or revoke grazing permits or leases. Grazing preferences still must be "safeguarded" and the agency's decision remains subject to the Administrative Procedure Act's minimal arbitrary and capricious standard. See *Perkins v. Bergland*, 608 F.2d 803, 805-06 (9th Cir. 1979). Still, the Taylor Grazing Act also provides that "[n]othing in this chapter shall be construed in any way to diminish, restrict, or impair any right which has been heretofore or may be hereafter initiated under existing law validly affecting the public lands" 43 U.S.C. § 315. Additionally, FLPMA creates a right to compensation in case a permit or lease is cancelled for authorized permanent improvements on the land, provided the cancellation, in whole or in part, is "in order to devote the lands covered by the permit or lease to another public purpose, including disposal" 43 U.S.C. § 1752(g).

200. *Hage v. United States*, 51 Fed. Cl. 570 (Ct. Cl. 2002).

201. See, e.g., *Public Lands Council v. Babbitt*, 529 U.S. 728 (2000) (stating that the Secretary of the Interior has consistently reserved the authority to cancel or modify grazing permits); *United States v. Fuller*, 409 U.S. 488 (1973) (stating that grazing permits are licenses rather than rights); *Light v. United States*, 220 U.S. 523 (1911) (explaining that a failure to object to grazing on public land did not confer any vested rights); *Alves v. United States*, 133 F.3d 1454 (Fed. Cir. 1998) (explaining that no difference exists between grazing permits and grazing preferences).

202. *Hage*, 51 Fed. Cl. at 587.

203. Pub. L. 94-579, Oct. 21, 1976, 90 Stat. 2743.

204. Christine Knight, *A Regulatory Minefield: Can the Department of Interior Say "No" to a Hardrock Mine?* 73 U. COLO. L. REV. 619, 659 (2002); H. Michael Anderson & Alike Moncrief, *America's Unprotected Wilderness* 76 DENV. U. L. REV. 413, 425 n.77 (1999); Kelly Nolen, *Residents at Risk: Wildlife and the Bureau of Land Management's Planning Process*, 26 ENVTL. L. 771, 794 (1996).

it is determined that disposal of a particular parcel will serve the national interest²⁰⁵ Second, FLPMA establishes specific procedures and Congressional oversight regarding the withdrawal of public lands.²⁰⁶ Third, it requires a periodic and systematic inventorying of public lands and their resources.²⁰⁷ Fourth, it emphasizes the adoption and use of a public land use planning process to guide the public land management decisions of federal agencies operating under its authority.²⁰⁸ Fifth, it requires the Secretary of the Interior to “[consider] the views of the general public” in establishing comprehensive rules and regulations and to structure “adjudication procedures to assure adequate third party participation.”²⁰⁹ Additionally, FLPMA declares the national policy to be that:

[T]he public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use.²¹⁰

FLPMA also requires that “regulations and plans for the protection of public land areas of critical environmental concern be promptly developed.”²¹¹ Still, FLPMA also acknowledges that the public lands will continue to be used for consumptive purposes,²¹² and indicates that its expansive listing of goals has no substantive weight unless “specific statutory authority

205. 43 U.S.C. § 1701(a)(1) (1986).

206. 43 U.S.C. §§ 1701(a)(4), 1714. FLPMA also established specific procedures, among other purposes, for the sale of public lands under Interior’s control, and exchanges of public lands within the National Forest System. 43 U.S.C. §§ 1713, 1716.

207. 43 U.S.C. § 1701(a)(2).

208. 43 U.S.C. § 1701(a)(7).

209. 43 U.S.C. § 1701(a)(5). Also, it broadens (or perhaps makes more explicit) the purposes for which public lands are to be managed. The Secretary of the Interior is instructed to manage the public lands under his/her control “on the basis of multiple use and sustained yield unless otherwise specified by law.” 43 U.S.C. § 1701(a)(7).

210. 43 U.S.C. § 1701(a)(8).

211. 43 U.S.C. § 1701(a)(11).

212. 43 U.S.C. § 1701(a)(12) (“[T]he public lands [should] be managed in a manner which recognizes the Nation’s need for domestic sources of minerals, food, timber, and fiber from the public lands . . .”). FLPMA indicates:

The term “areas of critical environmental concern” means areas within the public lands where special management attention is required (when such areas are developed or used or where no development is required) to protect and prevent irreparable damage to important historic, cultural, or scenic values, fish and wildlife resources or other natural systems or processes, or to protect life and safety from natural hazards.

43 U.S.C. § 1702.

for their implementation is enacted by this Act or by subsequent legislation”²¹³ Thus, FLPMA establishes a number of clear procedural requirements (e.g., inventorying, establishing land use plans, public involvement, and management for multiple-use and sustained yield), but only one clear substantive requirement, the protection of critically sensitive areas.²¹⁴

Under FLPMA, Congress continued NEPA’s emphasis on systematic planning in designated resource management areas. Agency actions are to be based upon these Resource Management Plans (RMPs). RMPs represent the middle tier of BLM’s planning process.²¹⁵ The top tier consists of federal law, executive and court orders, guidance documents, the BLM manual, and national programming documents.²¹⁶ The bottom tier consists of specific action plans to implement the RMP, including allotment management plans, individual habitat management plans, and plans for areas of critical habitat. The regulations specifically provide that preparation of a RMP is a major federal action requiring preparation of an EIS.²¹⁷ The District or Area Managers are responsible for preparing the RMPs.²¹⁸ The State Director is responsible for quality control and supervisory review, including plan approval.²¹⁹

The steps in preparing a RMP parallel those for an EIS:

- Identification of issues.²²⁰
- Development of planning criteria.²²¹
- Inventory data and information collection.²²²
- Analysis of the management situation.²²³
- Formulation of alternatives.²²⁴

213. 43 U.S.C. § 1701(b).

214. *Natural Resources Defense Council, Inc. v. Hodel*, 624 F. Supp. 1045, 1052-54 (D. Nev. 1985). “The declarations of policy and goals [in FLPMA] and ancillary provisions contain only broad expressions of concern and desire for improvement. They are general clauses and phrases that can hardly be considered concrete limits upon agency discretion. Rather, it is language which breathes discretion at every pore.” *Id.* at 1058 (quoting *Perkins v. Bergland*, 608 F.2d 803, 806 (9th Cir. 1979) (quoting *Strickland v. Morton*, 519 F.2d 467, 469 (9th Cir. 1975)) (internal quotations omitted). *But see Nat’l Wildlife Fed’n et al. v. Bureau of Land Mgmt.*, 140 IBLA 85, 99 (1997) (stating that the BLM violated FLPMA because it failed to manage the land under the theory of multiple use and sustained yield, did not balance the different values of the land, and failed to make a “reasoned and informed decision that the benefits of grazing the canyons outweighed the costs”).

215. Nolen, *supra* note 204, at 777.

216. 43 C.F.R. §§ 1601.0-4(a), 1610.1 (2002).

217. 43 C.F.R. § 1601.0-6.

218. 43 C.F.R. § 1601.0-4(c).

219. 43 C.F.R. § 1601.0-4(b), (c).

220. 43 C.F.R. § 1610.4-1.

221. 43 C.F.R. § 1610.4-2.

222. 43 C.F.R. § 1610.4-3.

223. 43 C.F.R. § 1610.4-4.

- Estimation of effects of alternatives.²²⁵
- Selection of preferred alternatives (i.e., those that meet the planning criteria).²²⁶
- Selection of resource management plan.²²⁷
- Monitoring and evaluation of the plan.²²⁸

The process for preparing a RMP encourages public involvement in identifying issues and reviewing the planning criteria, the draft RMP, and the draft EIS.²²⁹

FLPMA's Subchapter IV and its related regulations establish specific procedures governing rangeland management and the issuance of grazing permits and leases.²³⁰ Grazing permits and leases are to be issued for a term of no more than ten years.²³¹ The permittee will be given first priority to renew the grazing permit or lease as long as: (1) the rangeland remains available for grazing; (2) the permittee is in compliance with the applicable law; and (3) the permittee is willing to accept any new terms and conditions contained in the lease or permit.²³² The Secretary of the Interior may (but is not required to) develop an allotment management plan (AMP) governing grazing in a particular area.²³³ Permits or leases may incorporate the terms

224. 43 C.F.R. § 1610.4-5.

225. 43 C.F.R. § 1610.4-6.

226. 43 C.F.R. § 1610.4-7.

227. 43 C.F.R. § 1610.4-8.

228. 43 C.F.R. § 1610.4-9.

229. 43 C.F.R. § 1610.2.

230. 43 U.S.C. § 1751 *et seq.* (1986).

231. 43 U.S.C. § 1752(a).

232. 43 U.S.C. § 1752(c).

233. 43 U.S.C. § 1752(d). FLPMA describes an allotment management plan to mean:

[A] document prepared in consultation with the lessees or permittees involved, which applies to livestock operations on the public lands or on lands within National Forests in the eleven contiguous Western States and which:

- (1) prescribes the manner in, and extent to, which livestock operations will be conducted in order to meet the multiple-use, sustained-yield, economic and other needs and objectives as determined for the lands by the Secretary concerned; and
- (2) describes the type, location, ownership, and general specifications for the range improvements to be installed and maintained on the lands to meet the livestock grazing and other objects of land management; and
- (3) contains such other provisions related to livestock grazing and other objectives found by the Secretary concerned to be consistent with the provision of this Act and other applicable law.

43 U.S.C. § 1702(k). Allotment management plans are to be:

[T]ailored to the specific range condition of the area to be covered by such plan, shall be reviewed on a periodic basis to determine whether they

and conditions of an existing AMP. In areas where no AMP is in place, the Secretary shall "specify therein the numbers of animals to be grazed and the seasons of use and that he may reexamine the condition of the range at any time and, if he finds on reexamination that the condition of the range requires adjustment in the amount or other aspect of grazing use, that the permittee or lessee shall adjust his use to the extent the Secretary concerned deems necessary."²³⁴

3. The Public Rangelands Improvement Act of 1978

Congress enacted the Public Rangelands Improvement Act in 1978 (PRIA).²³⁵ In passing this legislation, Congress extensively criticized the existing state of public rangelands.²³⁶ It established policies for inventorying

have been effective in improving the range condition of the lands involved or whether such lands can be better managed under the provisions of subsection (e) of this section. The Secretary concerned may revise or terminate such plans or develop new plans from time to time after such review and careful and considered consultation, cooperation and coordination with the parties involved.

43 U.S.C. § 1752(d).

234. 43 U.S.C. § 1752(e). This same section authorizes the Secretary to include in grazing permits and leases "such terms and conditions as he deems appropriate for management of the permitted or leased lands pursuant to applicable law." *Id.*

235. Pub. L. 95-514, Oct. 25, 1978, 92 Stat. 1803.

236. The Congressional Findings indicated, among other things, that:

(1) vast segments of the public rangelands are producing less than their potential for livestock, wildlife habitat, recreation, forage, and water and soil conservation benefits, and for that reason are in an unsatisfactory condition;

(2) such rangelands will remain in an unsatisfactory condition and some areas may decline further under present levels of, and funding for, management;

(3) unsatisfactory conditions on public rangelands present a high risk of soil loss, desertification, and resultant underproductivity for large acreages of the public lands; contribute significantly to unacceptable levels of siltation and salinity in major western watersheds including the Colorado River; negatively impact the quality and availability of scarce western water supplies; threaten important and frequently critical fish and wildlife habitat; prevent expansion of the forage resources and resulting benefits to livestock and wildlife production; increase surface runoff and flood danger; reduce the value of such lands for recreation and esthetic purposes; and may ultimately lead to unpredictable and undesirable long-term local and regional climatic and economic changes;

(4) the above-mentioned conditions can be addressed and corrected by an intensive public rangelands maintenance, management, and improvement program involving significant increases in levels of rangeland management and improvement funding for multiple-use values

43 U.S.C. § 1901(a)(1)-(4).

and monitoring public rangelands,²³⁷ provided for funding of rangeland improvements,²³⁸ and fixed fees that would be “equitable” but would not disrupt or harm the western livestock industry.²³⁹ The term “rangeland improvement” under PRIA includes but is not limited to capital investments.²⁴⁰ PRIA restates Congress’ commitment to “multiple-use values.”²⁴¹ PRIA reaffirms the Secretary’s responsibility to manage public rangelands in accordance with both the Taylor Act and FLPMA.²⁴² Congress specifically exempted the national grasslands from the Act.²⁴³

4. Rangeland Reform ‘94

Although not a statute, new regulations, adopted by the Department of the Interior in 1994²⁴⁴ and upheld by the United States Supreme Court in 2000,²⁴⁵ modify how grazing on public lands may be conducted in

237. 43 U.S.C. § 1903.

238. 43 U.S.C. § 1904.

239. 43 U.S.C. § 1905. PRIA also authorized the Secretary to implement an experimental stewardship program and – no later than December 1985 – report on its results to Congress. 43 U.S.C. § 1908.

240. 43 U.S.C. § 1902(f). The section reads in pertinent part:

The term “range improvement” means any activity or program on or relating to rangelands which is designed to improve production of forage; change vegetative composition; control patterns of use; provide water; stabilize soil and water conditions; and provide habitat for livestock and wildlife. The term includes, but is not limited to, structures, treatment projects, and use of mechanical means to accomplish the desired results.

Id.

241. 43 U.S.C. § 1901(a)(4).

242. 43 U.S.C. § 1903(b) provides:

The Secretary shall manage the public rangelands in accordance with the Taylor Grazing Act (43 U.S.C. § 315-315(o)), the Federal Land Policy and Management Act of 1976 (43 U.S.C. § 1701-82), and other applicable law consistent with the public rangelands improvement program pursuant to this chapter. Except where the land use planning process required pursuant to section 202 of the Federal Land Policy and Management Act (43 U.S.C. § 1712) determines otherwise or the Secretary determines, and sets forth his reasons for this determination, that grazing use should be discontinued (either temporarily or permanently) on certain lands, the goals of such management shall be to improve the range conditions of the public rangelands so that they become as productive as feasible in accordance with the rangeland management objectives established through the land use planning process, and consistent with the value and objectives listed in section 1901(a) and (b)(2) of this title.

Id.

243. 43 U.S.C. § 1907.

244. 60 Fed Reg. 9894-9971 (1995) (amending 43 C.F.R. pts. 4, 1780, and 4100).

245. Public Lands Council v. Babbitt, 529 U.S. 728 (2000).

the future.²⁴⁶ The new regulations reflect an ecosystem approach to managing BLM's public lands, "focusing on protecting biological diversity, amenities, aesthetics, and recreation while allowing for sustainable development."²⁴⁷ The 1994 amended regulations, among other things, establish minimum national Fundamentals of Rangeland Health and local guidelines and standards to evaluate the health of the rangeland resources and to use in fixing grazing practices.²⁴⁸ The new regulations also establish statewide Resource Advisory Committees (RACs) and Rangeland Resource Teams to encourage public participation in BLM rangeland management decisions.²⁴⁹ The new regulations provide new definitions for the terms "grazing preferences" and "permitted use" and eliminate the previous regulatory requirement that individuals had to be *in the livestock business* to become a permit or lease holder.²⁵⁰ The new regulations also provide that the federal government will become the owner of any newly constructed permanent range improvements placed on the public lands.²⁵¹

246. For a more thorough analysis of Rangeland Reform '94, see Erik Schlenker-Goodrich, *Moving Beyond Public Land Council v. Babbitt: Land Use Planning and the Range Resource*, 16 ENVTL. L. & LITIG. 139 (2001); Joseph M. Feller, *Back to the Present: The Supreme Court Refuses to Move Public Range Law Backward, But Will the BLM Move Public Range Management Forward?* 31 ENVTL. L. REPT. 10021 (2001) [hereinafter Feller II]; Joseph M. Feller & David E. Brown, *From Old-Growth Forests to Old-Growth Grasslands: Managing Rangelands for Structure and Function*, 42 ARIZ. L. REV. 319 (2000); Todd M. Olinger, *Public Rangeland Reform: New Prospects for Collaboration and Local Control Using the Resource Advisory Councils*, 69 U. COLO. L. REV. 633 (1998); Bruce M. Pendery, *Reforming Livestock Grazing on the Public Domain: Ecosystem Management-Based Standards and Guidelines Blaze a New Path for Range Management*, 27 ENVTL. L. 513 (1997).

