DEPARTMENT OF THE INTERIOR

Office of the Secretary

43 CFR Part 46

RIN 1090–AA95

Implementation of the National Environmental Policy Act (NEPA) of 1969

AGENCY: Office of the Secretary, Interior.

ACTION: Final rule.

SUMMARY: The Department of the Interior (Department) is amending its regulations by adding a new part to codify its procedures for implementing the National Environmental Policy Act (NEPA), which are currently located in chapters 1–6 of Part 516 of the Departmental Manual (DM). This rule contains Departmental policies and procedures for compliance with NEPA, Executive Order (E.O.) 11514, E.O. 13352 and the Council on Environmental Quality's (CEQ) regulations (40 CFR Parts 1500–1508). Department officials will use this rule in conjunction with and supplementary to these authorities. The Department believes that codifying the procedures in regulations that are consistent with NEPA and the CEQ regulations will provide greater visibility to that which was previously contained in the DM and enhance cooperative conservation by highlighting opportunities for public engagement and input in the NEPA process.

The Department will continue to maintain Department's information and explanatory guidance pertaining to NEPA in the DM and Environmental Statement Memoranda (ESM) to assist bureaus in complying with NEPA. Bureau-specific NEPA procedures remain in 516 DM Chapters 8–15 and bureau guidance in explanatory and informational directives. Maintaining explanatory information in the Department's DM chapters and ESM, and bureau-specific explanatory and informational directives will facilitate timely responses to new ideas, new information, procedural interpretations, training needs, and editorial changes to assist field offices when implementing the NEPA process.

EFFECTIVE DATE: November 14, 2008.

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SUPPLEMENTARY INFORMATION: As a part of the conversion of the Department's NEPA procedures from 516 DM to regulations, a number of key changes have been made. This rule:

- Clarifies which actions are subject to NEPA section 102(2) by locating all relevant CEQ guidance in one place, along with supplementary Department procedures.
- Establishes the Department's documentation requirements for urgently needed emergency responses. The Responsible Official (RO) must assess and minimize potential environmental damage to the extent consistent with protecting life, property, and important natural, cultural and historic resources and, after the emergency, document that an emergency existed and describe the responsive actions taken.
- Incorporates CEQ guidance that the effects of a past action relevant to a cumulative impacts analysis of a proposed action may in some cases be documented by describing the current state of the resource the RO expects will be affected.
- Clarifies that the Department has discretion to determine, on a case-by-case basis, how to involve the public in the preparation of EAs.
- Highlights that adaptive management strategies may be incorporated into alternatives, including the proposed action.
- Incorporates language from the statute and CEQ guidance that EAs need only analyze the proposed action and may proceed without consideration of additional alternatives when there are no unresolved conflicts concerning alternative uses of available resources.

This rule is organized under subparts A through E, covering the material currently in 516 DM Chapters 1 through 6. The Department is replacing these chapters with new 516 DM Chapters 1–3, which will include explanatory guidance on these regulations. These revised chapters will be available to the public before the effective date of this rule and will be found at *http://www.doi.gov/oepc*. The Department did not include 516 DM Chapter 7 in this rule because it provides internal administrative guidance specific to Department review of environmental documents and project proposals prepared by other Federal agencies. Chapters 8–15 of 516 DM continue to contain bureau-specific NEPA implementing procedures. In addition, other guidance pertaining to the Department's NEPA regulations and the bureaus' NEPA procedures will be contained in explanatory and informational directives. These explanatory and information directives will be contained either in the DM or ESM (for Departmental guidance), bureau NEPA handbooks (for bureau-specific guidance), or both.

The CEQ was consulted on the proposed and final rule. CEQ issued a letter stating that CEQ has reviewed this rule and found it to be in conformity with NEPA and CEQ regulations (per 40 CFR 1507.3 and NEPA section 102(2)(B)).

Comments on the Proposal

This rule was published as a proposed rule in the **Federal Register** (73 FR 126) on January 2, 2008, and there was a 60-day comment period that closed on March 3, 2008. The Department received 100 comments. These comments were in the form of letters, e-mails, and faxes. Of the 100 comments received 50 were substantive; the remaining comments were all variations of a single form letter addressing one or more of three issues, which have been addressed below. The Department very much appreciates the response of the public, which has assisted the Department in improving the clarity of this final rule.

In addition to changes made to the final rule in response to specific comments received, which are noted below, the Department has made minor revisions throughout in order to improve the clarity of the rule. In general, these latter revisions do not change the substance or meaning of any of the provisions proposed on January 2, 2008, except in one or two instances as noted. As contemplated in the preamble to the proposed rule, the Department has added a provision specifying the circumstances in which an Environmental Assessment (EA) may tier to an Environmental Impact Statement (EIS) and in which a bureau may reach a Finding of No Significant Impact (FONSI) or Finding of No New Significant Impact (FONNSI). Please see paragraph 46.140(c).

General Comments on the Proposed Rule

Comment: Several commenters questioned the rationale for moving the Department's NEPA procedures from the DM to regulations and requested further clarification of this rationale.

Response: The Department believes that codifying the procedures in regulation will provide greater visibility to that which was previously contained in the DM and highlight opportunities for public engagement and input in the NEPA process. The Department believes that this greater accessibility of the regulations, when published in the Code of Federal Regulations (CFR), will allow

the public to more easily participate in the NEPA process.

Comment: Some commenters stated that the Department should include the issue of global climate change in all environmental analysis documents. They stated that the Department has a legal obligation under NEPA to analyze the effects of global climate change as shaping the context within which proposed actions take place, as well as the impacts of proposed projects on climate change. Another group recommended that the Department include a mandate that an environmental analysis of climate change impacts be included in the NEPA analysis prepared for Resource Management Plans (RMPs). Several groups suggested that the Department should require planning documents for fossil fuel developments to consider various energy alternatives, including conservation and energy efficiency. They also recommended that the Department analyze greenhouse gas emissions in all decision documents related to energy development on public lands. Another commenter suggested that the Department compile information about landscape changes in response to climate change to use for programmatic NEPA documents.

Response: Climate change issues can arise in relation to the consideration of whether there are direct or indirect effects of the greenhouse gas emissions from a proposed action, the cumulative effect of greenhouse gas emissions, and the effect of climate change on the proposed action or alternatives. The extent to which agencies address the effects of climate change on the aspects of the environment affected by the proposed action depends on the specific effects of the proposed action, their nexus with climate change effects on the same aspects of the environment, and their implications for adaptation to the effects of climate change. Whether and to what extent greenhouse gas emissions and/or climate change effects warrant analysis is the type of determination that Responsible Officials make when determining the appropriate scope of the NEPA analysis. Extensive discussion regarding the role of the Department, as well as the Federal government as a whole, with respect to the effects of greenhouse gas emissions and/or global climate change is beyond the scope of this rule concerning environmental analysis generally. Consequently, the final rule does not contain explicit provisions addressing global climate change.

Comment: One commenter stated that the Department should include a provision that agencies must seek input through the NEPA process from local, regional, State, and tribal health agencies when making decisions that may impact human health. Several groups recommend requiring a Health Impact Assessment (which is a tool used by the World Health Organization) when a project may impact human health.

Response: The Department appreciates this suggestion but does not believe inclusion of a specific requirement in this regard is appropriate in this rule. Individual bureaus of the Department have addressed and will continue to address possible impacts to human health in certain circumstances, such as with respect to subsistence issues in Alaska. Whether or not a Health Impact Assessment is the appropriate means to assess potential impacts on human health with regard to a particular proposal is the type of determination that Responsible Officials make for all manner of possible impacts when determining the appropriate scope of the NEPA analysis.

Responses to Comments on Individual Provisions, Including Analysis of Changes Made

The following paragraphs contain responses to comments made on individual provisions of the proposed rule and incorporate discussion of changes made to the rule as proposed in January 2008.

Subpart A: General Information

Section 46.10 Purpose of this Part. A new paragraph (c) has been added to clarify that, in accordance with CEQ regulations at 40 CFR 1500.3, trivial violations of these regulations are not intended to give rise to any independent cause of action.

Section 46.30 Definitions. This section supplements the terms found in the CEQ regulations and adds several new definitions. The terms affected are the following: Adaptive management; Bureau; Community-based training; Controversial; Environmental Statement Memoranda; Environmentally preferable alternative; No action alternative; Proposed action; Reasonably foreseeable future actions; and Responsible Official. A definition of consensus-based management has been placed in section 46.110. The definitions of no action alternative and proposed action have been moved to this section for the final rule from proposed section 46.420, as these terms may apply to both EAs and EISs. Comments and responses addressing these terms may be found below, in the discussion of section 46.420.

Comment: Several commenters expressed concern that the definition of ''community'' may be ''misinterpreted in a variety of ways to mean local and county governments affected by a proposed action, or communities of individuals with a common interest in the project who do not necessarily live in the area directly affected by the project.'' Several groups recommended that the Department include and review the definition(s) in Environmental Statement Memorandum No. ESM03–7.

Response: Because of the possibility of confusion noted by the commenter, the Department has included a provision at section 46.110 focusing on ''consensus-based management'' as incorporating the ideas reflected in the emphasis on community involvement in the NEPA process. In developing the provision addressing consensus-based management, the Department relied upon the existing ESM03–7.

Comment: Many commenters expressed concerns with the proposed definition of ''controversial.'' Some stated that the size or nature of a proposed action should not render the action controversial under NEPA. Several individuals are concerned that the proposed definition of ''controversial'' would render all proposed projects on public lands as being controversial and will protract NEPA analyses. One group applauded the Department for defining ''controversial'' in terms of disputes over the bio-physical effects of a project rather than merely opposition to a project.

Response: The language in the proposed rule reflects current case precedent on the meaning of ''controversial'' under NEPA and has been retained, but with modification to address the confusion regarding the reference to ''size'' and ''nature'' in the final rule. Courts have consistently specified that disagreement must be with respect to the character of the effects on the quality of the human environment in order to be considered to be ''controversial'' within the meaning of NEPA, rather than a mere matter of the unpopularity of a proposal. *See Como-Falcon Coalition, Inc.* v. *U.S. Dept. of Labor*, 609 F.2d 342 (8th Cir. 1978), *cert. denied*, 446 U.S. 936 (''Mere opposition to federal project does not make project controversial so as to require environmental impact statement.'')

Comment: Some commenters suggested that the definition of ''environmentally preferable alternatives'' does not make clear whether the requirement applies to Records of Decision (RODs) on projects

analyzed in an EIS or EA or only to those analyzed in an EIS. They recommended adding a sentence at the end of the definition clarifying that the requirement applies to EAs and EISs.

Response: CEQ regulations require the identification of at least one environmentally preferable alternative in a ROD, which is the decision document issued after completion of an EIS. (40 CFR 1505.2(b); *see also* Question 6b of CEQ's ''Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations,'' 46 Fed. Reg. 18026 (Mar. 23, 1981), as amended (hereinafter CEQ's ''Forty Most Asked Questions''). The CEQ regulations do not identify the decision document issued after completion of an EA/FONSI, and bureaus do not issue RODs in this situation. Therefore, the Department has not changed the definition in response to this comment.

Comment: Several commenters expressed reservations about the definition of Preliminary Environmental Impact Statement (PEIS). They suggested that the role of the PEIS be clarified. One commenter wanted the Department to include provisions on how the scoping process and the PEIS will interact. Others wanted to know what level of detail should be included in a PEIS and whether use of a PEIS would introduce an additional requirement for public comment. One commenter strongly disagreed with the use of a PEIS, stating that the use of a PEIS could delay a DEIS or FEIS and could add additional expenses to private proponents that are funding NEPA projects. They recommended that the Department add a provision to the rule that would enforce time restrictions on the PEIS process.

Response: Because of the confusion and concern surrounding the PEIS, and upon further reflection, the Department has decided not to include this provision in the final rule. The definition in the proposed rule found at section 46.30 and description in sections 46.415 and 46.420 have been removed in the final rule. The Department continues to encourage collaboration with the public in an approach to alternative development and decision-making. The implementation of any such approach is determined by the RO. The PEIS was simply an optional tool and its removal from the final rule will not diminish this continuing Departmental emphasis on collaboration. The RO will still be free to involve and inform the public regarding each particular NEPA analysis in a manner that best meets the public and government needs.

Comment: One commenter stated that the Department should add ''agency'' to the definition of ''Reasonably Foreseeable Future Actions'' to ensure the agency covers all reasonably foreseeable actions that flow from proposed actions. Several commenters stated that the proposed definition of ''Reasonably Foreseeable Future Actions'' conflicts with the definition of ''Reasonably Foreseeable Development Scenario'' contained in the Instruction Memorandum 2004–089 issued by the BLM. Another commenter stated that the proposed definition of ''Reasonably Foreseeable Future Actions'' does not follow CEQ guidelines.

Response: The final rule defines ''reasonably foreseeable future actions'' to explain a term used in CEQ's definition for ''cumulative impact'' at 40 CFR 1508.7. The Department has attempted to strike a balance by eliminating speculation about activities that are not yet planned, but including those that are reasonably foreseeable and are expected to occur (for example, based on other development in the area when there has been some decision, funding, or development of a proposal (see 40 CFR 1508.23)). The Department does not believe that the definition of ''reasonably foreseeable future actions'' conflicts with the description of the Bureau of Land Management's analytical tool, the ''reasonably foreseeable development scenario'' or RFD. The RFD is a projection (scenario) of oil and gas exploration, development, production, and reclamation activity that may occur in a specific resource area during a specific period of time; as such, the analysis in the RFD can provide basic information about oil and gas activities that may inform the analysis of reasonably foreseeable future actions.

In order to clarify that reasonably foreseeable future actions include both ''federal and non-federal'' activities, we have added these terms in the definition in section 46.30. This is consistent with 40 CFR 1508.7. The Department has added language to clarify that the existing decisions, funding, or proposals are those that have been brought to the attention of the RO.

In its mention of the ''Responsible Official of ordinary prudence'' the definition also incorporates the reasonableness standard emphasized by the Supreme Court as ''inherent in NEPA and its implementing regulations.'' In *Department of Transportation* v. *Public Citizen*, 541 U.S. 752, 770 (2004), the Court reaffirmed that this ''rule of reason'' is what ensures that agencies include in the analyses that they prepare information useful in the decision-making process. In that case, the Court noted that the agency in question, the Federal Motor Carrier Safety Administration in the Department of Transportation, properly considered the incremental effects of its own safety rules in the context of the effects of the reasonably foreseeable possibility that the President might lift the moratorium on cross-border operations of Mexican motor carriers. *Id.* In those circumstances, the possibility that the President might act in one of several ways was neither an existing decision, matter of funding, or proposal, but was nevertheless a possibility that a person of ordinary prudence would consider when reaching a decision regarding the proposed action of promulgating the rule at issue in that case. Similarly, in some circumstances an RO of ordinary prudence would include analysis of actions that, while not yet proposed, funded, or the subject of a decision, nevertheless are likely or foreseeable enough to provide important information and context within which any significant incremental effects of the proposed action would be revealed.

Subpart B: Protection and Enhancement of Environmental Quality

The proposed rule did not include portions of 516 DM Chapter 1 that are merely explanatory in that they address internal Departmental processes. This information will be retained in the DM or will be issued as additional explanatory information by the Department's Office of Environmental Policy and Compliance in Environmental Statement Memoranda.

In this final rule, this subpart includes the following sections:

Section 46.100 Federal action subject to the procedural requirements of NEPA. This section provides clarification on when a proposed action is subject to the procedural requirements of NEPA. Paragraph 46.100(b)(4), ''The proposed action is not exempt from the requirements of section 102(2) of NEPA,'' refers to those situations where, either a statute specifically provides that compliance with section 102(2) of NEPA is not required, or where, for instance, a bureau is required by law to take a specific action such that NEPA is not triggered. For example, Public Law 105–167 mandates the Bureau of Land Management (BLM) to exchange certain mineral interests. In this situation, section 102(2) of NEPA would not apply because the law removes BLM's decision making discretion. Also, this provision refers to situations where there is a clear and unavoidable conflict

between NEPA compliance and another statutory authority such that NEPA compliance is not required. For example, if the timing requirements of a more recent statutory authority makes NEPA compliance impossible, NEPA must give way to the more recent statute.

Similarly, the final rule clarifies that the proposed action is subject to the procedural requirements of NEPA and the CEQ regulations depending on ''the extent to which bureaus exercise control and responsibility over the proposed action and whether Federal funding or approval will be provided to implement it'' paragraph 46.100(a). The criteria for making this determination include, *inter alia*, ''when the bureau has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal'' paragraph 46.100(b)(1), and ''the effects can be meaningfully evaluated'' and ''the proposed action would cause effects on the human environment'' paragraph 46.100(b)(3).

The clarifications provided in this section have been made, in part, in order to ensure that the rule is consistent with the Supreme Court's decision in *Department of Transportation* v. *Public Citizen*, 541 U.S. 752, 770 (2004). In *Public Citizen*, the Court explained that a ''but for'' causal relationship is insufficient to make an agency responsible for a particular effect under NEPA and the relevant regulations, but that there must be ''a reasonably close causal relationship'' between the environmental effect and the alleged cause and that this requirement was analogous to the ''familiar doctrine of proximate cause from tort law.'' 541 U.S. at 767. The Court reaffirmed that ''courts must look to the underlying policies or legislative intent in order to draw a manageable line between those causal changes that may make an actor responsible for an effect and those that do not'' and that inherent in NEPA and its implementing regulations is a ''rule of reason.'' *Id.*

Comment: Some commenters expressed concern regarding the procedural requirements of NEPA. One group stated that the Department's procedural actions should be subject to NEPA requirements regardless of whether or not sufficient funds are available. This group stated that if a proposed action is even being considered by a RO, the procedural requirements of NEPA must apply. Another group suggested the Department add an additional subsection that offers guidance whether an ''action'' is subject to NEPA compliance.

Response: The Department agrees that the procedural requirements of NEPA apply when a proposal consistent with 40 CFR 1508.23 has been developed. Mere consideration of a possible project however does not constitute a proposed action that can be analyzed under NEPA. Rather, under 40 CFR 1508.23, a proposal is ripe for analysis when an agency is ''actively preparing to make a decision.''

When the proposed action involves funding, Federal control over the expenditure of the funds by the recipient is essential to determining what constitutes a ''Federal'' action that requires NEPA compliance. This is consistent with 40 CFR 1508.18(a). The issue of funding does not turn on the sufficiency, or lack thereof, of the funding, but on the degree of Federal control or influence over the use of the funds. The language in the final rule regarding whether a proposal is subject to NEPA compliance has been clarified by addressing the question of whether NEPA applies in paragraph 46.100(a), and when the NEPA analysis should be conducted in paragraph 46.100(b).

Comment: One individual urged the Department to not add additional obligations that are not currently required under NEPA, particularly with respect to the emphasis on public participation.

Response: This final rule adds no additional obligations not currently required under NEPA and the CEQ regulations. Section 46.100 is an effort to consolidate existing requirements in 40 CFR 1508.18, 40 CFR 1508.23, and 40 CFR 1508.25, among others. For instance in 40 CFR 1500.2(d) CEQ requires that Federal agencies ''* * * encourage and facilitate public involvement in decisions which affect the quality of the human environment.'' Consistent with this provision, paragraph 46.305(a) requires that a bureau must, to the extent practicable, provide for public notification and public involvement when an environmental assessment is being prepared. However, the methods for providing public notification and opportunities for public involvement are at the discretion of the RO. Individual bureaus will be able to provide in their explanatory and informational directives descriptions of ways of carrying out public notification and involvement appropriate to different kinds of proposed actions.

Comment: One commenter stated that the proposed rule as written suggests that a NEPA review would only occur to the extent the effects on the human environment could be meaningfully evaluated and that the proposed provision at 46.100 seemed to ''conflict with situations where there are 'unknowns' and the bureau cannot meaningfully evaluate the effects, but it nonetheless is necessary to move ahead with the proposal.'' This commenter suggested that the Department clarify that NEPA review will proceed and will be based on the best available data.

