

Ambient Air Quality Standard.” One petition was submitted by the Treasure State Resource Industry Association and Yellowstone County, and the other petition was submitted by the Montana Sulphur and Chemical Company (the Petitioners). The EPA carefully considered these petitions and supporting information, along with information contained in the rulemaking docket, in reaching decisions on these petitions. The EPA denied the petitions for reconsideration in separate letters to the Petitioners dated August 14, 2014. The letters explain the EPA’s reasons for the denials. One of the Petitioners also requested that the EPA stay the

effectiveness of the designations rule, pending reconsideration. Because the EPA denied the reconsideration requests, the EPA also denied the stay request.

**DATES:** The petitions for reconsideration and stay request were denied August 14, 2014.

**FOR FURTHER INFORMATION CONTACT:** Rhonda Wright, Air Quality Policy Division, Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, Mail code C539-04, Research Triangle Park, NC 27711; telephone: (919) 541-1087; email: [wright.rhonda@epa.gov](mailto:wright.rhonda@epa.gov).

**SUPPLEMENTARY INFORMATION:**

**I. Where can I get copies of this document and other related information?**

This **Federal Register** notice, the petitions for reconsideration and the response letters to the Petitioners are available in the EPA’s docket established for the rulemaking to promulgate the air quality designations for the 2010 SO<sub>2</sub> NAAQS, under Docket ID No. EPA-HQ-OAR-2012-0233. The table below identifies the Petitioners, the date the EPA received the petitions, the document identification number of the petitions, the date of the EPA’s responses and the document identification numbers for the EPA’s responses.

| Petitioner   | Dates of petitions to the EPA | Petition: document No. in docket | Date of the EPA response | The EPA response: document No. in docket |
|--|-------------------------------|----------------------------------|--------------------------|--|
| <b>Billings, MO Nonattainment Area</b>   |                               |                                  |                          |  |
| Montana Sulphur & Chemical Company ...<br>Treasure State Resource Industry Association and Yellowstone County. | October 4, 2013 .....         | -0356                            | August 14, 2014 .....    | [INSERT No.]                             |
|  | November 26, 2013 .....       | -0360                            | August 14, 2014 .....    | [INSERT No.]                             |

All documents in the docket are listed in the index at <http://www.regulations.gov>. Although listed in the index, some information is not publicly available, e.g., confidential business information or other information where disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through <http://www.regulations.gov> or in hard copy at EPA’s Docket Center, Public Reading Room, U.S. Environmental Protection Agency, William Jefferson Clinton West Building, 1301 Constitution Avenue, Northwest, Room 3334, Washington, DC 20004. This Docket Center is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the Air Docket is (202) 566-1742.

In addition, the EPA has established a Web site for the SO<sub>2</sub> designations rulemaking at <http://www.epa.gov/so2designations>. This **Federal Register** notice, the petitions for reconsideration and the response letters to the Petitioners are also available on this Web site along with other information relevant to the designations process.

**II. Judicial Review**

Section 307(b)(1) of the Clean Air Act indicates which Federal Courts of Appeal have venue for petitions for review of final actions by the EPA. This section provides, in part, that petitions for review must be filed in the Court of Appeals for the District of Columbia Circuit (i) when the agency action consists of “nationally applicable regulations promulgated, or final actions taken, by the Administrator,” or (ii) when such action is locally or regionally applicable, if “such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination.” In the rule establishing air quality designations for the 2010 SO<sub>2</sub> NAAQS, the EPA determined that the actions are of nationwide scope and effect for the purposes of section 307(b)(1). [See 78 FR 47191, 47197 (August 5, 2013)].

The EPA has determined that its actions denying these petitions for reconsideration also are of nationwide scope and effect because they directly relate to the SO<sub>2</sub> designations rulemaking that the EPA previously determined is of nationwide scope and effect. Thus, any petition for review of the final letters denying the petitions for reconsideration must be filed in the Court of Appeals for the District of Columbia Circuit on or before October 24, 2014.

Dated: August 15, 2014.

**Janet McCabe,**  
*Acting Assistant Administrator, Office of Air Radiation.*  
[FR Doc. 2014-20216 Filed 8-22-14; 8:45 am]  
**BILLING CODE 6560-50-P**

**COUNCIL ON ENVIRONMENTAL QUALITY**

**40 CFR Parts 1500, 1501, 1502, 1503, 1505, 1506, 1507, and 1508**

**Effective Use of Programmatic NEPA Reviews**

**AGENCY:** Council on Environmental Quality.  
**ACTION:** Notice of Availability, Request for Public Comments on Draft Guidance on Effective Use of Programmatic National Environmental Policy Act Reviews.

**SUMMARY:** The Council on Environmental Quality (CEQ) is publishing draft guidance on when and how Federal agencies can effectively use National Environmental Policy Act (NEPA) programmatic reviews. Guidance on programmatic NEPA reviews has been requested by the agencies and attention on programmatic NEPA reviews has increased as agencies are increasingly undertaking broad landscape scale analyses for proposals that affect the resources they manage. This guidance is designed to assist agency decision-makers and the public

in understanding the environmental impacts from proposed large-scope Federal actions and activities and to facilitate agency compliance with NEPA by clarifying the different planning scenarios under which an agency may prepare a programmatic, broad-scale, review. The guidance also addresses how agencies can prepare such reviews to ensure they are timely, informative, and useful for advancing decision-making.

The goal of this guidance is to encourage a more consistent approach to programmatic NEPA reviews so that the analyses and documentation will allow for the expeditious and efficient completion of any necessary tiered reviews. It builds on guidance issued since 1981 that explained the use of tiering and its place in the NEPA process.

**DATES:** Submit comments on or before October 9, 2014.

**ADDRESSES:** The NEPA Draft Guidance Documents are available at <http://www.whitehouse.gov/administration/eop/ceq/initiatives/and> <http://www.nepa.gov>. Submit electronic comments on the NEPA Draft Guidance "Effective Use of Programmatic NEPA Reviews" to <http://www.whitehouse.gov/webform/submit-comments-draft-guidance-programmatic-nepa-reviews>, or in writing to The Council on Environmental Quality, Attn: Horst Greczmiel, 722 Jackson Place NW., Washington, DC 20503.

**FOR FURTHER INFORMATION CONTACT:** The Council on Environmental Quality (ATTN: Horst Greczmiel, Associate Director for National Environmental Policy Act Oversight), 722 Jackson Place NW., Washington, DC 20503. Telephone: (202) 395-5750.

**SUPPLEMENTARY INFORMATION:** This draft guidance will apply to Federal agencies in accordance with sections 1507.2 and 1507.3 of the CEQ Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 40 CFR Parts 1500-1508. The National Environmental Policy Act (NEPA), 42 U.S.C. 4321-4370, enacted in 1970, is a fundamental tool used to harmonize our environmental, economic, and social aspirations and is a cornerstone of our Nation's efforts to protect the environment. NEPA recognizes that many Federal activities affect the environment and mandates that Federal agencies consider the environmental impacts of their decisions before acting. Additionally, NEPA emphasizes public involvement in government actions affecting the environment by requiring that the

benefits and risks associated with proposed actions be assessed and publicly disclosed.

CEQ, which is charged with overseeing NEPA, recognizes that NEPA is a visionary and versatile law that can be used effectively to address new environmental challenges facing our nation and also to engage the public widely and effectively. Programmatic NEPA reviews are one method of NEPA implementation that merits increased attention and use to facilitate agency compliance with NEPA, and enhance the quality of public involvement in governmental decisions relating to the environment. For example, programmatic NEPA environmental reviews provide another mechanism for agencies to address efforts on improving environmental reviews for various sectors and types of Federal activities such as infrastructure<sup>1</sup> and disaster recovery.<sup>2</sup> In March 2012, CEQ published guidance focused on improving the efficiency and timeliness of NEPA environmental reviews<sup>3</sup> and this guidance provides NEPA practitioners with another tool to improve the effectiveness and efficiency of NEPA reviews.

CEQ interprets its regulations as allowing for the use of a programmatic review in an Environmental Assessment (EA) as well as in an Environmental Impact Statement (EIS). A programmatic NEPA review may be appropriate when the action being considered falls into any one of the categories of Federal actions subject to NEPA, including: (1) Adopting official policy; (2) adopting formal plans; (3) adopting agency programs; and (4) approving multiple actions.

CEQ is seeking public comment on this guidance for 45 days. The draft guidance and Appendix A which provides a table of key distinctions between programmatic and the subsequent tiered NEPA reviews are available for review and comment here and at the CEQ Web site at <http://www.whitehouse.gov/administration/eop/ceq/initiatives/>. Appendices B (CEQ regulations and guidance relevant to programmatic reviews) and C (examples of successful programmatic NEPA

reviews) are also available for review on that Web site. CEQ welcomes your comments and any suggestions on all the Appendices.

