

**ALTERNATIVES AND SCOPE OF THE NEPA ANALYSIS  
MITIGATION MEASURES  
SCOPING PROCESS**

**Angela Foster  
Attorney  
Office of General Counsel  
Department of Energy**

## ALTERNATIVES AND THE SCOPE OF ANALYSIS

### SCOPE OF ANALYSIS

#### I. Statutory Language

A. **Section 102(2)(C)**: "...include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on:

- (i) the environmental impact of the proposed action
- (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented
- (iii) alternatives to the proposed action
- (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
- (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented."

#### II. Regulatory Language

A. **40 CFR 1508.25, 1502.4(a), and 1502.9a)**: Scope consists of the range of actions, alternatives, and impacts to be considered in an EIS, and may depend on its relationship to other statements (such as where agencies prepare broad or programmatic EISs, and then tier their EISs to eliminate repetitive discussions of the same issues and to focus on the actual issues ripe for decision at each level of environmental review). To determine the scope of an EIS, agencies must consider 3 types of actions: those which may be connected, cumulative, and similar. Agencies must also consider 3 types of alternatives, including the no action alternative, other reasonable courses of actions, and mitigation measures which are not in the proposed action. Finally, agencies must consider 3 types of impacts: direct, indirect, and cumulative.

### ALTERNATIVES

#### I. Statutory Language

A. See **Section 102(2)(C)(iii)** above

B. **Section 102(2)(E)**: "All agencies of the Federal government shall...study, develop and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources."

## II. Regulatory Language

A. § 1502.14 "...This section is the heart of the environmental impact statement [EIS]. Based on the information and analysis presented in the sections on the Affected Environment (§1502.15) and the Environmental Consequences (§1502.16), it should present the environmental impacts of the proposal and the alternatives in comparative, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public. In this section agencies shall:

1. Rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.

2. Devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits.

3. Include reasonable alternatives not within the jurisdiction of the lead agency.

4. Include the alternative of no action.

5. Identify the agency's preferred alternative or alternatives, if one or more exists, in the draft statement and identify such alternative in the final statement, unless another law prohibits the expression of such a preference.

6. Include appropriate mitigation measures not already included in the proposed action or alternatives.

B. § 1502.2(d) EISs shall state how alternatives considered in it and decisions based on it will or will not achieve the requirements of sections 101 and 102(1) of the Act and other environmental laws and policies.

C. § 1502.2(e) The range of alternatives discussed in the EIS shall encompass those to be considered by the ultimate agency decisionmaker.

D. § 1502.(f) Agencies shall not commit resources prejudicing selection of alternatives before making a final decision.

E. § 1505.1(e) Agency procedures must require that the alternatives considered by the decisionmaker are encompassed by the range of alternatives discussed in the relevant environmental documents and that the decisionmaker consider the alternatives

described in the EIS. If another decision document accompanies the relevant environmental documents to the decisionmaker, agencies are encouraged to make available to the public before the decision is made any part of that document that relates to the comparison of alternatives.

F. § 1505.2(b) The Record of Decision must identify all alternatives considered by the agency in reaching its decision, specifying the alternative(s) which were considered to be environmentally preferable.

G. § 1502.13 The EIS shall briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action.

H. §§ 1507.2, 1508.9 Concerns agency compliance, and environmental assessments. Agencies must study, develop and describe alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources. This Section 102(2)(E) requirement extends to all such proposals, not just the more limited EIS requirement in Section 102(2)(C).

#### KEY CASE LAW

#### **Reasonable Alternatives, including Alternatives Beyond the Authority of Proposing Agency:**

*Natural Resources Defense Council v. Morton, 458 F.2d 827 (D.C. Cir. 1972)*

FACTS: Interior Department prepared an EIS for proposed oil and gas lease sales off the coast of Louisiana. The EIS dealt adequately with the environmental impacts of the proposed sale, and addressed modifications to the proposal to delete some of the tracks with greater environmental risks.