Response: The Department agrees that NEPA analysis takes place when the effects of a proposed action can be meaningfully evaluated, as stated in the revised paragraph 46.100(b). Further, the Department appreciates the commenter highlighting the possibility of confusion resulting from the structure of 46.100 as proposed. As proposed, section 46.100 addressed both the questions of whether and when a proposed action is subject to the procedural requirements of NEPA, but without grouping the provisions addressing these two issues separately. In response to this comment, and upon further review, the Department has restructured section 46.100 to separate these two issues into paragraphs (a) and (b) for the sake of clarity. The revised paragraph 46.100(b) identifies when in its development the proposed Federal action the NEPA process should be applied and, if meaningful evaluation of effects cannot occur, then the proposal is not yet ripe for analysis under NEPA.

That being said, NEPA itself does not require the use of ''best available data;'' rather, CEQ regulations demand information of ''high quality'' and professional integrity. 40 CFR 1500.1, 1502.24. However, the Department's obligations under other authorities, such as the Information Quality Act Section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554), do require bureaus to use the best available data. While discussion of the Department's obligations under the Information Quality Act is outside the scope of this rule, the Department concurs that meaningful evaluation must be carried out on the basis of whatever data is available. The Department does not believe that this is inconsistent with CEQ's provision regarding those situations where information is incomplete or unavailable (40 CFR 1502.22). In fact, rather than stating that meaningful evaluation cannot take place when there are ''unknowns'' as the commenter appears to suggest, the CEQ regulations provide steps to take in order that meaningful evaluation can continue when information is lacking; therefore, the Department does not believe

revision of this rule is necessary to address this point.

Comment: Several individuals responded to our request for input regarding the use of FONSIs based on tiered EAs where a FONSI would be, in effect, a finding of no significant impacts other than those already disclosed and analyzed in the EIS to which the EA is tiered. These individuals supported the concept.

Response: The Department appreciates the comment. The Department has added the provision as contemplated. See section 46.140, which provides for the use of tiered documents. See also the detailed response to comments on section 46.140, below. Under this final rule a FONSI or FONNSI (Finding of No New Significant Impact) can be prepared based on an EA that is tiered to an EIS. This approach is consistent with CEQ regulations at 40 CFR 1508.28.

Comment: One group recommended the Department clarify that the National Park Service (NPS) should prepare an EA or EIS as part of its submission to the National Capital Planning Commission.

Response: This comment was specifically referring to situations where a particular type of proposed action may be subject to categorical exclusion (CX or CE) under the Department's NEPA procedures but not under the NEPA procedures of another Federal agency such as, in this case, the NEPA procedures of the National Capital Planning Commission (NCPC). While, as a general rule, each Federal agency is responsible for compliance with NEPA consistent with both CEQ's regulations and its own procedures for implementing NEPA, the particular issue raised concerns a very specific situation involving two Federal agencies acting under very specific and distinct authorities. Therefore, the Department declines to address this comment more specifically and does not believe a specific provision is necessary in general Departmental procedures.

Section 46.105 Using a contractor to prepare environmental documents. This section explains how bureaus may use a contractor to prepare any environmental document in accordance with the standards of 40 CFR 1506.5(c).

Comment: Some commenters wanted the Department to clarify requirements for working with a contractor. Some stated that strict requirements should be put into place for selection of a contractor to ensure the adequacy of documents, independent evaluation, and sound management practices. One individual stated that the Department should adopt existing CEQ guidance on the use and selection of contractors.

Response: The Department complies with CEQ regulations and follows existing CEQ guidance on the selection and use of contractors. Each bureau is responsible for determining how its officials will work with contractors, subject to the CEQ regulations and guidance. In any event, the RO is responsible for, or is the approving official for, the adequacy of the environmental document. The Department does not believe any further clarification of the rule is necessary.

Comment: Another commenter applauded the Department for a ''clear articulation of the use of contractors for NEPA document preparation.''

Response: The Department appreciates the comment.

Section 46.110 Incorporating consensus-based management. This section provides a definition of consensus-based management and incorporates this approach as part of the Department's NEPA processes. Paragraph 46.110(e), requiring bureaus to develop directive to implement section 46.110 has been removed from the final rule as not appropriate for regulatory treatment.

Comment: Most commenters supported the Department's proposed rule on consensus-based management. However, many individuals expressed concerns regarding the breadth of the definition of consensus-based management. Because of the lack of concrete provisions within this section, many individuals suggested the NEPA process could become ''unnecessarily time consuming and costly.'' Several individuals stated that the word ''consensus'' should be taken out of the proposed rule because ''consensus'' suggests interested parties will determine the preferred alternative. Other individuals suggested that the term ''consensus'' has the potential to create ''unreasonable expectations in the public.'' One group suggested replacing ''consensus'' with ''open and transparent community involvement and input.'' Another suggestion for the replacement of the word ''consensus'' was ''collaboration.'' Several individuals stated that the proposal for consensus-based management should be withdrawn and that the Department should continue following the current CEQ regulations on collaboration. Individuals suggested that the Department clearly define what constitutes community.

Response: The Department has revised section 46.110, and added a definition for ''consensus-based management'' to this section. The definition comes from the existing ESM03–7, and expresses existing Department policy. The definition of ''consensus-based management'' has been modified in order to render it in regulatory language. Many of the commenters seem to assume that in the absence of consensus the Department will not take action. This is not the case. While the RO is required to consider the consensus-based management alternative whenever practicable, at all times discretion remains with the RO regarding decisions, if any, to be made with respect to the proposed action. While the Department requires the use of consensus-based management, whenever practicable, we have added a provision that if the RO determines that the consensus-based alternative should not be the preferred alternative, an explanation of the rationale behind this decision is to be incorporated in the environmental document.

Comment: Some commenters stated that the technique of consensus-based management may be impossible to implement. One group was particularly concerned with the definition of ''interested party.'' They believe it may be impossible for the Department to determine who the interested parties are and that the process of managing interested parties may be cumbersome and add expense and time onto NEPA projects. This group suggested that the Department develop a clear and concise definition of ''interested parties.''

Response: The Department acknowledges that consensus may not always be achievable or consistent with the Department's legal obligations or policy decisions. However, the Department requires the use of consensus-based management whenever practicable. CEQ regulations direct agencies to encourage and facilitate public involvement in the NEPA process. 40 CFR 1500.2(d), 40 CFR 1506.6. The Department agrees that use of the term ''interested parties'' may cause confusion. The Department has replaced the term ''interested parties'' with ''those persons or organizations who may be interested or affected'' which is used in the CEQ regulations. See for example 40 CFR 1503.1.

Comment: Several individuals stated that it is vital that the interests of the ''regional community'' be taken into account during the NEPA process. One commenter applauded the Department for including consensus-based management in the proposed rule and for taking additional steps to support the ''cooperative conservation policy.'' One group believed this proposal would ''provide an avenue for impacted local governments and citizens to become

involved in the agency review process, and have their interests acknowledged in a meaningful way, and achieve a win-win final decision.''

Response: The Department appreciates the comment and agrees that the interests of the regional and local community should be taken into account during the NEPA process.

Comment: Several commenters stated that the Department needs to add a provision to the rule that clearly spells out the role of the RO. This provision would include directives on selecting alternatives.

Response: The Department has defined ''Responsible Official'' under section 46.30. The Department has also specified in the definition that the RO is responsible for NEPA compliance (which includes the selection of alternatives). The particular identity of the RO for any given proposed action is determined by the relevant statute, regulation, DM, or specific delegation document that grants the authority for that particular action.

Comment: Some individuals also stated that a process should be included to assure the public that the community's work is reflected in the evaluation of the proposed action and the final decision, even if the community alternative is not eventually selected as the agency's preferred alternative. One group suggested that the Department define what constitutes ''assurance'' that participant work is considered in the decision-making process. Several groups stated that the community alternative must fully comply with NEPA, CEQ regulations, and all Department policies and procedures in order to be considered by the RO. Several groups refer to court cases stating that NEPA ''does not require agencies to consider alternatives that are not feasible or practical.'' Individuals would like the Department to explain what a community alternative consists of, how it will be evaluated, who is the relevant community, and how many community alternatives can be proposed for each project. They also expressed concern that the proposed rule suggests all alternatives submitted must be analyzed in detail.

Response: Section 46.110 provides for the evaluation of reasonable alternatives presented by persons, organizations or communities who may be interested or affected by a proposed action in the NEPA document even if the RO does not select that alternative for implementation. The final rule clarifies that, while all or a reasonable number of examples covering the full spectrum of reasonable alternatives may be considered, a consensus-based management alternative (if there are any presented) may only be selected if it is fully consistent with the purpose of and need for the proposed action, as well as with NEPA generally, the CEQ regulations, and all applicable statutory and regulatory provisions, as well as Departmental and bureau written policies and guidance could be selected. It also provides that bureaus must be able to show that participants' or community's input is reflected in the evaluation of the proposed action and the final decision. Therefore, the Department believes that the final rule adequately addresses these comments.

Comment: Some individuals indicated that NEPA does not require consensus and stated the proposed rule goes against the direction of the CEQ regulations. Some commenters directed the Department to review CEQ's ''Collaboration in NEPA'' handbook. Several groups recommended that the Department include and review the Environmental Statement Memorandum No. ESM03–7.

Response: The Department agrees neither NEPA nor the CEQ regulations require consensus. This new regulation requires the use of consensus-based management whenever practicable. Consensus-based management is not inconsistent with the intent of NEPA and the CEQ regulations. The Department has reviewed CEQ's publication ''Collaboration in NEPA—*A Handbook for NEPA Practitioners*'' available at *http://ceq.eh.doe.gov/nepa/nepapubs/Collaboration_in_NEPA_Oct2007.pdf.* While consensus-based management, like collaboration, can be a useful tool, the Department recognizes that consensus-based management may not be appropriate in every case. The final rule does not set consensus-based management requirements, including timelines or documentation of when parties become involved in the process. Similar to collaborative processes, consensus-based management processes, like public involvement and scoping, will vary depending on the circumstances surrounding a particular proposed action. Some situations will require a lot of time and others will not. Regardless of the level or kind of public involvement that takes place, at all times the RO remains the decision maker.

Comment: One group suggested that the Department remove paragraph (b) because it is ''duplicative, ambiguous, and unnecessary.'' They believed this section simply restates the requirement in section 1502.14 of the CEQ regulations that requires agencies evaluate ''all reasonable alternatives.'' They also expressed concern that community-based alternatives may be given preferential weight over the project proponent's alternative.

Response: The Department does not agree that the section is unnecessary and duplicative or that it simply restates the requirement in section 1502.14 of the CEQ regulations. Although there are some common elements to 40 CFR 1502.14 and paragraph 46.110(b), this paragraph requires the use of consensus-based management in NEPA processes and decision-making whenever practicable. The RO is responsible for an analysis of the reasonable alternatives, and the NEPA process allows for the selection of an alternative based on the consideration of environmental effects, as well as the discretionary evaluation of the RO. The intent of this provision is that alternatives presented by those persons or organizations that may be interested or affected, including applicants, be given consideration.

Comment: One group wanted to see a mandate added to the proposed rule that requires the Department to work with tribal governments. One individual suggested that the word ''considered'' should be changed to ''adopted,'' ''accepted,'' or ''implemented'' to ensure consideration is given to an alternative proposed by a tribe.

Response: The Department has a government-to-government relationship with federally-recognized tribes and as such specifically provides for consultation, coordination and cooperation. We consider all alternatives, including those proposed by the tribes, as part of the NEPA process, but cannot adopt, accept, or implement any alternative before full evaluation of all reasonable alternatives. Therefore, the Department declines to adopt the group's recommendation.

Section 46.113 Scope of the analysis. This section, as proposed, addressed the relationships between connected, cumulative, and similar actions and direct, indirect and cumulative impacts. This section has been removed from the final rule.

Comment: Some commenters stated that the proposed rule is not clear with respect to the issue of what projects need to be included in the scope of analysis. One individual suggested that the Department should include language in the proposed rule clarifying that the effects of connected, cumulative and similar actions must be included in the effects analysis as indirect or cumulative effects. These actions do not become part of the proposed action, and alternatives for these actions need not be considered in the analysis.

One individual suggests that the Department change the language to provide guidance that allows bureaus to determine which projects need to be included in a cumulative effects analysis. They recommend clearly defining ''connected,'' ''cumulative,'' ''direct,'' and ''indirect.'' If these changes are made, some believe this rule will provide uniformity, consistency, and predictability to the NEPA process.

Another individual suggested ''should'' be removed from this section. They expressed concern that the current wording implies that connected and cumulative action analysis is optional.

One commenter recommended that this section should be deleted in its entirety because it is inconsistent with CEQ regulations. They recommended that the Department revise the section to reflect the difference between the treatment of connected, cumulative, and similar actions and the treatment of the effects of such actions.

Response: In light of the confusion reflected in several of the comments, as well as upon further consideration, the Department has eliminated this provision from the final rule. Bureaus will continue to follow CEQ regulations regarding scope of analysis at 40 CFR 1508.25, as well as bureau specific directives.

Section 46.115 Consideration of past actions in the analysis of cumulative effects. This section incorporates CEQ guidance issued on June 24, 2005 that clarifies how past actions should be considered in a cumulative effects analysis. The Department has elected not to repeat the specific provisions of the CEQ guidance in the final rule. Responsible Officials are directed to refer to the applicable CEQ regulations and the June 24, 2005 CEQ guidance.

Comment: Several groups commended the Department for its efforts to bring clarity to the NEPA cumulative effects analysis.

Response: The Department appreciates the comments.

Comment: Several groups stated that CEQ regulations do not contain a ''significant cause-and-effect'' filter excluding projects from cumulative impact analysis because the project's effects are minor. One group was concerned that the proposed rule contains measures that would ''constrain the usefulness of agencies' analyses of cumulative impacts,'' and would violate CEQ regulations. This group suggested that the proposed rule would constrain the scope of actions whose effects should be considered in a cumulative impacts analysis.

Some individuals stated that the Department is proposing to curtail the consideration and evaluation of past actions when proposing future activities. They stated that the agencies and public should be informed of potential environmental consequences before decisions are made. Others suggested this section does not provide guidance to the RO on what past actions and proposed future actions should be included in the analysis. Groups stated that a Department field office has no inherent expertise in determining which actions are relevant to a cumulative impacts analysis and should therefore not be vested with such discretion. Several groups suggested that the entire section should be removed from the proposed rule, and that the Department should conduct environmental analyses pursuant to CEQ regulations. One individual stated ''NEPA is intended to ensure that bureaus make sound decisions informed by the ''cumulative and incremental environmental impacts'' of the proposed projects and how those impacts will actually affect the environment.'' Several groups stated that vague language for past actions to be included in cumulative impact analysis will result in more confusion and litigation.

Response: At section 46.115, this final rule incorporates guidance on the analysis of past actions from the June 24, 2005 CEQ *Guidance on the Consideration of Past Actions in Cumulative Effects Analysis,* which may be found at *http://ceq.eh.doe.gov/nepa/regs/Guidance_on_CE.pdf.* This section is consistent with existing CEQ regulations, which use the terms ''effects'' and ''impacts'' synonymously and define cumulative impact as ''the incremental impact of an action when added to other past, present, and reasonably foreseeable future actions'' (40 CFR 1508.7).

The focus of the CEQ guidance incorporated in this final rule is on the consideration of useful and relevant information related to past actions when determining the cumulative effects of proposals and alternatives. Bureaus will conduct cumulative effects analyses necessary to inform decision-making and disclose environmental effects in compliance with NEPA. A ''significant cause-and-effect'' filter is specifically provided for in the CEQ guidance.

To clarify the Department's commitment to follow CEQ guidance concerning consideration of past actions, the final rule at section 46.115 is revised to state, ''When considering the effects of past actions as part of a cumulative effects analysis, the Responsible Official must analyze the effects in accordance with 40 CFR 1508.7 and in accordance with relevant guidance issued by the Council on Environmental Quality, such as 'The Council on Environmental Quality Guidance Memorandum on Consideration of Past Actions in Cumulative Effects Analysis' dated June 24, 2005, or any superseding Council on Environmental Quality guidance.'' The Department believes that by incorporating CEQ's guidance we have included sufficient specificity in the rule; any other ''how to'' information may be provided through the Departmental chapters in the DM, environmental statement memoranda series, or bureau-specific explanatory and informational directives.

Comment: Groups expressed concern over the definition of ''reasonably foreseeable future actions'' and suggested this definition should be removed from the final proposal. They understood that the Department cannot conduct a ''crystal ball'' analysis but that actions should be considered in the analysis even if decisions and funding for specific future proposals does not exist.

Response: The Department agrees. In response, the Department has added specificity and provided guidance on what should be considered a reasonably foreseeable future action in order to ensure that speculative activities or actions are not incorporated into the analysis while actions that may inform the RO's analysis of cumulative impacts for the proposed action are included, even if they are not yet funded, proposed, or the subject of a decision identified by the bureau. This approach is consistent with CEQ regulations.

Section 46.120 Using existing environmental analyses prepared pursuant to NEPA and the Council on Environmental Quality regulations. This section explains how to incorporate existing environmental analysis previously prepared pursuant to NEPA and the CEQ regulations into the analysis being prepared.

Comment: Several individuals agreed that using existing documentation will reduce lengthy analysis and duplication of work and applaud the Department for including this section in the proposed rule. However, commenters would like a provision added to the section to ensure the supporting documentation is provided to the public online and in the bureau's office.

Response: The Department agrees that any information relied upon in a NEPA analysis should be publicly available, either independently or in connection with the specific proposed action at

issue, and has so stated in section 46.135.

Section 46.125 Incomplete or unavailable information. CEQ regulations at 40 CFR 1502.22 provide ''When an agency is evaluating reasonably foreseeable significant adverse effects on the human environment in an environmental impact statement and there is incomplete or unavailable information, the agency shall always make clear that such information is lacking'' and sets out steps that agencies must follow in these circumstances. This section clarifies that the overall costs of obtaining information referred to in 40 CFR 1502.22 are not limited to the estimated monetary cost of obtaining information unavailable at the time of the EIS, but can include other costs such as social costs that are more difficult to monetize. Specifically, the Department requested comments on whether to provide guidance on how to incorporate non-monetized social costs into its determination of whether the costs of incomplete or unavailable information are exorbitant. The Department also requested comments on what non-monetized social costs might be appropriate to include in this determination; *e.g.,* social-economic and environmental (including biological) costs of delay in fire risk assessments for high risk fire-prone areas.

Comment: Many commenters expressed concern with the incomplete or unavailable information section. They stated that the rule does not provide guidance to bureaus on how to address ''non-monetized social costs.'' Some individuals stated that critical information is missing from this section, such as an exclusive list of non-monetized social costs. Several groups suggested the Department expand on CEQ regulation section 1502.22 which addresses agency procedure in the face of incomplete or unavailable information. Groups stated that the Department should ''direct its bureaus to specifically evaluate the risks of proceeding without relevant information, including risks to sensitive resources.'' Some suggested the Department provide their findings to the public so the public can provide meaningful comment and scrutiny. They stated that this approach would be more consistent with case law and with CEQ regulations. Groups stated that if the section remains ''as is,'' the Department has provided ''the bureaus with an incentive to cease collecting information and providing it to the public.'' One group stated that the proposed rule encourages agencies to find reasons not to obtain information that they have already acknowledged is relevant to reasonably foreseeable significant impacts and that this message is contrary to NEPA and CEQ regulations. Several other commenters noted that the proposed rule provides clarity in assessing the monetary costs of gathering information and is consistent with CEQ regulations.

Response: The Department believes that section 46.125 provides guidance sufficient to implement 40 CFR 1502.22 in so far as CEQ's regulation addresses this issue of costs. The Department has added some language in response to comments regarding what sorts of considerations constitute ''non-monetized social costs.'' However, the Department believes that other factors that may need to be weighed include the risk of undesirable outcomes in circumstances where information is insufficient or incomplete. Paragraph 1502.22(b) specifically provides for the steps the Department will take if the overall cost of obtaining the data is exorbitant or the means to obtain the data are not known.

Comment: One commenter suggested that the Department must ''utiliz[e] public comment and the best available scientific information'' and recommended including a provision to this effect in the final rule.