Public comments are requested on or before October 9, 2014. CEQ intends to make all comments received available online without change, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Please do not include any personal information or any information that you consider to be Confidential Business Information or otherwise protected as part of a public comment.

Dated: August 14, 2014.

**Michael J. Boots,**

*Acting Chair, Council on Environmental Quality.*

## Effective Use of Programmatic NEPA Reviews

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<sup>1</sup> See Federal Infrastructure Projects, Permitting Dashboard, available at <http://www.permits.performance.gov/>.

<sup>2</sup> See Unified Federal Review, available at [http://achp.gov/unified\\_federal\\_review.html](http://achp.gov/unified_federal_review.html).

<sup>3</sup> Council on Environmental Quality, Memorandum for Heads of Federal Departments and Agencies: Improving the Process for Preparing Efficient and Timely Environmental Reviews under the National Environmental Policy Act (March 6, 2012), available at [http://ceq.hss.doe.gov/current\\_developments/docs/Improving\\_NEPA\\_Efficiencies\\_06Mar2012.pdf](http://ceq.hss.doe.gov/current_developments/docs/Improving_NEPA_Efficiencies_06Mar2012.pdf).

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## I. Introduction

A programmatic National Environmental Policy Act (NEPA) review should assist agency decision-makers and the public in understanding the environmental impacts from proposed large scope Federal actions and activities. The analyses in a programmatic review are valuable in setting out the broad view of environmental harms and benefits, which can then be relied upon when agencies make decisions based on the Programmatic Environmental Assessment (PEA) or Programmatic Environmental Impact Statement (PEIS),<sup>4</sup> as well as decisions based on a subsequent (tiered)<sup>5</sup> NEPA review. Programmatic NEPA reviews should result in clearer and more transparent decision-making, as well as provide a better defined and more expeditious path toward decisions on proposed actions. Agencies are encouraged to revise or amend their NEPA implementing procedures, if necessary, to allow for analyses at a programmatic level.

### A. Purpose of This Guidance

This guidance was prepared to assist Federal agencies to improve and modernize their use of programmatic NEPA reviews (analysis and documentation). The term “programmatic” describes any broad or high-level NEPA review; it is not limited to a NEPA review for a particular program.<sup>6</sup> Programmatic NEPA reviews assess the environmental impacts of proposed policies, plans, programs, or projects for which subsequent actions will be implemented either based on the PEA or PEIS, or based on subsequent NEPA reviews tiered to the programmatic review (e.g., a site- or project- specific document). Programmatic NEPA reviews designed to meet NEPA responsibilities for proposed actions without a tiered review are governed by the same

regulations and guidance that apply to non-programmatic NEPA reviews. They should be developed and their adequacy judged as a stand-alone final NEPA review. This guidance addresses both programmatic NEPA reviews that make decisions applicable to subsequent tiered NEPA reviews and programmatic NEPA reviews without any subsequent review.

The programmatic approach under NEPA has not been fully used for its intended purpose and when used, it often has not fulfilled agency or stakeholder expectations.<sup>7</sup> On March 6, 2012, the Council on Environmental Quality (CEQ) published guidance highlighting the efficiencies provided for in the CEQ Regulations Implementing the Procedural Requirements of the National Environmental Policy Act (CEQ Regulations)<sup>8</sup> and received feedback from several stakeholders that additional guidance on programmatic and tiered NEPA reviews would provide a valuable addition to agency practices and procedures for providing more timely and efficient NEPA reviews.<sup>9</sup>

<sup>7</sup> Council on Environmental Quality, National Environmental Policy Act Task Force Report: Modernizing NEPA Implementation (Sept. 24, 2003) (finding that reliance on programmatic NEPA documents has resulted in public and regulatory agency concern that programmatic NEPA documents often result in a “shell game” of when and where deferred issues will be addressed, undermining agency credibility and public trust. The report found that the public may fail to understand: (1) The significance of the broad decisions being analyzed; and (2) that the specific details will be provided in subsequent site-specific documents. On the other hand, when programmatic NEPA documents are focused, some respondents fear that some issues and analyses will be deferred and ultimately never addressed. The NEPA Task Force found that agencies that provide the greatest specificity in programmatic documents have the greatest difficulty in maintaining the viability and durability of these documents. This difficulty associated with maintaining document relevancy has led some agencies as well as members of the public to conclude that preparing programmatic NEPA documents is not cost effective. The recommendation of the Task Force was that CEQ develop advice to agencies on the analytical requirements associated with the different uses of programmatic NEPA reviews, to foster agreement and consistency between agency decisions and public expectations), available at <http://ceq.hss.doe.gov/ntf/20030929memo.pdf>.

<sup>8</sup> Council on Environmental Quality, Memorandum for Heads of Federal Departments and Agencies: Improving the Process for Preparing Efficient and Timely Environmental Reviews under the National Environmental Policy Act (March 6, 2012), available at [http://ceq.hss.doe.gov/current\\_developments/docs/Improving\\_NEPA\\_Efficiencies\\_06Mar2012.pdf](http://ceq.hss.doe.gov/current_developments/docs/Improving_NEPA_Efficiencies_06Mar2012.pdf).

<sup>9</sup> This guidance is not a rule or regulation, and the recommendations it contains may not apply to a particular situation based upon the individual facts and circumstances. This guidance does not change or substitute for any law, regulation, or any other legally binding requirement and is not legally enforceable. The use of non-mandatory language such as “recommend,” “may,” “should,” and

This guidance is designed to provide practitioners with guidance to assist in the preparation and proper use of programmatic NEPA reviews, and help agencies inform and meet public expectations for programmatic reviews that will enhance the focus and utility of public review and comment. It builds on guidance issued in 1983 that explains the use of tiering and its place in the NEPA process.<sup>10</sup>

This new guidance focuses specifically on NEPA reviews and not on other types of programmatic analyses. CEQ recognizes that analyses conducted outside the context of NEPA can also play an important role, for example, in assessing existing conditions. Although these types of analyses may be used—either by incorporation by reference or as a starting point for developing the NEPA review—an analysis prepared by an agency is not a NEPA programmatic review unless that agency is making decisions on a proposed Federal action. This important distinction was explained in previous NEPA guidance which referred to a non-NEPA programmatic review as a joint inventory or planning study:

In geographic settings where several Federal actions are likely to have effects on the same environmental resources it may be advisable for the lead Federal agencies to provide historical or other baseline information relating to the resources. This can be done either through a programmatic NEPA analysis or can be done separately, such as through a joint inventory or planning study. The results can then be incorporated by reference into NEPA documents prepared for specific Federal actions so long as the programmatic analysis or study is reasonably available to the interested public.<sup>11</sup>

### B. The Nature of Programmatic NEPA Reviews

A PEA or PEIS addresses the general environmental issues and concerns at a broad policy or program level, and can effectively frame the scope of subsequent site- and project-specific proposed Federal actions. A well-crafted NEPA programmatic review provides

“can,” is intended to describe CEQ policies and recommendations. The use of mandatory terminology such as “must” and “required” is intended to describe controlling requirements under the terms of NEPA and the CEQ Regulations, but this document does not establish legally binding requirements in and of itself.

<sup>10</sup> Council on Environmental Quality, Guidance Regarding NEPA Regulations, Memorandum for Heads of Federal Agencies (July 28, 1983), available at <http://ceq.hss.doe.gov/nepa/regs/1983/1983guid.htm>.

<sup>11</sup> Council on Environmental Quality, Guidance on the Consideration of Past Actions in Cumulative Effects Analysis (June 24, 2005), available at [http://ceq.hss.doe.gov/nepa/regs/Guidance\\_on\\_CE.pdf](http://ceq.hss.doe.gov/nepa/regs/Guidance_on_CE.pdf).

<sup>4</sup> The terms PEA and PEIS are also known by some Federal agencies as generic or tier 1 NEPA review.

<sup>5</sup> “Tiering” refers to an approach where federal agencies first consider the broad, general impacts of proposed program, plan, policy, or large scope project—or at the early stage of a phased proposal—and then conduct subsequent, narrower, decision focused reviews. See 40 CFR 1502.20 and 1508.28.

<sup>6</sup> For example, programmatic NEPA reviews are used when agencies revise forest or land and resource management plans, establish programs to eradicate or control invasive species, develop infrastructure with a multijurisdictional footprint, or develop multiple similar recovery projects following a major disaster.

the basis for broad or high-level decisions such as identifying geographically bounded areas within which future proposed activities can be taken or identifying broad mitigation and conservation measures that can be applied to subsequent tiered reviews.