247. Pendery, *supra* note 246, at 516 (internal citations omitted).

248. 43 C.F.R. pts. 4180.01-2 (2002). Pendery notes:

The [national Fundamentals of Rangeland Health] require BLM to modify grazing by no later than the start of the next grazing year upon determining that the existing grazing management needs to be modified to "ensure" that watersheds are functioning properly, ecological processes are protected, water quality standards are met, and rare species habitats are protected. The "Standards and Guidelines for Grazing Administration" are numerous specific ecological considerations intended to compliment the fundamentals. BLM must also modify livestock grazing or grazing management by no later than the next grazing year if grazing is a "significant factor" in failure to meet the standards and guidelines. The action taken must be "appropriate," which means it must achieve "significant progress" towards "fulfillment of the standards" and "conformance with the guidelines."

Pendery, *supra* note 246, at 516-17 (citations omitted).

249. 43 C.F.R. pt. 1780.

250. 40 C.F.R. § 4100.0-5. The new regulations reinforce previous court rulings. The term *preferences* refers to the relative rights of permittees and licensees and not to any property rights held by them. The new definition for *permitted use* makes clear that the numbers will be tied to the land use plan.

251. 40 C.F.R. § 4120.3-2(b).

The new regulations impose additional grazing management obligations on BLM's district managers, depending upon "whether overall ecological processes are working properly and meeting ecosystem needs" of the public lands.²⁵² The state BLM directors are required to assess the rangeland health of public lands under their control to determine the classification.²⁵³ If the assessment determines that the rangelands are not healthy and that livestock grazing is a significant cause of these conditions, then the authorized officer is to take appropriate action to "ensure significant progress is made towards compliance with the standards and guidelines in areas of poor health."²⁵⁴ Table 1 shows the results of this assessment.²⁵⁵

In 1999, an environmental group sought an injunction against the BLM in Idaho to bar "hot season" (July 16 to September 30) grazing in riparian pastures of two specified allotments and ordering the BLM to change how grazing in the allotment was managed before the beginning of the 2000

252. Pendery, *supra* note 246, at 538 n.202 (quoting the Final Environmental Impact Statement for the new regulations) (citations omitted).

253. Pendery, *supra* note 246, at 538. This classification is dependent upon whether the lands are "properly functioning" (the "vegetative and ground cover maintain soil conditions that can sustain natural biotic communities"), "functioning at risk" (the "vegetative and soil are susceptible to losing their ability to sustain naturally function biotic communities") or "nonfunctioning" (the "vegetative and ground cover are not maintaining soil conditions that can sustain natural biotic communities"). *Id.*

254. Pendery, *supra* note 246, at 539. The federal regulations provide:

The authorized officer shall take appropriate action under subparts 4110, 4120, 4130, and 4160 of this part as soon as practicable but not later than the start of the next grazing year upon determining that existing grazing management needs to be modified to ensure that the following conditions exist.

(a) Watersheds are in, or are making significant progress toward, properly functioning physical condition, including their upland, riparian wetland, and aquatic components; soil and plant conditions support infiltration, soil moisture storage, and the release of water that are in balance with climate and landform and maintain or improve water quality, water quantity, and timing and duration of flow.

(b) Ecological processes, including the hydrologic cycle, nutrient cycle, and energy flow, are maintained, or there is significant progress toward their attainment, in order to support healthy biotic populations and communities.

(c) Water quality complies with State water quality standards and achieves, or is making significant progress toward achieving, established BLM management objectives such as meeting wildlife needs.

(d) Habitats are, or are making significant progress toward being, restored or maintained for Federal threatened and endangered species, Federal proposed, Category 1 and 2 Federal candidate and other special status species.

43 C.F.R. § 4180.1, (cited in Pendery, *supra* note 246, at 565).

255. See *infra* Section III. A.2.

season.²⁵⁶ The BLM argued that it was only required to initiate a review of grazing practices on public lands if the level of grazing is a significant factor in the failure to achieve the standards and conformance with the guidelines. The Federal District Court refused to grant a preliminary injunction. However, the Ninth Circuit Court of Appeals reversed, interpreting the federal regulations as requiring the agency to “tak[e] action that results in progress toward fulfillment of ecological standards and guidelines by the start of the next grazing year.”²⁵⁷

5. Other Selected Substantive Standards Affecting Grazing on BLM Lands

The CEQ regulations require that EISs “state how alternatives considered in it and decisions based on it will or will not achieve the requirements” not only of its provisions but also of “other environmental laws and policies.”²⁵⁸ Similarly, the Fundamentals of Rangeland Health, established under the 1994 regulations of the Department of the Interior’s governing rangeland health, require authorized officials to take appropriate action regarding grazing to ensure state water quality standards under the Clean Water Act are being achieved and endangered species habitats are being restored or maintained or are making significant progress toward being restored or maintained.²⁵⁹ The impacts of these other environmental laws and policies should be considered not only in preparing (but also in deciding whether to prepare) an EIS. These statutes also impose additional substantive environmental standards on BLM’s decision whether to permit grazing on its public lands.

For example, section 9 of the Endangered Species Act (ESA) prohibits any person, including federal agencies, from taking endangered species within the United States.²⁶⁰ The term “take” (or “taking”) under the ESA “means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect”²⁶¹ The United States Supreme Court has upheld U.S. Fish and Wildlife Service regulations that define destruction of habitat as a taking under the ESA.²⁶² Section 7 of the ESA and applicable regulations also require federal public lands agencies, such as the BLM, to consult with the U.S. Fish and Wildlife Service to ensure that their actions will not jeopardize the continued existence of a listed species.²⁶³ Federal courts have held that

256. *Idaho Watersheds Project v. Hahn*, 187 F. 3d 1035, 1036 (9th Cir. 1999).

257. *Hahn*, 187 F.3d at 1037.

258. 40 C.F.R. § 1502.2(d).

259. 43 C.F.R. § 4180.1.

260. 16 U.S.C. § 1538(a)(1)(B) (2000).

261. 16 U.S.C. §1532(19).

262. *Babbitt v. Sweet Home Chapter of Cmty. for a Greater Oregon*, 515 U.S. 687, 688 (1995) (upholding a U.S. Fish and Wildlife Service regulation that included habitat modification in the definition of “taking”).

263. 16 U.S.C. § 1536(a)(2).

the ESA requires federal land agencies to consult with the U.S. Fish and Wildlife Service before permitting grazing²⁶⁴ and to eliminate public grazing if it is likely to jeopardize a listed species.²⁶⁵

Other federal environmental statutes can impose substantive standards as well as triggering the required preparation of an EIS. These include impacts on water quality guidelines created under the Clean Water Act,²⁶⁶ on wilderness and wild river areas under the Wilderness Act,²⁶⁷ and on cultural resources and national monuments under the Antiquities Act.²⁶⁸ These statutes supercede the multiple use policy established under FLPMA for federal rangelands and impose dominant use requirements on the affected public lands.

C. BLM's Initial Response to NEPA

Commentators have frequently criticized BLM's reluctance to carry out its responsibility under NEPA.²⁶⁹ *Natural Resource Defense Council v. Morton*, decided in 1974, was one of the first judicial reviews of BLM's grazing allotment and NEPA practices.²⁷⁰ The plaintiffs claimed that the BLM had failed to comply with NEPA in that it had continued to issue grazing permit renewals since 1970 without preparing any EIS dealing with the permits' environmental impacts. The BLM was preparing a programmatic EIS for grazing. The plaintiffs did not seek to enjoin the issuance of individual grazing permits or ask that impact statements be prepared for each renewal. Instead they asked that detailed individual statements be prepared on an appropriate district or geographic level to assess the actual impact of grazing on the local environment.²⁷¹ The federal district court found that issuance of grazing licenses constituted an action for purposes of section 102

264. *Pacific Rivers Council v. Thomas*, 936 F. Supp. 738 (D. Idaho 1996) (stating that a biological opinion is required).

265. *S.W. Center for Biological Diversity v. U.S. Bureau of Reclamation*, 6 F. Supp. 2d 1119 (D. Ariz. 1997) (stating that the agency agreed to remove livestock from miles of streamside habitat for endangered bird species.).

266. Peter M. Lacy, *Addressing Water Pollution from Livestock Grazing After Onda v. Dömbeck: Legal Strategies under the Clean Water Act*, 30 ENVTL. L. 617 (2000).

267. *Nat'l Wildlife Fed'n v. Cosgriffe*, 21 F. Supp. 2d 1211 (D. Ore. 1998). See also Charlton H. Bonham, *The Wild and Scenic Rivers Act and the Oregon Trilogy*, 21 PUB. LAND & RESOURCES L. REV. 109 (2000).

268. James R. Rasband, *Utah's Grand Staircase: The Right Path to Wilderness Preservation?* 70 U. COLO. L. REV. 483 (1999).

269. See Feller II, *supra* note 246; Feller I, *supra* note 177; PUBLIC NATURAL RESOURCES, *supra* note 4, at §§ 19:1 – 19:14.

270. *Natural Resource Defense Council, Inc. v. Morton*, 388 F. Supp. 829 (D.D.C. 1974). See also *American Horse Protection Assoc., Inc. v. Andrus*, 608 F.2d 811 (9th Cir. 1979) (holding that *Morton* did not preclude jurisdiction on the part of Nevada courts to determine whether to require EIS preparation of an EIS for proposal to round up and remove thousands of wild horses from federal public lands, and the fact that the decision was only interim and minor did not preclude a finding that the final decision may be major). *Id.* at 813-15.

271. *Morton*, 388 F. Supp. at 833-34.

of NEPA, and that “[g]razing clearly may have a severe impact on local environments.”²⁷² It noted a history of overgrazing in Nevada and further found, “[W]hen the cumulative impacts of the entire program is (sic) considered it is difficult to understand how defendants-interveners can claim either that the impact of the program is not significant or that the federal action involved is not major.”²⁷³

The BLM conceded in *Morton* that NEPA applied to its grazing program but argued “first that plaintiffs’ suit is premature and should await issuance of the final programmatic impact statement, and second that the Bureau is not in violation of the Act since the programmatic impact statement sufficiently complies with the intent of NEPA.”²⁷⁴ The court rejected BLM’s first claim of exhaustion, indicating that “the court might be less willing to consider the plaintiffs’ claim if the BLM had demonstrated more diligence in pursuing its own role.”²⁷⁵ The BLM had delayed “beyond reason.”²⁷⁶ In fact, the BLM had waited two and a half years after NEPA’s effective date before starting to develop its programmatic EIS. The District Court in *Morton* also rejected BLM’s claim that its programmatic EIS was sufficient to satisfy NEPA’s requirements. It acknowledged that an earlier case had upheld the use of a programmatic, rather than an individualized EIS, for the purchase of coal, but held that the facts of that case were distinguishable from those in *Morton*.²⁷⁷ A programmatic EIS, drafted at the national level by the BLM, may provide general policy pronouncement, but “it in no way insures that the decision-maker considers all of the specific and particular consequences of his actions or the alternatives available to him.”²⁷⁸ Additionally, the district court noted that the BLM process at the local level did not ensure public involvement. It conceded that NEPA did not specifically require public hearings and that the general public would be permitted to comment on the programmatic EIS. Nevertheless, the district court concluded, “[W]hen it comes to the actual implementation of the licensing permit program at the local level, there will be no opportunity for particularized input by state and local citizens.”²⁷⁹ Finally, the district court distinguished the coal case where the bidders were required to prepare individualized reports detailing potential environmental impacts. The grazing permitting process for BLM did not supply such information.

272. *Id.* at 834.

273. *Id.* (citations omitted).

274. *Id.* (citations omitted).

275. *Id.* at 836.

276. *Id.*

277. *Id.* at 838. First, it pointed out that there was a clear conflict in the coal case between the substantive requirements of the law and the requiring of individualized EISs. There was no such conflict here. Second, the primary decision maker in the coal case was at the national level while in BLM grazing decisions local district managers make the decision. *Id.*

278. *Id.* (citations omitted).

279. *Id.* at 839.

In *Natural Resource Defense Council v. Hodel*, an environmental group challenged BLM's land use plan – prepared under FLPMA – and its associated EIS.²⁸⁰ Regarding their NEPA challenge, the plaintiffs claimed: 1) the BLM had decided its course of action prior to preparing the EIS, and 2) the EIS failed to analyze specific proposals or alternatives. The district court rejected both assertions. Regarding the first claim, the court found no evidence that BLM had failed to comply with the procedural requirements of NEPA and remarked that – assuming the plaintiffs' arguments were correct – the “planned action involved virtually *no change over the status quo*, at least for the first several years of the plan.”²⁸¹

Regarding the EIS content, the district court rejected the plaintiffs' claims that a proper grazing EIS: 1) must allocate forage on each allotment; 2) should consider a broader range of alternatives (only one of the alternatives considered called for livestock reductions during the first five years); 3) should consider the no-grazing alternative; 4) should include estimates of carrying capacity, and 5) should adequately describe the proposed action (the underlying rationale for the decision). The district court relied on a simple principle – the scope of the proposed action determines the EIS's scope and specificity.²⁸² It would be “unreasonable to expect the EIS to analyze possible actions in greater detail than is possible given the tentative nature of the MFP itself.”²⁸³

In a 1997 administrative decision, *National Wildlife Federation v. Bureau of Land Management*, an administrative law judge found that the BLM was neglecting its duties in regards to the Comb Creek Wash allotment in the Moab district of Utah. The administrative law judge held that the BLM violated NEPA's procedural requirements under section 102(2)(c) because its EIS did not provide any site-specific environmental analysis of the impact of grazing on the five canyons in the allotment.²⁸⁴ This ruling contradicts the earlier Nevada district court holding in *Natural Resource Defense Council v. Hodel*, described above, which had allowed the BLM to avoid site-specific analysis in the EIS.²⁸⁵ The administrative law judge in the Comb Creek dispute held that the “evidence showed that any level of grazing may significantly affect the quality of the human environment; therefore, the BLM is prohibited from allowing any grazing until an adequate EIS is prepared and considered.”²⁸⁶ The administrative law judge also directed the BLM to prepare an environmental assessment for grazing outside the subject canyons to determine if an EIS was required.

280. *Natural Resources Def. Council, Inc. v. Hodel*, 624 F. Supp. 1045 (D. Nev. 1985).

281. *Hodel*, 624 F. Supp. at 1050.

282. *Id.*

283. *Id.* at 1051.

284. *Nat'l Wildlife Fed'n v. Bureau of Land Mgmt.*, 140 IBLA 85 (1997).

285. *See supra* notes 280-83 and accompanying text.

286. *Nat'l Wildlife Fed'n*, 140 IBLA at 96.