Response: There is no question that public involvement is an integral part of the NEPA process and can take a variety of forms, depending on the nature of the proposed action and the environmental document being prepared; therefore the final rule includes several provisions addressing public involvement. There is, however, some level of confusion regarding the data standard applicable to the type of information NEPA requires. The assertion is frequently made in court cases, as the commenter suggests here, that NEPA analyses must use the ''best available science'' to support their conclusions. In fact, the ''best available science'' standard comes from section 7 of the Endangered Species Act, specifically 16 U.S.C. 1536(a)(2), which requires that ''each agency shall use the best scientific and commercial data available'' when evaluating a proposed action's impact on an endangered species. In addition, the ''best available science'' standard is used by the United States Department of Agriculture Forest Service's regulations implementing the National Forest Management Act of 1976, 16 U.S.C. 1600 *et seq.* (see Final Rule and Record of Decision, National Forest System Land Management Planning Part III, 73 Fed. Reg. 21468 (Apr. 21, 2008) (to be codified at 36 CFR Part 219)). NEPA imposes a different standard: rather than insisting on the best scientific information available, CEQ regulations demand information of ''high quality'' and professional integrity. 40 CFR 1500.1, 1502.24. Therefore, the Department declines to accept the commenter's recommendation.

Section 46.130 Mitigation measures in analyses. This section has been clarified from the proposed rule. The revision clarifies how mitigation measures and environmental best management practices are to be incorporated into and analyzed as part of the proposed action and its alternatives.

Comment: Most individuals stated that the Department should address mitigation measures in the proposed rule. These individuals explained that, in order to provide interested parties an accurate portrayal of potential effects, it is necessary to include all mitigation measures in the impacts analysis. Several individuals indicate the language in the proposed rule is broad and unclear. Several groups opposed the proposed rule in its current form and suggested that the Department should revise and narrow the rule to ''clarify that possible mitigation measures are discussed in NEPA documents in order to help inform an agency's decision, but reflect the well-settled legal principle that the agency need not guarantee that particular mitigation measures be implemented or that such mitigation measures be successful.'' One group suggested that the Department revise the proposed rule to clarify that NEPA does not require agencies to adopt particular mitigation measures or to guarantee the success of the mitigation plans. One group stated that avoiding significant environmental effects should be the primary goal in the development of any proposed action and mitigation should be a final course of action when all other attempts to avoid impacts have been exhausted.

Response: The Department agrees with the comments about the importance of mitigation; the provision addressing mitigation is carried forward into this final rule. The Department has, however, refined the language of the provision for clarity. The Department agrees that NEPA does not require bureaus to adopt particular mitigation measures and that it is not possible to guarantee the success of mitigation plans, but does not believe revision to the final rule reflecting this understanding is necessary.

Comment: One group argued that including mitigation measures in the effects analysis is crucial to demonstrate that potential effects can be mitigated through the use of stipulations,

conditions of approval, and best management practices. They did not believe it necessary to ''strip'' mitigation measures or best management practices from an applicant's proposal just for the sake of analyzing the stripped down version.

Response: It was not the Department's intent that applicants' proposals be stripped of all best management practices or mitigation measures. The Department has included language to clarify this point. Independent of NEPA, any application must provide a proposal that includes any ameliorative design elements (for example, stipulations, conditions, or best management practices) required to make that proposal conform to legal requirements. In addition, the applicant's proposal presented to the bureau for decision-making will include any voluntary ameliorative design element(s) that are part of the applicant's proposal. Therefore, the analysis of the applicant's proposal, as an alternative, includes, and does not strip out, these elements. Should the bureau wish to consider and/or require any additional mitigation measures other than the design elements included in the applicant's proposal, the effects of such mitigation measures must also be analyzed. This analysis can be structured as a matter of consideration of alternatives to approving the applicant's proposal or as separate mitigation measures to be imposed on any alternative selected for implementation.

Section 46.135 Incorporation of referenced documents into NEPA analysis. This section establishes procedures for incorporating referenced documents as provided for in the CEQ regulations at 40 CFR 1502.21.

No comments were received on this section, but clarifying changes have been made in this final rule.

Section 46.140 Using tiered documents. This section clarifies the use of tiering. As contemplated in the preamble to the rule, and in response to favorable comments, the Department has added a new subsection clarifying that an environmental assessment may be prepared, and a finding of no significant impact reached, for a proposed action with significant effects, whether direct, indirect, or cumulative, if the environmental assessment is tiered to a broader environmental impact statement which fully analyzed those significant effects. Tiering to the programmatic or broader-scope environmental impact statement would allow the preparation of an environmental assessment and a finding of no significant impact for the individual proposed action, so long as any previously unanalyzed effects are not significant. The finding of no significant impact, in such circumstances, would be, in effect, a finding of no significant impact other than those already disclosed and analyzed in the environmental impact statement to which the environmental assessment is tiered. The finding of no significant impact in these circumstances may also be called a ''finding of no *new* significant impact.'' In addition, the provision requiring bureaus to review existing directives addressing tiering, and listing topics that must be included in such directives has been removed from the final rule as not appropriate for regulatory treatment. The numbering of the subsections has been adjusted accordingly.

Comment: One group supported using existing analyses to avoid duplication of effort and to minimize costs. However, they stated that the Department should clearly indicate that existing data does not need to be supplemented with new data if there is no evidence that the current conditions differ from the conditions in which the existing data was developed.

Response: The Department concurs with the comment, but believes that it has been addressed in paragraph 46.140(a). As contemplated in the preamble to the rule, and in response to favorable comments, the Department has added a new paragraph 46.140(c).

Section 46.145 Using adaptive management. This section incorporates adaptive management as part of the NEPA planning process.

Comment: Most commenters supported the concept of adaptive management. However, they stated that the Department has not clearly explained how adaptive management will be incorporated into the NEPA process. One individual believed adaptive management could be a useful tool in allowing ''mid-course corrections'' without requiring new or supplemental NEPA review. Several groups suggest that the Department clarify that adaptive management is only appropriate where risk of failure will not cause harm to sensitive resources. Also, they stated that a requirement for a sufficient inventory of current conditions of affected resources should be included in the adaptive management plan. A detailed monitoring plan should be developed with specific indicators that will serve to define the limits of acceptable change. They also requested a ''fallback'' plan, which would be implemented if adaptive management, monitoring, or funding is not available. Several commenters suggested the Department include sufficient detail and commitments as to how impacts will be measured, avoided, and mitigated. They urged the Department to make this plan available for public comment. Another group suggested that the Department clearly delineate the scope, duration, and availability of funding for any planned monitoring programs before they are implemented. One individual suggested that the Department include additional detail that will clarify how and when it is appropriate to evaluate the effects of adaptive management in subsequent NEPA analysis. Another commenter suggests the Department develop a manual to demonstrate to managers circumstances where adaptive management has worked on-the-ground.

Many groups were concerned that adaptive management is a costly practice and will result in accruing additional costs for project proponents. One group was concerned that lack of information may be used to excuse and allow actions to proceed without sufficient protective measures in place. Some commenters expressed concern that it would be impossible to adequately analyze impacts of adaptive management ''since those actions rely on future conditions that could be complicated and cumulative.'' Modifications to requirements and conclusions in decision documents must be allowed to ensure appropriate adjustments to management actions, according to one group. One commenter was concerned that the Department may misuse adaptive management with regard to on-the-ground monitoring due to lack of funding. Another group suggested the project proponent should play a role in defining the adaptive management strategy and ensuring funding will be available. They also suggested the Department clarify that public involvement is welcome but adaptive management strategies and implementation are the full responsibility of the agency.

Groups questioned adaptive management's consistency with current case law, NEPA, and CEQ regulations. Several commenters suggested that this section should be eliminated due to its inconsistencies with NEPA and CEQ. Due to lack of CEQ framework and no guidance for implementation, one group suggested that the Department should remove this section from the proposed rule.

Response: The Department has made minor wording changes to this section. Adaptive Management (AM) is an approach to management; however, it can be integrated with the NEPA process. The establishment of specific provisions with respect to the use of AM

is beyond the scope of this rule. The intent of this provision is only to clarify that the use of an AM approach is not inconsistent with NEPA. That is, proposed actions must be analyzed under NEPA. Each proposed action, including possible changes in management resulting from an AM approach, may be analyzed at the outset of the process, or these changes in management may be analyzed when actually implemented.

Section 46.150 Emergency responses. This section clarifies that ROs, in response to the immediate effects of emergencies, can take immediate actions necessary to mitigate harm to life, property, or important resources without complying with the procedural requirements of NEPA, the CEQ regulations, or this rule. Furthermore, ROs can take urgent actions to respond to the immediate effects of an emergency when there is not sufficient time to comply with the procedural requirements of NEPA, the CEQ regulations, or this rule by consulting with the Department (and CEQ in cases where the response action is expected to have significant environmental impacts) about alternative arrangements.

Comment: Some commenters expressed concern regarding the broad definitions provided in the emergency response section. They stated the section is ''written too broadly and could potentially lead to the misuse of the provision that would allow a bureau to bypass the preparation of an environmental document.'' One group objected to the lack of specificity in terms provided in this section, such as ''emergency,'' ''emergency actions,'' ''immediate impact,'' and ''important resources,'' leaves uncertainty as to how this provision may be implemented by the Department.

Response: There is no special meaning intended for the term ''emergency'' beyond its common usage as ''an unforeseen combination of circumstances or the resulting state that calls for immediate action'' (*Webster's Third New International Dictionary Of The English Language* 1961 and *Merriam-Webster's Collegiate Dictionary* (11th ed. 2004)); ''a sudden, urgent, usually unexpected occurrence or occasion requiring immediate action'' (*Random House Dictionary Of The English Language* (2ed. 1987)); ''a state of things unexpectedly arising, and urgently demanding immediate action'' (*The Oxford English Dictionary 2ed. 1991*) and ''[a] situation that demands unusual or immediate action and that may allow people to circumvent usual procedures * * *'' (*Black's Law Dictionary 260, 562* (8th ed. 2004)). The proposed regulation, as revised in this final rule, recognizes that responsible officials can take immediate actions to control the immediate impacts of an emergency to mitigate harm to life, property, or important natural or cultural resources.

The final rule, at section 46.150, replaces ''other important resources'' with ''important natural, cultural, or historic resources'' to more clearly identify the type of resources impacted by the emergency. The Department has not defined an emergency because it is impossible to list all circumstances that constitute an emergency; it is up to the RO to decide what constitutes an emergency.

Only such actions required to address the ''immediate impacts of the emergency that are urgently required to mitigate harm to life, property, or important natural, cultural, or historic resources'' may be taken without regard to the procedural requirements of NEPA or the CEQ regulations. Thus, there are no NEPA documentation requirements for these types of situations and the final rule requires NEPA to apply to any and all subsequent proposed actions that address the underlying emergency (paragraphs 46.150 (c) and (d)). The provisions of section 46.150 codify the existing Department practice and CEQ guidance for emergency actions.

Comment: Another group suggested that the Department add a sentence that states ''the RO shall document in writing the action taken, any mitigation, and how the action meets the requirements of this paragraph.'' Several commenters stated that this section does not comply with Congress' mandate to comply with NEPA and CEQ regulations. Several groups believed the proposed rule would allow a bureau to implement any action at any time and avoid the NEPA planning process. Others stated that the ''important resources'' clause should be removed from this section. Several commenters were concerned that the Department is implementing emergency response in order to preclude analysis of fire suppression activities.

Response: The Department agrees that the RO should document the determination of an emergency and have modified the final rule to require this. The Department will continue to act to protect lives, property, and important natural, cultural, or historic resources through means including the use of fire suppression. The Department notes that fire suppression alternatives are addressed in plans that are subject to NEPA analysis.

Section 46.155 Consultation, coordination, and cooperation with other agencies. This section describes the use of procedures to consult, coordinate, and cooperate with relevant State, local, and tribal governments, other bureaus, and Federal agencies concerning the environmental effects of Department plans, programs, and activities. The Department deleted the reference to organizations since this section will deal only with Federal, State, and tribal governmental entities. Material related to consensus-based management has been moved to section 46.110 in order to consolidate all provisions related to consensus-based management. Paragraph 46.155(b), directing bureaus to develop procedures to implement this section, has been deleted as not appropriate for regulatory treatment.

Comment: Many commenters supported this section and stated collaboration would benefit all interested parties.

Response: The Department appreciates the comments.

Comment: Some individuals pointed out that consensus is often unachievable and unnecessary. One group stated that the Department should put federal project reviews into a consensus building process to ensure that opinions and experience are captured in the NEPA process.

Response: Please see our response above to comments on section 46.110.

Comment: Many groups suggested the Department require bureaus to work with cooperating agencies, such as the U.S. Fish and Wildlife Service. One commenter indicated that the Department should ensure that enhanced involvement does not add unnecessary cost or burden to project proponents. They also stated that ''memorializing cooperative conservation in regulations, rather than policy guidance, will result in unnecessary burdens and litigation.''

Response: The Department requires that the RO of the lead bureau consider any request by an eligible government entity to participate in a particular EIS as a cooperating agency. The Department recognizes that an emphasis on the use of cooperating agencies may result in additional steps in the NEPA process, but is likely to lead to improved cooperative conservation and enhanced decision making. Executive Order 13352 on Facilitation of Cooperative Conservation requires all federal agencies to implement cooperative conservation in their programs and activities. Cooperative conservation is consistent with the CEQ requirement that agencies should

encourage and facilitate public involvement in the NEPA process. See 40 CFR 1500.2(d), 1506.6.

Comment: Several tribes expressed concern that the proposed rule will negate the government-to-government consultation with tribes. The tribes believed that the Department should include a provision to ensure Indian tribes are given the opportunity to fully participate in the NEPA process and address concerns that are unique to each action.

Response: See our response above with respect to government-to-government consultation under section 46.110.

Section 46.160 Limitations on actions during the NEPA analysis process. This section incorporates guidance to aid in fulfilling the requirements of 40 CFR 1506.1.

Comment: Several individuals agreed with the proposed rule and believe there is legal authority to support this section. One individual suggested that the Department should address actions that can be taken while a ''project'' is underway, specifically ''actions taken by a private project applicant that are outside the jurisdiction of the bureau are not an irreversible or irretrievable commitment of agency resources.'' They suggested the Department add a provision to this section to clarify the Department's commitment to projects. Although the direction is clear in the provision, one group stated bureau field offices are not adhering to this policy and that an additional provision should be added to this section regarding the use of existing NEPA documents for major federal actions. Another group wanted the Department to add an additional sentence clarifying that a particular action must be justified independently of the program and will not prejudice the ultimate decision of the proposed program.

Response: The Department appreciates the support expressed for this provision. The Department believes that this provision is clear and consistent with 40 CFR 1506.1 and does not believe any additional statement to this effect need be added to the final rule. The requested addition is not required because the provision here at section 46.160 only addresses situations where the major Federal action is within the scope of and analyzed in an existing NEPA document supporting the current plan or program. With respect to current practice within the Department, as explained in the preamble to the proposed rule, see 73 FR 126 (Jan. 2, 2008), the Department believes that one of the benefits of establishing this final rule is greater transparency in the NEPA process. Such transparency is likely to improve consistency of implementation across the Department, as well.

Section 46.165 Ensuring public involvement. This section has been removed from the final rule. CEQ regulations include requirements for public involvement in the preparation of an EIS. Section 46.305 of this final rule addresses public involvement in the EA process. The requirement in paragraph 46.305(a), that the bureau must, to the extent practicable, provide for public notification and public involvement when an EA is being prepared, includes an element of timeliness. The RO has the discretion to choose method(s) of public notification and public involvement that ensure that, if practicable, the public receives timely information on the proposed action.

Comment: One commenter stated that this provision does not provide clarity in the role of public participation. They suggested the Department add additional language to explain the timing, processes and opportunities this provision will provide.

Response: CEQ regulations implementing NEPA direct agencies to encourage and facilitate public involvement in the NEPA process ''to the fullest extent possible.'' 40 CFR 1500.2(d); see also 40 CFR 1506.6. Bureaus conduct a wide variety of actions under various conditions and circumstances. Therefore, the Department has determined that the best approach is for individual bureaus to provide direction as to how ROs should exercise their discretion in ensuring that this involvement takes place in a manner practicable in the particular circumstances of each proposed action, but that it is not appropriate to provide specifics as to how this should occur in this final rule. The Department has provided some information regarding public involvement in ESM 03–4 and may address this topic in future ESMs.

Section 46.170 Environmental effects abroad of major Federal actions. This section describes procedures the bureaus must follow in implementing EO 12114, which ''represents the United States government's exclusive and complete determination of the procedural and other actions to be taken by Federal agencies to further the purpose of the National Environmental Policy Act, with respect to the environment outside the United States, its territories and possessions.''

No comments were received on this provision.

Subpart C: Initiating the NEPA Process

In the conversion from 516 DM 2 to 43 CFR Part 46, Subpart C, we have restructured the Department's requirements for initiating the NEPA process. We have put into regulations the essential parts of the NEPA process that are unique to the Department and which require further clarification of the CEQ regulations. This rule clarifies the requirements for applying NEPA early, using categorical exclusions (CEs), designating lead agencies, determining eligible cooperating agencies, implementing the Department's scoping process, and adhering to time limits for the NEPA process.

Section 46.200 Applying NEPA early. This section emphasizes early consultation and coordination with Federal, State, local, and tribal entities and with those persons or organizations who may be interested or affected whenever practical and feasible. A new paragraph 46.200(e) has been added to clarify that bureaus must inform applicants as soon as practicable of any responsibility they will bear for funding environmental analyses associated with their proposals. Any cost estimates provided to applicants are not binding upon the bureau. This provision had already been included with respect to the preparation of EISs, but should also have been included with respect to EAs. Therefore, the provision has been moved from 46.400 (EISs) to 46.200.

Comment: Some commenters supported this section of the proposed rule as it is currently written.

Response: The Department appreciates the comments.

Comment: Some commenters stated that the proposed rule is not clear with respect to how community-based training will be conducted and what the content of the training will include. These commenters suggested the proposed rule should provide a detailed discussion of the purpose of such training, as well as when it is warranted.

Response: The Department has determined that this topic is most appropriately addressed in the environmental statement memoranda. Community-based training, including the content of the training, is included in ESM03–7 and, if appropriate, will be expanded in future ESMs or bureau-specific explanatory and informational directives. No change to the proposed rule has been made.

Comment: Some commenters also recommended that the proposed rule should clarify that it does not expand the amount of information required for applications under the relevant substantive statute.

Response: The final rule does not expand the amount of information required beyond what is required by NEPA and CEQ regulations, which may be more than the information required for applications under the relevant substantive statute. This provision simply provides that the bureaus be forthcoming with descriptions of information that the applicant may need.

Comment: A few commenters stated that public involvement should be limited to submitting comments on the scoping notice, attending public meetings, and submitting comments on the final version of draft NEPA documents. Various commenters suggest that the proposed rule require early consultation with applicants. Others proposed additional changes to the proposed rule to further facilitate early coordination between the Department and applicants. These commenters recommended that the proposed rule distinguish between public involvement in the EA process and the EIS process.

Response: As noted above, CEQ regulations implementing NEPA direct agencies to encourage and facilitate public involvement in the NEPA process ''to the fullest extent possible.'' 40 CFR 1500.2(d); see also 40 CFR 1506.6. The Department is encouraging enhanced public involvement and broad-based environmental coordination early in the NEPA process. The purpose is to facilitate better outcomes by encouraging dialogue among the affected parties. Public involvement is encouraged during the EA and EIS process. CEQ regulations prescribe the manner in which the minimum level of public involvement must be carried out under the EIS process; the manner of conducting public involvement in the EA process is left to the discretion of RO.

Section 46.205 Actions categorically excluded from further NEPA review. This section provides Department-specific guidance on the use of categorical exclusions.

Comment: Many commenters supported this section of the proposed rule as it is currently written. These commenters supported the position that NEPA does not ''apply to statutorily created categorical exclusions,'' such as those created by Congress in 2005.

Response: The Department concurs that legislation governs the application of statutory categorical exclusions. For example, the Energy Policy Act of 2005 (EPAct) establishes how NEPA applies with respect to these categorical exclusions.

Comment: Several groups suggested that the Department ''ensure that its bureaus involve the public in the development and application of CEs and clearly state that extraordinary circumstances need to be provided for unless Congress specifically exempts an agency from doing so.'' These groups maintained that CE disagreements could be reduced through greater transparency in their application. Some of these comments recommended the deletion of paragraph 46.205(d) from the proposed rule. Overall, commenters generally believed it is important to articulate the extraordinary circumstance under which a CE will not apply.