#### FINDINGS:

- 1) An EIS provides a basis for evaluation of the benefits of a proposed project in light of its environmental risks and a comparison of the net balance for the proposed project with the environmental risks presented by alternative courses of action.
- 2) Agencies must look at "reasonable alternatives", but this is not limited to measures which the agency itself can adopt. When the proposed action is an integral part of a coordinated plan to deal with a broad problem, the

range of alternatives which must be analyzed is broadened. While Interior did not have the authority to undertake certain alternatives (such as elimination of oil import quotas), such actions are within the purview of Congress and the President to whom the EIS is given. An EIS is not only for the agency, but also for the guidance of others and must provide them with the environmental effects of both the proposal and the alternatives for their consideration.

3) The discussion of alternatives need not be exhaustive. The information must be sufficient to permit a reasoned choice of alternatives as far as environmental aspects are concerned, including alternatives not within the scope of authority of the agency. Further, it is not appropriate to disregard alternatives merely because they do not offer a complete solution to the problem.

4) Discussion of reasonable alternatives does not require a "crystal ball" inquiry. The statute must be construed in the light of reason.

5) The mere fact that an alternative requires legislative implementation does not automatically establish it as beyond the domain of what is required for discussion, particularly since NEPA was intended to provide a basis for consideration and choice by the decisionmakers in both the legislative and executive branches.

#### What is Reasonable?

*Natural Resources Defense Council v. Callaway*, 524 F.2d 79  
(2d Cir. 1975)

**FACTS:** Navy challenged on dumping of polluted dredged spoil at dumping site in Long Island Sound, based on, *inter alia*, failure to look at reasonable alternatives.

**FINDINGS:** The content and scope of the discussion of alternatives to the proposed actions depend upon the nature of the proposal. Although there is no need to consider alternatives of speculative feasibility or alternatives which could be changed only after significant changes in government policy or legislation, the EIS must still consider such alternatives to the proposed action as may partially or completely meet the proposal's goals, and it must evaluate their comparative merits. [Note that the court's finding in *NRDC v. Morton*, above, that an

alternative requiring a change in legislation was "reasonable," turned on the fact that the EIS dealt with a broad policy issue. In *Callaway*, the court indicated that for a project-specific EIS, an alternative requiring a "significant" change in legislation may not be "reasonable."]

Other cases to review regarding "reasonable:"

*Citizens Against Burlington v. Busey*, 938 F.2d 190 (D.C. Cir. 1991)

*Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978)

*Marble Mountain Audubon Society v. Rice*, 914 F.2d 179 (9th Cir. 1990)

"Small Federal Handle"

*Macht v. Skinner*, 916 F.2d 13 (D.C. Cir. 1990)

FACTS: Maryland Mass Transit Administration decided to build a light rail line near Baltimore, to be financed solely by state and local governments. There was some federal involvement, including a Corps of Engineers 404 permit for 3.58 acres of wetlands. Using federal funds, Maryland began consideration of three extensions to the rail line. The federal grant was provided to the state for assistance in preparing alternative analyses and draft EISs for contemplated extensions. Plaintiffs argued that there was sufficient federal involvement in the rail project to constitute a major federal action triggering NEPA.

FINDINGS: Court held that neither the Corps of Engineers wetlands permit nor the grant money was sufficient to transform the entirely state-funded project into a federal action. The Court characterized the issue as "whether the federal participation in the project is so substantial that the state should not be allowed to go forward until all the federal approvals have been granted in accordance with NEPA." In this case, the court found that the Corps had discretion only over a negligible portion of the entire project, that the only federal involvement in the state portion of the project was the wetlands permit, and that the state had not entered into a financial partnership with the federal government.

**Additional Cases:**  
Scope of Analysis

*Piedmont Heights Civic Club, Inc. v. Moreland*, 637 F.2d 430 (1981): To determine the appropriate scope for an EIS for a segment of highway project, courts consider such factors as whether the proposed segment has independent utility, does not foreclose the opportunity to consider alternatives, and does not irretrievably commit federal funds for closely related projects.

Programmatic Statements

*City of Tenakee Springs v. Clough*, 915 F.2d 1308 (9th Cir. 1990): Where there are large scale plans for regional development, NEPA requires both programmatic and site-specific statements.

Connected Actions

*Save the Yaak Committee v. Block*, 840 F.2d 714 (9th Cir. 1990): Proposed road reconstruction, timber harvest, and feeder roads had to be analyzed as connected actions by Forest Service in deciding whether to prepare an EIS or an EA.

