IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

Supreme Court No. 99263-1

(King County Superior Court No. 20-2-03704-4 SEA)

WILD FISH CONSERVANCY; CENTER FOR FOOD SAFETY; CENTER FOR BIOLOGICAL DIVERSITY; and FRIENDS OF THE EARTH,

Appellants,

v.

WASHINGTON DEPARTMENT OF FISH & WILDLIFE,

Respondent,

and

COOKE AQUACULTURE PACIFIC, LLC,

Intervenor-Respondent.

APPELLANTS' OPENING BRIEF

Brian A. Knutsen, WSBA No. 38806
Emma Bruden, WSBA No. 56280
Kampmeier & Knutsen, PLLC
1300 S.E. Stark Street, Suite 202
Portland, Oregon 97214
(503) 841-6515 (Knutsen)
(503) 719-5641 (Bruden)

Sophia Ressler, WSBA No. 48406
Center for Biological Diversity
2400 NW 80th Street, #146
Seattle, WA 98117
(206) 900-7953

Attorneys for Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Washington Statutes

Washington Regulations

Federal Statutes

Federal Regulations

Other Authorities

Glossary of Acronyms

AR	Administrative Record
CEQ	Council on Environmental Quality
CP	Clerk's Papers
DFW	Washington Department of Fish & Wildlife
DNR	Washington Department of Natural Resources
DNS	Determination of Nonsignificance
DPS	Distinct Population Segment
DS	Determination of Significance
EIS	Environmental Impact Statement
ESA	Endangered Species Act
mDNS	Mitigated Determination of Nonsignificance
NEPA	National Environmental Policy Act
NMFS	National Marine Fisheries Service
RP	Report of Proceedings
SEPA	State Environmental Policy Act

I. INTRODUCTION.

The State Environmental Policy Act ("SEPA") seeks "to inject environmental consciousness into governmental decision-making" to protect the "fundamental and inalienable right to a healthful environment." *Columbia Riverkeeper v. Port of Vancouver USA*, 188 Wn.2d 80, 91–92, 392 P.3d 1025 (2017); RCW 43.21C.020(3). The "touchstone" for SEPA compliance is whether the "selection and discussion of alternatives fosters informed decision-making and informed public participation." *See California v. Block*, 690 F.2d 753, 767 (9th Cir. 1982). The Department of Fish and Wildlife ("DFW") wholly disavowed those objectives by approving commercial steelhead farming in Puget Sound without considering and disclosing alternatives, relying on state-wide guidance that calls for such evaluations only when an environmental impact statement ("EIS") is prepared. DFW thereby violated SEPA.

Concerned citizens throughout the Pacific Northwest watched in disgust when one of Cooke Aquaculture Pacific, LLC's ("Cooke") commercial salmon farms collapsed in 2017, releasing over 200,000 farmed Atlantic salmon and myriad other pollution into Puget Sound. The Legislature, spurred by outraged Washingtonians, enacted a phase-out of non-native finfish aquaculture. DFW responded by hastily permitting the remaining industrial salmon farms in Puget Sound to rear steelhead—a

salmonid stock that poses severe threats to this ecosystem, particularly to threatened Puget Sound steelhead. In doing so, DFW disregarded objections from another state agency, five Puget Sound Tribes, numerous environmental and wildlife groups, and thousands of concerned citizens.

DFW determined that its new aquaculture permit for commercial farming of steelhead ("Permit") would not have significant environmental impacts and that SEPA therefore did not require DFW to evaluate and disclose impacts in an EIS. In concluding that the Permit would not have significant impacts, DFW did not compare the environmental conditions that would exist in the absence of the Permit to those that would result under the Permit. Instead, DFW compared impacts from the Permit to a hypothetical environmental baseline where commercial farming of Atlantic salmon would continue in Puget Sound if DFW did not issue the Permit for steelhead. DFW thereby avoided an EIS by fabricating a fictitious baseline that obfuscated the actual ecological impacts that will result from commercial steelhead farming under the Permit.

DFW also refused to study and disclose alternatives, pointing to Department of Ecology ("Ecology") rules applicable to agencies throughout the State that require such analyses only in an EIS. Clerk's Papers ("CP") 624–25. That interpretation is inconsistent with the text of SEPA and judicial opinions and regulations interpreting and implementing

identical language in the National Environmental Policy Act ("NEPA").

II. ASSIGNMENTS OF ERROR.

A. Statement of Assignments of Error.[1]

1. The superior court erred in determining that DFW was not required to consider and disclose alternatives prior to issuing the Permit.

2. The superior court erred in affirming DFW's decision not to prepare an EIS before issuing the Permit.

B. Issues Pertaining to the Assignments of Error.

1. Whether SEPA's requirement to "[s]tudy, develop, and describe" alternatives to proposals that "involve[] unresolved conflicts concerning alternative uses of available resources," RCW 43.21C.030(2)(e), applies where a proposed agency action would have adverse impacts on the environment.

2. Whether DFW was required to study, develop, and describe alternatives under RCW 43.21C.030(2)(e) before issuing the Permit.

3. Whether, in determining if the Permit will have significant impacts requiring an EIS, DFW was required to compare the impacts that will result under the Permit to an environmental baseline that accounts for

[1] The Statement of Grounds for Direct Review identified an additional issue: the superior court erred in determining that DFW was the appropriate lead SEPA agency. Appellants maintain that the Washington Department of Natural Resources should be designated the lead agency under applicable rules, but are no longer pursuing this issue.

the phase out of commercial farming of Atlantic salmon in Puget Sound.

4. Whether DFW's agency record fails to demonstrate that the agency adequately considered the environmental consequences of the Permit and fails to show that there will not be significant impacts.

III. STATEMENT OF THE CASE.

A. The State Environmental Policy Act.

SEPA's declared purpose is, *inter alia*, to encourage productive and enjoyable harmony between people and their environment and to promote efforts which will prevent or eliminate damage to the environment. RCW 43.21C.010. The statute "does not demand any particular substantive result in government decision making . . . ." *Stempel v. Dep't of Water Res.*, 82 Wn.2d 109, 118, 508 P.2d 166 (1973). Instead, SEPA requires agencies to consider environmental and ecological factors to the "fullest extent possible" to ensure the environment is shaped "by deliberation, not default." *Eastlake Cmty. Council v. Roanoke Assocs., Inc.*, 82 Wn.2d 475, 490, 513 P.2d 36 (1973).

An EIS is required for "major actions significantly affecting the quality of the environment." RCW 43.21C.030(2)(c). The EIS must describe the environmental impacts of the proposal, the adverse impacts that cannot be avoided if it is implemented, alternatives to the action, and the relationship between local short-term uses of the environment and the

maintenance and enhancement of long-term productivity. *Id.*

Ecology is charged with promulgating rules to implement SEPA. RCW 43.21C.110; *see also* WAC ch. 197-11. Ecology's rules explain that an EIS is required when there is "a reasonable likelihood of more than a moderate impact on environmental quality." WAC 197-11-794(1). The future impacts need only be probable, not certain to occur. *King County v. Wash. State Boundary Review Bd.*, 122 Wn.2d 648, 663, 860 P.2d 1024 (1993). The "significance" of an impact is dependent upon its intensity and context. WAC 197-11-794(2).

Further, "[t]he severity of an impact should be weighed along with the likelihood of its occurrence;" e.g., "[a]n impact may be significant if its chance of occurrence is not great, but the resulting environmental impact would be severe if it occurred." *Id.* A significant impact can result from the combination of several marginal impacts. WAC 197-11-330(3)(c). Where there is scientific uncertainty concerning impacts, the agency generally must describe the worst-case scenario and its likelihood of occurrence in the SEPA document. WAC 197-11-080(3).

Among the factors to consider in determining whether an EIS is required is whether the action may adversely affect a species listed as endangered or threatened under the Endangered Species Act ("ESA"). WAC 197-11-330(3)(e)(ii). Indeed, a finding that an action "is likely to

adversely affect" ESA-listed species, "[s]tanding alone . . . , suggests the need for an EIS." *Klamath-Siskiyou Wildlands Ctr. v. U.S. Forest Serv.*, 373 F. Supp. 2d 1069, 1080 (E.D. Cal. 2004) (discussing NEPA).[2]

Ecology's rules establish a three-step inquiry, referred to as the "threshold determination," to determine whether a proposed action will have significant impacts requiring an EIS. WAC 197-11-330(1)(a)–(c). First, the agency prepares a SEPA "checklist" to describe the proposal and its impacts. WAC 197-11-330(1)(a), -960. Second, the agency determines what the adverse impacts will be and whether they will be significant. WAC 197-11-330(1)(b). Third, the agency determines whether the impacts can be mitigated so they will not be significant. WAC 197-11-330(1)(c), -768. The threshold determination results in a determination of significance ("DS"), determination of nonsignificance ("DNS"), or a mitigated determination of nonsignificance ("mDNS"). An EIS is prepared fully evaluating the impacts of the proposal only where the agency makes a DS. *See* RCW 43.21C.030(c); WAC 197-11-400(2).