Response: As noted above, CEQ regulations include specific requirements for the establishment of procedures, including CEs, for implementing NEPA. When established as part of the DM, the categories listed in the final rule and the extraordinary circumstances language were approved by CEQ and subject to public review and comment, in accordance with 40 CFR 1507.3, by publication in the **Federal Register**, March 8, 2004 (69 FR 10866). The final CEs, as originally published in the DM, and as presented in this final rule, were developed based on a consideration of those comments. The Department has provided for extraordinary circumstances in the application of its CEs. Each bureau has a process whereby proposed actions are evaluated for whether particular CEs are applicable including whether extraordinary circumstances exist. As noted above, part of the Department's intent in publishing its NEPA procedures as regulations is to increase transparency in their implementation.

By moving its NEPA procedures, including CEs and the listing of extraordinary circumstances from the DM to regulations, the Department does not intend to alter the substance of these CEs or extraordinary circumstances. In paragraph 46.205(d) the Department is merely acknowledging the fact that Congress may establish CEs by legislation, in which case the terms of the legislation determine how to apply those CEs.

Section 46.210 Listing of Departmental Categorical Exclusions. This section includes a listing of the Department's CEs (currently 516 DM Chapter 2, Appendix B–1). The CEs are in paragraphs (a) through (l). These CEs were all published for public comment prior to inclusion in the DM. This section includes the same number of CEs as were in the DM and the wording in the CEs is unchanged, with five exceptions. Four of those changes are made between the rule as proposed and final because of minor editorial changes from how the categorical exclusions appeared in the DM.

First, § 46.210(b) has been revised from ''Internal organizational changes and facility and office reductions and closings'' as it appeared in the DM to ''Internal organizational changes and facility and bureau reductions and closings'' to conform to the definition of ''bureau'' in the final rule, at § 46.30, which includes ''office.'' The DM had not provided a definition of ''bureau'' and so used both ''bureau'' and ''office.'' Second, the word ''development'' was inadvertently added, so that the parenthetical in the proposed rule at § 46.210(c) read ''(*e.g.*, in accordance with applicable procedures and Executive Orders for sustainable development or green procurement).'' This change has been deleted from this final rule.

Third, the numbering system has been changed in the CE § 46.210(k) from the DM, originally published as final on June 5, 2003 (68 FR 33814), in order to more clearly set out the requirements for use of the CE for hazardous fuels reduction activities. The meaning of the CE has not changed. And fourth, in paragraphs 46.210(k) and (l), the citations to the ESM series, which appeared in parentheticals in the DM, but as footnotes in the Notice published on March 8, 2004 (69 FR 10866), have been placed in the text itself for ease of reference.

Finally, paragraph 46.210(i), which replaces 516 DM Chapter 2, Appendix B–1, Number 1.10, has been changed to correct an error during the finalization of the revision to these DM chapters in 2004. Prior to 1984, and up until 2004, this CE, as established and employed by the Department, covered ''Policies, directives, regulations, and guidelines that are of an administrative, financial, legal, technical, or procedural nature; or the environmental effects of which are too broad, speculative, or conjectural to lend themselves to meaningful analysis and will later be subject to the NEPA process, either collectively or case-by-case.'' 49 FR 21437 (May 21, 1984); 516 DM 2, Appendix 1 (June 30, 2003) (Archived versions of 516 DM chapters, including the 1984, 2003, and 2004 versions of 516 DM 2, may be accessed at *http://elips.doi.gov/app_dm/index.cfm?fuseaction=ShowArchive*). No problems with the use of the CE were brought to the attention of the Department during this period. It is the version of the CE that was in place prior to 2004 that was proposed in the Department's January 2, 2008 Notice of Proposed Rulemaking (73 FR 126, 130), and is announced as final in the rule published today.

From 2004, however, a slightly different version of the CE appeared in the DM chapters. In 2000, the Department proposed revisions to 516 DM, including 516 DM 2. 65 FR 52212, 52215 (Aug. 28, 2000). No change was proposed to this CE at that time, and no comments were received regarding this CE. No further action was taken on the 2000 proposal until 2003, when the Department again published the proposed revision to the 516 DM chapters at issue; however, as proposed this revision included an erroneous change to this CE. 68 FR 52595 (Sept. 4, 2003). No comments were received regarding this CE in response to the 2003 Notice. As a result, although no change had been intended, the following version was published as final in 2004 (69 FR 10866, 10877–78 (Mar. 8, 2004)), and incorporated into 516 DM 2, Appendix 1.10: ''Policies, directives, regulations, and guidelines that are of an administrative, financial, legal, technical, or procedural nature and whose environmental effects are too broad, speculative, or conjectural to lend themselves to meaningful analysis and will later be subject to the NEPA process, either collectively or case-by-case.''

As noted in the preamble to the proposed rule, published January 2, 2008 (73 FR 126, 130), the Department is correcting an unintended drafting error in the 2004 Rule. The text which previously described two categories of policies, directives, regulations and guidelines (''* * * that are of an administrative, financial, legal, technical, or procedural nature; or the environmental effects of which are too broad, speculative, or conjectural to lend themselves to meaningful analysis and will later be subject to the NEPA process * * *''), was replaced with a more restrictive category of policies, directives, regulations and guidelines (''* * * that are of an administrative, financial, legal, technical, or procedural nature and whose environmental effects are too broad, speculative, or conjectural to lend themselves to meaningful analysis and will later be subject to the NEPA process * * *''). During the Departmental review beginning in 2006, in preparation for this rulemaking, the Department discovered the drafting error that infected both the 2003 proposal and the 2004 final revision to the DM. This error has made it difficult to use the CE as originally intended, and has engendered confusion in the Department. It is now clear that the erroneous version that became final in 2004, though inadvertent, had resulted in a substantive difference in meaning. For example, the use of the word ''and'' made it difficult to apply the CE to an agency action, such as a procedural rule, that has no individual or cumulative significant environmental effects. With the correction effectuated by this 2008 rulemaking (no comments were received with respect to this proposed correction), this CE has now been replaced with its original version. As such, actions such as procedural rules with no individual or cumulative significant environmental effects are covered by the categorical exclusion, as well as circumstances where the action will later be subject to NEPA compliance.

Comment: One commenter stated that the bureau-specific CEs should be included in the proposed rule. Comments also suggest the addition of a new category in the proposed rule which allows the bureaus the discretion to establish other Departmental CEs which are consistent with 43 CFR 46.205. One group suggests revising the proposed rule to cross-reference bureau-specific CEs. This group maintained that this cross-reference will provide better information for the public, as well as promote greater transparency in the NEPA process.

Response: Bureau specific CEs are listed separately in the 516 DM Chapters 8–15 to reflect bureau specific mission and activities. Those DM Chapters remain in effect. Bureaus have specific resource management and environmental conservation responsibilities and their CEs are tailored to these unique missions and mandates. The Departmental CEs are general and are applicable throughout the Department and across all bureaus. Bureaus have the discretion to propose additional CEs that apply in a bureau specific context and which are included in the bureau specific chapters of the DM. If appropriate, bureaus can also propose to the Department additional CEs to augment those already in this rule for future consideration. Such additional proposed CEs would have to be consistent with the broad nature of the already existing Departmental CEs. Cross referencing is unnecessary because bureau specific CEs are unique to that particular bureau and do not apply to other bureaus.

Comment: Several groups cited 40 CFR 1508.27(b), and stated that the Department ''must also perform a cumulative effects analysis prior to promulgation of the CE.'' These groups stated that impacts analysis at the project level does not relieve the Department from the obligation to ensure that the CE has no cumulative impacts. These groups were concerned that the proposed rule on CEs does not comply with NEPA requirements and would violate recent court rulings.

Response: The requirements for establishing agency procedures for implementing NEPA—such as the procedures set forth in this rule, and including CEs—are set forth in CEQ's regulations at 40 CFR 1505.1 and 1507.3. These provisions require agencies to consult with CEQ while developing procedures and to publish the procedures in the **Federal Register** for public comment prior to adoption. The CEQ regulations do not direct agencies to prepare a NEPA analysis or document before establishing agency NEPA procedures. This means that agencies are not required to prepare a NEPA analysis to establish their NEPA procedures; however, agencies must have a basis for determining that actions covered by proposed CEs do not have individual or cumulative impacts.

Agency NEPA procedures assist agencies in fulfilling agency responsibilities under NEPA and are not, themselves, actions or programs that may have effects on the human environment. Moreover, agency NEPA procedures do not dictate what level of NEPA analysis is required for a particular proposed action or program. Thus, such procedures are not federal actions subject to the requirements of NEPA. The determination that establishing agency NEPA procedures does not itself require NEPA analysis and documentation has been upheld in *Heartwood, Inc.* v. *U.S. Forest Service,* 73 F. Supp. 2d 962, 972–73 (S.D. Ill. 1999), *aff'd* 230 F.3d 947, 954–55 (7th Cir. 2000).

By including the Department's CEs in this rule, the Department is merely moving established categories and language addressing extraordinary circumstances from their current location in the DM to the new 43 CFR Part 46. When established as part of the DM, these categories and extraordinary circumstances language were approved by CEQ and subject to public review and comment, in accordance with 40 CFR 1507.3. The substantiation for those actions included the bases for determining that the actions covered by the CE do not ''individually or cumulatively have a significant effect on the human environment.''(40 CFR 1508.4). This final rule does not add any new categories or—apart from one clarifying addition (explained below)—alter existing language regarding extraordinary circumstances. Therefore, the Department does not believe that this final rule fails to comply with NEPA or the CEQ regulations and believes that the existing procedural

framework established by the statute, CEQ regulations, and existing Department procedures is maintained.

In *Sierra Club* v. *Bosworth,* 2007 U.S. App. LEXIS 28013 (9th Cir., Dec. 5, 2007), the case cited by commenters, the Ninth Circuit determined, in part, that the U.S. Forest Service's establishment of a CE constituted establishment of a program for which a cumulative effects analysis was required. Because this litigation involves a CE that is analogous to a CE used by the Department, the Department has determined that the category in question will remain in the final rule, with the understanding and written direction that it will not be used by the individual bureaus in areas within the jurisdiction of the Ninth Circuit. If, at a later date, the Department determines changes must be made to sections 210 and 215 of part 46, those changes will similarly undergo CEQ review as well as public review and comment. Further, in such event, the Department will comply with all applicable requirements for rulemaking.

Comment: Some groups also suggested that this section of the proposed rule is ''extremely vague and broad.'' These commenters recommended removal of, or expanded limits on, the portions of the CE that authorize mechanical treatment to reduce fuels, as well as those portions which authorize post-fire rehabilitation. Commenters maintain that the allowance of these authorizations would be ''environmentally disastrous.'' Furthermore, these groups recommended implementation of strict measures to ensure that ''temporary roads'' remain temporary.

Response: As explained above, by including the Department's CEs in this rule, the Department is merely moving established categories and language addressing extraordinary circumstances from their current location in the DM to the new 43 CFR Part 46. When established as part of the DM, these categories and extraordinary circumstances language were approved by CEQ and subject to public review and comment, in accordance with 40 CFR 1507.3 (for example, see 68 **Federal Register** 33813 published on June 5, 2003). This final rule does not add any new categories or alter existing language regarding extraordinary circumstances, with the exceptions noted above with respect to the language of the CEs, including the correction of the typographical error in paragraph 46.210(i) and the clarification in section 46.215 noted below.

Comment: Some commenters suggested modification of the proposed rule in such a way that the collection of small samples for mineral assessments be included within educational CEs. Other commenters recommended the proposed rule be modified to incorporate CEs for the Fish and Wildlife Service. Another commenter recommended that the Department adopt its own CE relating to the installation, maintenance, or restoration of artificial water developments used in the conservation of wildlife. In addition, this commenter suggests clearly defining small water control structures in the proposed rule.

Response: See responses above.

Section 46.215 Categorical Exclusions: Extraordinary circumstances. This section contains a listing of the Department's CEs: Extraordinary Circumstances (currently 516 DM Chapter 2, Appendix B–2). This section includes the same number of CEs: Extraordinary Circumstances as were in the DM, and the wording in the CEs: Extraordinary Circumstances is essentially unchanged. Similar to the listing of CEs, each of the Extraordinary Circumstances was published for public comment prior to inclusion in the DM. The CEs: Extraordinary Circumstances are in paragraphs (a) through (l). In the proposed rule, and in this final rule, the only change from the way the Extraordinary Circumstances appeared in the DM is the addition of the following sentence to section 46.215: ''Applicability of extraordinary circumstances to categorical exclusions is determined by the Responsible Official.'' This is not a substantive change to the extraordinary circumstances themselves, but reflects the authority and the responsibility of the RO. Similarly, the phrase ''as determined by the bureau'' (which appears in the DM) was inadvertently left out of the proposed rule at paragraph 46.215(g); the final rule therefore reads: ''Have significant impacts on properties listed, or eligible for listing, on the National Register of Historic Places as determined by the bureau.'' While the DM provision (*see* 69 FR 19866, Mar. 8, 2004) that is being replaced by this rule read ''as determined by either the bureau or office,'' only ''bureau'' is used here, to be consistent with the definition of ''bureau'' in the final rule, at section 46.30.

Comment: Another commenter believed that the Executive Order on Facilitation of Hunting Heritage and Wildlife Conservation should form the basis of extraordinary circumstances and should be added to the proposed rule.

Response: As noted above, no new CEs or extraordinary circumstances are being added at this time. That being said, the Department is aware of the referenced Executive Order and will incorporate in Departmental directives, as appropriate, any plan developed under the Executive Order for the management of resources under the Department's jurisdiction.

Comment: Some commenters stated that lands found to have ''wilderness characteristics,'' such as citizen proposed wilderness areas, do not constitute extraordinary circumstances. Many commenters suggested that the Department revise this section of the proposed rule to clarify that the term ''highly controversial environmental effects'' does not include instances where there is merely a public controversy.

Response: The Departmental list of extraordinary circumstances specifies wilderness areas or wilderness study areas but not wilderness characteristics or citizen proposed wilderness areas. As noted above, no new extraordinary circumstances are being added as part of this initiative. That being said, just as with any other resource value, there may be circumstances where the issue of effects on areas with wilderness characteristics may be captured under the existing extraordinary circumstances.

Comment: One commenter requested, ''where an Interior agency proposes to categorically exclude a decision from review under NEPA, that the agency include the proposed decision on NEPA registers available on the agency's Web site.'' This commenter also requested eliminating the adoption of regulations and policies from the list of Departmental CEs, as found in paragraph (i).

Response: The Department declines to adopt the commenter's recommendation regarding making the proposed decisions supported by CEs available on bureau *Web site*(s). From a practical standpoint, many thousands of proposed actions annually are categorically excluded. To list each use of a CE on a NEPA register or bureaus' Web sites would prove overly burdensome. The Department declines to adopt the commenter's recommendation regarding eliminating the adoption of regulations and policies from the list of Departmental CEs, as found in paragraph (i). As explained above, the Department is not changing the language of the CEs or the extraordinary circumstances in the final rule, but is merely moving them from the DM to regulations.

Comment: Some groups stated that the proposed rule severely narrows the definition of extraordinary

circumstances. These groups also believed the proposed rule allows the Department to illegally manipulate NEPA's threshold question.

Response: This final rule simply moves established categories and language on extraordinary circumstances from the Department's NEPA procedures previously located in 516 DM 2, Appendix 1 and 2; no change was proposed or is made to the extraordinary circumstances themselves in the final rule. As noted above, these categories and requirements were established following public review and comment, in consultation with CEQ and with CEQ's concurrence, pursuant to 40 CFR 1507.3. The final rule does not add any new categories, nor does it substantively alter existing requirements regarding review for extraordinary circumstances. The Department notes that contrary to the commenter's assertion that the threshold question with respect to the extraordinary circumstances review is altered, the prefatory statement to the list of extraordinary circumstances was, and remains ''Extraordinary circumstances (see § 46.205(c)) exist for individual actions within CXs that *may* meet any of the criteria listed in paragraphs (a) through (l) of this section.'' (Emphasis added.)

Section 46.220 How to designate lead agencies. This section provides specific detail regarding the selection of lead agencies.

Comment: Some commenters stated that the proposed rule needs to address how a lead agency will be designated when more than one federal agency is involved. These commenters recommended that the Department consider requiring the consent of an agency before it can be named the lead agency. In addition, commenters suggested that the Department may want to recognize in the proposed rule that the RO would need to comply with any applicable statutory or regulatory requirements in the designation of the lead agency.

Response: CEQ regulations at 40 CFR 1501.5 establish guidelines on the designation of a lead agency, including resolution of the question of designation, in the event of dispute. The RO complies with this rule in the designation of a lead agency.

Section 46.225 How to select cooperating agencies. This section establishes procedures for selecting cooperating agencies and determining the roles of non-Federal agencies, such as tribal governments, and the further identification of eligible governmental entities for cooperating agency relationships. Criteria for identifying, and procedures for defining, the roles of cooperating agencies and the specific requirements to be carried out by cooperators in the NEPA process are set forth in this section.

Comment: Several commenters supported consensus-based management for resolving competing government interests.

Response: The Department appreciates the comments.

Comment: Some commenters suggested that lead NEPA agencies must collect the ''best available information,'' with the decision-making process based on this information. These commenters also proposed modification of the proposed rule to ''encourage'' the use of this section in preparing an EA.

Response: The Department collects the high quality information, and that information supports the NEPA analysis which contributes to the decision-making process. This is consistent with CEQ requirements. The Department declines to make the recommended change to paragraph 46.225(e); ROs are given the latitude to exercise discretion in this regard.

Comment: Many commenters supported the use of memoranda of understanding (MOU) and recommended revision of the proposed rule to include clarification on cooperating agency status and limitations, as well as a schedule for the environmental document.

Response: Paragraph 46.225(d) provides for the use of memoranda of understanding (MOU) between the lead and cooperating agencies. The MOU provides a framework for cooperating agencies to agree to their respective roles, responsibilities and limitations, including, as appropriate, target schedules. The requirement with respect to memoranda of understanding in paragraph 46.225(e) may apply to EAs also.

Section 46.230 Role of cooperating agencies in the NEPA process. This section provides specific detail regarding the responsibilities of cooperating agencies.

No comments were received for this section.

Section 46.235 NEPA scoping process. This section discusses the use of NEPA's scoping requirements to engage the public in collaboration and consultation for the purpose of identifying concerns, potential impacts, relevant effects of past actions, possible alternatives, and interdisciplinary considerations. The regulatory language encourages the use of communication methods (such as using the Internet for the publications of status of NEPA documents on bulletin boards) for a more efficient and proactive approach to scoping.

Comment: Some organizations stated that the Department has offered no explanation for the lack of required scoping when preparing an EA or applying a CE, as compared with scoping for an EIS. These organizations maintained that this lack of scoping contradicts the proposed guidance found in paragraph 46.200(b). These commenters stated that federal agencies are required to ensure proper public involvement when implementing NEPA and suggested public scoping assists in making an informed decision.

Response: Although scoping is not required for the preparation of an EA (CEQ regulations at 40 CFR 1501.7 specifically reference the preparation of an EIS), the Department encourages the use of scoping where appropriate as it does represent a form of public involvement, which is a requirement of EAs. The Department has added language to clarify the relationship between this section and section 46.305. In addition, in contrast to the rule as proposed, the Department has also clarified that while public notification and public involvement are required to the extent practicable in the preparation of an EA, the RO has the discretion to determine the manner of this public notification and public involvement. See paragraph 46.305(a). Scoping is not a step necessary to document a CE. The Department recognizes and acknowledges the importance of scoping as a form of public involvement and participation in the NEPA process, wherever it is appropriate, in that it can serve the purpose of informed decision making.

Comment: One commenter recommended clarification of ''interdisciplinary considerations'' in the proposed rule.

Response: This rule ensures that the use of the natural, social, and the environmental sciences as required under section 102(2)(A) of NEPA. As recommended by the commenter, we have clarified this provision by replacing the phrase ''interdisciplinary considerations'' in paragraph 46.235(a) with the phrase ''interdisciplinary approach'' as provided in 40 CFR 1502.6.

Section 46.240 Establishing time limits for the NEPA process. The section requires bureaus to establish time limits to make the NEPA process more efficient.

Comment: One commenter pointed out that the proposed rule does not explain why time limits should be established. This commenter recommended the addition of specific

guidance and direction to the proposed rule so bureau staff can process NEPA documents with minimal delay.