Federal district courts have also addressed BLM's reticence in preparing EISs in three cases involving grazing in areas designated under the Wild and Scenic River Act (WSRA).²⁸⁷ For example, Congress designated the Donner and Blitzen Rivers in Oregon under the WSRA in 1988. The designation required BLM to prepare a comprehensive plan to protect the rivers' "outstandingly remarkable values" and "address resource protection, development of lands and facilities, user capacities, and other management practices necessary or desirable to achieve" their wild and scenic river designation.²⁸⁸ Scientists hired by the BLM found that the river area had a number of unique plant species and communities. They recommended removal of grazing from the entire river corridor and prevention of livestock trespassing, although BLM noted that the Nature Conservancy biologist had recommended that an allotment management plan be adopted to govern grazing in the South Fork of the Blitzen.²⁸⁹ BLM prepared an EA in 1993 and subsequently issued a record of decision and a FONSI, indicating that the River Plan alternative it had selected would have no significant impact on the human environment.²⁹⁰ Several environmental groups sought a court order that: "1) the river management plan BLM prepared for the Donner and Blitzen Wild and Scenic Rivers violates the Wild and Scenic Rivers Act . . . ; 2) the environmental assessment BLM prepared to analyze the environmental impacts of implementing the river management plans, and alternatives to it, violate the National Environmental Policy Act . . . ; and 3) BLM violated the National Environmental Policy Act by failing to prepare an environmental impact statement to analyze the cumulative impacts of similar and connected actions in the river."²⁹¹ In ONDA I, the court granted the plaintiffs' summary judgment. It found that continued cattle grazing, permitted under the Plan, would degrade some of the outstanding values of the river, noting the recommendations of the scientists the BLM had hired.²⁹²

The district court outlined three main reasons for the summary judgment. Regarding the NEPA claims, the district court first observed that allowing continued grazing was an action triggering a NEPA analysis. "The River Plan here purports to authorize cattle grazing in accordance with the structures of the WSRA; that involves distinctly different considerations from prior decisions to allow grazing."²⁹³ Second, the district court rejected

287. See *Oregon Natural Desert Ass'n v. Green*, 953 F. Supp. 1133 (D. Or. 1997) [hereinafter ONDA I]; *Oregon Natural Desert Ass'n v. Singleton*, 47 F. Supp. 2d 1182 (D. Or. 1998) [hereinafter ONDA II]; *Nat'l Wildlife Fed'n v. Cosgriffe*, 21 F. Supp. 2d 1211 (D. Or. 1998). The Federal District Court and Federal Court of Appeals also addressed a fourth WSRA and NEPA challenge in *ONRC Action v. Bureau of Land Mgmt.*, 150 F.3d 1132 (9th Cir. 1998). See also *infra* note 309 and accompanying text.

288. *ONDA I*, 953 F. Supp. at 1137 (citations omitted).

289. *Id.* at 1137-38.

290. *Id.* at 1138.

291. *Id.* at 1136-37.

292. *Id.* at 1145-46, 1148.

293. *Id.* at 1147.

BLM's claim that any deficiencies in the River Plan were addressed in the Andrews Resource Area Management Framework Plan (MFP) and in the south Steens Allotment Management Plan (AMP). The MFP's express purpose was to prepare a grazing program under FLPMA.²⁹⁴ Third, the district court rejected BLM's contention that under these facts it was not required to prepare an EIS simply because qualified experts disagreed. The district court noted, "The scientific data in the record unequivocally indicates that grazing in the river area may significantly degrade protected river values, yet no EIS was prepared."²⁹⁵ The district court held that "the BLM's decision to allow grazing was not 'founded on a reasoned evaluation of the relevant factors'" and "[i]n light of the uncontroverted scientific evidence, BLM violated NEPA when it failed to prepare an EIS to analyze the impacts of grazing in the river area."²⁹⁶

In ONDA II, conservation groups also challenged a comprehensive management plan BLM prepared for the Owyhee River because the BLM allowed livestock grazing to continue.²⁹⁷ The plaintiffs also challenged the BLM's failure to prepare an EIS under NEPA and the alternatives in the BLM's EA. The Plan's first management prescription for grazing provided for an inventory of the river corridors as no baseline data existed. The Plan also adopted three utilization standards to achieve its goal of maintaining or improving vegetation. The district court noted that "at the time the standards were set, the BLM had no utilization studies for riparian areas" and that "the 30, 40 and 50% utilization standards [in the Plan] represented the grazing levels in existence at the time the Plan was being written."²⁹⁸ The district court agreed with the plaintiffs that BLM's actions violated the WSRA by not determining if grazing was compatible with the river's special values. The BLM cited a 1979 environmental statement upon which Congress relied in making the designation.²⁹⁹ The district court disagreed with the BLM's conclusions regarding this statement and held that the unambiguous language of the WSRA implied a duty upon the BLM.³⁰⁰

294. *Id.* at 1146-48. No mention of the subsequent wild and scenic river designation or any site-specific information regarding grazing's impact on the values to be protected. Moreover, the district court challenged BLM's authority to tier to the AMP EA. The district court noted that the CEQ regulations permit tiering only to an earlier programmatic EIS. *Id.*

295. *Id.* at 1148.

296. *Id.*

297. *Oregon Natural Desert Ass'n v. Singleton*, 47 F. Supp. 2d 1182, 1184-85 (D. Or. 1998) [*ONDA II*]. Congress designated the Owyhee River a wild and scenic river in 1984. *Id.*

298. *Id.* at 1188.

299. *Id.* at 1191 (quoting a 1979 National Park Service Environmental Statement that provided: "Livestock grazing . . . would be continued under license from the BLM on all Federal land but moderated as necessary so as not to be detrimental to soil stability, vegetative patterns, wildlife distribution, or other environmental values.").

300. *Id.* at 1192. "The language of the WSRA itself is unambiguous and gives no support to the notion that Congress specifically intended cattle grazing to occur in the Owyhee Riv-

Regarding the plaintiffs' second complaint, BLM argued, "[B]ecause the Plan mitigated grazing to avoid significant impact, an EIS was unnecessary and the FONSI was correct."³⁰¹ The district court indicated that an EA must contain "high quality" and "accurate scientific analysis," citing CEQ regulations.³⁰² Moreover, "[t]he agency must adequately explain its decision not to prepare an EIS by supplying a convincing statement of reasons why potential effects are insignificant."³⁰³ Such a statement of reasons is crucial, the district court emphasized, to demonstrate that the agency had taken a hard look at the environmental impacts. Regarding the mitigation measures adopted to avoid having to prepare an EIS, the district court opined that "mitigation measures should be supported by analytical data, even if that data is not based on the best scientific methodology available."³⁰⁴ Mitigation measures need not compensate for every adverse environmental impact, but "the agency must analyze mitigation measures in detail and explain how effective the measures would be A mere listing of mitigation measures is insufficient to qualify as the reasoned discussion required by NEPA."³⁰⁵ The district court found the EA and proposed mitigation inadequate to satisfy NEPA.³⁰⁶

The district court also considered the alternatives examined by BLM in its EA. "The requirement of considering a reasonable range of alternatives applies to an EA as well as an EIS."³⁰⁷ The district court found that the alternatives examined were not reasonable. The EA did not consider elimination of cattle grazing, even though such removal is an obvious rea-

ers." *Id.* Moreover, even if grazing was initially authorized, the BLM must realize that it can unauthorize the grazing. "[I]f grazing proves to be detrimental to soil, vegetation, wildlife, or other values, or is inconsistent with the 'wild' designation, then clearly the BLM has the right – indeed, the duty – not only to restrict it, but to eliminate it entirely." *Id.*

301. *Id.* at 1193.

302. *Id.*

303. *Id.*

304. *Id.* (citations omitted).

305. *Id.* (internal quotations omitted).

306. *Id.* at 1194 (citations omitted). The Plan/EA itself identifies specific areas in which cattle grazing is negatively affecting the rivers' ORVs. The BLM's "mitigated FONSI" is not supported by any analytical data; its mitigation measures are not specific to degraded areas and appear to be nothing more than a continuation of the status quo; and it does not reveal how mitigation measures would compensate for the adverse environmental impacts identified in the Plan/EA. There is no evidence in the record that if the utilization standards are something different from the status quo, they are anything more than guesswork, given the absence of an inventory and utilization studies.

The . . . Plan/EA contains no statistical data and not a single scientific citation. It is replete with plans to monitor conditions and develop data in the future, but as plaintiffs point out, NEPA requires "that the agency develop the data first, and then make a decision, not make a decision and then develop the data.

Id.

307. *Id.* at 1195 (citing 40 C.F.R. 1508.9(b) (2002)).

sonable alternative. Moreover, the other alternatives considered were essentially strawmen (i.e., alternatives that were inconsistent with the wild and scenic river designation). The district court concluded that BLM had failed to take a hard look at grazing and subsequently held that an injunction, excluding grazing in areas of concern identified by BLM's Management Plan, was warranted.³⁰⁸

In a third case, *National Wildlife Federation v. Cosgriffe*, plaintiffs again claimed that the BLM had failed to satisfy its obligations to prepare an appropriate comprehensive management plan for rivers designated under the WSR and to prepare an EIS under NEPA.³⁰⁹ The BLM conceded that it had not prepared a comprehensive management plan for the John Day designated river within the time frame required by the statute.³¹⁰ It challenged, however, the district court's jurisdiction regarding provisions concerning grazing in the comprehensive planning document "because plaintiffs have not properly sought judicial review of a site-specific BLM decision authorizing livestock grazing. Instead, plaintiffs mount a generalized challenge to the management of the John Day WSRs."³¹¹ The district court agreed, citing the United States Supreme Court decision in *Lujan v. National Wildlife Federation*.³¹² Here, the district court held, "[P]laintiffs cannot challenge the BLM's overall grazing policy in the John Day WSRs, but instead should have challenged individual grazing permits."³¹³ The plaintiffs claimed that the remedy they were seeking (removal of the livestock from this public land) was within the court's power to enforce its WSR ruling. But the district court noted that, unlike ONRC II, there was not unanimous agreement in this case regarding the necessity or merits of removing livestock from the public lands.³¹⁴ Moreover, it noted that if livestock were removed from the public lands, they most likely would be moved to private lands adjoining the John Day WSRs, creating the inadvertent possibility that the overall health of the river would be made worse.³¹⁵ Regarding the plaintiffs' NEPA claims, the BLM conceded that it had a duty to prepare an EIS for the comprehensive management plan for the John Day WSRs. However, the district court again relied on the reasoning in *Lujan* to foreclose any generalized challenge to the grazing policy that might be established in the comprehensive plan. Instead, it concluded: "[I]f the BLM inappropriately tiered its site-specific decisions to the 1984 and 1985 EISs [associated with BLM's approval of

308. *Id.* at 1195-96.

309. *Nat'l Wildlife Fed'n v. Cosgriffe*, 21 F. Supp. 2d 1211 (D. Or. 1998).

310. *Id.* at 1217.

311. *Id.* at 1221.

312. *Id.* (citing *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 890-99 (1990)).

313. *Cosgriffe*, 21 F. Supp. 2d at 1221. A similar finding was made by the Ninth Circuit Court of Appeals in *ONRC Action v. Bureau of Land Mgmt.*, 150 F.3d 1132, 1135 (9th Cir. 1998).

314. *Cosgriffe*, 21 F. Supp. 2d at 1221-22.

315. *Id.* at 1222.

resource management plans for the area], . . . then plaintiffs must challenge the decisions individually."³¹⁶

IV. BLM'S ENSUING RESPONSE TO ITS NEPA RESPONSIBILITIES REGARDING GRAZING ON PUBLIC LANDS: A CASE STUDY

*A. BLM's Paper Response: A Review of Selected Documents Given to BLM Personnel, 1988-2000*³¹⁷

1. BLM's 1988 NEPA Handbook

In 1988, the BLM issued its National Environmental Policy Act Handbook, H-1790-1,³¹⁸ to provide instructions to field personnel regarding how to satisfy the procedural provisions of NEPA.³¹⁹ We will limit our discussion to the Handbook's commentary on the use and preparation of environmental assessments. These are two of the seven chapters in the Handbook.

a. Chapter III, Using Existing Environmental Analyses

Chapter III of the Handbook instructs field personnel to use existing environmental analyses "in analyzing impacts associated with a proposed action to the extent possible and appropriate."³²⁰ This chapter lists four different methods for using existing analyses or documents: Tiering, supplementing, using another agency's EA or EIS, and incorporation by reference.³²¹ Before the BLM may use another environmental document to evaluate a proposed action, however, three questions must be answered:

316. *Id.* at 1224.

317. BLM frequently refers to its 1988 NEPA Handbook in notices concerning the preparation of EAs, EISs, and related records of decisions. *See, e.g.*, 60 Fed. Reg. 25243 (May 11, 1995) (stating that notice of intent is needed to prepare an environmental impact statement). The Handbook itself, however, has not been the subject of notice and publication and whether its terms are binding upon the agency has not been addressed by any court. *But see* Heartwood, Inc. v. United States Forest Service, No. 1:00-CV-683, 2001 U.S. Dist. LEXIS 20602 at *9 n.2 (W.D. Mich. Dec. 3, 2001) (holding that the Forest Service's Environmental Handbook, whose provisions had been published in the Federal Register, is binding upon the agency, distinguishing it from the facts of another case where the court held that another (unpublished) Forest Service manual was not binding).

318. BUREAU OF LAND MANAGEMENT, U.S. DEP'T OF INTERIOR, H-1790-1, NATIONAL ENVIRONMENTAL POLICY ACT HANDBOOK (1988) [hereinafter HANDBOOK]. All references to the Federal Register are dated 1988.

319. 40 C.F.R. pt. 1500-1508 (1988). The Department of Interior also issued a guidance manual on NEPA. HANDBOOK, *supra* note 334, at I (citing OFFICE OF ENVIRONMENTAL PROJECT REVIEW, U.S. DEP'T OF INTERIOR, DEPARTMENTAL MANUAL, PART 516, NATIONAL ENVIRONMENTAL POLICY ACT OF 1969, 516 DM 1-7 (1969)). The Department of Interior subsequently has issued a number of instruction memorandums to field offices and the Washington office to clarify the NEPA process in grazing decisions. *See infra* sections IV.A. 2-6.

320. HANDBOOK, *supra* note 318, at III-1.

321. *Id.* at III-1 - III-6.

“(1) [h]ave any relevant environmental analyses related to the proposed action been prepared (e.g. RMP/EIS, programmatic EIS)?; (2) [w]ho prepared or cooperated in the preparation of the analysis (e.g., the BLM, Forest Service)?; [and] (3) [d]o any of the existing analyses fully analyze the proposed action and alternatives?”³²²

After identification and review of existing documents, tiering may be used to “avoid unnecessary paperwork.”³²³ The Handbook provides guidance for when tiering is appropriate and gives three examples.³²⁴ Tiering should be used “to prepare new, more specific or more narrow environmental documents (e.g., activity plan EAs) without duplicating relevant parts of the previously prepared, more general or broader documents (e.g., RMP/EISs).”³²⁵ Tiering is also allowed as long as the relevant parts of other documents are referenced to and the ultimate decision does not affect or modify the existing document’s decision.

If additional environmental analysis is needed for a proposed action, then supplements “to existing draft or final EISs are prepared.”³²⁶ EAs are not formally supplemented; an existing EA should be modified to reflect “changed circumstances or new information.”³²⁷ Any changes can be attached or incorporated. Under both the CEQ regulations and the Handbook, “substantial changes in the proposed action” or “significant new circumstances” are reasons to supplement an existing environmental document.³²⁸

The Handbook authorizes field office personnel to use another agency’s EA or EIS to “reduce paperwork, eliminate duplication, and make the process more efficient.”³²⁹ The BLM may use another agency’s EA if “the environmental document meets CEQ, DOI, and BLM standards,” and “the BLM review[s] the environmental document” and concludes that the document addresses “all BLM concerns and suggestions.”³³⁰ The Handbook inexplicably asserts that the use of another agency’s EA is more “straight-forward” than the use of an EIS because no special procedures exist.³³¹ The

322. *Id.* at III-1.

323. *Id.* at III-3.

324. *Id.* (citing 40 C.F.R. § 1508.28). The tiering examples include other documents such as an Activity Plan EA or Project-Specific EA to a RMP/EIS, or a RMP/EIS to a Programmatic EIS. *Id.* The tiering should be to a broad, general document, such as a RMP/EIS, but the examples in the Handbook seem to reverse the tiering and may be confusing.

325. HANDBOOK, *supra* note 318, at III-3.

326. *Id.* at III-4.

327. *Id.*

328. *Id.* (citing 40 C.F.R. § 1502.9(c)(1)(i)-(ii)).