One advantage of preparing a programmatic NEPA review for repetitive agency activities is that the programmatic NEPA review can effectively provide a starting point for the analysis of cumulative and indirect impacts. Using such an approach allows an agency to subsequently tier to this analysis, and address more narrow, site-specific, details. This avoids repetitive broad level analyses in subsequent tiered NEPA reviews and provides a more comprehensive picture of the consequences of possible actions. An agency relying on a programmatic NEPA review must consider whether the depth of analysis needed for a tiered action requires adding to, or building on, the analysis provided in the programmatic NEPA document. A programmatic NEPA review can also be an effective means to narrow the consideration of alternatives and impact discussions in a subsequent tiered NEPA review.

Decision-makers may also call for a programmatic NEPA review for other reasons. For example, programmatic analyses may serve to influence the nature of subsequent decisions, thereby providing for an integrated and sustainable policy, planning framework, or program. Programmatic NEPA reviews may also support policy- and planning-level decisions when there are limitations in available information and uncertainty regarding the timing, location, and environmental impacts of subsequent implementing action(s). For example, in the absence of certainty regarding the environmental consequences of future tiered actions, agencies may be able to make broad program decisions and establish parameters for subsequent analyses based on a programmatic review that adequately examines the reasonably foreseeable consequences of a proposed program, policy, plan, or suite of projects.

## II. Programmatic NEPA Reviews in Council on Environmental Quality Regulations

The concept of “programmatic” NEPA reviews is imbedded in the CEQ Regulations Implementing the Procedural Requirements of NEPA (CEQ Regulations) that address analyses of “broad actions” and the tiering process.<sup>12</sup>

The CEQ Regulations state in relevant part that environmental impact statements may be prepared, and are sometimes required, for broad Federal actions such as the adoption of new agency programs or regulations, and that agencies shall prepare statements on broad actions so that they are relevant to policy and are timed to coincide with meaningful points in agency planning and decisionmaking.<sup>13</sup> The regulations also state that when preparing statements on broad actions (including proposals by more than one agency), agencies may find it useful to evaluate the proposal(s) in one of the following ways: geographically, including actions occurring in the same general location, such as body of water, region, or metropolitan area; generically, including actions that have relevant similarities, such as common timing, impacts, alternatives, methods of implementation, media, or subject matter; or by stage of technological development, including Federal or Federally assisted research, development or demonstration programs for new technologies which, if applied, could significantly affect the quality of the human environment.<sup>14</sup> CEQ interprets its regulations as allowing for the use of a programmatic approach in developing an EA as well as in an EIS.

CEQ interprets its regulations as allowing for the use of a programmatic approach in developing an EA as well as in an EIS. In cases where a policy, plan, program, or broad project analysis identifies but does not provide sufficiently in-depth analysis for potential future actions, then subsequent analyses are appropriate and are referred to as “tiered” analyses. Tiering is one way “to relate broad and narrow actions and to avoid duplication and delay.”<sup>15</sup> Appendix A provides a table of key distinctions between programmatic and the subsequent tiered NEPA reviews. Appendix B provides the CEQ regulations and guidance relevant to programmatic reviews, and Appendix C contains examples of successful programmatic NEPA reviews.<sup>16</sup>

## III. When to Use a Programmatic and Tiered NEPA Review

Programmatic NEPA reviews add value and efficiency to the decision-

making process when they inform the scope of decisions and subsequent tiered NEPA reviews. Programmatic NEPA reviews can facilitate decisions on matters that precede site- or project-specific implementation, such as mitigation commitments for subsequent actions, or narrowing of future alternatives. They also provide information and analyses that can be incorporated by reference in future NEPA reviews. Programmatic NEPA documents may help an agency look at a large or multi-faceted action without becoming immersed in all the details of future site or project-specific proposals. Using programmatic and subsequent tiered NEPA reviews effectively will allow for a focused review at the proper level.

A programmatic NEPA review may be appropriate when the action being considered falls into one of the four major categories of actions to which NEPA can apply:

- *Adopting Official Policy.* Decision to adopt in a formal document an official policy that would result in or substantially alter agency programs. The programmatic analysis for such a decision should include a road map for future agency actions with defined objectives, priorities, rules, or mechanisms to implement objectives. Programmatic examples include:

- Rulemaking at National- or regional-level;
- Adoption of an agency-wide policy;

or

- Redesign of an existing program.
- *Adopting Formal Plans.* Decision to adopt formal plans, such as documents that guide or prescribe alternative uses of Federal resources, upon which future agency actions will be based. For example, setting priorities, options, and measures for future resource allocation according to resource suitability and availability. Specific programmatic examples include:

- Strategic planning linked to agency resource allocation; or
- Adoption of an agency plan for a group of related projects.

- *Adopting Agency Programs.* Decision to proceed with a group of concerted actions to implement a specific policy or plan; e.g., an organized agenda with defined objectives to be achieved during implementation of specified activities. Programmatic examples include:

- A new agency mission or initiative;

or

- Proposals to substantially redesign existing programs.

- *Approving Multiple Actions.* Decision to proceed with multiple projects that are temporally or spatially

<sup>12</sup> 40 CFR 1502.4(b).

<sup>14</sup> 40 CFR 1502.4(c).

<sup>15</sup> 40 CFR 1502.4(d). Tiering is described at 40 CFR 1502.20 and further defined at 40 CFR 1508.28.

<sup>16</sup> Appendices B & C available at <http://www.whitehouse.gov/administration/eop/ceq/initiatives/>.

<sup>12</sup> 40 CFR parts 1500–1508.

connected and that will have a series of associated concurrent or subsequent decisions. Programmatic examples include:

- Several similar actions or projects in a region or nationwide (e.g., a large scale corridor project); or
- A suite of ongoing, proposed or reasonably foreseeable actions that share a common geography or timing, such as multiple activities within a defined boundary (i.e., Federal land or facility).

Agencies should exercise their judgment and discretion when determining whether to prepare a PEA or PEIS.<sup>17</sup> CEQ recommends agencies give particular consideration to preparing a PEA or PEIS when: (1) Initiating or revising a national or regional rulemaking, policy, or program; (2) adopting a plan for managing a range of resources; or (3) making decisions on common elements or aspects of a series or suite of closely related projects.

A programmatic NEPA review may not be a cost effective effort for an agency if the effort required to perform the review is substantially greater than the time and effort saved in analyzing subsequent proposals or if the lifespan of the programmatic NEPA document is limited. Agencies usually benefit by asking two questions when determining whether to prepare a programmatic NEPA review: (1) Could the PEA or PEIS be sufficiently forward looking to contribute to the agency's basic planning of an overall program?; and (2) does the PEA or PEIS provide the agency the opportunity to avoid 'segmenting' the overall program from subsequent individual actions and thereby avoid unreasonably constricting the scope of environmental regulation?<sup>18</sup>

#### IV. Practical Considerations for Programmatic Reviews and Documents

This section provides practical guidance to help agencies implement a successful programmatic approach. The following points will be addressed:

- Answering the fundamental question of what decision(s) does the agency need to make;
- Answering the question of what actions would the agency subsequently want to take based on the programmatic NEPA review;

<sup>17</sup> *National Wildlife Federation v. Appalachian Regional Commission*, 677 F.2d 883, 888 (D.C. Cir. 1981).

<sup>18</sup> *Piedmont Environmental Council v. F.E.R.C.*, 558 F.3d 304, 316 (4th Cir. 2009) (quoting *Nat'l Wildlife Fed'n v. Appalachian Reg'l Comm'n*, 677 F.2d 883, 888–89 (D.C. Cir. 1981)) (agency can do all individual EISs but not if that is an attempt to segment the program and thereby limit regulation; if so, a programmatic should have been done).

- Determining the purpose and need of the programmatic proposal to be analyzed and decided on and its relationship to subsequent tiered level proposals and decisions;
- Defining a practical scope for the programmatic review that is appropriate to the particular type of broad action being analyzed;
- Gathering and analyzing data for broadly scoped actions that potentially affect large geographic areas;
- Coordinating among the multiple overlapping jurisdictions and agencies that may have a role in assessing or determining whether and how a subsequent action may proceed;
- Communicating the scope, content, and purpose of a programmatic NEPA analysis in a way the parties involved in the process and the public can understand;
- Communicating the opportunities for public engagement in the development of the tiered NEPA reviews; and
- Maintaining the relevancy of programmatic NEPA documents for subsequent tiered analyses.

#### A. Determining the Utility and Scope of the Programmatic NEPA Review

Agencies should carefully consider, as early as practicable, the benefits of making the initial broad decisions and the amount of effort required to perform the programmatic review to ensure that using the programmatic approach facilitates decision-making and merits the investment of time and effort. To determine the utility of the PEA or PEIS, and the scope of analysis, an agency may find it helpful to consider:

- What Federal decisions need to be made now and in the future regarding the broad Federal action being proposed?
- What are the meaningful decision points<sup>19</sup> from proposal through implementation, and where are the most effective points in that continuum to address the potential for effects?
- What are the appropriate geographic limits and time frames for this programmatic review?
- Is it necessary to analyze the particular effects of a proposed action at a broader scale to facilitate analysis and/or decision-making at a more refined (i.e., tiered) level, and is a programmatic NEPA review the best way to do this?