Response: CEQ regulations at 40 CFR 1501.8 encourage federal agencies to set time limits appropriate to individual actions. This rule requires individual bureaus to establish time limits, as appropriate, to expedite the NEPA process and to ensure efficiency, especially when project completion may be time sensitive or when statutory or regulatory timeframes may be applicable. The Department believes individual bureaus are best situated to establish time frames on a case-by-case basis, and does not deem it necessary to implement specific additional guidance to ensure that delays are not encountered in the NEPA process.

Comment: Another commenter stated that the proposed rule appears to be focused solely on internal administrative factors and fails to acknowledge that complex projects and potential impacts could seriously affect timelines. Commenters also suggested that the availability of the public to participate in the process needs to be considered and accounted for when setting time limits. Multiple commenters supported establishing time limits for the NEPA process on a case-by-case basis, as long as the time limits do not impose a schedule that cannot facilitate the project proponent's goals and objectives for the proposed action.

Response: The Department does not have a prescribed time limit for each proposed step in the NEPA process. In each case, time limits are set based on a consideration of factors such as funding, staff availability, public needs, and the complexity of the proposed action. The Department realizes that the proponent's goals and objectives are a consideration in scheduling the time considerations, as well as the factors mentioned above.

Comment: Several commenters requested an addition to the proposed rule ''that cooperating agencies represent that they have sufficient qualified staff and necessary resources to participate as a cooperating agency on the project and meet project deadlines.'' Several commenters also recommended several additions to the proposed rule to strengthen time limit requirements.

Response: The MOU as required under paragraph 46.225(d) is a mechanism for establishing that such cooperating agencies represent that they have sufficient qualified staff to participate on the project and meet project deadlines. The Department does not believe any change to the final rule is necessary.

Subpart D: Environmental Assessments

In the conversion from 516 DM Chapter 3 to 43 Part 46 Subpart D, we have written this rule to incorporate procedural changes, expand upon existing procedures, give greater discretion and responsibilities to bureaus, and provide clarity in the EA process.

Section 46.300 Purpose of an EA and when it must be prepared. This section clarifies that the action being analyzed is a ''proposed'' action. It expands upon the purpose and clarifies when to prepare an EA.

Comment: One group recommended that the Department add a provision to assure that all decisions made by the RO after preparing an EA or an EA and FONSI are in writing and include the Official's reasoning behind that decision.

Response: This rule addresses the Department's NEPA procedures and not the Department's decision-making authorities. The Department has decided that documentation requirements for decisions on proposed actions made on the basis of preparation of EAs and FONSIs are outside the scope of this rule. That is, bureau decision making itself is governed by Department and bureau-specific authorities. Section 46.325 describes the culmination of the EA process rather than documentation of a final decision on the proposed action and has been edited to ensure this point is clearly made.

Comment: Another group stated that wording in paragraph (a), in the context of the Bureau of Indian Affairs, may be misleading since many EAs are prepared by a tribal government agency. These commenters suggested that paragraph (a) be revised as follows: ''A bureau must ensure that an EA is prepared for all proposed Federal actions * * *''

Response: The Department concurs and has revised the language at paragraph 46.300(a) to reflect the suggested change.

Section 46.305 Public involvement in the EA process. This section incorporates procedural changes and differentiates the requirements for public involvement in the EA and EIS processes. This section has been revised from the proposed to require bureaus, to the extent practicable, to provide for public notification and public involvement when an environmental assessment is being prepared. This represents a change from the rule as proposed, which had included a requirement that ''The bureau must provide for public notification when an EA is being prepared.'' The Department has made this change in order to be more consistent with CEQ regulations, which do not require bureaus to provide such notice in each and every instance, but only require that Federal agencies ''shall to the fullest extent possible encourage and facilitate public involvement in decisions which affect the quality of the human environment.'' 40 CFR 1500.2(d). With respect to EAs, CEQ regulations require that agencies provide notice of the availability of such environmental documents, but are otherwise quite general in approach to public involvement in EAs. *See* 40 CFR 1501.4(b) and 1506.6. As the Department's bureaus prepare thousands of EAs each year—many times for routine matters for which there are not categorical exclusions, but for which there is no interest on the part of the public—a categorical public notification requirement would prove a fairly substantial burden. Therefore, discretion is left to the RO in each case to determine how best to involve the public in a decision that affects the quality of the human environment.

This section has also been expanded to give bureaus the discretion to provide cooperating agency status for EAs. It specifies that the publication of a draft EA for public comment is one method available for public involvement, but it is not required.

Comment: Some commenters supported this section of the proposed rule as it is currently written. These commenters believed that the proposed rule is consistent with CEQ regulations, which only require public involvement in EAs to the extent practicable.

Response: The Department appreciates the comments and has clarified that because notification is a means of public involvement, it too is subject to the qualifier ''practicable'' and has revised the final rule as described above.

Comment: This section of the proposed rule directs bureaus to consider comments that are ''timely'' received. One commenter maintained that the proposed rule did not adequately define ''timely.'' This commenter also recommended stating in the rule ''that if no comments are received during this 30-day comment period, the decision is made using the content of the draft document.''

Response: Publication of a ''draft'' EA is not required. The RO has the discretion whether to invite comments on an EA. If an RO requests comments, there will be a stated time limit to the comment period. Comments not received within this stated time limit may be deemed untimely by the RO. It

is left to the discretion of the RO to take action when comments have been received after the end of the comment period.

Comment: Several commenters also supported the proposed provision which would allow cooperating agencies to participate in the development of EAs. They recommended rewording of the proposed rule to ''encourage'' cooperating agency participation, not merely ''permit'' this participation.

Response: The rule has used ''may allow'' rather than the term ''encourage,'' because cooperating agency involvement in an EA is a matter of discretion for the RO; no change is made to the final rule.

Comment: Many commenters supported publication of draft EAs and recommended modification of the proposed rule to support publication of draft EAs. These commenters believed that this section of the proposed rule is in violation of CEQ direction and that public review of environmental documents has the potential to identify information about impacts or resource uses that would be otherwise unknown.

Response: The manner of public involvement, including the publication of a draft EA, is a matter of discretion for the RO; this provision is consistent with 40 CFR 1501.3.

Comment: Several commenters expressed disappointment that ''the language in the Department's NEPA proposed rule focuses on how not to provide public involvement opportunities in section 46.305.'' This group maintained that it is essential that the public effectively be involved in the NEPA process, that public participation is a fundamental component of NEPA, and that public involvement extends to all ''environmental documents,'' including EAs. These commenters urged the Department to include positive language in the proposed rule to involve the public in the preparation of an EA, including requiring publishing of draft EAs for public comment, and establishing clear and specific guidelines for public involvement in the EA process.

Response: The Department strongly encourages public involvement and participation in the NEPA process at all stages. However, consistent with CEQ regulations, the Department's final rule distinguishes between ''public involvement'' and ''public comment.'' With respect to EISs, CEQ's regulations specify that the public must have the opportunity to comment on a draft EIS. By contrast, the CEQ regulations do not specify that public involvement should take any particular form for EAs, as recognized by every court that has decided the issue. Therefore, the Department's final rule clarifies that the RO has the discretion to determine how public involvement in the preparation of an EA is to occur, depending on the particular circumstances surrounding the proposed action. Bureaus engage in a wide variety of routine actions, for which EAs are prepared (*e.g.*, approval of replacement of culverts, erection of fences, etc.). Therefore, it is neither necessary nor practical for public comment to be required for each of these EAs. Public involvement can take a variety of forms, ranging from notification on bureau or field office Web sites to the holding of public meetings. Some of the bureaus provide more specific direction on facilitating public involvement (see 516 DM Chapters 8–15 and bureau handbooks).

Comment: Another commenter recommends that the proposed rule should ensure that communities and tribes potentially impacted by the proposed action have adequate opportunities to participate in the development of an EA.

Response: See response above regarding the CEQ requirement respecting public involvement. The circumstances surrounding each proposed action may interest a variety of members of the public, including, but not limited to, communities and tribes potentially impacted by the proposed action. The RO has the discretion to implement public notification and public involvement measures appropriate to the proposed action, and affected communities. In addition, as noted above, and independent of its responsibilities under NEPA, the United States has a government-to-government relationship with federally-recognized tribes. In accordance with this responsibility, the Department specifically provides for consultation, coordination and cooperation within the framework of government-to-government consultation.

Section 46.310 Contents of an EA. This section establishes new language outlining what information must be included in an EA. It describes the requirements for alternatives, if any, and provides for incorporating adaptive management strategies in alternatives. Sections on tiered analysis, from 516 DM Chapter 3, are found in subpart B of this rule, since this information pertains to both EISs and EAs.

Comment: Several commenters supported this section of the proposed rule as it is currently drafted. These commenters maintained that CEQ regulations only require that an EA contain a brief discussion of the environmental impacts of the proposed action and alternatives.

Response: The Department appreciates the comments.

Comment: Other commenters stated that this section of the proposed rule should be removed because it conflicts with NEPA, CEQ regulations, and existing case law.

Response: The Department disagrees. This section fully complies with NEPA and CEQ regulations, as well as CEQ guidance. On September 8, 2005, the CEQ issued EA guidance to Federal agencies entitled ''Emergency Actions and NEPA'' that explained language at section 102(2)(E) of NEPA ''unresolved conflicts concerning alternative uses of available resources'' (42 U.S.C. 4332(2)(E)). The CEQ guidance states: ''When there is consensus about the proposed action based on input from interested parties, you can consider the proposed action and proceed without consideration of additional alternatives. Otherwise, you need to develop reasonable alternatives to meet project needs'' (Attachment 2 ''Preparing Focused, Concise and Timely Environmental Assessments'', *http://ceq.eh.doe.gov/nepa/regs/Preparing_Focused_Concise_and_Timely_EAs.pdf*).

Comment: Several commenters stated that the proposed rule calls for a superficial analysis of impacts, which creates the potential for inadequate research. These commenters were concerned that this superficial analysis will not provide an adequate analysis of impacts, will only serve to exacerbate conflict and will result in poor decision-making and possible litigation.

Response: The Department disagrees. CEQ regulations describe EAs as ''concise'' documents that ''briefly'' provide information sufficient to determine whether preparation of an EIS is required. CEQ has issued guidance consistent with this idea (see September 8, 2005 CEQ guidance referenced above). The Department does not believe that conciseness necessarily leads to a superficial analysis.

Comment: These commenters therefore suggested that ''consensus'' be changed to ''unanimity'' to assure that there is no confusion about the limited circumstances in which paragraph 46.310(b) applies.

Response: ''Unanimity'' is not required; therefore, the Department declines to make the suggested alteration to the final rule.

Comment: One commenter suggested that the cumulative effects of the proposed action and other previous actions should be included in the list of things that must be discussed in an EA.

Response: This rule does not attempt to alter the requirements of the CEQ regulations. Rather, paragraph 46.310(a)(3) of the Department's final rule requires that EAs include brief discussions of the environmental impacts of the proposed action. Environmental impacts include direct, indirect and cumulative impacts (40 CFR 1508.7 and 1508.8). A separate listing of the requirement to include discussion of any cumulative impacts is not necessary.

Section 46.315 How to format an EA. This section provides clarification on the EA format.

No comments were received on this provision.

Section 46.320 Adopting EAs prepared by another agency, entity, or person. In this section, the term ''and other program requirements'' has been added to the compliance stipulations. It also expands the requirements of the RO in adopting another agency's EA.

Comment: One commenter suggested that a new section be added to the proposed rule which includes the requirement that the RO ''consults with other agencies that have regulatory authority over the project'' when adopting an EA prepared by another agency. This commenter maintained this will help ensure that other affected agencies agree with the adoption. Another organization suggested that this section of the proposed rule should state that an Indian tribe may be the applicant.

Response: The determination to adopt another agency's EA is left solely to the discretion of the RO. However, the Department expects that the RO will consult with any other agency that has regulatory authority over the project that is the subject of a bureau's proposed action and environmental analysis. In fact, this final rule provides at section 46.155: ''The Responsible Official must whenever possible consult, coordinate, and cooperate with relevant State, local, and tribal governments and other bureaus and Federal agencies concerning the environmental effects of bureau plans, programs, and activities within the jurisdictions or related to the interests of these agencies.'' This provision applies to proposed actions supported by both EAs and EISs. As such no change has been made to section 46.320.

The Department recognizes generally that an Indian tribe may be an applicant, as well as a State or other unit of government; paragraph 46.300(a) has been modified to read: ''A bureau must ensure that an EA is prepared for all proposed Federal actions'' in order to reflect that it may be the applicant who is preparing the EA, especially when a tribe is the applicant. No other change in this respect has been made to the final rule.

Section 46.325 Conclusion of the EA process. Documentation requirements for decisions made on the basis of EAs and FONSIs are beyond the scope of this rule. After a bureau has completed an EA for a proposed action, the bureau will make a finding of no significant impact, or will determine that it is necessary to prepare an EIS, in which case, the bureau will publish a Notice of Intent in the **Federal Register** or will take no further action on the proposal.

Comment: Several commenters ''suggested that the requirement that a decision be documented also include a requirement that the document be made public.''

Response: Bureau decision documents are public documents. While some bureaus routinely publish these documents (for instance on bureau or field office Web sites), the Department is not including a requirement that all decision documents be published. Decision documents are available from bureaus upon request.

Subpart E: Environmental Impact Statements

This subpart takes the place of 516 DM Chapter 4, with following exceptions.

The language from 516 DM Chapter 4 that simply reiterates the CEQ regulations is not included in subpart E of this rule. Those DM sections are: statutory requirements, cover sheet, summary, purpose and need, appendix, methodology and scientific accuracy, proposals for legislation, and time periods.

Sections on tiering, incorporation of referenced documents into NEPA analysis, incomplete or unavailable information, adaptive management, and contractor prepared environmental documents, from 516 DM Chapter 4 are found in subpart B of this rule since that information pertains to EISs and EAs.

The phrase ''environmentally preferable alternative'' is found in the definitions, subpart A. This phrase expands on the definition that currently exists in 516 DM 4.10(A)(5).

This rule also incorporates procedural changes, clarifies the extent of discretion and responsibility that may be exercised by bureaus and provides clarity in the EIS process.

Section 46.400 Timing of EIS development. This section describes when an EIS must be prepared.

Comment: One commenter recommended revising the definition of ''environment'' within the proposed rule to avoid disputes.

Response: Neither the Department's proposed nor final rule includes a definition of ''environment.'' Neither NEPA nor the CEQ regulations define this term; however, the CEQ regulations do define ''human environment,'' and the definitions in the CEQ regulations apply (see sections 46.20 and 46.30). The Department does not believe that a definition is required.

Comment: One commenter stated that it is important to note that the RO should not have the authority to mandate whether an applicant must pay for environmental analyses. The commenter recommended that the applicant should be given the opportunity to voluntarily fund the NEPA analysis. Others recommended that any reference to who pays for the analysis be deleted from the proposed rule.

Response: The provision in the Department's final rule specifies only that the RO ''must inform applicants as soon as practicable of any responsibility they will bear for funding environmental analyses associated with their proposal.'' This provision refers specifically to the responsibility of the RO to inform the applicant of any such requirements in each instance. (As noted above in the introduction to section 46.200, this provision has been moved from section 46.400 to section 46.200 because it applies to EAs as well, and the application to EAs was inadvertently left out of the proposed rule.) The question of whether an RO may require an applicant to pay for NEPA analysis is outside the scope of this rule because programs and bureaus have different payment requirements, for example, under their cost recovery authority, if applicable.

Section 46.405 Remaining within page limits. This section encourages bureaus to keep EISs within the page limits described in the CEQ regulations using incorporation of referenced documents into NEPA analysis and tiering.

No comments were received on this provision.

Section 46.415 EIS Content, Alternatives, Circulation and Filing Requirements. This section provides direction for the development of alternatives, establishes language on the documentation of environmental effects with a focus on NEPA statutory requirements, and provides direction for circulating and filing the draft and final EIS or any supplement(s) thereto. The Department changed the title of this section and added a sentence to address

Federal Advisory Committee Act (FACA) implications.

Comment: Some commenters supported this portion of the proposed rule as it is written.

Response: The Department appreciates the comments.

Comment: One group stated that the term ''interested parties'' is too broadly defined, resulting in significant delays in agency decision-making. Consequently, standing would be given to parties that otherwise would lack standing to pursue future legal action.

Response: The Department agrees that the meaning of ''interested parties'' is potentially ambiguous and has revised this term to match the language used in the CEQ regulations. Please see the final rule at section 46.110, as well as the responses to comments on that section.

Comment: Some commenters believed that the cumulative effects of the proposed action and other previous actions must also be disclosed in an EIS. Consequently, these commenters recommended adding cumulative effects to the list of terms that must be disclosed in the contents of an EIS.

Response: Paragraph 46.415(a)(3) of the Department's final rule requires that an EIS disclose ''the environmental impact of the proposed action.'' Environmental impact includes direct, indirect and cumulative impacts (40 CFR 1508.7 and 1508.8). The Department does not believe that a separate listing of the requirement to include discussion of cumulative impacts is necessary.

Comment: Several commenters commented on paragraph (c), which provides ''the RO shall make those preliminary draft and final EISs available to those interested and affected persons and agencies for comment.'' The main concern discussed by commenters is that the word ''shall'' implies that the RO will be required to circulate preliminary drafts of EISs. These commenters recommended that the proposed rule should allow public circulation of preliminary EISs when the RO determines that such circulation would be beneficial, but public disclosure should not be required. Other commenters stated it is inappropriate for agencies to share preliminary EISs that represent preliminary agency thoughts. They were concerned that public release of a preliminary document would hinder internal discussion regarding innovative management options available for consideration and analysis.

Response: The Department has elected not to include a ''preliminary environmental impact statement'' in the final rule. Please see the response above to comments on section 46.30.

Comment: One group recommended clarification of the proposed rule by stating that the human environment changes over time, regardless of the action being assessed under NEPA. They recommended this clarification should ''explicitly exclude the idea that nothing changes over time, so the no action alternative means no change.''

Response: The Department acknowledges that some clarification was needed and added language to the final rule. Natural systems evolve over time. The ''no action'' alternative is not the alternative that results in ''no change'' to the environment; rather it represents the state of the environment without the proposed action or any of the alternatives. When the proposed action involves a proposed change in management then, under the no action alternative, what does not change is management direction or level of intensity.

Comment: Another commenter stated ''it is not clear from the proposed rule how or why ''incremental changes'' will be considered as alternatives'' and asked for additional detail regarding the ''incremental process'' and how it interacts with the alternative discussion.

Response: The Department appreciates this comment. The intent of this provision is that modifications to alternatives developed through a collaborative process, may, themselves, be considered alternatives to a proposed action. To avoid confusion, the final rule no longer uses the term ''incremental'' when dealing with alternatives.

Comment: Many commenters fully supported and encouraged analysis of the no action alternative. Several recommended clarification in the proposed rule on how the tenets of adaptive management will work with the requirements for clearly articulating and pre-specifying the adjustments and the respective environmental effects that might later occur. Another commenter encouraged the Department to specify in the proposed rule that alternatives considered throughout the NEPA process must be capable of achieving the project goals.

Response: The Department believes that no further clarification is necessary. The intent of the provision respecting adaptive management is to clarify that the use of an adaptive management approach does not preclude the necessity of complying with NEPA. Each proposed action, including possible changes in management made as a result of an adaptive management approach may be analyzed at the outset of the process or the changes in management made may be analyzed when implemented.

Comment: Several commenters strongly opposed the idea that the RO, with or without input from any interested parties, would be permitted to make modifications to a proponent's proposed action. These commenters recommend eliminating this language in its entirety from the proposed rule.

Response: Bureaus would analyze reasonable alternatives that would meet the purpose and need for action. In determining the range of reasonable alternatives, the range may in some cases be limited by the proponent's proposed action, but the RO must still evaluate reasonable alternatives within that range. As such the RO may include additional alternatives for analysis, including those which represent different modifications of the proposed action. No change to the provision has been made.

Comment: Some commenters requested clarification on the public comment opportunity that follows the publication of a final EIS. They maintained the rule should explain that the public can submit comments on a final EIS prior to an agency's final decision.

Response: CEQ regulations at 40 CFR 1506.10(b)(2) require a 30-day waiting period between publication of the final EIS and signing of a ROD. CEQ guidance states: ''During that period, in addition to the agency's own internal final review, the public and other agencies can comment on the final EIS prior to the agency's final action on the proposal. CEQ's ''Forty Most Asked Questions.'' Therefore, while this period is not a formal comment period, the public may comment after the publication of the final EIS.