329. HANDBOOK, *supra* note 318, at III-5 (citing 40 C.F.R. § 1506.3).

330. *Id.* at III-5, III-8.

331. *Id.* at III-5. The special procedures refer to cooperating agency procedures that must be followed for an EIS. The use of an EIS is accomplished by either formally cooperating in the EIS development or adopting all or part of the EIS. *Id.* No procedures for adopting an-

BLM must take full responsibility and prepare its own FONSI or decision record for any other agency's document that it uses.

The CEQ regulations and BLM Handbook also refer to instances when an EA or EIS "may incorporate previous analyses by reference."³³² The documents can be from other federal or state agencies, tribal, state or local governments or even from private interests. In order to incorporate another document, however, that document must be available for inspection by the public or interested persons during the comment period.³³³

b. Chapter IV, Preparing Environmental Assessments

Chapter IV of the Handbook lists the steps for preparing EAs. It relies heavily on the CEQ regulations. An EA must be prepared for proposed actions that: "(1) are not exempt from NEPA, (2) have not been categorically excluded, (3) have not been covered in an existing RMP/EIS or other environmental analysis, and (4) do not normally or obviously require preparation of an EIS."³³⁴ The Handbook indicates that "an EA may also be prepared for any action at any time to assist in planning and decision making."³³⁵

The Handbook lists five steps in preparing an EA. The last four steps mimic those contained in the CEQ regulations; however, the first step imposes a higher standard. The steps are: (1) determining the scope of the assessment; (2) conducting the assessment and preparing the EA; (3) determining if any impacts are significant; (4) notifying the public; and (5) reach-

other agency's EA are listed in the Handbook, which raises questions about the level of scrutiny and public involvement.

332. *Id.* at III-8 (citing 40 C.F.R. § 1502.21).

333. *Id.*

334. *Id.* at IV-1. Chapter IV lists five potential purposes in preparing an EA:

1. To provide sufficient evidence and analysis of impacts on the quality of the human environment to support a determination of no significant impacts or a determination to prepare an EIS.
2. To serve as a vehicle for an interdisciplinary review of proposed actions and thus promotes consideration of all affected resources, even though impacts are not significant.
3. To provide a mechanism for identifying and developing appropriate mitigation measures.
4. To aid compliance with NEPA; these documents should be made available to the public.
5. To facilitate the preparation of the EIS, i.e., the results of the assessment are used in scoping (see Chapter V).

Id.

335. *Id.* (citing 40 C.F.R. § 1501.3).

ing and recording the decision.³³⁶ According to the Handbook, the process for preparing an EA is basically the same, whether the proposed action is initiated internally (within the BLM), externally (outside the BLM), or combined with any other document.³³⁷

The description in the Handbook for step one, determining the scope of the assessment, offers guidance regarding how to conduct the EA. This section stresses careful planning to minimize the amount of time and energy expended on preparing an EA. It also recommends internal coordination and informal contact with the user groups to determine the scope of the EA. The scope correlates to the cost and time of this document.³³⁸ Under this section, the Handbook supplies preparers with thirteen questions to assist them in determining the scope.³³⁹ These questions range from the need

336. *Id.*

337. *Id.* The text reads: "Additional procedural guidance for the preparation of land-use plan amendments using the EA process" is available, depending upon the type of action involved. *Id.*

338. See 43 C.F.R. §§ 2808.3-1, 2883.1-1(1988).

339. HANDBOOK, *supra* note 318, at IV-2 – IV-3. The thirteen questions are:

a. Is the proposal complete and fully described? Have program-specific requirements for information, if any, been satisfied?

b. Does the proposed action conform with the existing RMP (or management framework plan) for the area? If not, does the proposed action warrant further consideration through a plan amendment or can the proposed action be modified to conform with the existing plan? For externally initiated proposed actions, the applicant must agree to any changes in writing, e.g., as a modification to the application.

c. What is the need for the proposed action?

d. Can or should any modifications be made in the proposed action, e.g., changes in design features or management practices, to avoid or minimize environmental harm? For externally proposed actions, the applicant must agree to any changes in writing.

e. Are there opportunities to use information or analysis from existing environmental analyses by tiering or incorporating by reference?

f. Can the proposal be aggregated with other similar proposals, i.e., similar in nature, timing, or geographic location, and assessed in an EA without causing schedule problems?

g. Can the EA be combined with other non-NEPA documents to concurrently fulfill requirements and reduce paperwork? What other statutory, regulatory, or programmatic requirements are applicable to the proposal? (Consult program-specific guidance).

h. What issues and concerns need to be addressed? What resources are present and likely to be affected?

NOTE: Determining issues and concerns usually involves informal contact with user groups and other interested government agencies or organizations as well as BLM staff specialists. Careful consideration of

and completeness of the proposed action, the availability of other planning and NEPA documents, the existence of conflicts and issues to the criteria for determining the significance of any environmental impact.

Step two outlines the process for conducting the assessment and preparing the EA. The Handbook indicates that other agencies, applicants and the public should be involved in the assessment and preparation process.³⁴⁰ The process for preparing an EA involves five parts:

- Define the proposed action and alternatives,
- Identify the affected environment,
- Assess the impacts of the proposed action and alternatives,
- Identify mitigation measures, and
- Assess residual impacts.³⁴¹

Following the data collection and analysis, the preparer(s) must complete the EA.³⁴²

The last three steps (three, four, and five) describe how the field offices are to use the resulting EAs. Step three, determining whether impacts are significant, allows the manager to review the EA and make a determination whether the proposed action requires preparation of an EIS.³⁴³

what issues or concerns do or do not need to be addressed is essential in determining the scope of the assessment.

i. What criteria should be used to assess whether or not impacts are significant (*see* 40 CFR § 1508.27)?

j. Are there any unresolved conflicts concerning alternative uses of available resources (*see* Section 102(2)(e) of NEPA)? If so, what alternatives should be considered? Are there reasonable alternatives for satisfying the need for the proposed action? Will such alternatives have meaningful differences in environmental effects? Should they be considered?

k. What public notice and level of public involvement is appropriate or required by CEQ regulations (40 CFR § 1501.4, 1506.6) and by program-specific regulations or standards?

l. What information is needed to assess the proposed action? Is the information already available or must it be obtained?

m. What interdisciplinary involvement is necessary (team makeup)?

Id.

340. 40 C.F.R. § 1501.4(b).

341. HANDBOOK, *supra* note 318, at IV-3 – IV-4.

342. *Id.* at IV-4. On a following page of the Handbook, a note also stated that “[a]n EA should not be labeled as ‘draft’ when issued for public review;” thus, all EAs for public review are final documents and not drafts. *Id.* at IV-6.

343. *Id.* at IV-5. If the manager, who is responsible for authorizing the action, determines that the impacts are not significant, he prepares a finding of no significant action (FONSI). Alternatively, if he determines the impacts are significant, the action cannot be approved

In step four, notifying the public, the manager must determine whether the EA and FONSI should be made available for public comment.³⁴⁴ Those instances include where the proposed action is or is closely similar to one normally requiring preparation of an EIS under the agency's own rules, or the proposed action is without precedent.³⁴⁵ If public review is necessary, then the interested public must be provided notice of the document's availability, and the agency must wait thirty days before making its final determination.³⁴⁶ Step five in the EA process is titled "reaching and recording the decision." The Handbook indicates that the decision should be recorded in accordance with the program's specific requirements.

The Handbook's Chapter IV Part C, Documentation, outlines the content requirements for an EA. The Handbook provides that EAs should be concise (10-15 pages) and should provide sufficient evidence and analysis for determining whether to prepare an EIS or FONSI. The minimum content requirements, described in the Handbook, are taken from the CEQ regulations.³⁴⁷ An EA must contain brief discussions of:

- The need for the proposed action;
- The alternatives considered;
- The environmental impacts of the proposed action and alternatives; and
- A listing of agencies and persons consulted.³⁴⁸

unless an EIS is prepared or the action is mitigated to avoid these impacts. The Handbook instructs that if mitigation measures are employed to avoid preparation of an EIS, these modifications must be incorporated into the proposed action. *Id.*

344. *Id.* The CEQ regulations indicate that in only a limited number of instances must an agency make a FONSI available for public review, prior to issuing its final decision regarding the preparation of an EIS. *Id.* (citing 40 C.F.R. § 1501.4(e)(2)). The manager and authorized decision maker are not defined in the Handbook.

345. *Id.* at IV-6.

346. *Id.*

347. *Id.* at IV-7 (citing 40 C.F.R. § 1508.9(b)). The Handbook also lists additional items that must be included in an EA. *Id.* at IV-9. These items include: 1) identifying information; 2) information on related programs, policies, or projects, and 3) optional information regarding alternatives identified but not considered and the affected environment. First, the Handbook requires that the EA include certain information designed to identify the action under consideration. This identifying information includes: (a) Title, EA number, and type of project; (b) location of proposal; (c) name and location of preparing office; (d) lease, serial or case file number (where applicable); (e) applicant's name, and (f) date of preparation. The Handbook also indicates that the EA include information on any related programs, plans, or policies, such as existing RMPs and/or MFPs associated with the proposal. *Id.* The proposed action must conform with these existing items. If the EA is prepared with a LUP amendment, then the nonconformance must be discussed early in the document. The EA should also identify or refer to any relevant statutory or regulatory provisions. This list does not have to be exhaustive, but it should include ones that are necessary to improve understanding. All state or local permit requirements also should be identified. *Id.* at IV-9 to IV-10.

348. *Id.* at IV-7 to IV-8.

Even though it does not appear on this list, the Handbook also requires the EA preparer to identify and analyze mitigation measures, if appropriate, and their relation to the environmental impacts.³⁴⁹ The impact analysis must summarize: (a) direct, indirect, and cumulative impacts on all resources; (b) a negative declaration regarding resources that are not present and not affected; (c) references to other analyses or other EAs; (d) a specific description of mitigation measures (but not measures of proposed action or alternatives), and (e) the anticipated effectiveness of mitigation measures and any direct, indirect and cumulative impacts that remain.³⁵⁰ The Handbook also requires that the EA list all persons or agencies consulted or contacted.³⁵¹

The Handbook gives field offices some flexibility in how an EA may be formatted. The Handbook identifies four formats that may be used in preparing EAs. It gives the manager who prepares the EAs the responsibility for selecting an appropriate EA format for the proposed action under consideration.³⁵² Form one is to be used for a straightforward and relatively simple EA. The Handbook requires that three conditions be met to use this option:

- Few elements of the human environment will be affected or the impacts are minimal;
- Few simple and straightforward mitigation measures are needed; and
- No program-specific documentation requirements exist or are associated with its use.³⁵³

Form two is used for a more complex EA. This form's use is dependent upon one or more of the following conditions:

- Many identified elements will be affected or impacts are relatively complex;
- A large number of mitigation measures are identified as necessary; or
- Impacts are potentially controversial.

Form three, titled Optional EA/FONSI/DR Form, generally follows form one. The Handbook requires that four conditions be met to use this form:

- All conditions from form one are met;

349. *Id.* at IV-8.

350. *Id.*

351. *Id.* This should include a brief statement of purpose and results, if applicable. *Id.*

352. *Id.* at IV-10. The four options are referred to as Format Option #1, #2, #3, and #4. We identify them as form one, form two, form three, and form four, when appropriate.

353. *Id.*

- No unresolved conflicts exist and thus alternatives need not be considered;
- The EA will not generate wide public interest nor will be for public review and comment; and
- The proposed action is in an area with a LUP and conforms with that plan.³⁵⁴

Form four is known as the Combined EA Format because it combines the EA with “any other planning or decision document.”³⁵⁵ To use this format the environmental impact section must be clearly and separately identified.³⁵⁶

The content requirements are similar for any EA that is drafted. Each EA should have the minimum CEQ content requirements and any additional content information listed in the Handbook. The criteria are basically the same and appear as headings and subheadings. The difference between the form types turns on the complexity of the impacts, the amount of mitigation measures and any existing controversy surrounding the allotment.³⁵⁷

2. BLM’s December 23, 1998 Instruction Memorandum

A December 23, 1998 Instruction Memorandum, signed by the Assistant Director of Renewable Resources and Planning in Washington, indicates that a “confluence of events affecting the Bureau of Land Management’s (BLM) rangeland management program requires that we pursue an integrated approach to processing grazing permits and leases.”³⁵⁸ These events, the memo details, include the need to conduct range health assessments as a result of the revised 1994 regulations, the sizable number of permits and leases up for renewal during fiscal years 1999 and 2000, and the IBLA ruling in *National Wildlife Federal v. Bureau of Land Management* that “gave us a strong reminder of our responsibility for ensuring that all management actions on public land conform with the appropriate land use plans . . . and are in compliance with the National Environmental Policy Act (NEPA).”³⁵⁹

The Instruction Memorandum also had several attachments. First, Attachment 1 summarized the “The Grazing Rider,” a part of the Department of Interior’s Appropriation for fiscal year 1999.³⁶⁰ The rider gave

354. *Id.* at IV-11.

355. *Id.* at IV-12. These other documents are not named; the Handbook just refers to the use of program-specific planning or decision-making documents. There is also a citation to 40 C.F.R. § 1506.4 (1988). HANDBOOK, *supra* note 318, at IV-12.

356. 40 C.F.R. § 1506.4.

357. HANDBOOK, *supra* note 318, at IV-9 – IV-12.

358. Instruction Memorandum I, *supra* note 6, at 1.

359. *Id.* (citation omitted).

360. *Id.* at Attachment 1-1 (summarizing Section 124 of Public Law 105-277).

BLM additional time to complete its NEPA responsibilities. Section 124 of Public Law 105-277 provides that "grazing permits which expire during fiscal year 1999 shall be renewed for the balance of fiscal year 1999 on the same terms and conditions as contained in the expiring permits, or until the Bureau of Land Management completes processing of these permits in compliance with all applicable law, whichever comes first."³⁶¹ The Attachment further reads: "It is not necessary to document compliance with NEPA, ESA, or other laws or regulations before you issue the Pub. L. 105-277 permit."³⁶²

Attachment 2 to the Instruction Memorandum provides field personnel with a series of questions and answers regarding their NEPA and other responsibilities. Questions 1 and 2 address the agency's NEPA responsibilities prior to issuing a grazing lease or permit and the use of tiering in the preparation of EISs. It provides:

Before issuing a grazing permit or lease, you must either document an administrative determination that the existing NEPA analysis is sufficient or prepare an EA or EIS for the grazing permit or lease.

Tiering is appropriate when preparing a site-specific grazing permit EA which incorporates by reference the general discussions from a more general NEPA analysis, such as a grazing EIS, RMP EIS, or NEPA analysis for an allotment management plan. Incorporation by reference should briefly describe the general analysis and provide specific citation to where the analysis is contained in the broader NEPA document³⁶³

Question 3 addresses the procedure for applying the Standards of Rangeland Health and Guidelines for livestock grazing. Regarding the NEPA documentation, the answer in Attachment 2 indicates, "[T]he NEPA documentation for grazing permit renewals should include considerations of the concepts in the fundamentals of rangeland health."³⁶⁴ It is not clear what the BLM recommends to do if the Standards and Guidelines have not been completed.

361. *Id.*

362. *Id.* Attachment 1-1 indicates that a Public Law 105-277 permit "includes the same terms and conditions of the expiring permit except for the expiration date which shall be 9/30/99." *Id.*

363. *Id.* at Attachment 2-1, 2-2. See 40 C.F.R. § 1502.21 (1988).