For example, a programmatic NEPA review may serve as an efficient mechanism to describe Federal agency

<sup>19</sup> 40 CFR 1502.4(b) (“[a]gencies shall prepare statements on broad actions so that they are relevant to policy and are timed to coincide with meaningful points in agency planning and decisionmaking”).

efforts to adopt sustainable practices for energy efficiency, reduce or avoid greenhouse gas emissions, reduce petroleum product use, and increase the use of renewable energy including bioenergy, as well as other sustainability practices. The definition of “proposal” for the purposes of NEPA review should be considered when answering this question.<sup>20</sup>

- How long will the programmatic review continue to provide a relevant framework for tiering subsequent actions and what factors may result in the need to supplement or refresh the review?

#### 1. Purpose and Need

The purpose and need statement is key to developing the NEPA review, as it establishes the scope of the analyses, range of reasonable alternatives, and frames the decision to be made. The purpose and need for a programmatic review will differ from the purpose and need for a project- or site-specific EA or EIS. The purpose and need for a PEA or a PEIS needs to be broad enough so as to avoid eliminating reasonable alternatives for a tiered EA or EIS and focused enough for the agency to conduct a rational analysis of the impacts and allow for the public to provide meaningful comment on the programmatic action. The purpose and need sets the tone for the scoping process and the course for conducting the NEPA review.

#### 2. Scope of Analysis

The scope consists of the range of actions, the alternatives, and the associated impacts to be considered in a NEPA review.<sup>21</sup> A programmatic NEPA review, like project- or site-specific NEPA reviews, must address the potentially significant environmental impacts of a proposed Federal action. Consequently, the nature of the pending decision drives the scope of the environmental analyses and documentation. The planning process for the proposed action and the development of a programmatic NEPA review should start as early as practicable. By starting the planning process early, there should be sufficient time for establishing the reasonable scope of actions, alternatives, and impacts in the programmatic review,

<sup>20</sup> 40 CFR 1508.23 The regulation states that a “proposal” exists at that stage in the development of an action when an agency subject to the Act has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the effects can be meaningfully evaluated. It goes on to explain that a proposal may exist in fact as well as by agency declaration that one exists.

<sup>21</sup> 40 CFR 1508.25.

and identifying the decisions the programmatic review will support so that the level of analysis is clear from the start.

### 3. The Proposed Action

In addition to unconnected single actions, there are three types of actions set out in 40 CFR 1508.25(a) that may be analyzed in NEPA reviews, including those that are programmatic: connected actions, cumulative actions, and similar actions.

Connected actions are those that enable other actions that require a Federal action, or where the enabled action cannot or will not proceed unless the underlying action is taken; or are interdependent parts of a larger action and depend on the larger action for justification.<sup>22</sup> Projects that have independent utility are not connected actions.<sup>23</sup>

- Example: An agency could analyze a proposed pesticide aerial application program for a large metropolitan area in the same NEPA document with related actions such as the following: equipment purchase and location; pesticide purchase, storage methods and location; and loading locations that will be needed. These are examples of connected actions that are interdependent parts of the larger proposed pesticide aerial application program.

Cumulative actions are those with impacts which, when viewed with other proposed actions, have the potential for cumulatively significant impacts and should therefore be discussed collectively in the same NEPA review.<sup>24</sup>

- Example: A proposed pesticide use program can be analyzed in conjunction with a proposed pest eradication program as cumulative actions because they have the potential to affect the same resources. Note that cumulative effects would have to be considered when conducting the NEPA reviews for each of the proposals, whether in separate or combined NEPA reviews.

Similar actions are those which, when viewed with other reasonably foreseeable or proposed agency actions, have similarities such as timing, impacts, alternatives, or methods of implementation.<sup>25</sup> A programmatic NEPA review provides a platform for evaluating their environmental consequences together.

- Example: Several energy development programs proposed in a region of the country are similar actions

if they have similar proposed methods of implementation and best practice mitigation measures that can be analyzed in the same document.

Broad Federal actions may be implemented over large geographic areas and/or a long time frame. Programmatic NEPA documents must include connected and cumulative actions, and the responsible official should consider whether it is helpful to include a series or suite of similar actions.<sup>26</sup>

Agencies may prepare a single NEPA document to support both programmatic and project-specific proposals. Such an approach may be appropriate when an agency plans to make a broad program decision, as well as decisions to implement one or more specific projects under the program. For example, the programmatic approach may address both the broad impacts of the proposed broad Federal action and provide sufficiently detailed environmental analyses for specific decisions, such as determining the locations and designs of one or more proposals to implement the broad Federal action. The challenge for agencies is to clearly communicate why some environmental aspects are analyzed in greater detail—such as the project- or site-specific effects—than others—such as the programmatic effects. It is essential to clearly state the decisions the agency proposes to make based directly on the PEA or PEIS and distinguish the analysis of impacts and alternatives of the broad programmatic proposals from the project- or site-specific proposals.

### 4. The Alternatives

Alternatives in a programmatic NEPA review are expected to reflect the level of the broad Federal action being proposed and would include the standard NEPA requirements for alternatives.<sup>27</sup> In situations where there is an existing program, plan or policy, CEQ expects that the no-action alternative would typically be the continuation of the present course of action until a new program, plan or policy is developed.<sup>28</sup>

When preparing the programmatic NEPA review for a policy, plan, program, or project, alternatives can be considered at the programmatic level to support focusing future decisions and eliminating certain alternatives from detailed study in subsequent NEPA reviews. By clearly articulating the

nature of subsequent tiered decisions, agencies can craft the alternatives for a programmatic review to focus the scope and development of alternatives for the subsequent tiered NEPA documents. By articulating the reasoned choice between alternatives, with a discussion of why considered alternatives were not chosen, the range of alternatives in tiered NEPA reviews can be appropriately narrowed. Including a brief written discussion of the reasons alternatives were eliminated<sup>29</sup> should provide the justification for narrowing the range of reasonable alternatives to be considered in those tiered NEPA documents.

### 5. The Impacts

All NEPA reviews are concerned with three types of reasonably foreseeable impacts: direct, indirect, and cumulative.<sup>30</sup> The contrast between a programmatic and a project- or site-specific NEPA review is most strongly reflected in how these environmental impacts are analyzed. Because impacts in a programmatic NEPA review typically concern environmental effects over a large geographic and/or time horizon, the depth and detail in programmatic analyses will reflect the major broad and general impacts that might result from making broad programmatic decisions. Agencies should be clear about the context of the decision to be made and how it relates to the intensity of any potential impacts.

As noted previously, agencies may propose decisions regarding standard mitigation protocols and/or operating procedures in a programmatic NEPA review and thereby provide a framework and scope for the subsequent tiered analysis of environmental impacts. For example, proposals for long range energy or transportation infrastructure programs are potentially good candidates for PEAs and PEISs that include an assessment of how the programs will contribute to or reduce water quantity and quality. Discussions of water quantity and quality could then be incorporated by reference in tiered NEPA reviews. By identifying potential program impacts early, particularly cumulative and indirect impacts, programmatic NEPA reviews provide opportunities to modify program components and avoid or mitigate adverse impacts when developing subsequent proposals.

<sup>22</sup> 40 CFR 1508.25(a)(1).

<sup>23</sup> 40 CFR 1508.25(a)(1)(iii).

<sup>24</sup> 40 CFR 1508.25(a)(2).

<sup>25</sup> 40 CFR 1508.25(a)(3) and 1502.4(c).

<sup>26</sup> 40 CFR 1508.25(a).

<sup>27</sup> 40 CFR 1508.25(b) and 1508.9(3)(b).

<sup>28</sup> 46 FR 18026 (addressing in question and answer three what is included in a "no action" alternative).

<sup>29</sup> 40 CFR 1502.14(a).

<sup>30</sup> 40 CFR 1508.7 and 1508.8.

*B. Collaboration, Public Engagement, and Coordination With Other Environmental Reviews*

1. Importance of Collaboration and Cooperation

The types of actions that agencies analyze in programmatic reviews may feature some jurisdictional complexity. Impacts on state, tribal and private lands, and potentially overlapping authorities between agencies and governments with different missions and authorities should be considered in programmatic reviews that address resources or actions across jurisdictional boundaries. Collaboration and cooperation among Federal agencies, tribes, and state and local governments is especially critical for successful completion of meaningful programmatic NEPA reviews. Scoping early in the process provides agency decision-makers with access to other agencies' and governments' expertise and can help agencies identify broad scale issues, develop alternatives for analysis, identify the appropriate temporal and spatial parameters, and determine the appropriate depth of analysis or level of detail for the NEPA review.