Section 46.420 Terms used in an EIS. This section describes terms that are commonly used to describe concepts or activities in an EIS, including: (a) Statement of purpose and need, (b) Reasonable alternatives, (c) Range of alternatives, (d) Proposed action, (e) Preferred alternative, and (f) No action alternative. Definitions for proposed action and no action alternative have been moved to the definitions in section 46.30 as they may both be applicable to EAs as well as EISs. Comments and responses on these terms, however, are below. In order to clarify that it is the bureau's exercise of discretion that constitutes a proposed action that is subject to NEPA requirements, not just that the bureau might have a statutory role over a non-Federal entity's planned activity, the final rule has been changed to read ''discretion'' rather than

''authority'' in proposed paragraph 46.420(d), which is now in section 46.30. Section 46.30 explains that a ''proposed action'' includes ''the bureau's exercise of discretion over a non-Federal entity's planned activity that falls under a Federal agency's authority to issue permits, licenses, grants, rights-of-way, or other common Federal approvals, funding, or regulatory instruments.''

Comment: Several commenters stated that the proposed rule should clarify that, in order for an alternative to be reasonable, it must also be technically and economically feasible based upon input from the project proponent. These commenters stated that the term ''range of alternatives'' is defined without regard to the technical and economic feasibility of the alternatives.

Response: The Department's final rule, at paragraph 46.420(b), specifies that the term ''reasonable alternative'' includes alternatives that are technically and economically practical or feasible and that satisfy the purpose and need. The Department agrees that the project proponent, as a member of the public, may provide input to the bureau with respect to the technical and economic feasibility of alternatives. Ultimately, however, the bureau determines whether an alternative is technically and economically practical or feasible and meets the purpose and need of the proposed action. The Department did not include a reference to technical and economic feasibility in the definition of ''range of alternatives.'' Consistent with CEQ's regulations, 40 CFR 1505.1(e), and as explained in CEQ's ''Forty Most Asked Questions'' document, the range of alternatives includes all or a reasonable number of examples covering the full spectrum of reasonable alternatives, each of which must be rigorously explored and objectively evaluated, as well as those other alternatives which are eliminated from detailed study with a brief discussion of the reasons for eliminating them. This includes alternatives that may not be technically and economically feasible. The Department's final rule, at paragraph 46.420(c), maintains this broad meaning of ''range of alternatives.''

Comment: Many commenters recommended that the rule expressly state that the applicant's goals should be the primary consideration in the development of the statement of purpose and need. These commenters stated the Department should remove language in the proposed rule that requires agencies to consider the public interest in approving an application.

Response: The Department agrees that the bureau should consider the needs and goals of the parties involved, including the applicant. However, the public interest is also a key consideration under NEPA. As such the Department has not changed the language of this provision in the final rule.

Comment: One group recommended using the definition in paragraph 46.420(b) for the feasibility requirement throughout the proposed rule because it is the most complete definition.

Response: The Department concurs with the intent of this recommendation and has implemented this recommendation by changing 46.415(b) to read ''range of alternatives'' rather than ''reasonable alternatives,'' as ''range of alternatives'' as defined at paragraph 46.420(c) incorporates the definition of ''reasonable alternatives'' at paragraph 46.420(b).

Comment: One commenter stated that the definition of ''range of alternatives'' is circular and should be revised.

Response: The Department agrees and has clarified that the phrase ''rigorously explored and objectively evaluated'' in the CEQ regulations applies only to reasonable alternatives.

Comment: One commenter recommended that the Department distinguish the proposed federal action from the proposed project or activity for which the federal action is necessary.

Response: The Department agrees and has clarified the language of section 46.30 (formerly proposed as paragraph 46.420(d)). Paragraph 46.420(d) explains that a ''proposed action'' includes ''the bureau's exercise of discretion over a non-Federal entity's planned activity that falls under a Federal agency's authority to issue permits, licenses, grants, rights-of-way, or other common Federal approvals, funding, or regulatory instruments.''

Comment: A commenter agreed with the statement that no action can mean either no action or no change and that the proposed rule should acknowledge that the effect of the no action alternative is not always maintenance of the status quo.

Response: As specified in proposed paragraph 46.420(f) and now at section 46.30, the Department agrees that the no action alternative has two interpretations—''no change from a current management direction or level of management intensity'' or ''no project.'' Natural systems evolve over time. The ''no action'' alternative is not the alternative that results in ''no change'' to the environment; rather it represents the state of the environment without the proposed action or any of the alternatives. The Department has made minor edits to this section to clarify this point.

Comment: One individual recommended inserting ''national policies'' after ''giving consideration to'' in paragraph (e).

Response: The Department does not believe it is necessary to specifically include ''national policies'' as one of the factors that the bureau considers in identifying the preferred alternative. Proposed paragraph (e), now (d), refers to ''other factors,'' which is broad enough to include a variety of considerations, including, if appropriate, national policies.

Comment: One commenter stated that it is unclear whether the terms ''practical'' and ''feasible'' are intended to be synonymous within the proposed rule.

Response: These terms are not intended to be synonymous. CEQ's ''Forty Most Asked Questions'' explains ''reasonable alternatives include those that are practical or feasible from the technical and economic standpoint and using common sense.'' Any given reasonable alternative could be practical, feasible, or both.

Comment: One commenter encouraged the Department to revise the proposed rule to clarify and reflect established NEPA precedent that agencies need not conduct a separate analysis of alternatives that have substantially similar consequences.

Response: The Department agrees that bureaus need not separately analyze alternatives that have been shown to have substantially similar environmental consequences. This is a well-established principle; no change to the final rule is necessary.

Section 46.425 Identification of the preferred alternative in an EIS. This section clarifies when the preferred alternative must be identified.

Comment: Several groups questioned why more than one preferred alternative would be necessary and recommend that only one preferred alternative be allowed to avoid confusion.

Response: The Department's final rule is consistent with CEQ regulations, which expressly contemplate situations in which more than one preferred alternative may exist. 40 CFR 1502.14(e). Rather than confusing the public, the Department believes that in certain circumstances presentation of more than one preferred alternatives may encourage public involvement in the process.

Section 46.430 Environmental review and consultation requirements. This section establishes procedures for an EIS that also addresses other

environmental review requirements and approvals. It should be noted that this section allows for the completion of the NEPA analysis prior to obtaining all permits. However, if the terms of the permit are outside of the scope of analysis, additional NEPA analysis may be required.

Comment: One commenter commented that CEQ is currently undertaking a project to integrate review under NEPA and the National Historic Preservation Act (NHPA). This commenter recommended that the Department assure effective integration of that project's results with the proposed rule. In order to protect statutory rights of Indian tribes, another group recommended integration of regulations from the Advisory Council on Historic Preservation in this section of the proposed rule.

Response: Regulations implementing the National Historic Preservation Act (NHPA) at 36 CFR Part 800 encourage Federal agencies to coordinate compliance with section 106 of the NHPA with steps taken to meet the requirements of NEPA (36 CFR 800.8(a)). The Department is aware of the CEQ initiative to develop guidance to integrate review under NEPA and the NHPA, as called for in both the NHPA and the CEQ regulations (40 CFR 1502.25(a)) and will work with CEQ to integrate any such guidance in the Department's directives as appropriate. Please see response to comments addressing section 46.110 above regarding the Department's fulfillment of its responsibilities toward Indian tribes.

Comment: One group strongly supported consolidation of processes whenever possible to reduce delays and eliminate duplication of effort. This group proposed revision of the proposed rule to promote the consolidation of processes ''to the extent possible and otherwise not prohibited by law.'' This group also recommended the establishment of an exemption for mining operations based on the ''functional equivalence doctrine.'' They maintained that other laws and regulations applicable to the mining operations provide a rigorous framework for providing a ''harder look'' at environmental consequences than NEPA.

Response: The Department appreciates the support for its efforts to encourage consolidation of processes whenever possible. However, the Department does not believe the revision proposed by the commenter to paragraph 46.430(b) is necessary. The Department does not believe such an exemption for mining operations as advocated by the commenter is warranted, as it addresses matters beyond the scope of this rulemaking.

Comment: One commenter recommended revision of ''Paragraph (a) to clarify that an EIS need only identify and discuss studies relied upon for other consultation and review processes if the EIS is intended to serve as the NEPA compliance for those review processes.''

Response: The Department believes no revision to the final rule is necessary. When paragraph 46.430(a) states ''An EIS that also addresses other environmental review and consultation requirements. * * *'' this means that it is precisely when the EIS in question is to serve as the NEPA compliance (in whole or in part) for the other environmental review and consultation requirements that the EIS needs to identify and discuss studies relied upon for these other review and consultation processes.

Section 46.435 Inviting comments. This section requires bureaus to request comments from Federal, State, and local agencies, or tribal governments, and the public at large. This section also clarifies that bureaus do not have to delay a final EIS because they have not received comments.

Comment: One group proposed revisions to the proposed rule, which include: (1) Requesting comments from any potentially affected tribal government, (2) recognizing the federal government's continuing obligation to consult with tribal governments prior to making decisions which may impact tribal rights, (3) revising paragraph (c) to include all lands and waters within the boundaries of tribal lands, (4) inserting language to explicitly include Alaska Native tribes, and (5) including additional clauses covering various situations in which the Department must invite comments from a tribe. This group proposed these revisions because it believes the current language could be interpreted too narrowly by the Department bureaus, resulting in bureaus deciding not to request comments from tribal governments, even though a proposed action may affect tribal rights or interests.

Response: CEQ regulations at 40 CFR 1503.1(a)(4) require that agencies shall request the comments on a draft EIS from ''the public, affirmatively soliciting comments from those persons or organizations who may be interested or affected.'' This would necessarily include ''any potentially affected tribal government'' regardless of whether the proposed action may affect the environment of Indian trust or restricted land or other Indian trust resources, trust assets, or tribal health and safety, as specified in 46.435(c). In view of the CEQ regulations, the Department does not believe it is necessary to include the commenter's proposed language in this final rule. For instance, under 40 CFR 1503.1(a)(4), the bureaus would need to request comments from those persons or organizations affected by impacts to the resources noted by the commenters, including ''one or more historic properties to which the tribe attaches religious and cultural significance'' or ''wildlife or plant species that are important to the tribe for cultural purposes.'' Likewise, if any member of the public specifically requests information regarding the analysis of effects of a proposed action on a specific identified area, the bureau would provide that information.

This being said, the requirement to engage in government-to-government consultation with Indian tribes is a requirement apart from NEPA, and, in effect, broadens any consultation that needs to take place as a function of compliance with NEPA. The Department has other, more specific directives addressing government-to-government consultation, as well as how the Department is to fulfill its trust responsibilities. See, *e.g.*, 512 DM 2: ''Departmental Responsibilities for Indian Trust Resources''; ECM97–2 ''Departmental Responsibilities for Indian Trust Resources and Indian Sacred Sites on Federal Lands''.

Comment: One commenter encouraged the Department to provide for better coordination with permit applicants when the federal action being examined involves the issuance of a federal permit or authorization.

Response: Please see discussion, above, regarding paragraph 46.430(a).

Section 46.440 Eliminating duplication with State and local procedures. This section allows a State agency to jointly prepare an EIS, if applicable.

No comments were received addressing this provision.

Section 46.445 Preparing a legislative EIS. This section ensures that, when appropriate, a legislative EIS will be included as a part of the formal transmittal of a legislative proposal to the Congress.

No comments were received addressing this provision.

Section 46.450 Identifying the environmentally preferable alternative. This section provides for identifying the environmentally preferable alternative in the ROD.

Comment: One commenter supported this part of the proposed rule as it is written. Multiple commenters oppose

this section of the proposed rule and urge the Department to delete this section from the proposed rule. They believed ''that this provision is not necessary in light of the existing CEQ regulation found at 40 CFR 1505.2.'' In the event that Department does not remove this section from the proposed rule, these commenters recommended that the Department revise this section to include clarification that this rule in no way obligates agencies to identify and select an ''environmentally preferable alternative'' during its NEPA analysis.

Response: The Department appreciates these comments, but believes this provision is necessary to distinguish between ''identifying'' and ''selecting'' an environmentally preferable alternative, both for Departmental personnel and members of the public. Although the environmentally preferable alternative must be identified in the ROD, the RO is not required to select the environmentally preferable alternative as the alternative that will be implemented. No change is made in the final rule.

Procedural Requirements

Regulatory Planning and Review (E.O. 12866)

This is a significant rule and has been reviewed by the Office of Management and Budget (OMB) under Executive Order 12866. This rule:

(1) Is not an economically significant action because it will not have an annual effect of $100 million or more on the economy nor adversely affect productivity, competition, jobs, the environment, public health or safety, nor state or local governments.

(2) Will not interfere with an action taken or planned by another agency.

(3) Will not alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients of such programs.

(4) Raises novel policy and legal issues. It is a significant rulemaking action subject to OMB review because of the extensive interest in Department planning and decision making relating to NEPA.

In accordance with the Office of Management and Budget (OMB) Circular A–4, ''Regulatory Analysis,'' the Department has conducted a cost/benefit analysis. The analysis compared the costs and benefits associated with the current condition of having Departmental implementing procedures combined with Departmental explanatory guidance in the DM and the condition of having implementing direction in regulations and explanatory guidance in the DM.

Many benefits and costs associated with the rule are not quantifiable. Some of the benefits of this rule include collaborative and participatory public involvement to more fully address public concerns, timely and focused environmental analysis, and flexibility in preparation of environmental documents. These will be positive effects of the new rule.

Moving NEPA procedures from the DM to regulations is expected to provide a variety of potential beneficial effects. This rule would meet the requirements of 40 CFR 1507.3 by placing the Department's implementing procedures in their proper regulatory position. The Department will maintain Department- and bureau-specific directives in the DM and bureau handbooks to assist field offices. This will facilitate timely bureau responses to procedural interpretations, training needs, and editorial changes to addresses and Internet links to assist bureaus when implementing the NEPA process. Finally, the changes to the Department NEPA procedures are intended to provide the Department specific options to meet the intent of NEPA through increased emphasis on collaboration and the use of a consensus-based approach when practicable.

Thus, while no single effect of this rule creates a significant quantifiable improvement, the benefits outlined above taken together create the potential for visible improvements in the Department's NEPA program. Further discussion of the costs and benefits associated with the rule is contained in the economic analysis which is incorporated in the administrative record for this rulemaking and may be accessed on the Department's Office of Environmental Policy and Compliance Web site located at: *http://www.doi.gov/oepc*.

Regulatory Flexibility Act

The Department certifies that this document will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). This document provides the Department with policy and procedures under NEPA and does not compel any other party to conduct any action.

Congressional Review Act

The Administrator of the Office of Information and Regulatory Affairs has determined that this rule is not a major rule under 5 U.S.C. 804(2).

Unfunded Mandates Reform Act

Under Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538), the Department has assessed the effects of this rule on State, local, and tribal governments and the private sector. This rule does not compel the expenditure of $100 million or more by any State, local, or tribal government or anyone in the private sector. Therefore, a statement under section 202 of the Act is not required.

Takings (E.O. 12630)

This rule has been analyzed in accordance with the principles and criteria contained in E.O. 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights, and it has been determined that the rule does not pose the risk of a taking of Constitutionally protected private property.

Federalism (E.O. 13132)

The Department has considered this rule under the requirements of E.O. 13132, Federalism. The Department has concluded that the rule conforms to the federalism principles set out in this E.O.; will not impose any compliance costs on the States; and will not have substantial direct effects on the States or the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, the Department has determined that no further assessment of federalism implications is necessary.

Civil Justice Reform (E.O. 12988)

This rule complies with the requirements of E.O. 12988. Specifically, this rule:

(a) Does not unduly burden the judicial system;

(b) Meets the criteria of section 3(a) requiring that all regulations be reviewed to eliminate errors and ambiguity, and be written to minimize litigation; and

(c) Meets the criteria of section 3(b)(2) requiring that all regulations be written in clear language and contain clear legal standards.

Consultation With Indian Tribes (E.O. 13175)

In accordance with E.O. 13175 of November 6, 2000, and 512 DM 2, we have assessed this document's impact on tribal trust resources and have determined that it does not directly affect tribal resources since it describes the Department's procedures for its compliance with NEPA.

Paperwork Reduction Act

This rule does not contain information collections subject to OMB approval under the Paperwork Reduction Act (44 U.S.C. 3501, *et seq.*).

National Environmental Policy Act

The CEQ does not direct agencies to prepare a NEPA analysis or document before establishing agency procedures that supplement the CEQ regulations for implementing NEPA. Agency NEPA procedures are procedural guidance to assist agencies in the fulfillment of agency responsibilities under NEPA, but are not the agency's final determination of what level of NEPA analysis is required for a particular proposed action. The requirements for establishing agency NEPA procedures are set forth at 40 CFR 1505.1 and 1507.3. The determination that establishing agency NEPA procedures does not require NEPA analysis and documentation has been upheld in *Heartwood, Inc.* v. *U.S. Forest Service,* 73 F. Supp. 2d 962, 972–73 (S.D. III. 1999), aff'd 230 F.3d 947. 954–55 (7th Cir. 2000).

Data Quality Act

In developing this rule we did not conduct or use a study requiring peer review under the Data Quality Act (Pub. L. 106–554).

Effects on the Energy Supply (E.O. 13211)

This rule is not a significant energy action under the definition in E.O. 13211. A Statement of Energy Effects is not required.

Clarity of This Rule

We are required by E.O.s 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

—Be logically organized;
—Use the active voice to address readers directly;
—Use clear language rather than jargon;
—Be divided into short sections and sentences; and
—Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments as instructed in the **ADDRESSES** section. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that you find unclear, which sections or sentences are too long, the sections where you think lists or tables would be useful, etc.

List of Subjects in 43 CFR part 46

Environmental protection, EISs.

Dated: September 30, 2008.

James E. Cason,

Associate Deputy Secretary.

■ For the reasons given in the preamble, the Office of the Secretary is adding a new part 46 to Subtitle A of title 43 of the Code of Federal Regulations to read as follows:

PART 46—IMPLEMENTATION OF THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969

Sec.

Authority: 42 U.S.C. 4321 *et seq.* (The National Environmental Policy Act of 1969, as amended); Executive Order 11514, (Protection and Enhancement of Environmental Quality (March 5, 1970, as amended by Executive Order 11991, May 24, 1977)); 40 CFR parts 1500–1508 (43 FR 55978) (National Environmental Policy Act, Implementation of Procedural Provisions).

Subpart A—General Information

§ 46.10 Purpose of this part.

(a) This part establishes procedures for the Department, and its constituent bureaus, to use for compliance with:

(1) The National Environmental Policy Act (NEPA) of 1969, as amended (42 U.S.C. 4321 *et seq.*); and

(2) The Council on Environmental Quality (CEQ) regulations for implementing the procedural provisions of NEPA (40 CFR parts 1500–1508).

(b) Consistent with 40 CFR 1500.3, it is the Department's intention that any trivial violation of these regulations will not give rise to any independent cause of action.

§ 46.20 How to use this part.

(a) This part supplements, and is to be used in conjunction with, the CEQ regulations except where it is inconsistent with other statutory requirements. The following table shows the corresponding CEQ regulations for the sections in subparts A—E of this part. Some sections in those subparts do not have a corresponding CEQ regulation.

Subpart A 40 CFR

46.10 Parts 1500–1508

46.20 No corresponding CEQ regulation
46.30 No corresponding CEQ regulation

Subpart B

46.100 1508.14, 1508.18, 1508.23
46.105 1506.5
46.110 No corresponding CEQ regulation
46.115 1508.7
46.120 1502.9, 1502.20, 1502.21, 1506.3
46.125 1502.22
46.130 1502.14
46.135 1502.21
46.140 1502.20
46.145 No corresponding CEQ regulation
46.150 1506.11
46.155 1502.25, 1506.2
46.160 1506.1
46.170 No corresponding CEQ regulation

Subpart C

46.200 1501.2
46.205 1508.4
46.210 1508.4
46.215 1508.4
46.220 1501.5
46.225 1501.6
46.230 1501.6
46.235 1501.7
46.240 1501.8

Subpart D

46.300 1501.3
46.305 1501.7, 1506.6
46.310 1508.9
46.315 No corresponding CEQ regulation
46.320 1506.3
46.325 1501.4

Subpart E

46.400 1502.5
46.405 1502.7
46.415 1502.10
46.420 1502.14
46.425 1502.14
46.430 1502.25
46.435 1503
46.440 1506.2
46.445 1506.8
46.450 1505.2

(b) The Responsible Official will ensure that the decision making process for proposals subject to this part includes appropriate NEPA review.