364. Instruction Memorandum I, *supra* note 6, at Attachment 2-2. Regarding the specificity of such analysis, the answer notes: "The consideration of these concepts in the NEPA documentation will not necessarily require or be compatible to an assessment of rangeland health, as discussed in IM-98-91." *Id.*

Question 5 addresses how NEPA documentation should be handled when a permit/lease renewal involves more than one allotment. The Attachment gives field personal discretion to “determine for multiple allotment permits if one NEPA document would be most efficient for all allotments or if individual NEPA documentation should be done for each allotment.”³⁶⁵ The answer indicates, “Some allotments may require the development of further NEPA documentation while some may have sufficient existing documentation. Your NEPA document should clearly identify how each allotment has been considered.”³⁶⁶

Question 14 asks in which circumstances might a *categorical exclusion* (CX) apply to the EIS requirement for actions involving grazing decisions on BLM lands. The Attachment notes that the Department of the Interior has established a CX for “transfers of grazing preferences.”³⁶⁷ It points out, however, that a number of exceptions apply to such exclusions (e.g., “actions with adverse effects on wetlands, ecologically significant or critical areas, and on species listed or proposed for listing as threatened or endangered, or on critical habitat; with highly uncertain and potentially significant environmental effects; and actions which establish a precedent for future action).”³⁶⁸

3. BLM’s July 1, 1999 Instruction Memorandum

BLM issued a second Instruction Memorandum on July 1, 1999 addressing problems associated with relying on existing NEPA documents when making a NEPA decision.³⁶⁹ The Instruction Memorandum reiterated that BLM policy was to comply with NEPA and that BLM field officers must make sure that their NEPA documents are adequate. The memorandum indicated that a pre-existing NEPA document would be adequate if three conditions were met: “[1] a current proposed action previously was proposed and analyzed (or is a part of an earlier proposal that was analyzed); [2] resource conditions and circumstances have not changed; and [3] there is no suggestion by the public of a significant new and appropriate alternative.”³⁷⁰ The Instruction Memorandum also warned field personnel that—when using existing NEPA documents—they must “establish an administrative record that documents clearly that [they] took a hard look at . . . whether the impact analysis is valid for the proposed action.”³⁷¹ The memorandum

365. *Id.*

366. *Id.*

367. *Id.* at Attachment 2-6, (citing 57 Fed. Reg. 10918 (March 31, 1992)).

368. *Id.*

369. Instruction Memorandum No. 99-149 from the Department of the Interior Bureau of Land Management to All Washington Officers (WO) and Field Office (FO) Officers 1 (Jul. 1, 1999) [hereinafter Instruction Memorandum II] (on file with the authors).

370. *Id.*

371. *Id.* (citations omitted).

provided a six-page worksheet to assist field personnel in determining whether an existing NEPA document was adequate.

4. BLM's November 5, 1999 Instruction Memorandum on Grazing Renewals

In November 1999, BLM issued an Instruction Memorandum discussing compliance with NEPA and the alternatives to be included for livestock grazing permit renewals.³⁷² The memorandum acknowledged the confusion surrounding the need to discuss the alternatives and the range of alternatives to be included in grazing EAs and EISs. It provided, first, that preparer(s) "must consider alternatives to the proposed action when there are unresolved conflicts concerning alternative uses of available resources."³⁷³ Second, it indicated the range of alternatives to be considered will "depend[] on the nature of the proposal in relation to the unresolved conflicts and the site-specific facts in relation to the proposed activity."³⁷⁴ Thus, it indicated that non-controversial renewals would require consideration of a smaller range of alternatives. Third, it clarified that "[f]or livestock grazing permit renewals, the no action alternative will be not renewing the permit."³⁷⁵

5. Instruction Memorandum, January 20, 2000, from Wyoming BLM

Some confusion arose regarding BLM's November 5, 1999 Instruction Memorandum on Grazing Renewals and the no action alternative. The Wyoming state BLM office sent all field offices a clarifying memorandum to interpret the discussion of alternatives.³⁷⁶ The memorandum stated: "BLM [must] analyze[] the consequences of no livestock grazing and disclose[] them in NEPA documents prepared for grazing permit and lease renewals."³⁷⁷ For grazing preferences, the memorandum instructed, at least two alternatives should be examined: "no livestock grazing in one alternative, in addition to analyzing the impacts of continuation of the historic grazing use and conditions."³⁷⁸ The memorandum from the state office indicated that an EA need not specifically identify the "no action" alternative, but an

372. Instruction Memorandum No. 2000-022 from the Department of the Interior Bureau of Land Management to All Washington Officers (WO) and Field Office (FO) Officers, 1 (Nov. 5, 1999) [hereinafter Instruction Memorandum III] (on file with the authors).

373. *Id.*

374. *Id.*

375. *Id.* (citations omitted).

376. Instruction Memorandum No. WY-2000-20 from the Deputy State Director, Bureau of Land Management, Wyoming State Office to the Field Managers 1 (Jan. 20, 2000) [hereinafter Instruction Memorandum IV] (on file with the authors).

377. *Id.*

378. *Id.*

EIS prepared for grazing renewal must have the no action alternative identified.³⁷⁹

BLM's January 20, 2000 Instruction Memorandum emphasizes the need to comply with the Handbook's provisions regarding the content of EAs: "An EA that includes those components identified as required and recommended complies with the Council of Environmental Quality and BLM NEPA documentation requirements. If the EA also includes the optional requirements, it would be more complete."³⁸⁰ The Instruction Memorandum indicates that the NEPA analysis must have objective interdisciplinary input and involvement. "The criteria consistently used by the Interior Board of Land Appeals (IBLA) and by the courts to determine adequacy of analysis disclosed in NEPA documents are, reasoned analysis and the requisite hard look at the potential impacts of the action(s) involved."³⁸¹ Even though no standards exist for determining the detail of these NEPA documents, the memo instructs that several factors should be considered, such as the area, the alternatives, presence of threatened or endangered species or habitat, and a hard look especially if others are interested in the area.³⁸²

6. BLM's July 21, 2000 Instruction Memorandum

A July 21, 2000 Instruction Memorandum also addressed compliance with NEPA and the alternatives listed with livestock grazing permit or lease renewals.³⁸³ The memorandum indicated: "When [Field Officers] prepare an environmental assessment (EA) for issuing a livestock grazing permit(s), [the officer] must consider a reasonable range of alternatives."³⁸⁴ The memorandum provided the following instructions regarding what is a reasonable range:

At a minimum, you must address the following: (1) [I]ssuing a new permit based on the application (proposed action), (2) issuing a new permit with the same terms and conditions as the expiring permit (no action alternative); and (3) a no grazing alternative. If the application for a permit is the same as the expiring permit (no changes in the terms and conditions), then the proposed action and the no action al-

379. *Id.*

380. *Id.* at 2. (emphasis omitted) (citations omitted).

381. *Id.*

382. *Id.* at 2-3.

383. Instruction Memorandum No. 2000-022, Change 1, from the Department of the Interior Bureau of Land Management to All WO & FO Officials 1 (Jul. 21, 2000) [hereinafter Instruction Memorandum V] (on file with the authors).

384. *Id.*

ternative are the same. In this case, document that they are the same and analyze them as the proposed action.³⁸⁵

The Instruction Memorandum also revised the previous November 1999 memorandum and noted that the CEQ “has indicated that the no action alternative for permit renewals could be either no grazing or current terms and conditions.”³⁸⁶ The Instruction Memorandum notes, “[F]ield Offices had also indicated that they would prefer to consider the permit’s current terms and conditions as the no action alternative.”³⁸⁷

B. Case Study: Implementation of BLM NEPA Guidelines in Wyoming

1. Overview

a. Description of BLM Grazing Lands in Wyoming

BLM’s 1996 Public Lands Statistics indicate that more than forty-nine (49.7%) percent of Wyoming’s lands are federally owned.³⁸⁸ More than eighteen million (18,389,420) acres of federal lands in the state were under the jurisdiction of Wyoming’s BLM.³⁸⁹ One thousand seventy-three grazing permits, representing 1,539,420 AUMs were in force in Wyoming BLM grazing districts in fiscal 1996.³⁹⁰ One thousand, six hundred sixty-eight grazing leases, representing 463,391 AUMs were also in force on Wyoming BLM rangelands during the same period.³⁹¹

BLM’s national office is located in Washington D.C., with state offices located mostly in the eleven western states.³⁹² Wyoming’s state BLM office is located in Cheyenne. It is responsible for the overall management of BLM public lands in both Wyoming and Nebraska.³⁹³ Wyoming BLM has field offices in Buffalo, Casper, Cody, Kemmerer, Lander, Newcastle, Pine-dale, Rawlins, Rock Springs, and Worland.³⁹⁴

385. *Id.*

386. *Id.* at 2 (citations omitted).

387. *Id.* (citations omitted).

388. BLM, PUBLIC LANDS STATISTICS – 1996, at Table 1-3, available at <http://w3.access.gpo.gov/blm/images/1-3-96.pdf> (last visited December 20, 2002).

389. *Id.* at Table 1-4.

390. *Id.* at Table 3-7.

391. *Id.* at Table 1-4.

392. STATREGIC PLAN, *supra* note 176, at 6.

393. BLM, DIRECTORY, available at http://www.wy.blm.gov/Directory/fo_map/fo_map.html (last visited June 18, 2002).

394. *Id.* A map for the state of Wyoming Field Offices is available at <http://www.blm.gov/nstc/jurisdictions/pdf/JurWyo.PDF> (last visited Nov. 24, 2002). The Newcastle Field Office is also responsible for the public lands of the state of Nebraska.

b. Standards and Guidelines

In response to a Department of Interior (DOI) rule dated August 21, 1995, each state BLM must create applicable standards and guidelines.³⁹⁵ The purpose of these standards and guidelines were to assist the livestock grazing administration and management of public lands. The DOI rule established four fundamental principles that the standards and guidelines should achieve: “(1) Watersheds are functioning properly; (2) water, nutrients, and energy are cycling properly; (3) water quality meets State standards; and (4) habitat for special status species is protected.”³⁹⁶ These standards and guidelines are to be applied statewide for directing the activities that occur on public lands.³⁹⁷

In Wyoming, implementation of these standards and guidelines occurred after August 12, 1997. Wyoming’s BLM compiled these standards and guidelines in a pamphlet which explains the implementation process within the grazing allotments.³⁹⁸ Priority of allotment review is given to those allotments with high-priority or existing management plans.³⁹⁹ The public and permittees are to be involved by notification of any allotment review.⁴⁰⁰ Other allotments will be reviewed as time allows. These standards “serve to focus the on-going development and implementation of activity plans toward the maintenance or the attainment of healthy rangelands.”⁴⁰¹

These standards and guidelines are in the first planning tier of BLM’s three-tiered land use planning process. The first tier includes the policies, regulations and laws governing the BLM’s administration and management of the public land uses.⁴⁰² NEPA is also part of this first tier, and mandates the BLM consider the impacts of actions occurring on the public rangelands.⁴⁰³ Wyoming has completed assessments on 527 allotments, representing 9,025,113 acres, and has another 2,905 allotments or 85% to complete.

395. STANDARDS FOR HEALTHY RANGELANDS AND GUIDELINES FOR LIVESTOCK GRAZING MANAGEMENT FOR PUBLIC LANDS ADMINISTERED BY THE BUREAU OF LAND MANAGEMENT IN THE STATE OF WYOMING 1 (1995) [hereinafter S & G’s Pamphlet] (on file with the authors). The DOI rule is found in 43 C.F.R. § 4180.1 (2002). See *supra* section III.A.2.

396. S & G’s Pamphlet, *supra* note 395, at 1.

397. *Id.* The pamphlet defines the terms, standards and guidelines: “Standards address the health, productivity, and sustainability of the BLM administered public rangelands and represent the minimum acceptable conditions for the public rangelands.” *Id.* “Guidelines provide for, and guide the development and implementation of, reasonable, responsible, and cost-effective management practices at the grazing allotment and watershed level.” *Id.*

398. *Id.* at 1-2. This pamphlet outlines the six standards and nine guidelines.

399. *Id.* at 2.

400. *Id.*

401. *Id.*

402. *Id.* at 3.

403. *Id.*

2. Data Findings: Collection and Summary

a. Methodology

The information for this study comes from the State of Wyoming's Office of Federal Land Policy, which collected any EAs and EISs prepared for BLM grazing decisions during the study period.⁴⁰⁴ The study was divided into two grazing periods, May 1, 1999 through April 30, 2000 (period one), and May 1, 2000 through April 30, 2001 (period two).⁴⁰⁵

In both periods surveyed, no EISs were prepared to assist the BLM field offices in making their grazing decisions. EAs were the sole source of NEPA documentation. In period one, the BLM field offices in Wyoming prepared eight hundred grazing EAs. This number dropped significantly in the second period when the Office of Federal Land Policy received only one hundred and one EAs involving BLM grazing decisions. The dominant grazing decision made by Wyoming BLM field offices during both periods involved grazing permit or lease renewals. In period one, ninety-one percent of the EAs prepared and collected for this survey concerned permit or lease renewals in which no change in grazing terms or conditions was proposed, four percent involved permit or lease renewals with proposed changes in terms (such as reduction in livestock numbers), and another four percent dealt with grazing permit transfers.⁴⁰⁶ In period two, however, seventy-five percent of the surveyed EAs concerned grazing permit or lease renewals with no proposed change in conditions, nineteen percent involved renewals requests with changes in terms or conditions (including reduction of animal numbers), and six percent involved permit or lease transfers.

The study examined all EAs prepared by Wyoming BLM field offices for the second period and sent to the Office of Federal Land Policy for the State of Wyoming. Given the large number of grazing EAs prepared in the first period, however, the authors, following consultation, adopted a random but proportionate sampling technique.⁴⁰⁷ Under this methodology, twenty-five percent (25%), or two hundred, EAs sent to the Office of Federal

404. The Office of Federal Land Policy is in the State of Wyoming Office Building in Cheyenne, Wyoming.

405. These dates were picked for convenience to cover the permit expiration dates that mostly occurred during February and March of 2000. The date of the document was used if the permit expiration date is not found within the EA. The second year was smaller, as most of the renewals were completed during the first year because most permits expired at the end of February 2000. Ten-year permits are the norm.

406. Grazing permit transfers also include grazing lease transfers. We use the term permit to cover both permits and leases even though a distinction does exist. We did not separate lease from permit transfers in this case. See *supra* section III. B.2 for the distinction mentioned in FLPMA.

407. We added a small amount, around ten percent, as a margin of error; the actual amount of surveyed EAs was 228.

Land Policy were collected. Table 2 illustrates the proportion of grazing EAs prepared by each field office during the two periods. To better understand the similarity and differences in grazing renewal (and NEPA) decisions across the state, the sampling process adopted for the first period made sure that the proportion of EAs examined from each field office matched the proportion of EAs each office had actually prepared.⁴⁰⁸

<i>Field Office</i>	<i>Period One</i>	<i>Period Two</i>
Buffalo	5 %	19 %
Casper	21%	12 %
Cody	4 %	7 %
Kemmerer	4 %	12 %
Lander	11 %	9 %
Newcastle	12 %	34%
Pinedale	13 %	10 %
Rawlins	17 %	5 %
Rock Springs	5 %	10 %
Worland	8 %	12 %
State Total	100%	100%

Table 2: Percentage of EAs Allocated from each BLM Field Office

b. Descriptive Results⁴⁰⁹

The Handbook instructs the field office personnel to draft concise EAs, preferably in the page range of ten to fifteen pages. Table 3 shows the average page length for each EA form examined for both periods. Most of the EAs met this requirement. The form two EAs were much larger documents, having a range of 36 to 48 pages.

408. The proportionate allocation method, based upon each field office was the method selected because the overall goal was to focus on the statewide process while realizing that variances would occur within each field office. With the individual field office as the basis for the percentages, these estimates assist in obtaining an overall picture of the state.

409. The summary and compilation of results are on file with the authors. We used SPSS©, Inc. (Release #6, June 1993) to compile the data from the summary forms and to calculate the basic frequencies. SPSS was used in a spreadsheet format.