To prevent piecemeal decision-making where multiple agencies have authority over a project, SEPA rules provide procedures to designate

[2] Because SEPA is in large part identical to NEPA, Washington courts often look to federal case law for cross-jurisdictional interpretation and the use of precedents. *Eastlake Cmty. Council*, 82 Wn.2d at 488 n.5; *Kucera v. Dep't of Transp.*, 140 Wn.2d 200, 215–24, 995 P.2d 63 (2000).

a "lead agency" charged with primary SEPA responsibilities. *Columbia Riverkeeper*, 188 Wn.2d at 92–93; WAC 197-11-050(1), -758, -924(1). The lead agency makes the "threshold determination," which is binding on other agencies subject to limited exceptions. WAC 197-11-300, -310(2), -310(5), -390(1). For private projects that require aquatic lands leases from the Washington Department of Natural Resources ("DNR"), that agency is generally the lead SEPA agency. *See* WAC 197-11-938(5).

SEPA includes two separate requirements to consider alternatives. First, any EIS must address "alternatives to the proposed action." RCW 43.21C.030(2)(c)(iii). Second, agencies must "[s]tudy, develop, and describe appropriate alternatives . . . [for] any proposal which involves unresolved conflicts concerning alternative uses of available resources." RCW 43.21C.030(2)(e). Ecology's SEPA rules and guidance, however, only require consideration of alternatives in an EIS. *See* CP 624–25.

B. Wild Salmonids and Puget Sound Ecosystem.

"Since the 1970s, Puget Sound has experienced rapid human population growth with as many as one million new inhabitants per decade influencing Puget Sound streams, rivers, and estuaries." Agency Record ("AR") 15120. These pressures have imposed severe consequences on wildlife, especially wild salmonids. *See id.*

Three Puget Sound salmonid species are listed as threatened under

the ESA. The National Marine Fisheries Service ("NMFS") listed the Puget Sound Chinook salmon and the Hood Canal summer-run chum salmon as threatened species in 1999. *See* 64 Fed. Reg. 14,308 (Mar. 24, 1999); 64 Fed. Reg. 14,508 (Mar. 25, 1999); 50 C.F.R. § 223.102(e). The Puget Sound distinct population segment ("DPS") of steelhead was listed as a threatened species in 2007, and NMFS recently issued a recovery plan for the species that identifies commercial net pen aquaculture as a concern. 72 Fed. Reg. 26,722 (May 11, 2007); 50 C.F.R. § 223.102(e); AR 15088, 15184, 15232.

NMFS listed the Southern Resident Killer Whale DPS as an endangered species under the ESA in 2005, and identified inadequate prey availability, specifically salmon, as a primary limiting factor. 70 Fed. Reg. 69,903, 69,908 (Nov. 18, 2005); *see also* AR 2967–69, 4323.

These species are of fundamental importance to the Pacific Northwest ecology, culture, and economy, including to Puget Sound Tribes. *See, e.g.*, AR 3833–35, 4319, 6080. Unfortunately, DFW and its federal counterparts charged with preserving wildlife and fisheries are failing. *See* RCW 77.04.012. Puget Sound steelhead abundance is less than 5% to 10% of historical levels. AR 6964, 15115; *see also* AR 3834. There are only 73 Southern Residents—the lowest in 40 years. AR 2967.

C. Net Pens in Puget Sound.

Commercial net-pen aquaculture began in Puget Sound during the 1970s. AR 4486. Marine net pens are floating facilities that include support structures, stock nets used to contain the farmed fish, and predator exclusion nets. AR 245, 10604, 10606. Eggs are hatched at freshwater hatcheries, and the fish are cultured to a certain size prior to transfer to the marine net pens. AR 245. The fish are then reared in the marine environment to the desired harvest size. *Id.*

The Puget Sound commercial net pens have been used to rear primarily Atlantic salmon—a nonnative species—since at least the early 1990s. AR 243. Cooke has operated all commercial salmon farms in Puget Sound since June 2016. AR 4486. Prior to August 2017, Cooke operated eight facilities in Puget Sound: three facilities in Deepwater Bay southeast of Cypress Island in Skagit County; one facility in Skagit Bay north of Hope Island, also within Skagit County; three facilities in Rich Passage south of Bainbridge Island in Kitsap County; and one facility near Port Angeles in Clallam County. AR 4487, 6004; *see also* AR 246. To operate its net pens, Cooke leases the aquatic lands from DNR, requires pollution discharge permits under the federal Clean Water Act from Ecology, and requires a Marine Finfish Aquaculture Permit issued by DFW. AR 242.

Commercial salmonid aquaculture poses myriad ecological and

genetic threats. The high-density rearing conditions—like concentrated animal feeding operations or "CAFOs" on land—facilitate the transmission of diseases and parasites within the farmed population, which then are amplified into the surrounding environment where they can infect wild fish. *See* AR 3201–02, 4329–35, 4507–22, 10388. Escapes are inevitable; farmed fish escape in large releases due to structural failures and as gradual "leakage" through holes in the nets. *See* AR 4522–23. Escaped fish harm wild salmonids by spreading parasites and pathogens, competing for resources, including food and habitat, and through genetic interactions (mating) with fish of the same species. *See* AR 3197–200, 4525–33. Wild fish are also captured and harmed during net pen harvest activities and during efforts to recover escaped farmed fish. *See* AR 3216–19, 3389, 4531–33. Uneaten fish food and feces degrade the water quality and benthic environment below the net pen complexes. *See* AR 3214–16.

In recognition of the risks posed by commercial aquaculture and under direction by the Legislature, DFW's predecessor and other agencies prepared an EIS in 1990. *See* AR 10566, 10579–80. The intent was to assess the adequacy of existing rules on commercial fish farming in Puget Sound. AR 10569. The EIS focused on the species reared at that time—Atlantic salmon and coho salmon. *E.g.*, AR 10604. Since the 1990 EIS, three Puget Sound salmonid species have become threatened and the

scientific understanding of impacts associated with commercial salmon farming has grown significantly. *See* 64 Fed. Reg. 14,308 (Mar. 24, 1999); 64 Fed. Reg. 14,508 (Mar. 25, 1999); 72 Fed. Reg. 26,722 (May 11, 2007). For example, while NMFS found in 2008 that commercial salmon farming in Puget Sound is not likely to adversely affect threatened salmonids, it now identifies these industrial operations as a risk to the viability of the *entire* Puget Sound steelhead DPS. *Wild Fish Conservancy v. U.S. Envtl. Prot. Agency*, C08-0156-JCC, 2010 U.S. Dist. LEXIS 41838, at *6–7 (W.D. Wash. Apr. 28, 2010); AR 15184.

D. The Catastrophic Collapse of a Cooke Net Pen in 2017.

Cooke's Cypress Site 2 collapsed on August 19, 2017, containing 305,000 adult Atlantic salmon. *See* AR 6004. Unbelievably, Cooke blamed the incident on tidal conditions caused by a solar eclipse. *See* AR 4301–02, 4416. Regulators determined the cause to be poor maintenance, including insufficient net cleaning, and that tidal conditions were not abnormal. AR 6004, 6020, 6039–40; *see also* AR 3653–54, 3835.

Extensive efforts were undertaken to remove as many escaped farmed fish as possible. Washington State and Canada revised fishing regulations, intended to protect wild fish, to allow fishing that would otherwise be prohibited in hopes that Atlantic salmon would be caught. AR 6095. The Lummi Nation declared an emergency, activated its fishing

fleet, and recovered 44,239 escaped Atlantic salmon. AR 6084, 6095.

DNR, Ecology, and DFW investigated and issued a report on the failure. AR 5999–6118. The agencies concluded that Cooke underreported the number of fish that escaped and that between 243,000 and 263,000 farmed Atlantic salmon were released, between 186,000 and 206,000 of which were never recovered. AR 6006, 6084–109. The collapse of Cypress Site 2 also discharged a significant amount of pollution, with a "considerable amount of debris" remaining on the seafloor after Cooke represented that it had completed removal efforts. AR 6005–06, 6081–82.

E. Phase-Out of Atlantic Salmon Farming in Puget Sound.

After the Cypress Site 2 failure, significant steps were taken to protect the Puget Sound ecosystem from commercial salmon aquaculture.

DNR inspected and then terminated the lease for all three net pen farms at Cypress Island due to Cooke's failure to maintain them in good repair. AR 3653–54, 4423, 246 n.4, 4. DNR inspected and then terminated the lease for the Port Angeles net pen facility for similar reasons. AR 3653–54, 246 n.4, 4. DNR also notified Cooke of similar lease violations at the net pens in Rich Passage following inspections. AR 13921–27.

Wild Fish Conservancy filed a Clean Water Act lawsuit in 2017, alleging extensive violations of Cooke's pollution discharge permits for its Puget Sound facilities. *Wild Fish Conservancy v. Cooke Aquaculture Pac.,*

LLC ("*Cooke II*"), C17-1708-JCC, 2019 U.S. Dist. LEXIS 204382, at *4 (W.D. Wash. Nov. 25, 2019) (available at AR 13777–802). The court found that Cooke violated its permits by failing to: inspect mooring components, track and report all escapements, have sufficient pollution prevention plans and fish release prevention plans, and complete inspection forms. *Wild Fish Conservancy v. Cooke Aquaculture Pac., LLC* ("*Cooke I*"), C17-1708-JCC, 2019 U.S. Dist. LEXIS 70974, at *10–19 (W.D. Wash. Apr. 26, 2019); *Cooke II*, 2019 U.S. Dist. LEXIS 204382, at *23–36. The case resulted in a consent decree requiring that Cooke, *inter alia*, conduct engineering analyses and upgrade its net pens before any re-stocking and pay $2,750,000 to fund environmental restoration projects and to cover Wild Fish Conservancy's litigation expenses. AR 13803–12.