(c) During the decision making process for each proposal subject to this part, the Responsible Official shall consider the relevant NEPA documents, public and agency comments (if any) on those documents, and responses to those comments, as part of consideration of the proposal and, except as specified in paragraphs 46.210(a) through (j), shall include such documents, including supplements, comments, and responses as part of the administrative file.

(d) The Responsible Official's decision on a proposed action shall be within the range of alternatives discussed in the relevant environmental document. The Responsible Official's decision may combine elements of alternatives discussed in the relevant environmental document if the effects of such combined elements of alternatives are reasonably apparent from the analysis in the relevant environmental document.

(e) For situations involving an applicant, the Responsible Official should initiate the NEPA process upon acceptance of an application for a proposed Federal action. The Responsible Official must publish or otherwise provide policy information and make staff available to advise potential applicants of studies or other information, such as costs, foreseeably required for later Federal action.

§ 46.30 Definitions.

For purposes of this part, the following definitions supplement terms defined at 40 CFR parts 1500–1508.

Adaptive management is a system of management practices based on clearly identified outcomes and monitoring to determine whether management actions are meeting desired outcomes; and, if not, facilitating management changes that will best ensure that outcomes are met or re-evaluated. Adaptive management recognizes that knowledge about natural resource systems is sometimes uncertain.

Bureau means bureau, office, service, or survey within the Department of the Interior.

Community-based training in the NEPA context is the training of local participants together with Federal participants in the workings of the environmental planning effort as it relates to the local community(ies).

Controversial refers to circumstances where a substantial dispute exists as to the environmental consequences of the proposed action and does not refer to the existence of opposition to a proposed action, the effect of which is relatively undisputed.

Environmental Statement Memoranda (ESM) are a series of instructions issued by the Department's Office of Environmental Policy and Compliance to provide information and explanatory guidance in the preparation, completion, and circulation of NEPA documents.

Environmentally preferable alternative is the alternative required by 40 CFR 1505.2(b) to be identified in a record of decision (ROD), that causes the least damage to the biological and physical environment and best protects, preserves, and enhances historical, cultural, and natural resources. The environmentally preferable alternative is identified upon consideration and weighing by the Responsible Official of long-term environmental impacts against short-term impacts in evaluating what is the best protection of these resources. In some situations, such as when different alternatives impact different resources to different degrees, there may be more than one environmentally preferable alternative.

No action alternative.

(1) This term has two interpretations. First ''no action'' may mean ''no change'' from a current management direction or level of management intensity (*e.g.*, if no ground-disturbance is currently underway, no action means no ground-disturbance). Second ''no action'' may mean ''no project'' in cases where a new project is proposed for implementation.

(2) The Responsible Official must determine the ''no action'' alternative consistent with one of the definitions in paragraph (1) of this definition and appropriate to the proposed action to be analyzed in an environmental impact statement. The no action alternative looks at effects of not approving the action under consideration.

Proposed action. This term refers to the bureau activity under consideration. It includes the bureau's exercise of discretion over a non-Federal entity's planned activity that falls under a Federal agency's authority to issue permits, licenses, grants, rights-of-way, or other common Federal approvals, funding, or regulatory instruments. The proposed action:

(1) Is not necessarily, but may become, during the NEPA process, the bureau preferred alternative or (in a record of decision for an environmental impact statement, in accordance with 40 CFR 1505.2) an environmentally preferable alternative; and

(2) Must be clearly described in order to proceed with NEPA analysis.

Reasonably foreseeable future actions include those federal and non-federal activities not yet undertaken, but sufficiently likely to occur, that a Responsible Official of ordinary prudence would take such activities into account in reaching a decision. These federal and non-federal activities that must be taken into account in the analysis of cumulative impact include, but are not limited to, activities for which there are existing decisions, funding, or proposals identified by the

bureau. Reasonably foreseeable future actions do not include those actions that are highly speculative or indefinite.

Responsible Official is the bureau employee who is delegated the authority to make and implement a decision on a proposed action and is responsible for ensuring compliance with NEPA.

Subpart B—Protection and Enhancement of Environmental Quality

§ 46.100 Federal action subject to the procedural requirements of NEPA.

(a) A bureau proposed action is subject to the procedural requirements of NEPA if it would cause effects on the human environment (40 CFR 1508.14), and is subject to bureau control and responsibility (40 CFR 1508.18). The determination of whether a proposed action is subject to the procedural requirements of NEPA depends on the extent to which bureaus exercise control and responsibility over the proposed action and whether Federal funding or approval are necessary to implement it. If Federal funding is provided with no Federal agency control as to the expenditure of such funds by the recipient, NEPA compliance is not necessary. The proposed action is not subject to the procedural requirements of NEPA if it is exempt from the requirements of section 102(2) of NEPA.

(b) A bureau shall apply the procedural requirements of NEPA when the proposal is developed to the point that:

(1) The bureau has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal; and

(2) The effects of the proposed action can be meaningfully evaluated (40 CFR 1508.23).

§ 46.105 Using a contractor to prepare environmental documents.

A Responsible Official may use a contractor to prepare any environmental document in accordance with the standards of 40 CFR 1506.5(b) and (c). If a Responsible Official uses a contractor, the Responsible Official remains responsible for:

(a) Preparation and adequacy of the environmental documents; and

(b) Independent evaluation of the environmental documents after their completion.

§ 46.110 Incorporating consensus-based management.

(a) Consensus-based management incorporates direct community involvement in consideration of bureau activities subject to NEPA analyses, from initial scoping to implementation of the bureau decision. It seeks to achieve agreement from diverse interests on the goals of, purposes of, and needs for bureau plans and activities, as well as the methods anticipated to carry out those plans and activities. For the purposes of this Part, consensus-based management involves outreach to persons, organizations or communities who may be interested in or affected by a proposed action with an assurance that their input will be given consideration by the Responsible Official in selecting a course of action.

(b) In incorporating consensus-based management in the NEPA process, bureaus should consider any consensus-based alternative(s) put forth by those participating persons, organizations or communities who may be interested in or affected by the proposed action. While there is no guarantee that any particular consensus-based alternative will be considered to be a reasonable alternative or be identified as the bureau's preferred alternative, bureaus must be able to show that the reasonable consensus-based alternative, if any, is reflected in the evaluation of the proposed action and discussed in the final decision. To be selected for implementation, a consensus-based alternative must be fully consistent with NEPA, the CEQ regulations, and all applicable statutory and regulatory provisions, as well as Departmental and bureau written policies and guidance.

(c) The Responsible Official must, whenever practicable, use a consensus-based management approach to the NEPA process.

(d) If the Responsible Official determines that the consensus-based alternative, if any, is not the preferred alternative, he or she must state the reasons for this determination in the environmental document.

(e) When practicing consensus-based management in the NEPA process, bureaus must comply with all applicable laws, including any applicable provisions of the Federal Advisory Committee Act (FACA).

§ 46.115 Consideration of past actions in the analysis of cumulative effects.

When considering the effects of past actions as part of a cumulative effects analysis, the Responsible Official must analyze the effects in accordance with 40 CFR 1508.7 and in accordance with relevant guidance issued by the Council on Environmental Quality, such as ''The Council on Environmental Quality Guidance Memorandum on Consideration of Past Actions in Cumulative Effects Analysis'' dated June 24, 2005, or any superseding Council on Environmental Quality guidance.

§ 46.120 Using existing environmental analyses prepared pursuant to NEPA and the Council on Environmental Quality regulations.

(a) When available, the Responsible Official should use existing NEPA analyses for assessing the impacts of a proposed action and any alternatives. Procedures for adoption or incorporation by reference of such analyses must be followed where applicable.

(b) If existing NEPA analyses include data and assumptions appropriate for the analysis at hand, the Responsible Official should use these existing NEPA analyses and/or their underlying data and assumptions where feasible.

(c) An existing environmental analysis prepared pursuant to NEPA and the Council on Environmental Quality regulations may be used in its entirety if the Responsible Official determines, with appropriate supporting documentation, that it adequately assesses the environmental effects of the proposed action and reasonable alternatives. The supporting record must include an evaluation of whether new circumstances, new information or changes in the action or its impacts not previously analyzed may result in significantly different environmental effects.

(d) Responsible Officials should make the best use of existing NEPA documents by supplementing, tiering to, incorporating by reference, or adopting previous NEPA environmental analyses to avoid redundancy and unnecessary paperwork.

§ 46.125 Incomplete or unavailable information.

In circumstances where the provisions of 40 CFR 1502.22 apply, bureaus must consider all costs to obtain information. These costs include monetary costs as well as other non-monetized costs when appropriate, such as social costs, delays, opportunity costs, and non-fulfillment or non-timely fulfillment of statutory mandates.

§ 46.130 Mitigation measures in analyses.

(a) Bureau proposed action. The analysis of the proposed action and any alternatives must include an analysis of the effects of the proposed action or alternative as well as analysis of the effects of any appropriate mitigation measures or best management practices that are considered. The mitigation measures can be analyzed either as elements of alternatives or in a separate discussion of mitigation.

(b) Applicant proposals (*i.e.*, bureau decision-making on such proposals is the proposed action). An applicant's

proposal presented to the bureau for analysis must include any ameliorative design elements (including stipulations, conditions, or best management practices), required to make the proposal conform to applicable legal requirements, as well as any voluntary ameliorative design element(s). The effects of any mitigation measures other than the ameliorative design elements included in the applicant's proposal must also be analyzed. The analysis of these mitigation measures can be structured as a matter of consideration of alternatives to approving the applicant's proposal or as separate mitigation measures to be imposed on any alternative selected for implementation.

§ 46.135 Incorporation of referenced documents into NEPA analysis.

(a) The Responsible Official must determine that the analysis and assumptions used in the referenced document are appropriate for the analysis at hand.

(b) Citations of specific information or analysis from other source documents should include the pertinent page numbers or other relevant identifying information.

(c) Publications incorporated into NEPA analysis by reference must be listed in the bibliography. Such publications must be readily available for review and, when not readily available, they must be made available for review as part of the record supporting the proposed action.

§ 46.140 Using tiered documents.

A NEPA document that tiers to another broader NEPA document in accordance with 40 CFR 1508.28 must include a finding that the conditions and environmental effects described in the broader NEPA document are still valid or address any exceptions.

(a) Where the impacts of the narrower action are identified and analyzed in the broader NEPA document, no further analysis is necessary, and the previously prepared document can be used for purposes of the pending action.

(b) To the extent that any relevant analysis in the broader NEPA document is not sufficiently comprehensive or adequate to support further decisions, the tiered NEPA document must explain this and provide any necessary analysis.

(c) An environmental assessment prepared in support of an individual proposed action can be tiered to a programmatic or other broader-scope environmental impact statement. An environmental assessment may be prepared, and a finding of no significant impact reached, for a proposed action with significant effects, whether direct, indirect, or cumulative, if the environmental assessment is tiered to a broader environmental impact statement which fully analyzed those significant effects. Tiering to the programmatic or broader-scope environmental impact statement would allow the preparation of an environmental assessment and a finding of no significant impact for the individual proposed action, so long as any previously unanalyzed effects are not significant. A finding of no significant impact other than those already disclosed and analyzed in the environmental impact statement to which the environmental assessment is tiered may also be called a ''finding of no *new* significant impact.''

§ 46.145 Using adaptive management.

Bureaus should use adaptive management, as appropriate, particularly in circumstances where long-term impacts may be uncertain and future monitoring will be needed to make adjustments in subsequent implementation decisions. The NEPA analysis conducted in the context of an adaptive management approach should identify the range of management options that may be taken in response to the results of monitoring and should analyze the effects of such options. The environmental effects of any adaptive management strategy must be evaluated in this or subsequent NEPA analysis.

§ 46.150 Emergency responses.

This section applies only if the Responsible Official determines that an emergency exists that makes it necessary to take urgently needed actions before preparing a NEPA analysis and documentation in accordance with the provisions in subparts D and E of this part.

(a) The Responsible Official may take those actions necessary to control the immediate impacts of the emergency that are urgently needed to mitigate harm to life, property, or important natural, cultural, or historic resources. When taking such actions, the Responsible Official shall take into account the probable environmental consequences of these actions and mitigate foreseeable adverse environmental effects to the extent practical.

(b) The Responsible Official shall document in writing the determination that an emergency exists and describe the responsive action(s) taken at the time the emergency exists. The form of that documentation is within the discretion of the Responsible Official.

(c) If the Responsible Official determines that proposed actions taken in response to an emergency, beyond actions noted in paragraph (a) of this section, are not likely to have significant environmental impacts, the Responsible Official shall document that determination in an environmental assessment and a finding of no significant impact prepared in accordance with this part, unless categorically excluded (see subpart C of this part). If the Responsible Official finds that the nature and scope of the subsequent actions related to the emergency require taking such proposed actions prior to completing an environmental assessment and a finding of no significant impact, the Responsible Official shall consult with the Office of Environmental Policy and Compliance about alternative arrangements for NEPA compliance. The Assistant Secretary, Policy Management and Budget or his/her designee may grant an alternative arrangement. Any alternative arrangement must be documented. Consultation with the Department must be coordinated through the appropriate bureau headquarters.

(d) The Department shall consult with CEQ about alternative arrangements as soon as possible if the Responsible Official determines that proposed actions, taken in response to an emergency, beyond actions noted in paragraph (a) of this section, are likely to have significant environmental impacts. The Responsible Official shall consult with appropriate bureau headquarters and the Department, about alternative arrangements as soon as the Responsible Official determines that the proposed action is likely to have a significant environmental effect. Such alternative arrangements will apply only to the proposed actions necessary to control the immediate impacts of the emergency. Other proposed actions remain subject to NEPA analysis and documentation in accordance with this part.

§ 46.155 Consultation, coordination, and cooperation with other agencies.

The Responsible Official must whenever possible consult, coordinate, and cooperate with relevant State, local, and tribal governments and other bureaus and Federal agencies concerning the environmental effects of any Federal action within the jurisdictions or related to the interests of these entities.

§ 46.160 Limitations on actions during the NEPA analysis process.

During the preparation of a program or plan NEPA document, the Responsible Official may undertake any

major Federal action in accordance with 40 CFR 1506.1 when that action is within the scope of, and analyzed in, an existing NEPA document supporting the current plan or program, so long as there is adequate NEPA documentation to support the individual action.

§ 46.170 Environmental effects abroad of major Federal actions.

(a) In order to facilitate informed decision-making, the Responsible Official having ultimate responsibility for authorizing and approving proposed actions encompassed by the provisions of Executive Order (EO) 12114 shall follow the provisions and procedures of that EO. EO 12114 ''represents the United States government's exclusive and complete determination of the procedural and other actions to be taken by Federal agencies to further the purpose of the National Environmental Policy Act, with respect to the environment outside the United States, its territories and possessions.''

(b) When implementing EO 12114, bureaus shall coordinate with the Department. The Department shall then consult with the Department of State, which shall coordinate all communications by the Department with foreign governments concerning environmental agreements and other arrangements in implementing EO 12114.

Subpart C—Initiating the NEPA Process

§ 46.200 Applying NEPA early.

(a) For any potentially major proposed Federal action (40 CFR 1508.23 and 1508.18) that may have potentially significant environmental impacts, bureaus must coordinate, as early as feasible, with:

(1) Any other bureaus or Federal agencies, State, local, and tribal governments having jurisdiction by law or special expertise; and

(2) Appropriate Federal, State, local, and tribal governments authorized to develop and enforce environmental standards or to manage and protect natural resources or other aspects of the human environment.

(b) Bureaus must solicit the participation of all those persons or organizations that may be interested or affected as early as possible, such as at the time an application is received or when the bureau initiates the NEPA process for a proposed action.

(c) Bureaus should provide, where practicable, any appropriate community-based training to reduce costs, prevent delays, and facilitate and promote efficiency in the NEPA process.

(d) Bureaus should inform private or non-Federal applicants, to the extent feasible, of:

(1) Any appropriate environmental information that the applicants must include in their applications; and

(2) Any consultation with other Federal agencies, or State, local, or tribal governments that the applicant must accomplish before or during the application process.

(e) Bureaus must inform applicants as soon as practicable of any responsibility they will bear for funding environmental analyses associated with their proposals.

§ 46.205 Actions categorically excluded from further NEPA review.

Categorical Exclusion means a category or kind of action that has no significant individual or cumulative effect on the quality of the human environment. See 40 CFR 1508.4.

(a) Except as provided in paragraph (c) of this section, if an action is covered by a Departmental categorical exclusion, the bureau is not required to prepare an environmental assessment (see subpart D of this part) or an environmental impact statement (see subpart E of this part). If a proposed action does not meet the criteria for any of the listed Departmental categorical exclusions or any of the individual bureau categorical exclusions, then the proposed action must be analyzed in an environmental assessment or environmental impact statement.

(b) The actions listed in section 46.210 are categorically excluded, Department-wide, from preparation of environmental assessments or environmental impact statements.

(c) The CEQ Regulations at 40 CFR 1508.4 require agency procedures to provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect and require additional analysis and action. Section 46.215 lists the extraordinary circumstances under which actions otherwise covered by a categorical exclusion require analyses under NEPA.

(1) Any action that is normally categorically excluded must be evaluated to determine whether it meets any of the extraordinary circumstances in section 46.215; if it does, further analysis and environmental documents must be prepared for the action.

(2) Bureaus must work within existing administrative frameworks, including any existing programmatic agreements, when deciding how to apply any of the section 46.215 extraordinary circumstances.

(d) Congress may establish categorical exclusions by legislation, in which case the terms of the legislation determine how to apply those categorical exclusions.

§ 46.210 Listing of Departmental categorical exclusions.

The following actions are categorically excluded under paragraph 46.205(b), unless any of the extraordinary circumstances in section 46.215 apply:

(a) Personnel actions and investigations and personnel services contracts.

(b) Internal organizational changes and facility and bureau reductions and closings.

(c) Routine financial transactions including such things as salaries and expenses, procurement contracts (*e.g.*, in accordance with applicable procedures and Executive Orders for sustainable or green procurement), guarantees, financial assistance, income transfers, audits, fees, bonds, and royalties.

(d) Departmental legal activities including, but not limited to, such things as arrests, investigations, patents, claims, and legal opinions. This does not include bringing judicial or administrative civil or criminal enforcement actions which are outside the scope of NEPA in accordance with 40 CFR 1508.18(a).

(e) Nondestructive data collection, inventory (including field, aerial, and satellite surveying and mapping), study, research, and monitoring activities.

(f) Routine and continuing government business, including such things as supervision, administration, operations, maintenance, renovations, and replacement activities having limited context and intensity (*e.g.*, limited size and magnitude or short-term effects).

(g) Management, formulation, allocation, transfer, and reprogramming of the Department's budget at all levels. (This does not exclude the preparation of environmental documents for proposals included in the budget when otherwise required.)

(h) Legislative proposals of an administrative or technical nature (including such things as changes in authorizations for appropriations and minor boundary changes and land title transactions) or having primarily economic, social, individual, or institutional effects; and comments and reports on referrals of legislative proposals.

(i) Policies, directives, regulations, and guidelines: that are of an administrative, financial, legal,

technical, or procedural nature; or whose environmental effects are too broad, speculative, or conjectural to lend themselves to meaningful analysis and will later be subject to the NEPA process, either collectively or case-by-case.

(j) Activities which are educational, informational, advisory, or consultative to other agencies, public and private entities, visitors, individuals, or the general public.

(k) Hazardous fuels reduction activities using prescribed fire not to exceed 4,500 acres, and mechanical methods for crushing, piling, thinning, pruning, cutting, chipping, mulching, and mowing, not to exceed 1,000 acres. Such activities:

(1) Shall be limited to areas—

(i) In wildland-urban interface; and

(ii) Condition Classes 2 or 3 in Fire Regime Groups I, II, or III, outside the wildland-urban interface;

(2) Shall be identified through a collaborative framework as described in ''A Collaborative Approach for Reducing Wildland Fire Risks to Communities and the Environment 10-Year Comprehensive Strategy Implementation Plan;''

(3) Shall be conducted consistent with bureau and Departmental procedures and applicable land and resource management plans;

(4) Shall not be conducted in wilderness areas or impair the suitability of wilderness study areas for preservation as wilderness; and

(5) Shall not include the use of herbicides or pesticides or the construction of new permanent roads or other new permanent infrastructure; and may include the sale of vegetative material if the primary purpose of the activity is hazardous fuels reduction. (Refer to the ESM Series for additional, required guidance.)