	<i>Period One</i>	<i>Period Two</i>
<i>EA Form</i>	<i>Average Page Length</i>	<i>Average Page Length</i>
One	6.3	6.7
Two	48.0	36.3
Three	4.8	4.1
Four	2.0	--

Table 3: Average Page Length of EA for Both Periods

Each field office had specific staff members who completed the EAs, including the Range Management Specialist, Field Manager or Officer and the Range Technician. For the two periods, the staff person who completed the EAs was primarily the Range Management Specialist. For period one, the Range Management Specialist prepared 76.7% of the EAs. In period two, the Range Management Specialist prepared 82% of the EAs.

Both the Handbook and CEQ regulations also instruct the field offices to establish a team or at least utilize staff with different backgrounds in the EA process. We found the participatory process for EA preparation to be somewhat similar between the two periods. The EAs studied typically indicated that other BLM staff assisted in the EA preparation.

Table 4 shows the average size of allotments per field office for which grazing renewal requests were processed during the two periods. The data illustrates the wide divergence amongst field offices regarding the land areas they manage. For example, the average allotment size found on the sample grazing renewal requests processed by the Newcastle office (North-east corner of the state) was only 952.0 acres. In contrast, the average allotment size for the Kemmerer office (Southwest) was more than 108,071 acres. Fourteen percent of the EAs examined in period one and 15.8% of the EAs in period two failed to include information on the acreage impacted.

<i>Field Office</i>	<i>Period One Range</i>	<i>Period One Acre Avg.</i>	<i>Period Two Range</i>	<i>Period Two Acre Avg.</i>
Buffalo	80.0 – 10001.0	2717.6	35.6 – 19959.0	2006.9
Casper	40.0 – 16400.0	1058.1	37.2 – 17080.0	3819.3
Cody	170 – 11200.0	3279.4	20.0 – 6958.0	1555.9
Kemmerer	180.0 – 249728.0	108071.6	40.0 – 249728.0	43333.6

Lander	1370.0 – 39094.0	9815.3	13833.0 – 100000.0	56916.5
Newcas- tle	40.0 – 5074.0	952.0	40.0 – 3335.0	1147.5
Pinedale	43.0 – 55789.0	9765.5	80.0 – 15000.0	3137.1
Rawlins	40.0 – 220000.0	15478.8	40.0 – 25530.0	9628.3
Rock Springs	17000.0 – 276000.0	38583.3	10000.0 – 127000.0	86928.7
Worland	120.0 – 25100.0	4853.1	100.0 – 11500.0	3144.1

Table 4: Acreage Ranges and Average Acreage from All EAs for the Wyoming Field Offices

Table 5 shows the number of grazing decision EAs, by form type, prepared by each field office in Wyoming over the two periods. In both periods, form one predominated.⁴¹⁰ The only exception to this finding was for the Newcastle office where form three was the form of choice for period one. The Rock Springs field office had the highest use of EA form two; this may be due to the existence of controversies in the area. According to the Handbook, form one is to be used only when: a) few elements of the human environment will be affected or the impacts are minimal; b) few simple and straightforward mitigation measures will be needed; and c) no program-specific documentation requirements exist. Use of form three implied less impacts.⁴¹¹

Field Office	EA Form One		EA Form Two		EA Form Three		EA Form Three	
	Yr. One	Yr. Two	Yr. One	Yr. Two	Yr. One	Yr. Two	Yr. One	Yr. Two
Buffalo	12	19						
Casper	47	12				1		
Cody	5	7			5			
Kemmerer	1	12			8			
Lander	24	9			1			

410. See *infra* section IV.B.1.

411. The EA that follows form three is easy to determine as it is always titled, Optional EA/FONSI/DR form and is two pages. See HANDBOOK, *supra* note 318, at IV-9. It is sometimes more difficult to differentiate between forms one and two, as they are not titled. We looked at the complexity of the EA, impacts and mitigation measures to classify the form types.

Newcastle		2			26	2		
Pinedale	27	10			1		1	
Rawlins	25	4		1	15			
Rock Springs	1	1	11	6		3		
Worland	9	7			9	5		
State Total	151	83	11	7	65	11	1	0

Table 5: All EA Forms (One through Four) by each Wyoming Field Office, Both Periods

For the four EA form types, selection should depend upon the severity of the impacts, the need for mitigation measures and the concerns of the public. If these variables are large and/or complex, then the EA form selected should reflect those facts, and a form one should be selected instead of a three and a form two instead of a one. Table 6A and 6B compare the form selected versus the importance of cumulative impacts, the adoption of mitigation measures, and the availability of an RMP to tier on.

The cumulative impacts were identified on the EAs as “yes” or “no,” and not much detail was presented. Cumulative impacts are important to determine when an EIS needs to be done. In some instances, impacts to riparian areas were identified, which might have raised significant cumulative impacts, but appropriate mitigation measures were included to justify the issuance of a FONSI.

References to a RMP existed in all four types of EAs and occurred 89.5% of the time for period one, and 99% of the time for period two. If an RMP was mentioned, the EA identified the name and the date the RMP was approved. The RMPs were older documents for the most part. These RMPs included: 1) Buffalo RMP/EIS, 1985; 2) Casper, Platte River ROD/EIS, 1985; 3) Cody RMP/EIS, 1990; 4) Kemmerer RMP, 1986; 5) Lander RMP/EIS, 1987; 6) Newcastle⁴¹² MFP Grazing Plan (LUP), 1981; 7) Pinedale RMP, 1988; 8) Rawlins, Great Divide RMP, 1990; 9) Rock Springs, Grazing RMP, 1997; and 10) Worland, Washakie RMP, 1988 and Rangeland Program Summary Update for Washakie Resource Area, 1994.

412. Newcastle mentioned another RMP/EIS, but no date was included.

<i>EA Form</i>	<i>Cumulative Impacts %</i>		<i>Mitigation %</i>		<i>RMP %</i>	
	<i>Yes</i>	<i>No</i>	<i>Yes</i>	<i>No</i>	<i>Yes</i>	<i>No</i>
One n = 151	2	98	72.8	27.2	98.7	1.3
Two n = 11		100	100		100	
Three n = 65	1.5	98.5	40	60	66.2	33.8
Four n = 1		100		100	100	
Overall %	1.8	98.2	64.5	35.5	89.5	10.5

Table 6A: Three Form One Variables by EA Form, Period One

<i>EA Form</i>	<i>Cumulative Im- pacts %</i>		<i>Mitigation %</i>		<i>RMP %</i>	
	<i>Yes</i>	<i>No</i>	<i>Yes</i>	<i>No</i>	<i>Yes</i>	<i>No</i>
One n = 83		100	68.7	31.3	98.8	1.2
Two n = 7		100	100		100	
Three n = 11		100	54.5	45.5	100	
Four n = 0						
Overall %	0	100	69.3	30.7	99	1.0

Table 6B: Three Form One Variables by EA Form, Period Two

The great use of mitigation measures in the grazing EAs – overall 64.5% and 69.3%, respectively, for each period – may be explained by several factors. Tables 7A and 7B compare the choice of forms with the recorded presence of an endangered or threatened species. In some EAs, it was difficult to determine if a threatened or endangered species was or was not present. In such cases, we coded that result as indeterminate or ID. Many EAs denoted the presence of a threatened or endangered species, and also stated no effect. These cases were coded as “Yes.”

<i>EA Form</i>	<i>Threatened or Endangered Species Presence</i>		
	<i>%</i>		
	<i>Yes</i>	<i>No</i>	<i>ID</i>
One n = 151	57	43	
Two n = 11	100		
Three n = 65	75.4	20	4.6
Four n = 1		100	
All Forms	48.2	50.4	1.3

Table 7A: Related Impact Criteria by EA Form, Period One

<i>EA Form</i>	<i>Threatened or Endangered Species Presence</i>		
	<i>%</i>		
	<i>Yes</i>	<i>No</i>	<i>ID</i>
One n = 83	68.7	31.3	
Two n = 7	100		
Three n = 11	9.1	90.9	
Four n = 0			
All Forms	64.4	35.6	0

Table 7B: Related Impact Criteria by EA Form, Period Two

Another explanation for the large presence of mitigation measures across the forms may be only semantics in our coding. The mitigation measures mentioned in many EAs referred to completing the Standard and Guidelines in the near future. We coded this result as “future yes” or “FY.” We included this reference as part of the mitigation measures because these measures were listed under the mitigation section and the terms and conditions of the lease or permit may change if the allotment does not meet all six Standard and Guidelines.

Another crucial variable, related to mitigation and Standard and Guidelines, is the condition of the allotment. Tables 8A and 8B show that standards and guidelines work had been completed for less than 60% of the grazing EAs examined for the two periods. The total percentage completed or scheduled significantly increased in the second period. However, there

does not seem to be any relationship between the form selected and the completion of the standards and guidelines. Tables 8A and 8B also show the condition of the allotment, if mentioned in the EA. The condition of the land was not always mentioned or easy to discern from the EA.⁴¹³ If the condition was indeterminate, then it was coded ID. Conditions were determinable 78% of the time in the EAs for period one, but only 61.4% of the time in period two. The most common condition rating for both periods was fair to good.

Field Office	Standards & Guide-lines % completed			Condition % Determinable			If Yes, Type of Condition % n = 178			
	Yes	No	FY	Yes	No	ID	Poor	Fair	Good	Exc't
Buffalo	25	75		92		8	17	67		
Casper			100	91.4	4.3	4.3		2.1	89	
Cody	60	20	20	80		20	30	30	20	
Kemmerer		33	67	11	89				11	
Lander	4	50	46	100			46	29	25	
Newcastle		44	56	30	70				22	7.4
Pinedale	38	7	55	59		41	10	21	28	
Rawlins	7.5	2.5	90	95	2.5	2.5		35	45	15
Rock Springs	8		92	100			8.3	83	8.3	
Worland	33	28	39	89	11		5.5	44	39	
Overall %	13.6	20.2	66.2	78.1	14.0	7.9	9.2	27.6	38.2	3.1

Table 8A: Standards and Guidelines and Allotment Condition by Field Office for Period One

413. The authors looked for the land or allotment condition either under the condition paragraph or the soil/vegetation paragraph. Usually the condition variable was found with the classification of M, I, or C. M stands for maintaining; I is for improving, and C is for custodial. However, the condition was counted or included only if a description of the allotment was recorded in the EA. The following descriptive terms were found: Poor, fair (stable, static), good (satisfactory), and very good to excellent. Sometimes, the I would correlate to poor or fair, and the M to fair or good and the C to fair or good. Since these M, I, C labels are not used *per se* for the condition, we did not use them to determine the condition. Instead for the condition type, we coded the condition as ID (indeterminate) if an M, I, or C was present and no descriptive term was included. "No" in the condition table means no condition term or M, I, C listed.

Field Office	Standards & Guide-lines % completed			Condition % Determinable			If Yes, Type of Condition % n = 62			
	Yes	No	FY	Yes	No	ID	Poor	Fair	Good	Exc't
Buffalo	5	68	26	100			16	79	5	
Casper	23	8	69	31	7	62	15. 5	15. 5		
Cody	43	28	28	29	28	43			29	
Kemmerer	8	8	83	67		33	25	17	25	
Lander			100	100			11	56	33	
Newcastle	50		50	25	50	25			25	
Pinedale	40		60	70		30	20	20	20	10
Rawlins		40	60	60	20	20		60		
Rock Springs			100	10		90			10	
Worland	50		50	67	25	8		8	42	17
Overall %	19.8	18	61.4	61.	21.	16.	10.	29.	17.8	3.0
		.8		4	8	8	9	7		

Table 8B: Standards and Guidelines and Allotment Condition by Field Office for Period Two

In Tables 9A and 9B, we considered the EA forms selected and the number of alternatives identified. Most forms had at least one alternative listed. Period one had more than one half of the EAs with at least two alternatives (53%) in comparison to period two that had around 40.6%.⁴¹⁴

The surveyed documents used varying descriptions for the alternatives examined. These alternatives included: to renew the permit/lease, e.g., status quo; no action, e.g., cancel the permit; no grazing, e.g., no livestock; not renew the lease, e.g., cancel the permit; and a change in the terms or conditions. For period one, renew the permit was the most common alterna-

414. This difference between the two years could be a reflection of the confusion with the Instruction Memorandums. See *supra* section IV.B.2-7. The difference may be explained because of the tabulation method used. Only those alternatives that were titled "no action" were counted in this category. Several EAs would not use the term "no action," but would have a similar alternative, *i.e.* not to renew the permit.

tive listed. For period two, no grazing was the most frequently used alternative in the EAs. We would have expected the forms and numbers of alternatives to be related with form two necessitating the largest number of alternatives. In fact, form one consistently had the most alternatives across both periods.

<i>EA Form</i>	<i>Alternatives %</i>		<i>Number of Alternatives Listed</i>			
	<i>Yes</i>	<i>No</i>	<i>0</i>	<i>1</i>	<i>2</i>	<i>3</i>
One n = 151	83	17	1	33	92	25
Two n = 11	100		1		10	
Three n = 65	72	28	4	41	18	2
Four n = 1	100			1		
Total			6	75	120	27

Table 9A: The Presence of Alternatives and their Number by EA Form, Period One

<i>EA Form</i>	<i>Alternatives %</i>		<i>Number of Alternatives Listed</i>			
	<i>Yes</i>	<i>No</i>	<i>0</i>	<i>1</i>	<i>2</i>	<i>3</i>
One n = 83	95	5	4	38	30	11
Two n = 7	100			1	6	
Three n = 11	91	9	1	5	5	
Four n = 0						
Total			5	44	41	11

Table 9B: The Presence of Alternatives and their Number by EA Form, Period Two

Many outside persons and agencies were consulted in the EA preparation for grazing decisions for both periods. Table 10 summarizes the likelihood (in percentage) that a particular person or entity would be con-

sulted during the preparation of the EA. We only included the listing of these outside persons and agencies if they were listed on the EA. The consulting data is decidedly mixed. While more than 50% of the EAs examined in period one identified the potential presence of a threatened or endangered species, the federal Fish and Wildlife Service was consulted less than one third of the time. No mention is made regarding consultation with Wyoming Department of Environmental Quality regarding water quality problems. Public involvement is very low. This is understandable since the EA is a less formal first step in determining whether a full-blown EIS is required. Public involvement, if it occurs, may also arise through public comment on the draft EA or through a letter writing campaign not captured on the EAs. Nevertheless, the low involvement is troublesome given the CEQ and Handbook admonitions to involve the public to the extent reasonable. Usually, public comment existed and was noted if a controversial area was involved.⁴¹⁵

<i>Agency Type / Person</i>	<i>Period One</i>	<i>Period Two</i>
<i>State – Office of Federal Land Policy</i>	51.3%	68.3%
<i>State – Game & Fish</i>	27.2%	34.7%
<i>State – Dep't of Ag</i>	8.3%	6.9%
<i>Federal – USFWS</i>	31.1%	18.8%
<i>Federal – USFS</i>	< 1%	0%
<i>Permittee/Lessee</i>	67.1%	57.4%
<i>Public</i>	2.6%	4.0%
<i>BLM Field Biologist</i>	< 1%	0%
<i>Federal – BOR</i>	0%	< 1%
<i>Other</i>	< 1%	0%

Table 10: Percentage and Type of Outside Consultation for all EAs

415. This was also mentioned in the 1997 CEQ Effectiveness Study, *see infra* section IV.A.4.

3. Synthesis

a. Statutory, Regulatory, and Judicial Standards for Evaluating BLM's NEPA Process for Grazing Decisions

Commentators have suggested a variety of substantive criteria against which to evaluate an agency's actions in implementing NEPA's substantive and procedural responsibilities.⁴¹⁶ As the introduction to this article suggests, the fact that commentators disagree as to NEPA's purpose explains in part why they frequently disagree as to how effective NEPA has been.⁴¹⁷

One simple, basic source for substantive and procedural standards, against which to judge the NEPA process used by BLM in making its grazing decision, is the minimum requirements imposed on federal agencies by the CEQ regulations and federal court decisions. Table 11 summarizes selected statutory, regulatory, and judicially identified requirements, as outlined in the preceding sections. The criteria outlined focus on the underlying philosophy, the process, the content requirements for NEPA documents, the use of these documents in agency decision-making, and the requisite involvement of the public in the NEPA process. Criteria are grouped depending upon whether they apply solely to EA preparation, EIS preparation, or both.