Ecology issued a penalty for $332,000 in 2018 upon a finding that Cooke violated its Cypress Site 2 Clean Water Act permit by negligently allowing the release of farmed salmon, failing to inspect anchoring components, and not adequately cleaning the facility's nets. *Cooke II*, 2019 U.S. Dist. LEXIS 204382, at *4–5; AR 4423.

The public pushed for House Bill 2957 ("HB 2957"), which was signed into law on March 22, 2018. Laws of 2018, ch.179. The law prevents DNR from renewing leases for nonnative marine finfish aquaculture in Puget Sound and prevents DFW from permitting nonnative

finfish aquaculture following the expiration of existing leases. RCW 79.105.170; RCW 77.125.050. Cooke's remaining two leases cover four net pens and expire in 2022. AR 13146, 13168, 13184, 13204.

DFW began requiring that Cooke test fish for Piscine Orthoreoviros ("PRV") prior to transferring them to the net pens after the virus was detected in Atlantic salmon that escaped during the Cypress Site 2 failure. AR 4508, 6096. Testing revealed that Cooke's fish were infected with an exotic strain of PRV from the North Atlantic, likely imported from Iceland where Cooke sourced its salmon eggs. *See id.*; *see also* AR 8509–21. DFW has since denied the permits needed for Cooke to transfer Atlantic salmon from its hatcheries to Puget Sound net pens. AR 4508.

To summarize, Cooke's leases for its farms at Cypress Island and Port Angeles have been terminated due to disrepair, with leases for three facilities in Rich Passage and one facility in Skagit Bay remaining. *See* AR 4487. Cooke can lawfully rear Atlantic salmon in the four farms covered by the two remaining leases until the leases expire in 2022. RCW 79.105.170; RCW 77.125.050; AR 13141–78, 13179–217. However, Cooke has been denied permits to transfer fish into Puget Sound net pens because the Atlantic salmon were infected with an exotic virus. AR 4508. Thus, at the end of 2019 and beginning of 2020, Cooke was rearing Atlantic salmon in only two net pens, both of which were likely harvested

during the summer of 2020, and it is unlikely that Cooke has already or will restock any of the farms with Atlantic salmon. *See* AR 13318.

F. DFW's SEPA and Permitting Process.

DFW received an application from Cooke for an aquaculture permit to commercially farm steelhead at its Puget Sound facilities on January 18, 2019. AR 1. Steelhead are native to Puget Sound and therefore not subject to the prohibitions in HB 2957. AR 4503. DFW notified Cooke that SEPA review was required and directed Cooke to complete a SEPA checklist. *Id.* Cooke submitted its checklist on July 24, 2019. AR 264.

DFW provided notice of its intent to issue Cooke an aquaculture permit to commercially farm steelhead on October 1, 2019. AR 4486–88. DFW also issued an mDNS under SEPA at that time, identifying itself as the lead SEPA agency and determining that an EIS was not required. AR 4487–88. The mDNS incorporated the 1990 EIS prepared to assess then-existing rules for commercial aquaculture. AR 4487, 10569. DFW's notice also opened up a public comment period. AR 4488.

Over 3,500 comments were submitted, which resoundingly opposed the mDNS and urged DFW to prepare an EIS. AR 4415, 4431. The Samish Indian Nation, Swinomish Indian Tribal Community, Lummi Nation, Snoqualmie Indian Tribe, and Skokomish Indian Tribe requested an EIS and raised numerous concerns, including that Cooke's proposal

will interfere with adjudicated usual and accustomed fisheries and threaten wild steelhead recovery. AR 3611–13, 3652–55, 3833–35, 4288–91, 4316–46. DNR criticized DFW's SEPA efforts, expressing concerns about impacts to the declining wild Puget Sound steelhead population and DFW's failure to account for increased environmental stressors to wild fish due to climate change. AR 2925–29. Appellants here, Wild Fish Conservancy, Center for Food Safety, Center for Biological Diversity, and Friends of the Earth (collectively, the "Conservancy"), joined by many other organizations and nearly two thousand individuals, provided extensive comments and requested that DFW fully evaluate alternatives and prepare an EIS. AR 3188–3281, 3283–99, 3513–18, 3699–790, 3827–31. The City of Bainbridge Island, State Senator Christine Rolfes, and many affected landowners and other Washingtonians voiced concerns and requested an EIS be prepared to fully evaluate impacts. AR 4236–37, 3598–600, 3351–79, 3380–407.

DFW rejected these criticisms, issuing a justification for its mDNS ("Justification") on January 21, 2020 and a response to public comments in March 2020. AR 4501–46, 4414–32. Those documents emphasized that DFW was required to identify the 1990 EIS in its SEPA process, but the EIS was not a main source used for the mDNS. AR 4506, AR 4422.

The Justification explained that, in concluding there would not be

significant impacts requiring an EIS, DFW evaluated "Cooke's proposed action . . . [of] switching production from Atlantic salmon to . . . steelhead trout." AR 4505. Thus, DFW sought to identify differences in impacts between commercial production of Atlantic salmon and of steelhead, and then determined that the differences do not amount to a significant impact. *E.g.*, AR 4532–33 ("there would be no difference in those interactions between the farming of Atlantic salmon and . . . steelhead trout"), 4533 ("there is no reason to assume bycatch, if any, would differ between the farming of Atlantic salmon and the farming of . . . steelhead").

DFW did not study or disclose alternatives before issuing the Permit, and nothing in the record suggests that DFW even considered the Conservancy's and others' requests for consideration of alternatives. *See* AR 3191–92 (comments requesting consideration of alternatives). DFW issued the Permit authorizing Cooke to rear steelhead at all seven existing industrial salmon farms on January 21, 2020. AR 4484–85.

G. Proceedings Below.

The Conservancy filed its petition for review of the Permit and mDNS under the Administrative Procedure Act ("APA") on February 11, 2020. CP 1–15. DFW submitted its AR on May 12, 2020. CP 95–100.

Cooke intervened, without opposition, as a respondent. Over objections from DFW and Cooke, the Swinomish Indian Tribal

Community was granted leave to file an amicus brief opposing DFW's SEPA efforts. CP 484–89, 515–20, 524–33, 542–64, 565–66. However, the superior court subsequently indicated that it would limit its consideration of the amicus brief. Report of Proceedings ("RP") 4:14–5:1.

Following briefing, the superior court heard oral argument on September 24, 2020. *See generally* RP. The superior court entered its written Order on Appeal on November 6, 2020, rejecting the Conservancy's challenges and affirming DFW's mDNS and Permit. CP 987–96. The Conservancy filed its Notice of Appeal on November 23, 2020. CP 997–99. This Court accepted direct review on March 3, 2021.

IV. ARGUMENT.[3]

A. Standards of Review.

When reviewing an administrative decision, the appellate court sits in the same position as the superior court, applying the same standard to the agency decision. *Norway Hill Pres. & Prot. Ass'n v. King Cty. Council*, 87 Wn.2d 267, 271, 276, 552 P.2d 674 (1976). Further, the Court reviews interpretations of statutes de novo. *Neighborhood All. of Spokane Cty. v. Spokane County*, 172 Wn.2d 702, 715, 261 P.3d 119 (2011).

Negative threshold determinations like the mDNS warrant a

[3] The Conservancy established its standing below. *See* CP 141–43, 147–88. Those efforts are not disputed. *See* RP 44:5–6.

"reasonably broad standard of review;" courts apply both an "arbitrary and capricious" and a "clearly erroneous" standard of review. *Norway Hill Pres. & Prot. Ass'n*, 87 Wn.2d at 271, 274 n.5, 276. While this requires a court "give substantial weight to the agency determination," it also "allow[s] a reviewing court to consider properly 'the public policy contained in [SEPA].'" *Id.* at 275. This Court has explained:

> The policy of [SEPA], which is simply to insure . . . the full disclosure of environmental information so that environmental matters can be given proper consideration during decision making, is thwarted whenever an incorrect "threshold determination" is made. The determination that an action is not a "major action significantly affecting the quality of the environment" means that the detailed [EIS] of SEPA is not required before the action is taken or the decision is made. Consequently, "[w]ithout a judicial check, the temptation would be to short-circuit the process by setting statement thresholds as high as possible within the vague bounds of the arbitrary or capricious standard."

Id. at 273. The "clearly erroneous" standard is broader than "arbitrary or capricious," mandating review of the entire record rather than just a search for substantial evidence to support the agency decision. *Id.* at 274.

Further, the "opponent of a government action holds no burden to show . . . environmental damage," rather, "SEPA imposes the burden on the [agency] of thoroughly exploring and analyzing the possibility of environmental harm" in the record. *Conservation Nw. v. Okanogan County*, No. 33194-6-III, 2016 Wash. App. LEXIS 1410, at *95–96 (June

16, 2016) (unpublished opinion). A negative threshold determination is clearly erroneous "if, despite supporting evidence, the reviewing court on the record can firmly conclude a mistake has been committed." *Sisley v. San Juan County*, 89 Wn.2d 78, 84, 569 P.2d 712 (1977) (citation omitted). In contrast, to survive judicial scrutiny, the agency must show it considered the environmental factors in a manner sufficient to amount to prima facie compliance with SEPA, and the record must demonstrate the agency took a "hard look" at concerns through a "searching, realistic look at the potential hazards and, with reasoned thought and analysis, candidly and methodically addressed those concerns." *Id.* at 85; *Conservation Nw.*, 2016 Wash. App. LEXIS 1410, at *88–89; *see also Anderson v. Pierce County*, 86 Wn. App. 290, 302, 936 P.2d 432 (1977).