2. Public Involvement

Engaging the public is particularly important when developing programmatic NEPA reviews in order to ensure agency objectives are understood and to clarify how a programmatic review relates to subsequent tiered reviews. Effective public engagement also will help manage expectations with regard to the purpose and need, the scope of the programmatic NEPA review, and the purpose and need and scope of subsequent site- and project-specific NEPA reviews. Outreach to potentially interested stakeholders should begin as early as possible—even in advance of formal scoping periods—to afford the public a meaningful opportunity to comment on and shape the NEPA review.

When the public has a chance to see the big picture early it can provide fresh perspectives and new ideas before determinations are made that will shape the programmatic review as well as subsequent tiered proposals. Early outreach also provides an opportunity to develop trust and good working relationships that may extend throughout the programmatic and subsequent NEPA reviews and continue during the implementation of the proposed action.<sup>31</sup> An agency can

encourage early public participation by clearly explaining to the public not only what the proposed programmatic evaluation is meant to accomplish, but also how it relates to future actions, and why the public should get involved at the programmatic stage and not wait for any tiered reviews. Clarity of approach is essential to avoid the impression that a programmatic NEPA review creates a situation whereby the public is too early to raise issues in the broader programmatic analysis and then too late to raise them in any subsequent tiered analyses.

Stakeholders for a programmatic review may span multiple states and large areas. Consequently, public engagement should be well thought through to include all the potentially interested Federal and state agencies, tribes, local governments, private organizations, and individual citizens.<sup>32</sup>

3. Coordination With Other Environmental Reviews

The purpose and need statement and the proposed action for the programmatic NEPA review are critical for determining the compliance requirements under other applicable laws and regulations, such as the Endangered Species Act, National Historic Preservation Act, and Clean Water Act. They are also critical for determining when these other reviews must be completed and for developing a strategy to address all environmental review and consultation requirements in a coordinated manner. Coordinating compliance with other environmental reviews supports a broad discussion, facilitates a comprehensive project management schedule, provides opportunities to meet data, public engagement, and documentation requirements more efficiently, and generally promotes greater transparency in Federal decision-making.

Programmatic NEPA analysis and subsequent tiered NEPA analysis support a phased decision-making process that allows certain statutory and regulatory compliance to be achieved at the programmatic level. The nature of the decision at each phase and the extent to which it may constrain the subsequent consideration of alternatives will help determine an agency's overall

environmental compliance requirements. NEPA requires a full evaluation of all specific impacts when the agency proposes to make an irreversible and irretrievable commitment of the availability of resources to a project. This usually occurs at the site-specific level.<sup>33</sup>

Provided the PEA or PEIS has sufficient specific data and information, it may satisfy other relevant legal requirements for site-specific future actions, even when there is no irreversible or irretrievable commitment of resources at the programmatic level. The determination of whether a particular decision in a phased or incremental decision-making process represents this level of commitment begins with a well formulated description of the proposed action.<sup>34</sup> Agencies should be aware that preparing a programmatic NEPA review is not a substitute for compliance with other environmental laws.

For example, approval of land use plans that establish future management goals and objectives for resource management, and the measures to achieve those goals and objectives, do not necessarily require completion of the Section 106 process under the National Historic Preservation Act. In some cases, an agreement with stakeholders, such as a programmatic agreement pursuant to sec. 106 of the National Historic Preservation Act, demonstrates an agency's compliance requirements for phased decisions being analyzed through a programmatic NEPA review. For instance, where a Federal agency's broad decision will narrow the opportunities for adverse effects in future specific proposals, then the agency may initiate the sec. 106 process as part of the programmatic review. This will allow the agency to complete that process by establishing steps for meeting its responsibility as it implements the broad decision and prior to subsequent project- and site-specific proposals.

Agencies should clearly and concisely articulate their intentions to defer particular environmental review and consultation requirements for consideration until a subsequent project- or site-specific proposal is developed. When deferring these requirements, agencies may still need to analyze and address related statutory requirements to some extent in the programmatic document. For example, if the subsequent actions tiered to the

available at [http://ceq.hss.doe.gov/nepa/nepapubs/Collaboration\\_in\\_NEPA\\_Oct2007.pdf](http://ceq.hss.doe.gov/nepa/nepapubs/Collaboration_in_NEPA_Oct2007.pdf).

<sup>32</sup> For example, a good way to reach out to such a large and diverse public is through non-governmental organizations and citizen's groups. These organizations frequently know what their constituents care about and they may have effective means for communicating with those constituents. Agencies are also encouraged to use conference calls, web meetings and teleconferences to facilitate easy participation by the interested public.

<sup>33</sup> *N. Alaska Envtl. Ctr. v. Lujan*, 961 F.2d 886 (9th Cir. 1992).

<sup>34</sup> *Friends of Yosemite Valley v. Norton*, 348 F.3d, 789, 801 (9th Cir. 2003).

<sup>31</sup> 40 CFR 1501.7; see also Council on Environmental Quality, *Collaboration in NEPA—A Handbook for NEPA Practitioners* (October 2007),

programmatic document will require authorization under sec. 404 of the Clean Water Act prior to construction, agencies should include, after consultation with the U.S. Army Corps of Engineers, a discussion of the range of alternatives that are necessary to demonstrate compliance with the sec. 404(b)(1) Guidelines, and whether there are any practicable alternatives that have less adverse impact on the aquatic ecosystem—and do not have other significant environmental effects—will be made at the project-specific or site-specific level.

### C. Preparing the Documents

#### 1. Programmatic Environmental Assessment or Programmatic Environmental Impact Statement?

Programmatic approaches are usually associated with EISs and tiered documents more typically with proposal-specific EAs. Tiering an EA from a PEIS is appropriate when there are no new significant affects or considerations and the programmatic NEPA review addresses those measures that tiered proposals can rely on to address and reduce the significance of the site- or project-specific impacts.

An agency may prepare a PEA to determine whether an EIS is required or when considering a proposal that does not have significant impacts at the programmatic level. Following a PEA that results in a finding of no significant impact (FONSI), an agency may tier to an EA that results in a finding of no significant impact,<sup>35</sup> or may tier to an EIS when a subsequent site- or project-specific proposal has the potential for a significant impact on the environment.

Whether the agency prepares a PEA or a PEIS, that programmatic review should explain how the agency intends to use it to complete future proposal-specific NEPA reviews. Reasonably available information that should be provided both during scoping and in the PEA or PEIS includes the expected timing of the tiered review(s) as well as the issues, and depth of analysis, it is expected to consider. At the project- or site-specific level, it is necessary to consider the potential impacts that have not been analyzed and considered in the previous programmatic review to which it tiers.

#### 2. Level of Detail in Programmatic NEPA Documents

A PEA or PEIS addresses the broad environmental consequences relevant at the programmatic level. A subsequent tiered EA or EIS will address more

particularized considerations, but can benefit from the programmatic by summarizing and incorporating by reference parts of it.<sup>36</sup> For example, with the Forest Service's programmatic Gypsy Moth Supplemental EIS, the PEIS analyzed the human health and ecological risk assessments for each pesticide approved for use in the Gypsy Moth Eradication Program thereby eliminating the need for such analysis when individual spraying projects are proposed. The PEIS analyzed and disclosed these risks, and deferred to site or project level analyses the specific application of these risk data to how the insecticides would be used in a given project (e.g., dose rates, number of applications, presence of "sensitive populations") and other specific issues and concerns raised during scoping.

The PEA or PEIS must provide sufficient detail to foster informed decision-making that reflects broad environmental consequences from a wide-ranging federal program.<sup>37</sup> Site- or project-specific impacts need not be fully evaluated at the programmatic level when the decision to act on a site development or its equivalent is yet to be made.<sup>38</sup> Alternatives need only be specific enough to make a reasoned choice between programmatic directions. The alternatives need not consider every specific aspect of a proposal. For example, a programmatic analysis of a plan would not require consideration of detailed alternatives with respect to each aspect of the plan—otherwise a programmatic analysis would be impossible to prepare and would become a compilation of a vast series of site specific analyses.<sup>39</sup>

The following considerations may be helpful to determine the scale and scope of impacts to be addressed in a programmatic NEPA review:

- First, what are the appropriate scales of the affected environment to be analyzed (e.g., watershed, basin, etc.)?
- Second, what environmental impacts are of concern at this scale?
- Third, what information can be garnered about environmental impact criteria (thresholds) to assist in describing when those impacts are best addressed in detail?