(l) Post-fire rehabilitation activities not to exceed 4,200 acres (such as tree planting, fence replacement, habitat restoration, heritage site restoration, repair of roads and trails, and repair of damage to minor facilities such as campgrounds) to repair or improve lands unlikely to recover to a management approved condition from wildland fire damage, or to repair or replace minor facilities damaged by fire. Such activities must comply with the following (Refer to the ESM Series for additional, required guidance.):

(1) Shall be conducted consistent with bureau and Departmental procedures and applicable land and resource management plans;

(2) Shall not include the use of herbicides or pesticides or the construction of new permanent roads or other new permanent infrastructure; and

(3) Shall be completed within three years following a wildland fire.

§ 46.215 Categorical Exclusions: Extraordinary circumstances.

Extraordinary circumstances (see paragraph 46.205(c)) exist for individual actions within categorical exclusions that may meet any of the criteria listed in paragraphs (a) through (l) of this section. Applicability of extraordinary circumstances to categorical exclusions is determined by the Responsible Official.

(a) Have significant impacts on public health or safety.

(b) Have significant impacts on such natural resources and unique geographic characteristics as historic or cultural resources; park, recreation or refuge lands; wilderness areas; wild or scenic rivers; national natural landmarks; sole or principal drinking water aquifers; prime farmlands; wetlands (EO 11990); floodplains (EO 11988); national monuments; migratory birds; and other ecologically significant or critical areas.

(c) Have highly controversial environmental effects or involve unresolved conflicts concerning alternative uses of available resources [NEPA section 102(2)(E)].

(d) Have highly uncertain and potentially significant environmental effects or involve unique or unknown environmental risks.

(e) Establish a precedent for future action or represent a decision in principle about future actions with potentially significant environmental effects.

(f) Have a direct relationship to other actions with individually insignificant but cumulatively significant environmental effects.

(g) Have significant impacts on properties listed, or eligible for listing, on the National Register of Historic Places as determined by the bureau.

(h) Have significant impacts on species listed, or proposed to be listed, on the List of Endangered or Threatened Species or have significant impacts on designated Critical Habitat for these species.

(i) Violate a Federal law, or a State, local, or tribal law or requirement imposed for the protection of the environment.

(j) Have a disproportionately high and adverse effect on low income or minority populations (EO 12898).

(k) Limit access to and ceremonial use of Indian sacred sites on Federal lands by Indian religious practitioners or significantly adversely affect the physical integrity of such sacred sites (EO 13007).

(l) Contribute to the introduction, continued existence, or spread of noxious weeds or non-native invasive species known to occur in the area or actions that may promote the introduction, growth, or expansion of the range of such species (Federal Noxious Weed Control Act and EO 13112).

§ 46.220 How to designate lead agencies.

(a) In most cases, the Responsible Official should designate one Federal agency as the lead with the remaining Federal, State, tribal governments, and local agencies assuming the role of cooperating agency. In this manner, the other Federal, State, and local agencies can work to ensure that the NEPA document will meet their needs for adoption and application to their related decision(s).

(b) In some cases, a non-Federal agency (including a tribal government) must comply with State or local requirements that are comparable to the NEPA requirements. In these cases, the Responsible Official may designate the non-Federal agency as a joint lead agency. (See 40 CFR 1501.5 and 1506.2 for a description of the selection of lead agencies, the settlement of lead agency disputes, and the use of joint lead agencies.)

(c) In some cases, the Responsible Official may establish a joint lead relationship among several Federal agencies. If there is a joint lead, then one Federal agency must be identified as the agency responsible for filing the environmental impact statement with EPA.

§ 46.225 How to select cooperating agencies.

(a) An ''eligible governmental entity'' is:

(1) Any Federal agency that is qualified to participate in the development of an environmental impact statement as provided for in 40 CFR 1501.6 and 1508.5 by virtue of its jurisdiction by law, as defined in 40 CFR 1508.15;

(2) Any Federal agency that is qualified to participate in the development of an environmental impact statement by virtue of its special expertise, as defined in 40 CFR 1508.26; or

(3) Any non-Federal agency (State, tribal, or local) with qualifications similar to those in paragraphs (a)(1) and (a)(2) of this section.

(b) Except as described in paragraph (c) of this section, the Responsible Official for the lead bureau must invite eligible governmental entities to participate as cooperating agencies

when the bureau is developing an environmental impact statement.

(c) The Responsible Official for the lead bureau must consider any request by an eligible governmental entity to participate in a particular environmental impact statement as a cooperating agency. If the Responsible Official for the lead bureau denies a request, or determines it is inappropriate to extend an invitation, he or she must state the reasons in the environmental impact statement. Denial of a request or not extending an invitation for cooperating agency status is not subject to any internal administrative appeals process, nor is it a final agency action subject to review under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*

(d) Bureaus should work with cooperating agencies to develop and adopt a memorandum of understanding that includes their respective roles, assignment of issues, schedules, and staff commitments so that the NEPA process remains on track and within the time schedule. Memoranda of understanding must be used in the case of non-Federal agencies and must include a commitment to maintain the confidentiality of documents and deliberations during the period prior to the public release by the bureau of any NEPA document, including drafts.

(e) The procedures of this section may be used for an environmental assessment.

§ 46.230 Role of cooperating agencies in the NEPA process.

In accordance with 40 CFR 1501.6, throughout the development of an environmental document, the lead bureau will collaborate, to the fullest extent possible, with all cooperating agencies concerning those issues relating to their jurisdiction and special expertise. Cooperating agencies may, by agreement with the lead bureau, help to do the following:

(a) Identify issues to be addressed;

(b) Arrange for the collection and/or assembly of necessary resource, environmental, social, economic, and institutional data;

(c) Analyze data;

(d) Develop alternatives;

(e) Evaluate alternatives and estimate the effects of implementing each alternative; and

(f) Carry out any other task necessary for the development of the environmental analysis and documentation.

§ 46.235 NEPA scoping process.

(a) Scoping is a process that continues throughout the planning and early stages of preparation of an environmental impact statement. Scoping is required for an environmental impact statement; scoping may be helpful during preparation of an environmental assessment, but is not required (see paragraph 46.305(a) Public involvement in the environmental assessment process). For an environmental impact statement, bureaus must use scoping to engage State, local and tribal governments and the public in the early identification of concerns, potential impacts, relevant effects of past actions and possible alternative actions. Scoping is an opportunity to introduce and explain the interdisciplinary approach and solicit information as to additional disciplines that should be included. Scoping also provides an opportunity to bring agencies and applicants together to lay the groundwork for setting time limits, expediting reviews where possible, integrating other environmental reviews, and identifying any major obstacles that could delay the process. The Responsible Official shall determine whether, in some cases, the invitation requirement in 40 CFR 1501.7(a)(1) may be satisfied by including such an invitation in the notice of intent (NOI).

(b) In scoping meetings, newsletters, or by other communication methods appropriate to scoping, the lead agency must make it clear that the lead agency is ultimately responsible for determining the scope of an environmental impact statement and that suggestions obtained during scoping are only options for the bureau to consider.

§ 46.240 Establishing time limits for the NEPA process.

(a) For each proposed action, on a case-by-case basis, bureaus shall:

(1) Set time limits from the start to the finish of the NEPA analysis and documentation, consistent with the requirements of 40 CFR 1501.8 and other legal obligations, including statutory and regulatory timeframes;

(2) Consult with cooperating agencies in setting time limits; and

(3) Encourage cooperating agencies to meet established time frames.

(b) Time limits should reflect the availability of Department and bureau personnel and funds. Efficiency of the NEPA process is dependent on the management capabilities of the lead bureau, which must assemble an interdisciplinary team and/or qualified staff appropriate to the type of project to be analyzed to ensure timely completion of NEPA documents.

Subpart D—Environmental Assessments

§ 46.300 Purpose of an environmental assessment and when it must be prepared.

The purpose of an environmental assessment is to allow the Responsible Official to determine whether to prepare an environmental impact statement or a finding of no significant impact.

(a) A bureau must ensure that an environmental assessment is prepared for all proposed Federal actions, except those:

(1) That are covered by a categorical exclusion;

(2) That are covered sufficiently by an earlier environmental document as determined and documented by the Responsible Official; or

(3) For which the bureau has already decided to prepare an environmental impact statement.

(b) A bureau may prepare an environmental assessment for any proposed action at any time to:

(1) Assist in planning and decision-making;

(2) Further the purposes of NEPA when no environmental impact statement is necessary; or

(3) Facilitate environmental impact statement preparation.

§ 46.305 Public involvement in the environmental assessment process.

(a) The bureau must, to the extent practicable, provide for public notification and public involvement when an environmental assessment is being prepared. However, the methods for providing public notification and opportunities for public involvement are at the discretion of the Responsible Official.

(1) The bureau must consider comments that are timely received, whether specifically solicited or not.

(2) Although scoping is not required, the bureau may apply a scoping process to an environmental assessment.

(b) Publication of a ''draft'' environmental assessment is not required. Bureaus may seek comments on an environmental assessment if they determine it to be appropriate, such as when the level of public interest or the uncertainty of effects warrants, and may revise environmental assessments based on comments received without need of initiating another comment period.

(c) The bureau must notify the public of the availability of an environmental assessment and any associated finding of no significant impact once they have been completed. Comments on a finding of no significant impact do not need to be solicited, except as required by 40 CFR 1501.4(e)(2).

(d) Bureaus may allow cooperating agencies (as defined in § 46.225) to participate in developing environmental assessments.

§ 46.310 Contents of an environmental assessment.

(a) At a minimum, an environmental assessment must include brief discussions of:

(1) The proposal;

(2) The need for the proposal;

(3) The environmental impacts of the proposed action;

(4) The environmental impacts of the alternatives considered; and

(5) A list of agencies and persons consulted.

(b) When the Responsible Official determines that there are no unresolved conflicts about the proposed action with respect to alternative uses of available resources, the environmental assessment need only consider the proposed action and does not need to consider additional alternatives, including the no action alternative. (See section 102(2)(E) of NEPA).

(c) In addition, an environmental assessment may describe a broader range of alternatives to facilitate planning and decision-making.

(d) A proposed action or alternative(s) may include adaptive management strategies allowing for adjustment of the action during implementation. If the adjustments to an action are clearly articulated and pre-specified in the description of the alternative and fully analyzed, then the action may be adjusted during implementation without the need for further analysis. Adaptive management includes a monitoring component, approved adaptive actions that may be taken, and environmental effects analysis for the adaptive actions approved.

(e) The level of detail and depth of impact analysis should normally be limited to the minimum needed to determine whether there would be significant environmental effects.

(f) Bureaus may choose to provide additional detail and depth of analysis as appropriate in those environmental assessments prepared under paragraph 46.300(b).

(g) An environmental assessment must contain objective analyses that support conclusions concerning environmental impacts.

§ 46.315 How to format an environmental assessment.

(a) An environmental assessment may be prepared in any format useful to facilitate planning, decision-making, and appropriate public participation.

(b) An environmental assessment may be accompanied by any other planning or decision-making document. The portion of the document that analyzes the environmental impacts of the proposal and alternatives must be clearly and separately identified and not spread throughout or interwoven into other sections of the document.

§ 46.320 Adopting environmental assessments prepared by another agency, entity, or person.

(a) A Responsible Official may adopt an environmental assessment prepared by another agency, entity, or person, including an applicant, if the Responsible Official:

(1) Independently reviews the environmental assessment; and

(2) Finds that the environmental assessment complies with this subpart and relevant provisions of the CEQ Regulations and with other program requirements.

(b) When appropriate, the Responsible Official may augment the environmental assessment to be consistent with the bureau's proposed action.

(c) In adopting or augmenting the environmental assessment, the Responsible Official will cite the original environmental assessment.

(d) The Responsible Official must ensure that its bureau's public involvement requirements have been met before it adopts another agency's environmental assessment.

§ 46.325 Conclusion of the environmental assessment process.

Upon review of the environmental assessment by the Responsible Official, the environmental assessment process concludes with one of the following:

(1) A notice of intent to prepare an environmental impact statement;

(2) A finding of no significant impact; or

(3) A result that no further action is taken on the proposal.

Subpart E—Environmental Impact Statements

§ 46.400 Timing of environmental impact statement development.

The bureau must prepare an environmental impact statement for each proposed major Federal action significantly affecting the quality of the human environment before making a decision on whether to proceed with the proposed action.

§ 46.405 Remaining within page limits.

To the extent possible, bureaus should use techniques such as incorporation of referenced documents into NEPA analysis (46.135) and tiering (46.140) in an effort to remain within the normal page limits stated in 40 CFR 1502.7.

§ 46.415 Environmental impact statement content, alternatives, circulation and filing requirements.

The Responsible Official may use any environmental impact statement format and design as long as the statement is in accordance with 40 CFR 1502.10.

(a) *Contents.* The environmental impact statement shall disclose:

(1) A statement of the purpose and need for the action;

(2) A description of the proposed action;

(3) The environmental impact of the proposed action;

(4) A brief description of the affected environment;

(5) Any adverse environmental effects which cannot be avoided should the proposal be implemented;

(6) Alternatives to the proposed action;

(7) The relationship between local short-term uses of the human environment and the maintenance and enhancement of long-term productivity;

(8) Any irreversible or irretrievable commitments of resources which would be involved in the proposed action should it be implemented; and

(9) The process used to coordinate with other Federal agencies, State, tribal and local governments, and persons or organizations who may be interested or affected, and the results thereof.

(b) *Alternatives.* The environmental impact statement shall document the examination of the range of alternatives (paragraph 46.420(c)). The range of alternatives includes those reasonable alternatives (paragraph 46.420(b)) that meet the purpose and need of the proposed action, and address one or more significant issues (40 CFR 1501.7(a)(2–3)) related to the proposed action. Since an alternative may be developed to address more than one significant issue, no specific number of alternatives is required or prescribed. In addition to the requirements in 40 CFR 1502.14, the Responsible Official has an option to use the following procedures to develop and analyze alternatives.

(1) The analysis of the effects of the no-action alternative may be documented by contrasting the current condition and expected future condition should the proposed action not be undertaken with the impacts of the proposed action and any reasonable alternatives.

(2) The Responsible Official may collaborate with those persons or organization that may be interested or affected to modify a proposed action and alternative(s) under consideration prior to issuing a draft environmental impact statement. In such cases the Responsible Official may consider these

modifications as alternatives considered. Before engaging in any collaborative processes, the Responsible Official must consider the Federal Advisory Committee Act (FACA) implications of such processes.

(3) A proposed action or alternative(s) may include adaptive management strategies allowing for adjustment of the action during implementation. If the adjustments to an action are clearly articulated and pre-specified in the description of the alternative and fully analyzed, then the action may be adjusted during implementation without the need for further analysis. Adaptive management includes a monitoring component, approved adaptive actions that may be taken, and environmental effects analysis for the adaptive actions approved.

(c) *Circulating and filing draft and final environmental impact statements.* (1) The draft and final environmental impact statements shall be filed with the Environmental Protection Agency's Office of Federal Activities in Washington, DC (40 CFR 1506.9).

(2) Requirements at 40 CFR 1506.9 ''Filing requirements,'' 40 CFR 1506.10 ''Timing of agency action,'' 40 CFR 1502.9 ''Draft, final, and supplemental statements,'' and 40 CFR 1502.19 ''Circulation of the environmental impact statement'' shall only apply to draft, final, and supplemental environmental impact statements that are filed with EPA.

§ 46.420 Terms used in an environmental impact statement.

The following terms are commonly used to describe concepts or activities in an environmental impact statement:

(a) *Statement of purpose and need.* In accordance with 40 CFR 1502.13, the statement of purpose and need briefly indicates the underlying purpose and need to which the bureau is responding.

(1) In some instances it may be appropriate for the bureau to describe its ''purpose'' and its ''need'' as distinct aspects. The ''need'' for the action may be described as the underlying problem or opportunity to which the agency is responding with the action. The ''purpose'' may refer to the goal or objective that the bureau is trying to achieve, and should be stated to the extent possible, in terms of desired outcomes.

(2) When a bureau is asked to approve an application or permit, the bureau should consider the needs and goals of the parties involved in the application or permit as well as the public interest. The needs and goals of the parties involved in the application or permit may be described as background information. However, this description must not be confused with the bureau's purpose and need for action. It is the bureau's purpose and need for action that will determine the range of alternatives and provide a basis for the selection of an alternative in a decision.

(b) *Reasonable alternatives.* In addition to the requirements of 40 CFR 1502.14, this term includes alternatives that are technically and economically practical or feasible and meet the purpose and need of the proposed action.

(c) *Range of alternatives.* This term includes all reasonable alternatives, or when there are potentially a very large number of alternatives then a reasonable number of examples covering the full spectrum of reasonable alternatives, each of which must be rigorously explored and objectively evaluated, as well as those other alternatives that are eliminated from detailed study with a brief discussion of the reasons for eliminating them. 40 CFR 1502.14. The Responsible Official must not consider alternatives beyond the range of alternatives discussed in the relevant environmental documents, but may select elements from several alternatives discussed. Moreover, the Responsible Official must, in fact, consider all the alternatives discussed in an environmental impact statement. 40 CFR 1505.1 (e).

(d) *Preferred alternative.* This term refers to the alternative which the bureau believes would best accomplish the purpose and need of the proposed action while fulfilling its statutory mission and responsibilities, giving consideration to economic, environmental, technical, and other factors. It may or may not be the same as the bureau's proposed action, the non-Federal entity's proposal or the environmentally preferable alternative.

§ 46.425 Identification of the preferred alternative in an environmental impact statement.

(a) Unless another law prohibits the expression of a preference, the draft environmental impact statement should identify the bureau's preferred alternative or alternatives, if one or more exists.

(b) Unless another law prohibits the expression of a preference, the final environmental impact statement must identify the bureau's preferred alternative.

§ 46.430 Environmental review and consultation requirements.

(a) Any environmental impact statement that also addresses other environmental review and consultation requirements must clearly identify and discuss all the associated analyses, studies, or surveys relied upon by the bureau as a part of that review and consultation. The environmental impact statement must include these associated analyses, studies, or surveys, either in the text or in an appendix or indicate where such analysis, studies or surveys may be readily accessed by the public.

(b) The draft environmental impact statement must list all Federal permits, licenses, or approvals that must be obtained to implement the proposal. The environmental analyses for these related permits, licenses, and approvals should be integrated and performed concurrently. The bureau, however, need not unreasonably delay its NEPA analysis in order to integrate another agency's analyses. The bureau may complete the NEPA analysis before all approvals by other agencies are in place.

§ 46.435 Inviting comments.

(a) A bureau must seek comment from the public as part of the Notice of Intent to prepare an environmental impact statement and notice of availability for a draft environmental impact statement;

(b) In addition to paragraph (a) of this section, a bureau must request comments from:

(1) Federal agencies;

(2) State agencies through procedures established by the Governor of such state under EO 12372;

(3) Local governments and agencies, to the extent that the proposed action affects their jurisdictions; and

(4) The applicant, if any, and persons or organizations who may be interested or affected.

(c) The bureau must request comments from the tribal governments, unless the tribal governments have designated an alternate review process, when the proposed action may affect the environment of either:

(1) Indian trust or restricted land; or

(2) Other Indian trust resources, trust assets, or tribal health and safety.

(d) A bureau does not need to delay preparation and issuance of a final environmental impact statement when any Federal, State, and local agencies, or tribal governments from which comments must be obtained or requested do not comment within the prescribed time period.

§ 46.440 Eliminating duplication with State and local procedures.

A bureau must incorporate in its directives provisions allowing a State agency to jointly prepare an environmental impact statement, to the extent provided in 40 CFR 1506.2.

§ 46.445 Preparing a legislative environmental impact statement.

When required under 40 CFR 1506.8, the Department must ensure that a legislative environmental impact statement is included as a part of the formal transmittal of a legislative proposal to the Congress.

§ 46.450 Identifying the environmentally preferable alternative(s).

In accordance with the requirements of 40 CFR 1505.2, a bureau must identify the environmentally preferable alternative(s) in the record of decision. It is not necessary that the environmentally preferable alternative(s) be selected in the record of decision.

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