B. DFW Violated SEPA by Failing to Study Alternatives.

As noted, the "touchstone" for SEPA compliance is whether the "selection and discussion of alternatives fosters informed decision-making and informed public participation." *See Block*, 690 F.2d at 767. The importance of considering alternatives is reflected in SEPA's inclusion of two separate provisions requiring alternatives analyses: (1) as part of any EIS and (2) for any proposal that involves unresolved conflicts concerning alternative uses of resources. RCW 43.21C.030(2)(C)(iii), (2)(E). While the Conservancy maintains that an EIS was needed, DFW was nonetheless

required to study and disclose alternatives before issuing the Permit under SEPA's second provision prescribing evaluation of alternatives.

1. SEPA's requirements to consider alternatives.

SEPA includes two separate requirements for alternatives analyses. However, Ecology's rules only require agencies to consider alternatives under one of those SEPA requirements—when an EIS is prepared.

An EIS is required for proposals that will have significant impacts and the EIS must address alternatives. Specifically, agencies shall:

> (c) Include in every recommendation or report on . . . major actions significantly affecting the quality of the environment, a detailed statement by the responsible officer on:
>
> **** **** **** **** **** ****
>
> (iii) alternatives to the proposed action . . . .

RCW 43.21C.030(2). Ecology's SEPA rules prescribe procedures and standards for consideration of alternatives in an EIS. WAC 197-11-440(5).

Separate from the EIS requirement, agencies 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 . . . .

RCW 43.21C.030(2)(e). Ecology's SEPA rules do not address this requirement. *See* WAC ch. 197-11. SEPA rules governing the threshold determinations do not require consideration of alternatives as part of the

environmental checklist or a DNS. *See* WAC 197-11-960. Thus, agencies throughout the State do not conduct alternatives analyses where a DNS is made, but instead only study alternatives for proposals that require an EIS.

The parties are unaware of appellate authority addressing SEPA's requirement to study alternatives outside of an EIS. CP 993. However, the Court should give effect to the requirement to study alternatives where there are unresolved conflicts that is distinct from the requirement to address alternatives in an EIS. *See Citizens All. for Prop. Rights Legal Found. v. San Juan County*, 184 Wn.2d 428, 440, 359 P.3d 753 (2015) (statutes should be interpreted so that no portion is rendered superfluous).

2. NEPA's identical alternatives requirements.

SEPA's requirements to study alternatives were taken verbatim from NEPA. In such circumstances, this Court looks to "federal cases construing and applying provisions of NEPA for guidance." *Eastlake Cmty. Council*, 82 Wn.2d at 488 n.5; *see also Kucera v. Dep't of Transp.*, 140 Wn.2d 200, 215–24, 995 P.2d 63 (2000). Courts and implementing regulations require that agencies consider alternatives under NEPA, outside of an EIS, for any proposal that will have some adverse environmental impacts. That alternatives analysis is conducted as part of the "environmental assessment" used to determine whether a full EIS is necessary, which is analogous to the environmental checklist used for

SEPA's threshold determination process.

NEPA was signed into law on January 1, 1970, and included verbatim the two requirements to consider alternatives in SEPA discussed above. *See* Pub. Law 91-190, 83 Stat. 852, 853 (1970). When the Washington Legislature enacted SEPA the following year in 1971, it was modeling the statute generally, and alternatives requirements specifically, after NEPA. *See* Laws of 1971, ch.109, § 3(2)(c), (e); *Eastlake Cmty. Council*, 82 Wn.2d at 488 n.5. NEPA's requirements to consider alternatives in an EIS and where there are unresolved conflicts concerning resources have not been revised since enactment in 1970. *Compare* Pub. Law 91-190, 83 Stat. 852, 853 (1970), *with* 42 U.S.C. § 4332(2)(C)(iii), (2)(E) (2020).

NEPA's requirement to study alternatives to any proposal that involves "unresolved conflicts" "is supplemental to and more extensive" than the requirement to consider alternatives in an EIS. *Envtl. Def. Fund, Inc. v. Corps of Eng'rs of the U.S. Army*, 492 F.2d 1123, 1135 (5th Cir. 1974); *see also Bob Marshall All. v. Hodel*, 852 F.2d 1223, 1229 (9th Cir. 1988) ("The language and effect of the two subsections also indicate that the consideration of alternatives requirement is of wider scope than the EIS requirement."). "It was intended to emphasize an important part of NEPA's theme that all change was not progress and to insist that no major

federal project should be undertaken without intense consideration of other more ecologically sound courses of action, including shelving the entire project, or of accomplishing that same result by entirely different means." *Envtl. Def. Fund*, 492 F.2d at 1135; *see also Bob Marshall All.*, 852 F.2d at 1228 ("NEPA's [alternatives] requirement . . . both guides the substance of environmental decisionmaking and provides evidence that the mandated decisionmaking process has actually taken place.").

The Second Circuit Court of Appeals interpreted this provision:

> NEPA obliges agencies to "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." The Secretary suggests preliminarily that . . . it does not "use" a "resource" within the meaning of section 102(2)(E). This Court, however, has not construed section 102(2)(E) narrowly to apply only to agency actions that propose an identifiable use of a limited resource like park land or fresh water. Instead, we have ruled that federal agencies have a duty under NEPA to study alternatives to any actions that have an impact of the environment, even if the impact is not significant enough to require a full-scale EIS.

New York v. U.S. Dep't of Transp., 715 F.2d 732, 742 (2nd Cir. 1983). Other courts have also found that this requirement is triggered where a proposal would have environmentally harmful impacts, even if the impacts do not require an EIS. *Bob Marshall All.*, 852 F.2d at 1229 ("Because the . . . lease sale opens the door to potentially harmful post-leasing activity, it 'involves unresolved conflicts concerning alternative uses of

available resources,' NEPA therefore requires that alternatives—including the no-lease option—be given full and meaningful consideration."); *River Rd. All., Inc. v. Corps of Eng'rs of U.S. Army*, 764 F.2d 445, 452 (7th Cir. 1985) ("For non-significant impact does not equal no impact; so if an even less harmful alternative is feasible, it ought to be considered.").

That interpretation recognizes that a proposal with adverse environmental impacts necessarily involves conflicts as to whether or how to impact the environmental resource. *See Trinity Episcopal Sch. Corp. v. Romney*, 523 F.2d 88, 93 (2nd Cir. 1975) ("Although this language ['unresolved conflicts concerning alternative uses of available resources'] might conceivably encompass an almost limitless range, we need not define its outer limits, since we are satisfied that where (as here) the objective of a major federal project can be achieved in one of two or more ways that will have differing impacts on the environment, the responsible agency is required to study, develop, and describe each alternative for appropriate consideration.").

The Council on Environmental Quality ("CEQ") is charged with promulgating rules to implement NEPA. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 354 (1989). CEQ regulations provide for the development of an environmental assessment to determine whether the impacts from a proposal will be significant enough to require an EIS. 40

C.F.R. § 1501.5(a), (c). The environmental assessment is therefore equivalent to the environmental checklist required as part of SEPA's threshold determination. *See* WAC 197-11-960. CEQ regulations promulgated in 1978 specify that the environmental assessment "[s]hall include brief discussions . . . of alternatives as required by section 102(2)(E) [of NEPA] . . . ." 43 Fed. Reg. 55,978, 56,004 (Nov. 29, 1978) (previously codified at 40 C.F.R. § 1508.9(b)); *see* 40 C.F.R. § 1501.5(c)(2) (similar current codification). CEQ thereby interprets NEPA's requirement to consider alternatives where there are "unresolved conflicts" to apply to proposals that have impacts warranting evaluation in an environmental assessment. Courts provide "substantial deference" to CEQ's NEPA regulations. *See Robertson*, 490 U.S. at 356.[4]

Thus, federal courts and the federal agency charged with implementing NEPA have consistently interpreted the requirement to study alternatives where there are unresolved conflicts concerning alternative uses of resources to apply to any proposal that will have harmful environmental impacts.

[4] Consistent with CEQ's regulatory interpretation, courts require consideration of alternatives in an environmental assessment. *E.g.*, *Ctr. for Biological Diversity v. Salazar*, 695 F.3d 893, 915 (9th Cir. 2012); *Cent. S.D. Coop. Grazing Dist. v. Sec'y of the U.S. Dep't of Agric.*, 266 F.3d 889, 897 (8th Cir. 2001); *Mt. Lookout – Mt. Nebo Prop. Prot. Ass'n v. Fed. Energy Regulatory Comm'n*, 143 F.3d 165, 172 (4th Cir. 1998).

3. DFW was required to consider alternatives.

SEPA's requirement to "[s]tudy, develop, and describe" alternatives where there are "unresolved conflicts concerning alternative uses of available resources" should be construed in the same manner that federal courts and CEQ have construed the identical requirement of NEPA. Applying that standard, DFW violated SEPA by failing to consider alternatives because the Permit authorizes commercial steelhead farming operations that will, indisputably, have adverse environmental impacts, regardless of whether the impacts are significant enough to require an EIS.