Cases Interpreting Section 102(2)(E) of NEPA

*Environmental Defense Fund v. Corps of Engineers*, 470 F.2d 298 (8th Cir. 1972): No separate documentation is needed to satisfy this section if appropriate alternative analysis is incorporated into an EIS.

*Hanley v. Kleindienst*, 471 F.2d 823 (2d Cir. 1972): Court held that 102(2)(E) was not meant to simply duplicate 102(2)(C), therefore, 102(2)(E) does not apply only where an EIS is required.

*Trout Unlimited v. Morton*, 509 F.2d 1276 (9th Cir. 1974); *City of New Haven v. Chandler*, 446 F.Supp. 925 (D.Conn. 1978): The rule of reason applies to alternative analysis under both Sections 102(2)(C) and (102)(2)(E). The range of alternatives to be considered must be proportional to the significance of the environmental impact of the agency proposal.

*Sierra Club v. Watkins*, 34 ERC 2057 (D.C.Cir. 1991); *Sierra Club v. Alexander*, 484 F.Supp. 455 (N.D.N.Y. 1980). Section 102(2)(E) requirement applies even if a finding of no significant impact (FONSI) is properly issued.

## MITIGATION

The scope of an EIS consists of the range of actions, alternatives, and impacts to be considered, including the no action alternative, other reasonable alternatives to the proposed action, and mitigation measures (see page 1).

### Regulatory Language

A. § 1508.20: Mitigation includes:

(a) *avoiding* the impact altogether by not taking the action or parts of an action;

(b) *minimizing* impacts by limiting the degree or magnitude of the action and its implementation;

(c) *rectifying* the impact by *repairing, rehabilitating, or restoring* the affected environment;

(d) *reducing or eliminating* the impact over time by *preservation and maintenance* operations during the life of the action;

(e) *compensating* for the impact by *replacing or providing substitute* resources or environments.

B. § 1502.14(f): In its alternatives analysis, agencies shall include appropriate mitigation measures not already included in the proposed action or alternatives.

C. § 1502.16(h): In its environmental consequences analysis, agencies shall include discussions of means to mitigate adverse environmental impacts (if not fully covered under § 1502.14(f)).

D. § 1503.3(d): When a cooperating agency with jurisdiction by law objects to or expresses reservations about the proposal on grounds of environmental impacts, the agency expressing the objection or reservation shall specify the mitigation measures it considers necessary to allow the agency to grant or approve applicable permit, license, or related requirement or concurrences.

E. § 1505.2(c): The agency's Record of Decision (ROD) shall state whether all practicable means to avoid or minimize environmental harm have been adopted, and if not, why they were not. A monitoring and enforcement program shall be adopted and summarized where applicable for any mitigation.

F. §§ 1505.3, 1505.3(c): Any mitigation measures and other conditions established in the EIS or during its review and

*New York City v. Department of Transportation*, 715 F.2d 732 (1983): Section 102(2)(E)'s use of the term "available resources" is to be interpreted broadly, and is not confined to natural resources (risk of accident involving transportation of low-level radioactive material through New York City was enough to trigger provision).

committed as part of the decision shall be implemented by the lead agency or other appropriate consenting agency. The lead agency shall, upon request, inform cooperating or commenting agencies on progress in carrying out mitigation measures which they have proposed and which were adopted by the agency making the decision.

Scope of Mitigation Measures  
That Must be Covered

The mitigation measures discussed in an EIS must cover the range of impacts of the proposed action. Examples include: design alternatives that would decrease pollution emission, construction impacts, and/or esthetic intrusion; relocation assistance; possible land use controls, and other efforts. Mitigation measures must be considered even for impacts that by themselves would not be considered "significant." Once the proposal itself is considered as a whole to have significant impacts, all of its specific effects on the environment, whether or not they are significant, must be considered, and mitigation measures must be developed where it is feasible to do so. See *Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, Question 19a.*

**What if Available or Feasible Mitigation Measures are Outside the Jurisdiction of the Lead or Cooperating Agency, or are Unlikely to be Adopted or Enforced by the Responsible Agency?**

All relevant, reasonable mitigation measures that could improve the project must be identified, even if they are outside the jurisdiction of the agency(s) involved, and could not be committed as part of the Record of Decision. This will alert and encourage agencies or officials who could implement the measures to do so.