CRITERIA	BOTH EAS AND EISS	EAS	EISS
GENERAL PHILOSOPHY	NEPA supplements statutory mandates of every federal agency. ⁴¹⁸ NEPA process should ensure that relevant information will be made		EIS should be analytic rather than encyclopedic; should be concise and no longer than absolutely necessary to comply with

416. See, e.g., David R. Hodas, *The Role of Law in Defining Sustainable Development: NEPA Reconsidered*, 3 WID. L. SYMP. J. 1 (1998); Lorna Jorgensen, *The Move Towards Participatory Democracy in Public Land Management Under NEPA: Is it Being Thwarted by the ESA?* 20 J. LAND RESOURCES & ENVTL. L. 311 (2000).

417. See *supra* notes 8-12 and accompanying text. Congressional committees have also weighed-in in the debate regarding NEPA's effectiveness. See *Strengthen the National Environmental Policy Act: Hearings Before the Subcommittee on Oversight and Investigations of the Senate Committee on Energy and Natural Resources*, 104th Cong. (1996).

418. 40 C.F.R. § 1500.6 (2002).

	available to a larger audience who may also play a role in both the decision making process and the implementation of that decision. ⁴¹⁹		NEPA and regulations. ⁴²⁰ Encourage interdisciplinary analysis. ⁴²¹
TIMING	Triggered upon consideration of any policy, plan, program, or project. ⁴²² Consideration should be early in the process (not after the fact). ⁴²³ For applications to an agency, environmental assessments or statements shall be commenced no later than immediately after the application is received. ⁴²⁴	Agency shall prepare EAs when necessary under the procedures adopted by individual agencies to supplement the CEQ regulations. ⁴²⁵	Based upon any agency procedures supplementing the CEQ regulation and a determination that the action in question is not categorically excluded and the EA prepared indicates the possibility of significant impact on the human environment. ⁴²⁶ EIS process should begin as close as possible to the time the agency is developing or is presented with a proposal. ⁴²⁷
PUBLIC INVOLVEMENT	Make diligent efforts to involve public in preparing and implementing its "NEPA procedures." ⁴²⁸	Involve public as much as "practicable." ⁴³¹	Shall inform decision makers and the public of the reasonable alternatives that would avoid or minimize adverse

419. See *supra* text accompanying notes 131-132.

420. 40 C.F.R. § 1502.2(a), (c).

421. 40 C.F.R. § 1502.6.

422. See *supra* text accompanying note 54.

423. 40 C.F.R. § 1501.2.

424. 40 C.F.R. § 1502.5(b).

425. 40 C.F.R. § 1501.3.

426. See *supra* text accompanying notes 50-73.

427. 40 C.F.R. § 1502.5.

428. 40 C.F.R. § 1506.6(a). See *supra* text accompanying notes 70-73.

	Encourage and facilitate public involvement in decisions that affect the quality of the human environment. ⁴²⁹ Insure that environmental information is available to public officials and citizens before decisions are made and actions are taken. ⁴³⁰		impacts or enhance the quality of the human environment. ⁴³²
CONSULTATION	Consult with any federal agency with legal jurisdiction or special expertise with respect to any environmental impact involved and obtain comments and view of federal, state, and local agencies that are authorized to develop and enforce environmental standards. ⁴³³	Include within the EA listing of agencies and persons consulted. ⁴³⁴	Agency shall consult with and obtain comments from any federal agency having jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of the EIS and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the CEQ, and the public, and shall accompany the proposal through

429. 40 C.F.R. § 1500.2(d).

430. 40 C.F.R. § 1500.1(b).

431. 40 C.F.R. § 1501.4(b).

432. 40 C.F.R. § 1502.1. *See supra* text accompanying note 80.

433. *See supra* text accompanying note 83.

434. 40 C.F.R. § 1508.9(b).

			the existing agency review process. ⁴³⁵
Preparer(s)	Use an interdisciplinary approach. ⁴³⁶		<p>EIS should be prepared using an interdisciplinary approach. The disciplines of the preparers should be consistent with the issues and scope identified in the scoping process.⁴³⁷</p> <p>The EIS should list the names, qualifications of the person(s) who were primarily responsible for its preparation.⁴³⁸</p> <p>NEPA provides for agencies to prepare their EISs. The statute specifically allows a state agency or its official to prepare an EIS, in regard to any major federal action funded under a program of grants to the state, provided certain basic requirements are met.⁴³⁹</p>
Format – General	NEPA does not require agencies to assess every impact of a pro-	Concise; provide sufficient evidence to determine whether to	Provide a detailed statement, by the responsible official, on: 1) the

435. 42 U.S.C. § 4332(2)(C)(v) (1994). See 40 C.F.R. § 1502.19 (2002); *supra* text accompanying notes 82-83.

436. 42 U.S.C. § 4332(2)(A).

437. 40 C.F.R. § 1502.6. See *supra* text accompanying notes 97-100.

438. 40 C.F.R. § 1502.17.

439. 42 U.S.C. § 4332(2)(D). See *supra* note 98.

	<p>posed action but only those on the environment.⁴⁴⁰</p>	<p>prepare EIS or FONSI; aid in compliance with NEPA when no EIS is necessary; and facilitate preparation of EIS if necessary.⁴⁴¹ Content should include brief discussion of the need for the proposal; alternatives; the environmental impact of the proposed action and alternatives; and listing of agencies and persons consulted.⁴⁴²</p>	<p>environmental impact of the proposed action; 2) any adverse environmental effects which cannot be avoided should the proposal be implemented; 3) alternatives to the proposed action; 4) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity; and 5) any irreversible and irretrievable commitments of resources if the proposed action is implemented.⁴⁴³ It must provide a full and fair discussion of significant environmental impacts; inform decision makers and public of reasonable alternatives that would avoid or minimize adverse impacts or enhance the quality of human environment.⁴⁴⁴</p>
<p>Specific: Incomplete</p>		<p>With respect to limits on data and controversy, if a</p>	<p>Where information is incomplete or unavailable,</p>

440. See *supra* text accompanying note 135.
 441. 40 C.F.R. § 1508.9(a). See *supra* text accompanying note 69.
 442. 40 C.F.R. § 1508.9(b).
 443. 42 U.S.C. § 4332(2)(C).
 444. 40 C.F.R. § 1502.1. See *supra* text accompanying note 80.

<p>Information</p>		<p>substantial dispute exists NEPA then places the burden on the agency to come forward with a well-reasoned explanation of why the responses contesting the EA's conclusion do not suffice to create a public controversy based on potential environmental consequences. It is not sufficient to implement an alternative and then study the results afterwards.⁴⁴⁵</p>	<p>the agency shall make this fact clear. Where such information is unavailable because of cost or the means of accessing are unknown, the EIS shall include: 1) a statement that the information is lacking; 2) statement of its relevance; 3) a summary of existing credible scientific evidence relevant to any evaluation of the reasonably foreseeable significant adverse impacts on the human environment; and 4) the agency's evaluation of such impacts. For purposes of this evaluation, "reasonably foreseeable" includes impacts that have catastrophic consequences, even if their probability of occurrence is low, provided the analysis is supported by credible scientific evidence and not based on pure conjecture, and is within the rule of reason.⁴⁴⁶</p>

445. See *supra* text accompanying notes 173-175.

446. 40 C.F.R. § 1502.22.

Specific: Tiering	Whenever a broad EIS has been prepared and an EIS or EA is being considered for an action included in the broad program or policy EIS, then subsequent documents need only summarize the issues and discussion from the broader statement by reference and shall concentrate on the issues specific to the subsequent action. ⁴⁴⁷		
Specific: Human Environment	Natural and physical and the relationship of people with that environment. ⁴⁴⁸		When an EIS is prepared and economic or social and natural or physical environmental effects are interrelated, the EIS will discuss all of these effects. ⁴⁴⁹
Specific: Alternatives	Emphasize real world issues and alternatives; use the NEPA process to identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality	An agency need not consider all policy alternatives nor must it pursue policy alternatives that are contrary to the pertinent statutory goals or do not fulfill a project's purpose. Moreover, when an agency concludes through an	Alternatives should be sufficient to alert the public of its plans. The alternatives in the EIS should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply

447. 40 C.F.R. § 1502.20. See *supra* text accompanying note 96.

448. 40 C.F.R. § 1508.14. See *supra* text accompanying notes 61-62.

449. 40 C.F.R. § 1508.14 ("When an environmental impact statement is prepared and economic or social and natural or physical environmental effects are interrelated, then the environmental impact statement will discuss all of these effects on the human environment.").

	<p>of the human environment.⁴⁵⁰ Study, develop, and describe appropriate alternatives to recommended courses of action in any proposal that involves unresolved conflicts concerning alternative uses of available resources.⁴⁵¹</p>	<p>EA that a proposed project has minimal effects, the range of alternatives it must consider is diminished.⁴⁵²</p>	<p>defining the issues and providing a clear basis for choice among options by the decision maker and the public. The agency shall:</p> <ol style="list-style-type: none"> 1) rigorously explore and objectively evaluate all reasonable alternatives; 2) explain the reasons for eliminating other alternatives from detailed study; 3) devote substantial treatment to each alternative considered in detail, including the proposed action, so that reviewers may evaluate their comparative merits; 4) include alternatives not within the jurisdiction of the lead agency; 5) include the alternative of no action; 6) identify the agency's preferred alternative(s) in the draft statement and identify such alternative in the final statement unless another law prohibits the expression of a preference; and 7)
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450. 40 C.F.R. § 1500.2(b), (e).

451. 40 C.F.R. § 1501.2(c). *See supra* text accompanying notes 64-66.

452. *See supra* text accompanying note 155.

453. 40 C.F.R. § 1502.14.

			include appropriate mitigation measures not already included in the proposed action or alternatives. ⁴⁵³
<p>Specific: Significance (Intensity)</p>	<p>Severity of impacts. Includes impacts that: 1) may be beneficial or adverse; 2) impact public health or safety; 3) may affect unique characteristics of the geographic area; 4) are likely to be highly controversial; 5) are highly uncertain or involve unique or unknown risks; 6) will establish precedent for future actions with significant effects or represent a decision in principle about a future consideration; 7) are cumulatively significant; 8) may impact places or things listed or eligible for listing in the National Register of Historic Places or may cause losses or destruction of significant scientific, cultural, or historical resources; 9) may adversely affect an endangered or</p>		

	<p>threatened species or its habitat that has been determined to be critical; or 10) threaten a violation of Federal, State, or local law or requirements imposed for the protection of the environment.⁴⁵⁴</p>		
<p>Specific: Significance (Context)</p>	<p>Impacts on society as a whole, the affected region, the affected interests, and/or the locality.⁴⁵⁵</p>		
<p>Specific: Connected Actions and Cumulative Impacts</p>	<p>Connected actions refer to actions that automatically trigger other actions, cannot or will not proceed unless other actions are also taken; or are interdependent parts of a larger activity and depend on the larger action for their justification.⁴⁵⁶</p> <p>Cumulative impacts refer to incremental impacts of an action when added to other past, present, and reasonably foreseeable future actions regardless of</p>		

454. 40 C.F.R. § 1508.27(b)(10).

455. 40 C.F.R. § 1508.27(a).

456. 40 C.F.R. § 1508.25(a) (explaining scoping purposes).

457. 40 C.F.R. § 1508.25(a)(2). See also 40 C.F.R. § 1508.7; *supra* text accompanying notes 137-145.

	whose actions they may be. ⁴⁵⁷		
Specific: Mitigation		Mitigation measures need not be a condition of the permit (although this helps) nor even a contractual obligation. However, they must be more than vague statements of good intention and the mitigation measures must render the net effect of the modified project on the quality of the environment less than significant. ⁴⁵⁸	Include discussion of appropriate mitigation measures not already included in the proposed action or alternatives. ⁴⁵⁹ Include discussion(s) of energy requirements; natural or depletable resource requirements; and impacts on urban quality, historic and cultural resources, and the design of the built environment, along with the conservation potential of various alternative and mitigation measures and any means to mitigate adverse environmental impacts, not included with the alternatives presented. ⁴⁶⁰ Agency has an obligation to discuss mitigation measures but no obligation to implement them. ⁴⁶¹
Standard of Review: Procedural Elements		Whether the agency took a "hard look" at the problem; identified the relevant	Proof that agency has engaged in a "hard look" regarding the data collected. Agency

458. See *supra* text accompanying note 163.

459. 40 C.F.R. § 1502.14(f).

460. 40 C.F.R. § 1502.16(e), (f), (g), (h).

461. See *supra* text accompanying note 167.

		<p>areas of environmental concern; as to the problem studied and identified, whether the agency made a convincing case that the impact was insignificant; and when its possible impact is of true significance, whether the agency convincingly established that changes in the project sufficiently reduced it to a minimum.⁴⁶²</p>	<p>must take initiative in considering values at every distinctive and comprehensive stage of the process. Arbitrary and capricious standard of review.⁴⁶³</p>
<p>Standard of Review: Substantive Elements</p>	<p>None (NEPA imposes no substantive requirements).⁴⁶⁴</p>		

Table 11: Selected Legal Criteria to Evaluate BLM’s NEPA Process for Grazing Permit and Lease Renewals

b. Applying These Criteria to The Case Study’s Findings

The evidence indicates that both the national and state offices of the BLM have sought to utilize the NEPA process in making their grazing decisions. It is also true that the national, state, and local offices have relied exclusively on EAs rather than EISs to meet their grazing decision responsibilities under NEPA. As Table 11 illustrates, the criteria may create problems in assessing the NEPA process for EA preparation.

With respect to the paper response developed at the national level, the 1988 Handbook and subsequent Instruction Memorandums generated during the survey period routinely recite the CEQ regulations with limited additional explanation. Despite the national office’s written instructions, ambiguities remain. In some instances the instruction memorandums may, inadvertently, create new ambiguities as well as potentially new NEPA obligations for field personnel.

462. See *supra* text accompanying notes 116-124.

463. *Id.*

464. See *supra* text accompanying note 128.

First, the Handbook and the 1998 Instruction Memorandum appear to encourage usage of a wider range of documents for tiering than the CEQ regulations authorize. Several courts have indicated that tiering to nonprogrammatic documents is not permitted under NEPA.⁴⁶⁵ However, the Handbook seems to allow field offices to use another agency's EA. Additionally, the 1998 Instruction Memorandum refers to tiering to a "NEPA analysis for an allotment management plan," which could include EAs as well as EISs. The Handbook also authorizes the use of existing environmental analyses, but only if approached cautiously.⁴⁶⁶ The Handbook and a memorandum warn that it will be a rare situation that an existing analysis will have fully analyzed the proposed action and alternatives⁴⁶⁷ or that "resource conditions and circumstances have not changed."⁴⁶⁸

Second, the Handbook's and Instruction Memorandums' subsequent discussion of the no action alternative is still confusing. The national November 5, 1999 Instruction Memorandum indicated that the "no action" alternative consisted of not renewing the permit. In its July 21, 2000 Instruction Memorandum, the national office reversed itself. It requires field offices to include three alternatives at a minimum for any grazing renewal EA: "1) issuing a permit based on the application (proposed action); 2) issuing a new permit with the same terms and conditions as the expiring permit (no action alternative); and 3) a 'no grazing' alternative."⁴⁶⁹ In the interim, the January 20, 2000 Instruction Memorandum from Wyoming BLM noted the continued confusion regarding the no action alternative, with some field offices interpreting no action as maintaining the status quo permit or lease conditions. This Instruction Memorandum also appears to eliminate the field offices' discretion by requiring at least two alternatives: "no livestock grazing" and "continuation of the historic grazing use and conditions."⁴⁷⁰

Aside from creating confusion regarding the nature of and requirements for alternatives, the EA process adopted by the BLM diminishes the information available to both decision makers and the public. The November 5, 1999 Instruction Memorandum ties the number of alternatives considered to existing controversies and site-specific facts. This is consistent with the case law and regulations, yet it may be inconsistent with NEPA's underlying philosophy. The federal courts have required that the

465. See *supra* text accompanying note 139. See also *Kern v. United States Bureau of Land Management*, 284 F.3d 1062, 1074 (9th Cir. 2002) (stating that BLM may not tier to guidelines that were never subject to NEPA review); *Muckleshoot Indian Tribe v. United States Forest Service*, 177 F.3d 800 (9th Cir. 1999) (stating that Forest Service may not tier to Forest Plan).