While the parties may dispute the severity of harm and risks posed by Cooke's proposed operations, it is not disputed that impacts occur. For example, harvest operations result in bycatch of wild fish, including salmonids. *See* AR 4533. Cooke harvests fish by fastening a vessel to the farm, lowering a tube into the net pen, and suction pumping fish into the vessel. *See* AR 67. DFW has failed to require any monitoring or reporting of this bycatch, but similar operations in Canada report significant bycatch of numerous fish species, including salmonids like Chinook and chum salmon that, in Puget Sound, are threatened species protected under the ESA. *See* AR 13319. The public has observed Cooke shoveling bycatch overboard during harvest, with seals waiting below to feed on discharged fish. AR 3217, 3389, 15262 (video). Bycatch also occurs during efforts to

recover escaped farmed fish; indeed, DFW admits that such efforts "may cause unacceptable harm in situations where ESA-listed stocks are present." AR 4531. Also, fish waste and excess feed are discharged from Cooke's operations, adversely affecting water quality and the benthic environment below the farms. AR 2927–28, 3214–16, 4232, 4533. Further discussions of the harmful impacts are provided below in section IV.C.2 addressing the inadequacy of DFW's mDNS; however, the agency record indisputably demonstrates that such impacts occur.

DFW was therefore required to "study, develop, and describe appropriate alternatives" because the Permit will result in adverse environmental impacts, regardless of whether those impacts are significant enough to require an EIS. *See*, *e.g.*, *New York*, 715 F.2d at 742; *Bob Marshall All.*, 852 F.2d at 1229. The Permit "involves unresolved conflicts concerning alternative uses of available resources" because it necessarily involved DFW's decision of whether and how to authorize environmental and ecological impacts from Cooke's operations. *See Trinity Episcopal Sch. Corp.*, 523 F.2d at 93. As explained above, the Permit authorizes Cooke's harvest operations that also capture wild fish, making those resources unavailable for other uses, such as harvest by Tribes or others, to feed Southern Resident Killer Whales that suffer from inadequate prey availability, or to aid in the recovery of wild fish populations by spawning.

The record is replete with other examples of conflicts in the use of resources. For example, the Swinomish Indian Tribal Community and the Lummi Nation explained that Cooke's operations interfere with access to and use of usual and accustomed fishing areas and threaten their fisheries. AR 4316–45. The Samish Indian Nation described midden and other debris from net pen operations that could impact archaeological sites. AR 3612–13. The Snoqualmie Indian Tribe and the Skokomish Indian Tribe indicated that Cooke's operations could undermine the substantial investments made to recover wild salmonids. AR 3834–35, 4290–91. Residents living near net pens described extensive concerns and impacts, including those related to discharges from portable toilets and excessive noise from generators and maintenance work. AR 3387, 3395–96.

Cooke's operations under the Permit will have adverse environmental impacts. DFW's permitting decision therefore involved unresolved conflicts on whether and how to use those available resources, requiring that DFW "study, develop, and describe" alternatives before issuing the Permit. By failing to do so, DFW violated SEPA.

C. DFW's mDNS is Clearly Erroneous and Arbitrary.

1. DFW improperly measured the Permit's impacts against a fictional environmental baseline.

DFW's mDNS is clearly erroneous because it measures the Permit's impacts against a fictitious environmental baseline under which

Cooke would continue farming Atlantic salmon in Puget Sound if the Permit were not issued. DFW thereby erroneously limited its analyses and public disclosure of impacts to the differences between rearing Atlantic salmon and rearing steelhead. The Court should reject this sleight of hand. The environmental baseline should reflect the legal and practical reality that Atlantic salmon farming in Puget Sound cannot continue.

In gauging whether significant impacts requiring an EIS will occur, the agency evaluates "(1) the extent to which the action will cause adverse environmental effects in excess of those created by existing uses . . . , and (2) the absolute quantitative adverse environmental effects of the action itself, including the cumulative harm that results from its contribution to existing adverse conditions or uses in the affected area." *Norway Hill Pres. & Prot. Ass'n*, 87 Wn.2d at 277 (citation omitted). The agency must "analyze the proposal's impacts against existing uses, not theoretical uses." *Chuckanut Conservancy v. Dep't of Nat. Res.*, 156 Wn. App. 274, 290, 232 P.3d 1154 (2010). "Where a proposal 'change[s] neither the actual current uses . . . nor the impact of continued use on the surrounding environment,' that action is not a major action significantly affecting the environment and an EIS is not required." *Id.* at 285 (quoting *Asarco Inc. v. Air Quality Coal.*, 92 Wn.2d 685, 706, 601 P.2d 501 (1979)).

Comparing the effects of the action to those created by existing uses requires establishment of an environmental baseline. *See Chuckanut Conservancy*, 156 Wn. App. at 283–84. "'Baseline' is a term borrowed from [NEPA] jurisprudence" and "is a practical tool often employed to

identify the environmental consequences of a proposed agency action: Without establishing baseline conditions there is simply no way to determine what effect an action will have on the environment and, consequently, no way to comply with NEPA." *Chuckanut Conservancy*, 156 Wn. App. at 284 n.8 (citations and alteration marks omitted). "[C]ourts not infrequently find NEPA violations when an agency miscalculates the . . . baseline or when the baseline assumes the existence of a proposed project." *N.C. Wildlife Fed'n v. N.C. Dep't of Transp.*, 677 F.3d 596, 603 (4th Cir. 2012).

The environmental baseline may assume that ongoing actions authorized under existing statutes and regulations will continue; i.e., the baseline may include status quo operations authorized by existing regulatory structures. *See Chuckanut Conservancy*, 156 Wn. App. at 283–84, 289–92 (environmental baseline appropriately included some logging because DNR "has no power to preserve the entire forest"); *see also* 46 Fed. Reg. 18,026, 18,027 (Mar. 23, 1981) (the "no action" alternative, used as a baseline, may assume that "ongoing programs initiated under existing legislation and regulations will continue"[5]). For example, in *Chuckanut Conservancy*, the plaintiffs challenged a proposal to manage the Blanchard Forest and argued that the baseline should contemplate a

[5] The "no action" alternative is used as the baseline against which to measure the effects of the proposed action. *See Ctr. for Biological Diversity v. U.S. Dep't of Interior*, 623 F.3d 633, 642 (9th Cir. 2010); *Pac. Coast Fed'n of Fishermen's Ass'n v. U.S. Dep't of Interior*, 929 F. Supp. 2d 1039, 1048 (E.D. Cal. 2013); *Conservation Nw. v. Rey*, 674 F. Supp. 2d 1232, 1244 (W.D. Wash. 2009).

"no logging use." 156 Wn. App. at 289. The court noted that, under the existing regulatory scheme, DNR was required to manage the forest in a manner that provides for sustainable logging. *Id*. at 289–290. "No logging" was not appropriate as the baseline because it was a "theoretical use," while DNR's baseline appropriately "rel[ied] on the existing regulatory and policy framework . . . ." *Id.* at 290–92.

In contrast, where activities would not continue absent the new agency action, the baseline or status quo should be a no-operations scenario. *See Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 768, 781–84 (9th Cir. 2006) (EIS required because, instead of preserving the status quo, the lease extension gave the project proponent another five years to develop the project); *Pac. Coast Fed'n of Fishermen's Ass'ns v. U.S. Dep't of Interior*, 655 Fed. App'x 595, 598 (9th Cir. 2016) (agency improperly assumed renewal of water delivery contracts as the "no action" alternative). Similarly, the environmental baseline should not assume activities that would be unlawful. *See Asarco, Inc.*, 92 Wn.2d at 706–07 (variance that authorized emissions at levels that were already occurring but that violated legal requirements did not merely maintain the status quo and therefore required an EIS); *Friends of Yosemite Valley v. Kempthorne*, 520 F.3d 1024, 1037–38 (9th Cir. 2008) (NEPA analysis improperly included in the "baseline alternative" elements of the management plan that was currently under review and had previously been found invalid). Finally, the baseline should account for changes in legal authorizations. *See Rey*, 674 F. Supp. 2d at 1244–47 ("no action" alternative should have

accounted for modifications to an injunction that allowed limited logging).

Here, in determining there would not be any significant impacts requiring an EIS, DFW "emphasize[d]" its "determination [wa]s specific and limited to . . . transition [of] production from Atlantic salmon to . . . steelhead in [Cooke's seven[6]] existing Puget Sound net-pen facilities." AR 4501. DFW did not find that Cooke's commercial steelhead farming operations will not have significant environmental impacts; instead, it found the differences in impacts between farming steelhead and Atlantic salmon are not significant. *E.g.*, AR 4522 ("there would be minimal differences"), 4525 ("the relative survival of [escaped] steelhead trout would be the same as or less than previously seen with Atlantic salmon").

For example, after explaining that net pens may affect the "condition, growth, and reproductive success" of wild fish, and even impact the "overall biomass and migratory patterns" of wild fish populations, DFW summarily concludes "that there would be no difference in those interactions between the farming of Atlantic salmon and . . . steelhead . . . ." AR 4532–33. DFW's assumption that, absent the Permit, Cooke would continue rearing Atlantic salmon in its seven Puget Sound net pens is irreconcilable with the actual existing uses and with the legally authorized uses, making its baseline clearly erroneous.

Cooke currently owns seven net pen complexes in Puget Sound.

[6] DFW's Justification explains that the Permit will apply to the four existing facilities with valid leases and to the three existing facilities without valid leases if new leases are obtained. AR 4534.

See AR 4534. However, DNR terminated two leases for three facilities, Cypress Sites 1 and 3 and Port Angles, and DFW's Atlantic salmon aquaculture permit does not authorize production at those facilities. *See* AR 4534 (identifying facilities with and without valid leases), 4. Thus, Cooke does not have the necessary leases from DNR or aquaculture permit from DFW to rear Atlantic salmon at three of its seven facilities.