Determining the level of detail appropriate to a programmatic analysis requires weighing several factors,

including the extent of the interrelationship among proposed actions, the scale and scope of any subsequent decisions, as well as practical considerations of feasibility. Resolving these issues will require the expertise of the agencies responsible for the proposed action informed by the agencies responsible for the potentially impacted resources.<sup>40</sup>

#### 3. Depth of Impact Analysis in Programmatic NEPA Documents

The agency is obligated to conduct a meaningful impact analysis in accordance with NEPA, and that analysis should be commensurate with the nature and extent of potential impacts of the decision being made. A programmatic NEPA review should contain sufficient discussion of the relevant issues and opposing viewpoints to enable the decision-maker to take a "hard look" at the environmental effects and make a reasoned choice among alternatives.<sup>41</sup> There should be enough detail to enable those who did not have a part in its compilation to understand and meaningfully consider the factors involved.<sup>42</sup>

A broad (e.g., regional) description may suffice for characterizing the affected environment in most programmatic NEPA reviews, so long as potentially impacted resources are meaningfully identified and evaluated. Impacts can often be discussed in a broad geographic and temporal context with particular emphasis on cumulative impacts. Those impacts can often be shown in a meaningful way by displaying a range of potential effects. The scope and range of impacts may also be more qualitative in nature than those found in project- or site-specific NEPA reviews.

It may be more difficult for an agency to analyze the environmental impacts in depth when there is no clear indication—no site- or project-specific proposal pending—for the level of activity that may follow a programmatic decision.<sup>43</sup> A programmatic NEPA review should carefully consider the scope of both the programmatic and the subsequent tiered NEPA review. CEQ's 1981 scoping guidance addressed this issue and the need to be clear about the type of programmatic NEPA review.

[I]f a proposed program is under review, it is possible that site specific actions are not yet proposed. In such a case, these actions

<sup>36</sup> *Nevada v. Dep't of Energy*, 372 U.S. App. DC 432 (D.C. Cir. 2006).

<sup>37</sup> *Found. On Econ. Trends v. Heckler*, 756 F.2d 143, 159 (D.C. Cir. 1985).

<sup>38</sup> *Citizens for Better Forestry v. U.S. Dep't of Agriculture*, 481 F. Supp. 2d 1059, 1086, (D. Cal. 2007).

<sup>39</sup> *Greenpeace v. National Marine Fisheries Service*, 55 F. Supp. 2d 1248, 1276 (D. Wash. 1999).

<sup>40</sup> *Texas Committee on Natural Resources v. Bergland*, 573 F. 2d 201 (5th Cir. 1978).

<sup>41</sup> *Natural Resources Defense Council v. Morton*, 458 F.2d 827, 838 (D.C. Cir. 1972).

<sup>42</sup> *Baltimore Gas and Electric Co v. NRDC*, 462 U.S. 87 (1983).

<sup>43</sup> 40 CFR 1508.23.

<sup>35</sup> *Northern Plains Resource Council v. Lujan*, 874 F.2d 661, 665–66 (9th Cir. 1989).

are not addressed in the EIS on the program, but are reserved for a later tier of analysis.<sup>44</sup>

Thus, the deferred analysis should be identified and the intended use of tiering made clear at the outset of scoping, and articulated in the programmatic review. Informing participants and the public of the expected timing of the tiered review(s), as well as the issues and depth of analysis, allows them to concentrate on the issues at hand, rather than on those that will be addressed later. Courts have affirmed NEPA's requirement that Federal agencies document the environmental impacts of proposed broad actions, such as programs, recognizing the difficulty in predicting the level of activity that will occur and that it may not be possible to analyze thoroughly the environmental effects of, and the resource commitments involved in, such a broad proposed activity.<sup>45</sup>

For example, in the PEIS for the Container Terminal Development Plan prepared by the Port of Seattle Marine Planning & Development Department, the port determined that it was impossible to know the precise demand for container service in the future, and therefore it was impossible to predict the precise location, type and timing of specific facilities and their environmental impacts. Recognizing the uncertainties involved, the PEIS evaluated potential environmental impacts and opportunities comprehensively by focusing on a bounded range of potential activities and their impacts. The port's Container Plan projected a low and high range for container service demand and a range of new or improved facilities. The EIS evaluated strategies for meeting low and high range demand and the preferred alternative based on the plan, providing a flexible market-driven approach in recognition of the dynamic nature of the shipping industry and supply of regional container facilities.<sup>46</sup>

#### D. Mitigation and Monitoring

Programmatic NEPA reviews provide an opportunity for agencies to incorporate comprehensive mitigation planning and monitoring strategies into the Federal policymaking process at a broad or strategic, rather than specific,

or site-by-site, level. These analyses can promote sustainability and allow Federal agencies to advance the nation's environmental policy as articulated in sec. 101 of NEPA.<sup>47</sup>

By identifying potential adverse impacts early during the broad programmatic planning, programmatic NEPA reviews provide a unique opportunity to modify aspects of the proposal and subsequent tiered proposals to avoid or otherwise mitigate those impacts. A thoughtful and broad-based approach to planning for future development can include best management practices, standard operating procedures and comprehensive mitigation measures that address impacts on a broad programmatic scale (e.g., program-, region-, or nation-wide). These can expedite the preparation of subsequent project- or site-specific proposals by establishing siting, design, operational, or other relevant implementation criteria, requirements, and protocols. The subsequent tiered NEPA review would then include those measures to address potentially significant impacts and focus on the impacts and mitigation alternatives available at the project- or site-specific level that were not considered in the PEA or PEIS.

For example, a Forest Service and Bureau of Land Management PEIS for coal bed methane development on Federal lands in San Juan National Forest established siting and engineering techniques and best management practices to reduce the effects of coal bed methane development on surface water quality, quantity, and use; established a suite of mitigation measures for when pipelines, roads, or power lines crossed a stream, wetland, or riparian area; established the development of site-specific mitigation plans; and required monitoring plans for individual wells that would disturb wetlands or riparian areas.<sup>48</sup> These types of programmatic decisions provide valuable information for project proponents (e.g., applicants for Federal licenses or rights-of-way) as they design proposals and implementation activities and give the public insight into the kinds of protections that would be afforded in designing and permitting such facilities.

Programmatic NEPA reviews also afford agencies the opportunity to develop monitoring programs to address impacts on a broad scale. This provides

agencies the opportunity to ensure that mitigation commitments on the programmatic level are actually being implemented. Further, it allows agencies to determine whether the mitigation measures achieved the environmental outcomes they were designed to accomplish.<sup>49</sup>

Finally, monitoring is critical when agencies establish adaptive management strategies in a programmatic NEPA document to increase their flexibility in developing and analyzing subsequent resource management proposals. Identifying triggers for changing the course of implementation and the associated effects and analyzing those impacts at the programmatic level, can allow the agency to change the course of implementation without the need for developing supplemental NEPA reviews and the associated documentation. Ranges of results inform the public and the decision-maker about what parameters are acceptable for continued management under the proposed adaptive management regime and monitoring provides assurance that the environmental impacts have been adequately considered in the programmatic review.

#### E. Handling New Proposals While Preparing a Programmatic NEPA Review

Agencies are sometimes reluctant to conduct programmatic NEPA reviews because of the risk of delaying ongoing and newly proposed actions. The CEQ Regulations enable interim actions to proceed provided certain criteria are met.<sup>50</sup> Typically, proposed actions of relatively limited scope or scale that would have local utility may be taken as an interim action before completing the programmatic analysis.

The CEQ Regulations address interim action criteria for site- or project-specific EAs or EISs when required PEAs and PEISs are not yet completed.<sup>51</sup> Although the CEQ Regulations address criteria for interim actions specifically in the context of PEISs, in those cases where part of a proposed action needs to proceed while a PEA is being prepared, agencies should use the criteria in the CEQ Regulations. The CEQ Regulations recognize and provide for situations where the programmatic review is not available when the

<sup>44</sup> Council on Environmental Quality, Memorandum for General Counsels, NEPA Liaisons, and Participants in Scoping (April 30, 1981), available at <http://ceq.hss.doe.gov/nepa/regs/scope/scoping.htm>.

<sup>45</sup> *Kleppe v. Sierra Club*, 427 U.S. 390 (1976).

<sup>46</sup> Final Environmental Impact Statement, Container Terminal Development Plan, Port of Seattle Marine Planning & Development Department 1-17 (October 1991) (on file with the Council on Environmental Quality).

<sup>47</sup> 42 U.S.C. 4331. See also E.O. 13423, 72 FR 3919 (2007), available at [ceq.eh.doe.gov/nepa/regs/Executive\\_Order\\_13423.htm](http://ceq.eh.doe.gov/nepa/regs/Executive_Order_13423.htm).

<sup>48</sup> *San Juan Citizens Alliance v. Stiles*, 654 F.3d 1038 (10th Cir. 2011).