However, to ensure that environmental effects of a proposed action are fairly assessed, the probability or likelihood of the mitigation measures actually being implemented must also be addressed in both the environmental impact statement and the Record of Decision. as well as whether the necessary mitigation measures will not be implemented for a long period of time. See *40 Most Asked Questions, Question 19b.*

KEY CASE LAW

*Robertson v. Methow Valley Citizens Council*, 109 S.Ct. 1835, 490 U.S. 332, on remand 879 F.2d 705 (1989):

Facts: A U.S. Forest Service study designated a particular national forest site as having high potential for a major

ski resort. Methow Recreation applied for a special use permit to develop and operate the resort on the site. The Forest Service prepared an EIS for the proposal, addressing the impacts of various levels of development on wildlife and air quality, and outlined steps to mitigate adverse effects.

Findings:

(1) NEPA does not impose a substantive duty on agencies to mitigate adverse environmental effects or to include in an EIS a fully developed mitigation plan. Although the EIS requirement and NEPA's other "action forcing" procedures implement the statute's sweeping policy goals by ensuring that agencies will take a "hard look" at environmental consequences and by guaranteeing broad public dissemination of relevant information, it is well settled that NEPA itself does not impose substantive duties mandating particular results. *"Other statutes may impose substantive environmental obligations on federal agencies, but NEPA merely prohibits uninformed--rather than unwise--agency action."*

(2) One important ingredient of an EIS is the discussion of steps that can be taken to mitigate adverse environmental impacts. The requirement that an EIS contain a detailed discussion of possible mitigation measures flows from the language of NEPA and the CEQ regulations. Omission of a reasonably complete discussion of possible mitigation measures would undermine the "action forcing" function of NEPA. Without such a discussion, the public would be unable to adequately evaluate the severity of the adverse effects. *"There is a fundamental distinction, however, between a requirement that mitigation be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated, on the one hand, and a substantive requirement that a complete mitigation plan be actually formulated and adopted, on the other."*

## SCOPING

Scoping is the process to determine the scope of issues to be addressed in an EIS, and for identifying the significant issues related to a proposed action. Scoping may or may not include public meetings, but the process should involve interested parties at all levels of government, and all interested private citizens and organizations.

Scoping is also the point at which all other environmental requirements applicable to the proposed action should be identified; responsibilities should be allocated among all government agencies; any time and page limits set, and, in general, the entire structure and process to be used for that particular EIS, should be discussed with all identifiable participants.

**See CEQ Scoping Guidance.**

### REGULATORY LANGUAGE

A. § 1501.1(d): Agency planning should include identifying at an early stage the significant environmental issues deserving of study, and de-emphasizing insignificant issues, narrowing the scope of the EIS accordingly.

B. § 1501.7: There shall be an early and open process for determining the scope of issues to be addressed and for identifying the significant issues related to a proposed action. As soon as practicable after its decision to prepare an EIS, and before this process begins, the agency must first publish a notice of intent to prepare an EIS in the Federal Register. As part of the scoping process the agency shall:

(1) invite the participation of affected Federal, State, and local agencies, affected Indian tribes, the project proponent, and other interested persons;

(2) determine the scope and the significant issues to be analyzed in depth;

(3) identify and eliminate from detailed study insignificant issues, or issues which have been covered by prior environmental review, narrowing the discussion of these issues in the EIS to a brief summary of why they will not have a significant effect on the environment, or referencing the coverage elsewhere;

(4) allocate assignments for preparation of the EIS among the lead and cooperating agencies;

(5) indicate any other EISs or EAs which are being

prepared or will be prepared that are related to, but not part of the scope of, the EIS;

(6) identify other environmental review and consultation requirements so that they may be prepared concurrently with, and integrated with, the EIS;

(7) indicate the relationship between the timing of the preparation of the EIS and the agency's tentative planning and decisionmaking schedule;

As part of the scoping process, the lead agency may set page and time limits on the EIS, hold an early scoping meeting(s) which may be integrated with any other early planning meeting the agency has. Such a meeting is often appropriate when the impacts of a particular action are confined to specific sites.

(C) § 1502.9(a): Draft EISs shall be prepared in accordance with the scope decided upon in the scoping process.

(D) §§ 1506.8(b)(1); 1502.9(c)(4): There are two instances where the scoping process is not required: for the preparation of either a legislative or supplemental EIS.