DFW's aquaculture permit for Atlantic salmon authorizes operations at the four facilities with valid leases only until those leases expire. AR 3–4. Those four salmon farms are covered by two DNR leases, one lease for the Clam Bay, Orchard Rocks, and Fort Ward facilities and one lease for the Hope Island facility (also referred to as "Site 4"). *See* AR 13141–78, 13179–217. Those leases expire on November 10, 2022 and March 31, 2022, respectively. AR 13146, 13184. Under HB 2957, DNR is prohibited from issuing new or renewed leases for the propagation of nonnative Atlantic salmon, and DFW is prohibited from permitting aquaculture production of nonnative finfish species following the expiration of the existing leases. *See* RCW 79.105.170, 77.125.050. Thus, under this legal regime, Cooke's Atlantic salmon operations are limited to four facilities for the next year and are phased out entirely in 2022.

Moreover, as of the beginning of 2020, Cooke had Atlantic salmon in only two net pens, Hope Island ("Site 4") and Orchard Rocks, both of which were likely harvested in the summer of 2020. *See* AR 13318. Since DFW began requiring Cooke to test its Atlantic salmon for PRV in 2018, DFW has denied permits Cooke needed to transfer fish to the net pens

because the fish were infected with an exotic strain of PRV. *See* AR 4508, 8509–21. Thus, as a factual matter, it is unlikely that there will be any further commercial Atlantic salmon aquaculture in Puget Sound.

DFW's impacts analysis is therefore fundamentally flawed because it measures the impacts of rearing steelhead in Cooke's seven existing salmon farms under the Permit against a "theoretical" baseline in which Cooke would continue rearing Atlantic salmon at all seven facilities. *See Chuckanut Conservancy*, 156 Wn. App. at 290. Not only is this baseline inconsistent with actual current uses, but it is inconsistent with legally authorized uses because DFW has only permitted Cooke to rear Atlantic salmon in the four facilities with valid leases. AR 4. More importantly, the baseline fails to account for the enactment of HB 2957 that effectively prohibits commercial Atlantic salmon aquaculture in Puget Sound when existing leases expire in 2022. Further, the baseline does not account for the fact that Cooke cannot, as a practical matter, continue Atlantic salmon farming in Puget Sound whatsoever past the 2020 harvest.

The environmental baseline against which the impacts of the Permit should be analyzed and disclosed should reflect the legal and practical phase-out of commercial Atlantic salmon farming in Puget Sound. Through that lens, the Permit significantly changes both "the actual current uses," by allowing commercial aquaculture at currently dormant facilities, and "the impact of continuing use," by allowing commercial aquaculture to continue beyond the phase out of Atlantic salmon farming. *See Chuckanut Conservancy*, 156 Wn. App. at 285.

SEPA seeks to ensure that decision makers and the public are fully informed of the likely impacts of agency actions. *See Columbia Riverkeeper*, 188 Wn.2d at 91–92; *Robertson*, 490 U.S. at 349 (discussing NEPA). DFW undermined that intent by using a fictional baseline that assumed Cooke would rear Atlantic salmon at its seven existing net pens if the steelhead Permit was not issued. That erroneous baseline prevented a candid evaluation and disclosure of the actual impacts from DFW's decision to authorize Cooke's commercial steelhead production. *See Or. Nat. Desert Ass'n v. Jewell*, 840 F.3d 562, 570 (9th Cir. 2016) (faulty baseline "materially impeded informed decisionmaking and public participation"). DFW's reliance on a flawed baseline renders the mDNS clearly erroneous. *See id.* at 568–71; *N.C. Wildlife Fed'n*, 677 F.3d at 603.

2. <u>DFW failed to take a hard look at impacts</u>.

Cooke proposes to rear up to **3.5 million** steelhead at a time in Puget Sound. AR 81–82. By comparison, around 327,592 to 545,987 wild steelhead historically returned to Puget Sound each year, and current annual returns are approximately **22,000**. AR 6964, 15115, 15219. Cooke's proposal presents a variety of significant environmental harms and risks. DFW's record does not show that it conducted a "searching, realistic look at the potential hazards and, with reasoned thought and analysis, candidly and methodically addressed those concerns," rendering the mDNS clearly erroneous. *See Conservation Nw.*, 2016 Wash. App. LEXIS 1410, at *88–89; *see also Sisley*, 89 Wn.2d at 84–85.; *Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 730 (9th Cir. 2001) (The

Court should "determine whether the agency has taken a 'hard look' at the consequences of its actions, 'based [its decision] on a consideration of or the relevant factors,' and provided a 'convincing statement of reasons to explain why a project's impacts are insignificant.'") (citation omitted).

a. <u>DFW did not take a hard look at genetic risks to wild Puget Sound steelhead</u>.

Commercial production of steelhead poses genetic risks to wild Puget Sound steelhead. DFW did not methodically address this concern.

Commercially reared fish routinely escape net pen enclosures in massive numbers during episodic structural failures, such as occurred at Cypress Site 2 in 2017, and by chronic leakage through smaller tears in nets or during transfer operations. *See* AR 4522–23, 15273. Unlike nonnative Atlantic salmon, farmed steelhead escaping into Puget Sound could spawn with a native population; specifically, threatened Puget Sound steelhead. Genetic introgression of genes from domesticated farmed fish into wild populations can significantly harm wild fish by reducing reproductive fitness and population productivity, disrupting local adaptations, and reducing genetic diversity. *See* AR 4526, 7150, 15182.

Cooke intends to rear all-female sterilized steelhead and estimates that the sterilization failure rate is around 0.17%. AR 4527. To evaluate genetic risks, DFW applied that failure rate to one of Cooke's net pens holding 1,000,000 adult steelhead in a crude effort to estimate the number of farmed fish that could potentially mate with native steelhead. AR 4527–28. DFW assumed: 18% of the farmed fish would not escape, 23% of the

escaped fish would be recovered, only 10% to 50% of the non-recovered escaped fish would be sexually mature at the time of the incident, and only half of those fish would survive long enough to attempt to spawn. *Id.* Using those assumptions, DFW calculated that 63 to 316 fertile females would escape and survive long enough to attempt spawning and concluded that the risk of adverse genetic impacts is low. AR 4528–29. DFW's overly-simplistic analysis and unexplained conclusion is inadequate.

First, DFW does not provide an adequate explanation for why it only considered the possibility of an escape of adult fish, or for its assumption that only 10% to 50% of the non-recovered fish would be able to reproduce because they were already sexually mature at the time of escape. *See* AR 4527–28. Cooke informed DFW that "[y]oung domestic Rainbow Trout/steelhead more easily adjust[] to natural feeding after escape than the older, larger fish . . . ." AR 55. Thus, juvenile fish that escape may be more capable of surviving in the wild to sexual maturation and thereby present greater risks for genetic introgression than the adult fish contemplated in DFW's hypothetical. DFW consulted an expert, Jim Seeb, who advised that genetic interaction "risk increases if escapes occur at juvenile life stages." AR 15273. Similarly, DFW notes that gradual escapes may cause more genetic harm than large events, but DFW fails to evaluate the risks to wild Puget Sound steelhead from such escapes. *See* AR 4523. This omission is inexplicable given that a federal court recently found Cooke was violating regulatory requirements by failing to track and report small escapes from its Puget Sound net pens. *Cooke II*, 2019 U.S.

Dist. LEXIS 204382, at *30–35 (also at AR 13795–97).

Second, DFW does not provide any explanation for its conclusion that genetic introgression from its hypothetical escape incident would not have significant adverse effects. DFW does not even identify levels of genetic introgression that would be unacceptable. For hatchery fish, genetic risks are generally considered unacceptable when more than 5% of the fish on a spawning ground are hatchery and not wild fish. AR 3198. The Puget Sound steelhead DPS is estimated to be only 1% to 10% of its historical abundance. AR 6964, 15115. The annual abundance for many populations within the DPS, including some near Cooke's net pens, are around or even less than the 316 farmed fertile females identified in DFW's estimate; for example, recent abundance for the Puyallup and Cedar Rivers are 277 and five returning adults, respectively. *See* AR 15224–25, 3230–31. A net pen failure resulting in 63 to 316 farmed fertile steelhead surviving to spawn could result in far more than 5% of the steelhead present on certain spawning grounds being farmed and not wild fish. Moreover, wild steelhead are already severely impacted by hatchery fish on spawning grounds; any addition of domesticated farmed steelhead would compound the adverse genetic impacts. *See* AR 15124–25.

Third, there is a risk of much larger escapes. Puget Sound is a seismically active area, as demonstrated by the Nisqually earthquake in 2001. DNR and the National Oceanic and Atmospheric Administration have examined the consequences of earthquake-induced tsunamis, and their simulations show the potential for increased wave heights and current

speeds at the net pen locations. AR 3212–13. A large tsunami could collapse all Puget Sound net pens at once, while also creating conditions that make efforts to recover Cooke's 3.5 million escaped fish impossible. *See id.*; AR 82. Despite the Conservancy raising this concern with DFW, the agency completely ignored the issue. This is inconsistent with SEPA because "[a]n impact may be significant if its chance of occurrence is not great, but the resulting environmental impact would be severe if it occurred." WAC 197-11-794(2); *see also San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm'n*, 449 F.3d 1016, 1028–31 (9th Cir. 2006) (agency violated NEPA by failing to account for impacts of a terrorist attack on a proposed nuclear storage facility because the risk was not overly remote or speculative).

b. DFW did not take a hard look at disease risks.