<sup>49</sup> Council on Environmental Quality, Memorandum for Heads of Federal Departments and Agencies: Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact (January 14, 2011), available at [http://ceq.hss.doe.gov/current\\_developments/docs/Mitigation\\_and\\_Monitoring\\_Guidance\\_14Jan2011.pdf](http://ceq.hss.doe.gov/current_developments/docs/Mitigation_and_Monitoring_Guidance_14Jan2011.pdf).

<sup>50</sup> 40 CFR 1506.1.

<sup>51</sup> 40 CFR 1506.1(a) and (c).

program is at an investment stage or there is a commitment to implementation that will limit future alternatives.<sup>52</sup>

The CEQ Regulations state, in relevant part that while work on a required program environmental impact statement is in progress and the action is not covered by an existing program statement, agencies shall not undertake in the interim any major Federal action covered by the program which may significantly affect the quality of the human environment unless such action: Is justified independently of the program; is itself accompanied by an adequate environmental impact statement; and will not prejudice the ultimate decision on the program. Finally, the regulations state that interim action prejudices the ultimate decision on the program when it tends to determine subsequent development or limit alternatives.<sup>53</sup>

Under the first criterion regarding independent justification, agencies may take an interim action that the agency determines could be undertaken irrespective of whether or how the program goes forward, assuming the other two criteria are met. For example, in cases where an agency is obligated by law to carry out a proposed interim action, the agency should be able to demonstrate that the action has independent utility.

The second criterion makes it clear that an EIS must be prepared for a proposed interim action that has the potential for significant environmental impacts. Although completion of a PEIS first may be more efficient than preparing an adequate EIS for a proposed interim action, the agency could complete an adequate EIS for the interim action. In cases that don't involve significant impacts, an EA would be sufficient to provide adequate NEPA support to meet this second criterion.

Under the third criterion, agencies may take an interim action when they determine that the proposed interim action would not jeopardize the objective consideration of reasonable alternatives. Agencies should take care to distinguish interim actions from ongoing actions. An agency does not need to suspend all operations because it has elected to prepare a programmatic NEPA document. For example, in the case of an area-wide or site-wide PEIS considering a new proposed operations plan, ongoing operations within the area or site may continue and such ongoing operations would be considered under the no action alternative in the PEIS.

<sup>52</sup> 40 CFR 1502.4(c)(3).

<sup>53</sup> 40 CFR 1506.1(c).

#### F. The Decision Document

The decision is documented in a Record of Decision (ROD) following preparation of a PEIS or a decision may be based on a FONSI following preparation of a PEA. The decision document should clearly explain the decision and indicate whether tiered analyses will follow. For example, the agency should articulate its intentions with regard to future decisions, describe how the agency will use the programmatic NEPA document as a basis for tiering future NEPA reviews, and indicate when any deferred issues will be addressed.

The programmatic decision document following a PEA or a PEIS should provide the information required in a ROD. It should include a description of the alternatives considered, the environmentally preferable alternative, economic and technical considerations, agency statutory missions, essential considerations of national policy, and all practicable means to avoid or minimize environmental harm from the alternative selected that were adopted or, if not, why not. A monitoring and enforcement program should also be adopted and summarized for any mitigation where that is applicable.<sup>54</sup>

#### V. Subsequent Proposal-Specific NEPA Reviews

##### A. Deferred Issues

Certain issues may not be addressed in a PEA or PEIS, but rather are discussed fully in subsequent tiered NEPA analysis. These deferred issues can include issues that will be addressed in additional tribal consultations or further National Historic Preservation Act Section 106 consultation, Endangered Species Act Section 7 consultation, or other determinations and consultations. To provide clarity to the public and the decision-maker, programmatic NEPA reviews should make clear when the analysis of potential environmental impacts will be deferred. When preparing a PEA, it is acceptable for an agency to limit its analysis to those foreseeable effects resulting from the programmatic decision at hand. The programmatic document should clearly explain that, while there may be other effects, they do not affect the programmatic decision and full review of these issues is being deferred. In this case agencies should logically explain why there is no effect on the programmatic decision, and also include sufficient information to explain where and when deferred issues

raised by the public and/or regulatory agencies will be addressed.

The scoping process and subsequent public involvement provide an opportunity to clarify the triggers for determining when subsequent reviews and opportunities for review and comment will take place.<sup>55</sup> The programmatic document should also, whenever practicable, explain how and when the interested parties will be notified of any subsequent reviews.

##### B. Tiering NEPA Reviews

One of the main advantages of a programmatic NEPA review is the ability to tier subsequent reviews, such as site- or proposal-specific reviews.<sup>56</sup> Tiering has the advantage of not repeating information that has already been considered at the programmatic level so as to focus and expedite the preparation of the tiered NEPA review(s). When a PEA or PEIS has been prepared and an action is one anticipated in, consistent with, and sufficiently explored within the programmatic NEPA review, the agency need only summarize the issues discussed in the broader statement and incorporate discussion from the broader statement by reference and concentrate on the issues specific to the subsequent tiered proposal.<sup>57</sup>

There are times when an analysis at one level is sufficient. For example, when the programmatic review has taken the required "hard look" at the potential environmental impacts, an agency can rely upon the analysis provided in the PEA or PEIS.<sup>58</sup> On the other hand, an agency may determine that detailed analysis should be deferred to the tiered analysis. The programmatic review must be clear when issues are being deferred, and any subsequent tiered documents will need to review briefly what level of analysis has been considered and whether it is still contemporary.

While CEQ Regulations specifically authorize an agency to tier other NEPA reviews to an EIS, there is no barrier to tiering an EIS to an EA prepared in accordance with NEPA, the CEQ Regulations, and agency NEPA implementing procedures, so long as a sufficient explanation for such an approach is proffered. A programmatic NEPA review may defer some decisions, and make use of tiering and incorporation by reference, and still be

<sup>55</sup> See 40 CFR 1501.7 (scoping), sec. 1501.4 (public involvement in EAs), and sec. 1506.6 (public involvement).

<sup>56</sup> 40 CFR 1502.20.

<sup>57</sup> 40 CFR 1502.20.

<sup>58</sup> *Natural Resources Defense Council v. Morton*, 458 F.2d 827, 838 (D.C. Cir. 1972).

<sup>54</sup> 40 CFR 1505.2(c).

considered a “hard look.” Cases that address “improper tiering” involve situations where an agency attempts to tier to a non-NEPA document.<sup>59</sup>

Confusion over what level of NEPA analysis is required for tiered proposals may occur when a programmatic EIS is complete and the site-specific project will have a significant impact as indicated in the programmatic document. When this occurs, the appropriate question is not if there is a significant impact from the proposed action, but if there is a *new* significant impact that was not already considered and addressed in the programmatic review. If there are no new significant impacts, an EA may be appropriate instead of an EIS so long as the aspects of the proposed action that involve significant effects have not changed since the PEIS, and the agency presents its reasons for determining that the effects and potential mitigation measures were adequately considered in the PEIS. Consequently, as an agency determines the appropriate scope for a PEIS, it should consider the potential for significant site- or project-specific impacts and the cost/benefit of addressing them programmatically.

### C. New Information and Supplementing Documents

The CEQ Regulations provide a procedural framework for keeping environmental analyses current. They require agencies to prepare supplements upon determining there is significant new information of relevance to the proposed action or its impacts.<sup>60</sup> The possibility of new information arising after an EA or EIS is completed exists regardless of whether that NEPA review is a programmatic review.

When new information reaches an agency, it should be initially screened with respect to the following considerations:

- Does the new information pertain to a programmatic NEPA review that was prepared for a now-completed decision-making process?

- Are there any more decisions to be made by the agency that would use the original NEPA review to meet all or a portion of the agency’s NEPA compliance responsibilities for any upcoming decision?

If there are no further decisions to be made, revising the original programmatic NEPA review serves no purpose and is not required. If the new information is relevant to a future decision for which the agency intends to rely upon the original programmatic NEPA review to meet all or a portion of its NEPA compliance responsibilities, then the new information must be reviewed in order to determine if it has any potential effect on the content of the original programmatic review, either in terms of: (a) The accuracy of the previously analyzed impacts (direct, indirect or cumulative); or (b) the feasibility of the alternatives presented or their comparative analysis. If supplementation is not required, agencies should consider documenting that determination which, for example, could be done, through a memorandum to the record that could be included in the administrative record for the programmatic NEPA review.