466. See Instruction Memorandum I, *supra* note 6, at Attachment 2. See also *supra* text accompanying note 382.

467. See *supra* text accompanying note 328.

468. See *supra* text accompanying notes 367-368.

469. See Instruction Memorandum V, *supra* note 383, at 1.

470. See Instruction Memorandum IV, *supra* note 376, at 1.

alternatives selected be "reasonable,"⁴⁷¹ "foster informed decision-making and informed public participation,"⁴⁷² and be "responsive to the problems identified as most critical."⁴⁷³ The hard look standard, adopted by Judge Skelly Wright, does not allow federal agencies to act simply as umpires, but requires them to independently identify, analyze, and explain such conflicts to both decision makers and the public.⁴⁷⁴ The discussion of alternatives may be an important mechanism to revealing differences in impacts as well as conflicts in data. If one purpose for considering alternatives is to ensure *informed* public participation, then the alternatives should also consider intermediate steps beyond simply the status quo (often the proposed alternative and the no action alternative are the same) or elimination of grazing altogether. The language in the Wyoming state office's January 2000 Memorandum, giving field offices the option of not including the "no action" alternative in the EAs, further denies readers information that they might otherwise use in evaluating the grazing renewal decision.

Third, the December 23, 1998 Instruction Memorandum muddles the problem of potential cumulative impacts in the case in which a permittee grazes livestock in more than one allotment.⁴⁷⁵ The document instructs preparers to base their decision whether to prepare one or more documents upon efficiency grounds. Perhaps under the CEQ regulations, this decision should be based upon whether grazing on the two allotments creates cumulative environmental impacts rather than on economic or resource concerns alone. Cumulative impacts were captured in a number of instances by preparing allotment-wide EAs for all permits or leases.

Fourth, the Handbook arguably imposes a higher standard than current case law regarding mitigation and EAs by requiring that mitigation measures be incorporated into the proposed action.⁴⁷⁶ Table 11 indicates that mitigation measures need not be a condition placed on the permit. The Handbook's approach makes more sense by ensuring that the mitigation measures are part of the permit or lease.

Fifth, the Handbook and Instruction Memorandums may, at first glance, appear to impose a higher standard for public involvement in the preparation of EAs than NEPA or the CEQ regulations require. The CEQ regulations require only such involvement as is "practicable."⁴⁷⁷ In contrast, the Handbook recommends informal contact with user groups to determine

471. See *supra* text accompanying note 307.

472. See *supra* text accompanying note 148.

473. See *supra* text accompanying note 149.

474. *Calvert Cliffs' Coordinating Comm. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109, 1115 (1971).

475. See *supra* text accompanying notes 366-67.

476. See *supra* text accompanying notes 348-349.

477. See *supra* text accompanying note 71.

the EA's scope in step one of the process;⁴⁷⁸ involvement of other agencies, applicants, and the public in preparing the EA (step two);⁴⁷⁹ and the Handbook's statement of purpose indicates that these documents should be made available to the public.⁴⁸⁰ The high standards for public involvement are tempered by other provisions, however, in the Handbook and Instruction Memorandums. Chapter IV of the Handbook makes public distribution of the EA conditional, based upon whether the decision is unprecedented (not likely in this case) or normally requires preparation of an EIS. This standard may make public involvement an exception rather than the rule.

Sixth, the 1993 CEQ survey of NEPA practice indicated that federal agencies may develop alternative forms to carry out their responsibilities under the Act. The BLM Handbook also establishes four alternative forms (formats). However, the different formats are not particularly helpful. The CEQ regulations do establish minimum content requirements. As a result, the content of each form established by the Handbook is the same, though the detail can differ significantly. Information is sometimes difficult to locate on the forms. Some important information used in making decision is not included on the forms. For example, the Handbook lists thirteen questions preparers must answer in determining the scope of the EA. Answers to these questions are not part of the EA itself. Similarly, Attachment 2 to the December 23, 1998 Instruction Memorandum requires preparers to "document an administrative determination that the existing NEPA analysis is sufficient" if it is used. The attachment provides preparers a six-page worksheet in carrying out this analysis. The worksheet, however, is not part of the EA.

Seventh, the Handbook and the January 20, 2000 Instruction Memorandum convey an unfortunate but perhaps realistic tone and message: NEPA documents should be prepared with litigation in mind.⁴⁸¹ BLM's January 20, 2000 Instruction Memorandum states, "[T]he record of decision for the NEPA analysis shall specify what level of grazing will be authorized, if any, and the terms and conditions of such authorization. That decision is the proposed action (i.e., the proposed grazing decision)."⁴⁸² The clarification of this meaning is necessary, the Instruction Memorandum indicates, to prevent any further legal action by an adversely affected party. "This proposed decision will be subject to protest and, when it becomes final, subject to appeal by the permittee or lessee, as well as by any adversely affected party of interest."⁴⁸³

478. See *supra* text accompanying note 336.

479. See *supra* text accompanying note 340.

480. See *supra* text accompanying note 343.

481. See *supra* text accompanying notes 358-359.

482. See Instruction Memorandum IV, *supra* note 3786, at 2. (emphasis omitted).

483. *Id.*

The NEPA process as implemented by Wyoming's BLM comports with the practices discovered by the earlier 1993 survey by CEQ regarding NEPA practices of federal agencies. The 1993 survey found that EAs were the primary NEPA document used by federal land agencies. The findings of this study confirm this result; EAs were the only NEPA document used by Wyoming BLM for grazing decisions.

In completing their NEPA analysis for grazing decisions, the field offices in Wyoming collected the minimum data required by the CEQ regulations, Handbook, and Instruction Memorandums. The need for the proposal was described, a limited number of alternatives examined, environmental impacts discussed, and a listing of agencies and persons consulted. The documents were concise (averaging around six pages with the longest at forty-eight). Thus unlike the findings in the 1993 CEQ survey, there was no indication that the EAs prepared by the Wyoming BLM were substitutes for EISs or were prepared with litigation in mind, this despite the warnings of such possibilities in the January 20, 2000 Instruction Memorandum.⁴⁸⁴

The basis for the decision to issue a FONSI in every case, rather than conduct an EIS in some, was less clear. The CEQ regulations and case law listed several factors to be considered in determining whether an action could significantly affect the human environment (Table 11). A lack of data or conflicting data appears to impose additional responsibilities on federal agencies in carrying out their hard look responsibilities and at least one federal court refused to allow an agency to issue the permit first, collect the data afterwards, and make necessary adjustments thereafter.⁴⁸⁵ The EAs examined were replete with missing data – data regarding the presence of listed species under the ESA or rangeland health under BLM's Standards and Guidelines. Field offices concluded in each instance that the missing data were not sufficient to trigger the more thorough EIS. In many instances, the preparer and ultimate decision maker opted to make a renewal subject to any subsequent adverse rangeland health determination, appearing to follow the procedure rejected by the Ninth Circuit Court of Appeals.⁴⁸⁶ It is curious, given existing controversies in Wyoming regarding threatened or endangered species and rangeland health, that no renewal decision triggered an EIS. It is even more curious that none of the permit or lease transfers, which the December 23, 1999 Instruction Memorandum indicates are otherwise categorically excluded from the NEPA process unless the action involves "adverse effects on wetlands, ecologically significant or critical areas, and on species listed or proposed for listing as threatened or endangered, or on critical habitat; . . . [or] highly uncertain and potentially significant environmental effects; and actions which establish a precedent for future action,"

484. See *supra* text accompanying notes 481-483.

485. See *supra* text accompanying notes 167-175.

486. Nat'l Parks & Conservation Ass'n v. Babbitt, 241 F.3d 722 (9th Cir. 2001).

merited a full-blown EIS. However, without more data and with limited resources, we cannot substantively challenge decisions not to carryout EISs in the cases studied. Our major concern, however, is that the presence of such limited data only partially determined the EA format selected and a harder look before issuance of a FONSI.

Adoption of mitigation measures as part of the Record of Decision was often used in the cases studied to justify issuance of a FONSI. Mitigation measures were included 100% of the time whenever the more searching form two was employed. The 1993 CEQ study found that two agencies it surveyed had adopted the same strategy to avoid preparation of EISs. In a number of the mitigation FONSI's included in this study, assurance was given that the mitigation efforts would be monitored. In some instances a BLM staff person was named to carry out this responsibility. This would seem essential to make sure the conclusion drawn – that no significant impacts will occur – is actually true.

The 1993 CEQ survey indicated that all of the federal agencies responding had reported that some of their EAs had resulted in changes in the design of the proposed action. Our results follow these findings. The EAs prepared for grazing decision in this study did impact the final outcomes. In both periods, more than half of the final grazing decisions incorporated mitigation measures, though some of these measures were only to collect more data with an ill-defined promise to modify later.

We found another factor that mirrored the findings of the 1993 CEQ study. The 1993 study found that most agencies indicated that their "major EAs" had less public involvement than their EIS processes while two indicated that their longer EAs and EISs were similar.⁴⁸⁷ Fifty-eight percent had procedures for involving the public; one quarter had no such procedures.⁴⁸⁸ Our data shows that the BLM field offices routinely contacted federal and state agencies in either the preparation of the EAs or for comments on the EAs prepared. However, the listings do not clearly indicate where in the process the federal and state agencies were involved. Public involvement was minimal in the scoping, preparation, or review process of the grazing decision examined in this study. Less than five percent of the EAs indicated any listed contact with nongovernmental, nonpermittee/lessee individuals or entities.⁴⁸⁹

This difference between outside agency consultation and public involvement may reflect differences in how contacts are recorded. Contacts with federal and State agencies normally generate a paper trail. In some

487. Blaug, *supra* note 12, at 59.

488. *Id.*

489. Curiously the listing of contacts listed permittees/lessees in only 67.1% in period one and 57.4% in period two.

instances, we found that public contact was initiated through a public notice or letter. Such contacts were not normally indicated in the EAs.

4. Recommendations

On November 18, 2002, William Myers, Solicitor General for the Department of the Interior, told members of the National Cattlemen's Association that Interior "wants to make it easier to exempt from environmental reviews any activities that it sees as having insignificant effects on public lands."⁴⁹⁰ Myers also told the group that "the Interior Department hopes to complete a set of proposals by year's end that would reverse some of the changes in livestock-grazing regulations adopted under past Interior Secretary Bruce Babbitt."⁴⁹¹ No more information was included regarding what activities the Department of the Interior now deems "insignificant," nor what livestock grazing regulations, adopted by Secretary Babbitt, would be changed.

We also have no specific knowledge whether the Department of the Interior intends to modify its current Handbook and Instruction Memorandums regarding grazing decisions. BLM's 2000-2005 Strategic Plan indicates that its resources are being severely strained by performing its NEPA process under current practices:

The grazing permit renewal review process is placing a heavy demand on resource management staffs in BLM field offices. . . . In addition to the workload for permit renewal/rangeland health assessment, the BLM is providing information to interest groups under the Freedom of Information Act. Many of the same employees needed for permit renewal review also assist in prescribed fire/wildfire activities and preparation for appeals or litigation. Additionally, a large workload is anticipated for conducting Section 7 consultations under the ESA for livestock grazing that may affect threatened or endangered species or designated critical habitat.⁴⁹²

Neither the Solicitor General nor the 2000-2005 BLM Strategic Plan suggest that the current NEPA process for grazing decisions should be entirely discarded.

490. Scott Sonner, Interior's Top Lawyer Wants To Put Brakes on Environmental Reviews, Salt Lake Tribune, *Available at* http://www.sltrib.com/11182002/nation_w/17767.htm (last visited Nov. 19, 2002).

491. *Id.*

492. STRATEGIC PLAN, *supra* note 176, at 22.

Our study shows that Wyoming BLM faced a tremendous challenge in processing over 900 grazing decisions during the study period, 1999-2001. It accomplished this task without additional resources, with missing data, and within a short timeframe. Wyoming BLM relied exclusively on EAs to accomplish this challenge. The CEQ regulations provided little assistance to either the national or state offices of the federal land agencies in how to utilize EAs to accomplish NEPA's procedural goals. The 1988 Handbook and Instruction Memorandums sought to fill in the gaps. They were only partially successful; in some instances they may have created confusion or imposed higher standards for grazing decisions. The recorded public involvement did not match the Supreme Court's claim in *Robertson*.⁴⁹³ The discussion of alternatives and impacts was often limited at best. The decision not to prepare EISs in at least some of the grazing decisions was simply curious.

We recognize that this study examines only one type of decision, grazing renewals, for one agency, BLM, in one state, Wyoming, at one now distant point in time, 1999-2001. Nevertheless, the study did reveal several areas of concern that should be addressed by BLM and CEQ, given the current primacy of EAs in the NEPA process:

- Decision points in the current EA process, such as the document's scope, whether to tier, how to determine cumulative impacts, and identification of alternatives, should be more fully defined in the CEQ regulations.
- How to handle data problems, particularly the lack of data, should be specifically addressed by the CEQ.
- The CEQ regulations should ensure that early public involvement is the rule rather than the exception. Efforts should be made to accomplish this goal without significant additional time delays or resource expenditures.
- BLM's NEPA handbook, now more than fourteen years old, should be revised.
- Any revised Handbook should include a more complete glossary to facilitate shared understanding of terms used in the document.
- Any revised Handbook should follow specific examples (e.g., renewal decisions) from initiation of the process to the very end.
- Any EA circulated to the public prior to its final approval should be labeled draft to ensure the public understands that the document may change as a result of its input.

493. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

- Any revised Handbook should include checklists and worksheets, like those currently included in the Instruction Memorandums studied. These documents should be made available to the public at the same time the draft EA is made available.
- BLM's current use of four formats should be reviewed to make sure that the right forms are being used for the right actions and that the information presented is accessible to the readers. The same information should be located in the same place for each document.

V. CONCLUSION

In isolating these EAs for two time periods and analyzing their strengths and weaknesses, we tried to apply the NEPA process – including all regulatory, case law, and internal agency document standards – to an agency trying to perform its NEPA responsibilities, while also carrying out its other statutory and regulatory obligations. It was not an easy application or tight fit. We strived, however, to be objective in our findings and also offer some suggestions for improving the process.

The final evolution of NEPA remains incomplete. Court and regulatory action turned a hortative statute into a day-to-day workhorse, intended to ensure that federal agencies would engage in a hard look at any environmental impacts before acting. It did so not by changing the enabling act of any federal agency, but by imposing procedural standards that would somehow change the mindsets of agency decision makers without modifying the agencies' culture or resources.

More than thirty years later, it remains unclear how effective this grafting of procedural requirements, this attempt at genetic engineering, has been. The influence of the public on decision-making has apparently been stunted by federal land agencies' dominant use of EAs rather than EISs. The lack of clear rules governing the use of EAs and adequate resources to collect necessary data and carry out the NEPA and other planning processes has caused many within, and outside, the federal government to question whether a hard look is really occurring. Indeed, the federal land agencies' NEPA processes, as currently implemented through EAs, has become a Trojan horse. Without additional regulatory guidance, the adequacy of the scope, content, and conclusions of these EAs will remain open to challenge. Senator Thomas's words seem prescient – different results will occur with different administrations. Until the CEQ prepares clearer standards for EAs, the real workhorse for NEPA for public land agencies, the results will depend upon who is in charge.