Cooke's proposal to rear steelhead presents disease and parasite risks. DFW's record fails to demonstrate that the agency conducted a searching and realistic look at these hazards.

Fish are reared in high densities in net pens in a manner that allows for rapid spread of viruses and other diseases throughout the farmed population. *See* AR 4510. While wild fish are sometimes the initial source of a virus, high densities of infected farmed fish in a net pen amplify the pathogen levels in the environment and can then infect nearby wild fish. AR 4510–11, 8744, 8747–48. Studies on the transmission of pathogens from farmed fish to wild fish are difficult and limited in number. *See* AR

8744–45, 9985. However, the amplification of pathogens by aquaculture operations does result in infection of wild fish. AR 9984, 9997, 8748.

There are genetic variations for most salmonid viruses, with variations having different effects on different host species. *See, e.g.*, AR 4514. For example, the infectious hematopoietic necrosis virus ("IHNV") is comprised of three genogroups in North America—the U, M, and L group—and there are further subgroups within those genogroups. *Id.* In Puget Sound, the P clade of the U group is known to currently exist and it infects primarily sockeye salmon with high mortality rates for that species. *Id.* That UP clade also infects steelhead and Chinook salmon, but it is not known to cause disease in those two species. *Id.* The M clade, on the other hand, infects primarily steelhead and is associated with a high rate of mortality. *Id.* Cooke's proposal therefore presents increased risks of disease transmission to wild fish because farmed steelhead are more likely to become infected with virus strains that will infect wild steelhead. Indeed, evidence suggests that disease transmission from farmed to wild fish is more likely where the fish are the same species. *See* AR 8748.

The M clade of IHNV, which is particularly harmful to steelhead, is not known to currently exist in Puget Sound, but it has occurred on the Washington coast. AR 4514. There is no reason to assume that it will not make its way to Puget Sound, especially if there is a large year-round reservoir of steelhead hosts caged in Cooke's net pens. DFW claims that Cooke will vaccinate its farmed steelhead for IHNV in a manner that will provide protection for "up to two years." AR 4515. DFW does not provide

any further information on the effectiveness of the vaccine, but one study found a mortality rate of between 20% and 35% of fish that were exposed to IHNV six months and thirteen months after vaccination. AR 8736; *see also* AR 8788 (IHNV caused 20% mortality seven days following vaccination). Cooke plans to rear steelhead in the marine net pens for 14 to 16 months. AR 56. An outbreak of the M clade of IHNV at Cooke's facilities therefore could result in hundreds of thousands of farmed steelhead becoming infected, despite vaccination, thereby substantially amplifying the viral load in the surrounding environment. This poses substantial risks to wild steelhead susceptible to this clade.

PRV is another virus of concern but for which a vaccine is not used. *See* AR 4515–20. This virus was discovered relatively recently, and it is considered an emerging pathogen in farmed salmonids, and our understanding of the virus is therefore still developing. *See* AR 8509, 8476, 9985, 6403. As with IHNV, different genetic variations of PRV have differing infection and disease rates for different salmonid species. *See* AR 4515–19, 12546–47. DFW failed to require Cooke test its fish for PRV until it was discovered that fish that had escaped during the Cypress Site 2 failure were infected with the virus; it is likely that Cooke had been importing eggs from Iceland that were infected with an exotic strain of PRV from the North Atlantic for some time. *See* AR 4508, 6096, 8509–21.

DFW focused its PRV analysis on PRV-1, which is known to occur in the eastern North Pacific. *See* AR 4516–19. PRV-1 is believed to occur widely in Atlantic salmon farms in British Columbia and in Cooke's

prior Puget Sound operations. *See* AR 4517, 4519–20, 8516–19. DFW predicts that Cooke's steelhead operations will also have high rates of PRV-1 infections. AR 4519. A recent study in British Columbia found that exposure to salmon farms increases the PRV infection rates for wild Pacific salmon. AR 9992. That study further found evidence indicating that PRV infection in wild Pacific salmon may reduce their fitness for survival and reproduction in the wild; specifically, that PRV infection may reduce spawning migration ability. AR 9992, 9995. This could be due to the "cost of infection," whereby fish divert energy to fight the infection. AR 9995. This study thus suggests that PRV-1 infections in Cooke's Puget Sound farms could have significant impacts on wild salmonid populations, even though the PRV infection does not progress to a disease.

DFW acknowledges this recent study, but summarily discounts it because another study found that "PRV viral load had no effect on the oxygen affinity and carrying capacity of the red blood cells . . . ." AR 4519 (citing Zhang, et al. (2019)). However, that study focused solely on PRV impacts to Atlantic salmon, and not Pacific salmon. AR 13120. PRV-1 affects Pacific salmon and Atlantic salmon differently, causing jaundice and anemia only in Pacific salmon. AR 6464. It is therefore unsurprising that PRV-1 was found to not adversely affect blood oxygen levels in Atlantic salmon. That finding is inapposite to the finding that PRV-1 reduces fitness in wild Pacific salmon, which remains the best available science and is consistent with another recent study concluding that "migratory [Pacific] chinook salmon may be at more than a minimal risk

of disease from exposure to the high levels of [PRV-1] occurring in salmon farms." AR 6431. There is, at a minimum, scientific uncertainty regarding impacts to Pacific salmon from PRV-1 that required DFW to describe the worst-case scenario. *See* WAC 197-11-080(3).

Another significant concern relates to sea lice, a marine parasite. *E.g.*, AR 4520, 8642. Sea lice require certain salinity levels and are thus not present on wild juvenile salmonids as they move out of the freshwater environment. *See id.* Salmon farms infected with sea lice can expose those small and more vulnerable wild juveniles to unnaturally high levels of sea lice as the wild fish migrate through the near shore environment near net pens. *See* AR 8649, 10006–09. Studies have found that survival of wild fish is negatively correlated with abundance of sea lice on salmon farms, as even low sea lice levels can harm juvenile salmonids. AR 8681, 10002.

DFW acknowledges that sea lice are found at Cooke's operations, but summarily dismisses the concern based on 2006 salinity data that suggests conditions are generally inhospitable for the parasite. AR 4520–21. This is inadequate. DNR informed DFW that climate change is altering hydrologic patterns, leading to reduced summer freshwater flows, "making conditions more favorable for parasitic sea lice," while also increasing the susceptibility of wild fish to parasites. AR 2926; *see also* AR 15199. Notably, significant sea lice loads were recently observed on a wild salmonid in Skagit Bay near Cooke's Hope Island farm. *See* AR 4362, 4364. DFW's reliance on 2006 data in the face of more current information undermining that data without any explanation or additional

analysis is clearly erroneous. *See W. Watersheds Project v. USDA APHIS Wildlife Servs.*, 320 F. Supp. 3d 1137, 1147–50 (D. Idaho 2018).

c. DFW did not take a hard look at bycatch and ecological interactions.

Cooke's operations harm wild fish through bycatch and ecological interactions with the farmed fish. DFW's record does not show that the agency fully and adequately considered these impacts.

As described above in section IV.B.3, Cooke's harvest operations result in bycatch of wild fish. *See supra* section IV.B.3; *see also* AR 3217, 3389, 4533, 15262. Remarkably, DFW has failed to require Cooke to monitor or report this bycatch, even though threatened salmonids are likely impacted. *See* AR 13319 (Canadian data). DFW now acknowledges this harm and admits the "population-level effects of this bycatch are not known." AR 4533. However, DFW minimizes the issue by claiming that Canadian data show "the number of fish caught per incident is small absolutely . . . ." *Id.* DFW does not define "incident," estimate the frequency of "incidents" under the Permit, or quantify the number of fish, including threatened salmonids, that would be caught as bycatch.

Bycatch also occurs during efforts to recover farmed fish that have escaped their net pens. *See* AR 4531. DFW admits this has significant impacts, explaining that "[d]epending on the method, recapture may cause unacceptable harm in situations where ESA-listed stocks are present." *Id.* No further discussion on the extent of this harm is provided. Instead, the mDNS relies on mitigation to avoid significant impacts; Cooke is directed

to develop a "no-recovery option" in coordination with DFW, Ecology, DNR, affected Treaty Tribes, and NMFS. AR 4435–36. The no-recovery option would be invoked when more harm to wild salmonids would result from recovery efforts than from allowing all escaped fish to remain in Puget Sound. *Id.* That mitigation does not support the mDNS because it is entirely undeveloped—there is no direction on how to balance these harms in deciding whether to implement the no recovery option or analysis on how the plan, once developed, will avoid significant adverse impacts. *See*, *e.g.*, *Coal. for Canyon Preservation v. Slater*, 33 F. Supp. 2d 1276, 1279–80 (D. Mont. 1999) (insufficient analysis showing that mitigation would avoid significant impacts); *W. Land Exchange Project v. U.S. Bureau of Land Mgmt.*, 315 F. Supp. 2d 1068, 1091–92 (D. Nev. 2004) (mitigation to avoid an EIS must be "developed to a reasonable degree"; here, it was too speculative and lacked supporting analytical data).