The agency is responsible for making a reasoned determination whether new information raises significant new circumstances or information regarding environmental impacts or involves substantial changes in the actions decided upon in the programmatic analysis.<sup>61</sup> When a PEA was used, the determination must consider whether the PEA and FONSI are sufficient or whether an EIS is now necessary. If there is a need to supplement, a supplemental PEA can address the new information and result in a FONSI when the agency’s consideration of the context and intensity of the effects of the programmatic proposal warrant a FONSI.<sup>62</sup>

When an agency determines there is a need to supplement a NEPA review, programmatic NEPA reviews provide alternative ways to complete that supplementation. The traditional approach would be to supplement the base document, the original PEA or PEIS. Alternatively, if a new tiered NEPA review can include consideration of the programmatic issues, then the tiered review can also serve as the vehicle for supplementing the PEA or PEIS. When the new information’s

effects are limited to potential impacts or alternatives associated with the next stage, or project- or site-specific decision, then the tiered analysis can address the new information without having to supplement the PEA or PEIS.

### VI. The Lifespan of a Programmatic NEPA Document

Agencies must consider and make reasonable efforts to anticipate the length of time the programmatic decision and its supporting NEPA review will be maintained and used for subsequent tiered reviews. Programmatic documents may become outdated depending on the specificity and analyses included in them. Agencies should determine the factors that may result in the need to supplement or refresh the analysis,<sup>63</sup> establish criteria for evaluating the programmatic document for its use as a basis for subsequent proposal-specific NEPA, and communicate this to stakeholders. When a programmatic review is projected to have a long life span, then the agency should pay close attention to the possible effects of new information.

### VII. Conclusions

This guidance is intended to assist agencies in preparing PEISs and PEAs that address broad, strategic, programmatic level analyses. Agencies should consider using PEAs and PEISs whenever appropriate. Programmatic NEPA reviews provide an opportunity for considering environmental consequences at a broader level and enhance the integration of environmental concerns and mitigations into an agency’s planning procedures. In addition, agencies that are able to clearly explain how specific, outstanding, or future actions will be addressed in subsequent tiered documents, and how the analyses will be vetted publicly, will ensure that the public is informed and can improve the quality of participation and analysis agencies receive from the public, thereby enhancing decision-making. This guidance also is intended to assist NEPA practitioners in realizing the benefits of programmatic NEPA reviews. It should be used in conjunction with the regulations and guidance previously issued by CEQ (see relevant excerpts in Appendix B) and any applicable agency

<sup>59</sup> *Kern v. BLM*, 284 F.3d 1062 (9th Cir. 2002), the Court found that, “tiering to a document that has not itself been subject to NEPA review is not permitted, for it circumvents the purpose of NEPA.” In *Northcoast Environmental Center v. Glickman*, the Court found that, “[a]lthough CEQ procedures allow agencies to incorporate by reference certain materials to cut down on the bulk of an EIS, they cannot ‘tier’ their site-specific EISs to the broader POC program where the program itself has not been subject to NEPA procedures.” Courts have also held that agencies can’t properly tier when agencies tier to an outdated PEIS (*League of Wilderness Defenders v. Marquis-Brong*, 259 F. Supp. 2d 115, 1122–23 (D. Or. 2003), or an inadequate or flawed PEIS (*Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 811 (9th Cir. 1999)).

<sup>60</sup> See 40 CFR 1505.3 (monitoring), 1502.9 (supplementation). See also *Seattle Audubon Society v. Moseley*, 798 F. Supp. 1473, (D. Wash. 1992) (“[a] federal agency has a continuing duty to gather and evaluate new information relevant to the environmental impact of its actions, even after release of an EIS”).

<sup>61</sup> 40 CFR 1502.9.

<sup>62</sup> 40 CFR 1508.27.

<sup>63</sup> 46 FR 18026 (refer to question 32 in CEQ’s 40 Most Asked Questions). As a rule of thumb, if the proposal has not yet been implemented, or if the EIS concerns an ongoing program, EISs that are more than 5 years old should be carefully reexamined to determine if the criteria in sec. 1502.9 compel preparation of an EIS supplement.

NEPA procedures established in accordance with 40 CFR 1507.3.

**Appendix A: Programmatic and Tiered Analyses**

Programmatic and tiered analyses differ in their focus and scope. The

following table indicates the general differences between programmatic and subsequent tiered analyses.<sup>64</sup>

|                         | Programmatic level   | Subsequent (e.g., project- or site-specific) tiered level                                |
|-------------------------|--|--|
| Nature of Action .....  | Strategic, conceptual .....  | Construction, operations, site-specific actions.   |
| Level of Decision ..... | Policy, program, planning, suite of similar projects.  | Individual project(s).   |
| Alternatives .....      | Broad, general, research, technologies, fiscal measures, socioeconomic, land use allocations.                        | Specific alternative locations, design, construction, operation, permits, site-specific. |
| Scale of Impacts .....  | Macroscopic, for example, at a national, regional, or landscape level.   | Project level, mainly local.   |
| Scope of Impacts .....  | Broad in scale and magnitude .....   | Localized and specific.  |
| Time Scale .....        | Long- to medium-term (e.g., Regulatory) .....  | Medium- to short-term (e.g., Permit).  |
| Key Data Sources .....  | Existing national or regional statistical and trend data, policy and planning instruments.                           | Field work, sample analysis, statistical data, local monitoring data.                    |
| Impacts .....           | Qualitative and maybe quantitative to the degree possible.   | Generally quantifiable (though not always).  |
| Decision .....          | Broad, strategic program, policy, or plan .....  | Detailed, project- or site-specific, action-oriented.                                    |
| Mitigation .....        | General, broad suite of potential measures that could apply and potentially the commitments on when they will apply. | Specific, precise measures applicable to a proposed action.                              |

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**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**50 CFR Part 229**

[Docket No. 140325271-4271-01]

RIN 0648-BE13

**List of Fisheries for 2015**

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Proposed rule.

**SUMMARY:** The National Marine Fisheries Service (NMFS) publishes its proposed List of Fisheries (LOF) for 2015, as required by the Marine Mammal Protection Act (MMPA). The proposed LOF for 2015 reflects new information on interactions between commercial fisheries and marine mammals. NMFS must classify each commercial fishery on the LOF into one of three categories under the MMPA based upon the level of mortality and serious injury of marine mammals that occurs incidental to each fishery. The classification of a fishery on the LOF determines whether participants in that fishery are subject to certain provisions of the MMPA, such as registration, observer coverage, and take reduction plan (TRP) requirements.

<sup>64</sup> Maria Rosário Partidário, Strategic Environmental Assessment (SEA)—current

**DATES:** Comments must be received by September 24, 2014.

**ADDRESSES:** You may submit comments on the proposed rule, identified by “NOAA-NMFS-2014-0040” by any of the following methods:

(1) Electronic Submissions: Submit all electronic comments through the Federal eRulemaking portal: <http://www.regulations.gov> (follow instructions for submitting comments).

(2) Mail: Submit written comments to Chief, Marine Mammal and Sea Turtle Conservation Division, Attn: List of Fisheries, Office of Protected Resources, NMFS, 1315 East-West Highway, Silver Spring, MD 20910.

Comments regarding the burden-hour estimates, or any other aspect of the collection of information requirements contained in this rule, should be submitted in writing to Chief, Marine Mammal and Sea Turtle Conservation Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Silver Spring, MD 20910, or to the Office of Information and Regulatory Affairs at [OIRA\\_submissions@omb.eop.gov](mailto:OIRA_submissions@omb.eop.gov).

Instructions: All comments received are a part of the public record and will generally be posted to <http://www.regulations.gov> without change. All Personal Identifying Information (e.g., name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information. NMFS will accept anonymous comments (enter “N/A” in

practices, future demands and capacity-building needs (2003) (unpublished manuscript) available at <http://www.iaia.org/publicdocuments/ELA/SEA/SEAManual.pdf?AspxAutoDetectCookieSupport=1>.

the required fields, if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

**FOR FURTHER INFORMATION CONTACT:** Lisa White, Office of Protected Resources, 301-427-8494; Allison Rosner, Greater Atlantic Region, 978-281-9328; Jessica Powell, Southeast Region, 727-824-5312; Elizabeth Petras, West Coast Region (CA), 562-980-3238; Brent Norberg, West Coast Region (WA/OR), 206-526-6550; Kim Rivera, Alaska Region, 907-586-7424; Nancy Young, Pacific Islands Region, 808-725-5156. Individuals who use a telecommunications device for the hearing impaired may call the Federal Information Relay Service at 1-800-877-8339 between 8 a.m. and 4 p.m. Eastern time, Monday through Friday, excluding Federal holidays.

**SUPPLEMENTARY INFORMATION:**

**What is the List of Fisheries?**

Section 118 of the MMPA requires NMFS to place all U.S. commercial fisheries into one of three categories based on the level of incidental mortality and serious injury of marine mammals occurring in each fishery (16 U.S.C. 1387(c)(1)). The classification of a fishery on the LOF determines whether participants in that fishery may be required to comply with certain provisions of the MMPA, such as registration, observer coverage, and take reduction plan requirements. NMFS must reexamine the LOF annually, considering new information in the Marine Mammal Stock Assessment