Wild fish can be attracted to net pen operations due to the high concentrations of farmed fish and feed. *See* AR 4532, 5872. This can impact wild fish "condition, growth, and reproductive success," affecting a "population's overall biomass and migratory patterns." AR 4532. DFW assumes that these interactions will occur from Cooke's operations, but provides no analysis on the extent of harm caused to wild salmonids. Instead, DFW asserts, without explanation or support, that there would be no difference in impacts between Cooke's steelhead operations and its former Atlantic salmon farms. AR 4532–33.

Escaped farmed fish harm wild salmonids through ecological

interactions, such as competition for food habitat. *See* AR 5071–73, 11951; *see also* AR 15183, 3199. These interactions may be more harmful under Cooke's proposed steelhead operations than under its prior Atlantic salmon operations for a couple reasons. First, fewer escaped steelhead may be recovered than was accomplished with Atlantic salmon. DFW notes that "[s]teelhead do not school to the extent that salmon school, which may mean recapture efforts may not [sic] the same as for Atlantic salmon." AR 68. Further, DFW's new Permit contemplates, for the first time, the "no recovery operation" discussed above. *See* AR 4496. Second, farmed steelhead may be more likely to compete for spawning habitat and mates than Atlantic salmon because of the presence of wild fish of the same species. *See* AR 11951. DFW does not address these issues beyond merely acknowledging the existence of ecological risks associated with competition and predation. AR 4532.

d. DFW failed to take a hard look at risks posed by Cooke's regulatory violations.

Cooke has a history of regulatory violations that pose increased risks to the Puget Sound ecosystem. DFW failed to address this concern.

Cooke has repeatedly violated legal requirements in ways that increase environmental risks, including risks to ESA-listed species. Cooke's extensive Clean Water Act permit violations include failing to conduct maintenance inspections, create adequate plans to prevent pollution and fish releases, and monitor and track escaped fish. *Cooke I*,

2019 U.S. Dist. LEXIS 70974, at *10–19; *Cooke II*, 2019 U.S. Dist. LEXIS 204382, at *23–36. DNR terminated leases for four net pens because Cooke failed to maintain its facilities in good repair, and Cooke received notice of lease violations for its Rich Passage net pens. CP 190–98; AR 3653–54, 4423, 246 n.4, 4, 13921–27. Cooke's failure to maintain its facilities contributed to the catastrophic collapse of Cypress Site 2. AR 6004, 6006, 6064–65, 3653–54, 03835. Even under scrutiny during the comment period on the Permit, one of Cooke's net pens sunk to dangerous levels. AR 3195–96.

Extensive public comments voiced concerns related to Cooke's history of operating carelessly and illegally—perhaps best summed up by the Lummi Nation: "Cooke is the epitome of a 'bad actor' . . . ." AR 3653–54; *see also*, *e.g.*, AR 3611, 3835, 4343–44. DFW refused to account for this history when assessing the likely impacts from Cooke's future steelhead operations, claiming that the SEPA process was not an evaluation of the applicant. AR 4416, 4421. This ignores DFW's obligation to consider "all environmental impacts, whether resulting from legal or illegal conduct of [Cooke]," particularly in the face of mounting evidence that Cooke will continue to operate in an unlawful state of disrepair. *Conservation Nw.*, 2016 Wash. App. LEXIS 1410, at *92.

e. Conclusion on DFW's failure to take a hard look at impacts.

In sum, commercial farming of steelhead poses myriad risks and harms to the Puget Sound ecosystem, including to threatened Puget Sound steelhead and other ESA-listed species. Any one of those harmful impacts to an imperiled species warrants evaluation in an EIS. *See Klamath-Siskiyou Wildlands Ctr.*, 373 F. Supp. 2d at 1080. Yet, DFW trivializes each threat with cursory or no explanation, and without any consideration of whether the combination of several harmful impacts amounts to a significant impact requiring an EIS. *See* WAC 197-11-330(3)(c). DFW's record thereby fails to show the agency has taken a "hard look" at the consequences of its actions and provided a "convincing statement of reasons to explain why a project's impacts are insignificant." *See Nat'l Parks & Conservation Ass'n*, 241 F.3d at 730; *see also Sisley*, 89 Wn.2d at 84–85; *Conservation Nw.*, 2016 Wash. App. LEXIS 1410, at *88–89.

D. The Court Should Vacate the mDNS and Permit.

The appropriate remedy for the SEPA violations at issue is to vacate the mDNS and Permit and order an appropriate alternatives analysis and new SEPA process. Vacatur is the usual remedy when a court finds a SEPA violation and appropriate here given the substantial prejudice at issue. *See, e.g.*, *Lassila v. Wenatchee*, 89 Wn.2d 804, 818, 576

P.2d 54 (1978); *Asarco, Inc.*, 92 Wn.2d at 716–17; *State v. Grays Harbor County*, 122 Wn.2d 244, 256 n.12, 857 P.2d 1039 (1993); *see also* RCW 34.05.570(1)(d). Further, the Court should order preparation of an EIS, as the record reveals significant impacts. *King County*, 122 Wn.2d at 667; *see also Sisley*, 89 Wn.2d at 89–90; *Lassila*, 89 Wn.2d at 818; *Asarco, Inc*. 92 Wn.2d at 716–17; *Eastlake Cmty. Council*, 82 Wn.2d at 498.

V. CONCLUSION.

SEPA does not mandate any particular outcome; it instead seeks to protect the "fundamental and inalienable right to a healthful environment" by requiring agencies consider the ecological impacts of their actions to the "fullest extent possible." *See Stempel*, 82 Wn.2d at 118; *Eastlake Cmty. Council*, 82 Wn.2d at 490; RCW 43.21C.020(3). Washington agencies disregard statutory language and intent by failing to consider alternatives whenever they determine that the environmental harm from a proposal is not sufficient enough to warrant an EIS. Not only did DFW unlawfully refuse to consider alternatives here, but it also failed to fully analyze and disclose the actual impacts of commercial steelhead farming in Puget Sound by comparing such impacts to a fictitious baseline. The Conservancy respectfully requests the Court reverse the superior court and remand with instructions to: hold that DFW violated SEPA as described herein, vacate the mDNS and the Permit, and order preparation of an EIS.

RESPECTFULLY SUBMITTED this 19th day of March, 2021.

KAMPMEIER & KNUTSEN, PLLC

By: s/ Brian A. Knutsen
Brian A. Knutsen, WSBA No. 38806
Emma Bruden, WSBA No. 56280
1300 S.E. Stark Street, Suite 202
Portland, Oregon 97214
Tel: (503) 841-6515 (Knutsen)
(503) 719-5641 (Bruden)
Email: brian@kampmeierknutsen.com
emma@kampmeierknutsen.com

CENTER FOR BIOLOGICAL DIVERSITY

Sophia Ressler, WSBA No 48406
2400 NW 80th Street, #146
Seattle, WA 98117
Tel.: (206) 900-7953
Email: sressler@biologicaldiversity.org

Attorneys for Petitioners Wild Fish Conservancy, Center for Food Safety, Center for Biological Diversity & Friends of the Earth

CERTIFICATE OF SERVICE

I, Brian A. Knutsen, declare under penalty of perjury of the laws of the State of Washington, that I am co-counsel for Appellants and that on March 19, 2021, I caused the foregoing to be served on the following via E-mail per agreement with counsel:

Joseph V. Panesko
Noelle L. Chung
Washington State Office of the Attorney General
P.O. Box 40100
Olympia, WA 98504-0100
Email: Joe.Panesko@atg.wa.gov
Diane.Newman@atg.wa.gov
Noelle.Chung@atg.wa.gov
fwdef@atg.wa.gov

Counsel for Respondent Washington Department of Fish and Wildlife

Douglas J. Steding
David O. Bechtold
Lisa Chalet Rahman
Northwest Resource Law PLLC
101 Yesler Way, Suite 205
Seattle, WA 98104
Email: dsteding@nwresourcelaw.com
dbechtold@nwresourcelaw.com
kwilliams@nwresourcelaw.com
lrahman@nwresourcelaw.com
ehinkes@nwresourcelaw.com

Counsel for Intervenor-Respondent Cooke Aquaculture Pacific, LLC

s/ Brian A. Knutsen
Brian A. Knutsen, WSBA No. 38806

APPENDIX

TABLE OF CONTENTS

Washington Statutes

Washington Regulations

Federal Statutes

Federal Regulations

Other Authorities

Unpublished Opinions (provided under GR 14.1(d))

RCW 43.21C.010

Purposes.

The purposes of this chapter are: (1) To declare a state policy which will encourage productive and enjoyable harmony between humankind and the environment; (2) to promote efforts which will prevent or eliminate damage to the environment and biosphere; (3) and [to] stimulate the health and welfare of human beings; and (4) to enrich the understanding of the ecological systems and natural resources important to the state and nation.

RCW 43.21C.020

Legislative recognitions—Declaration—Responsibility.

(1) The legislature, recognizing that a human being depends on biological and physical surroundings for food, shelter, and other needs, and for cultural enrichment as well; and recognizing further the profound impact of a human being's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource utilization and exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of human beings, declares that it is the continuing policy of the state of Washington, in cooperation with federal and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to: (a) Foster and promote the general welfare; (b) create and maintain conditions under which human beings and nature can exist in productive harmony; and (c) fulfill the social, economic, and other requirements of present and future generations of Washington citizens.

(2) In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the state of Washington and all agencies of the state to use all practicable means, consistent with other essential considerations of state policy, to improve and coordinate plans, functions, programs, and resources to the end that the state and its citizens may:

(a) Fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(b) Assure for all people of Washington safe, healthful, productive, and aesthetically and culturally pleasing surroundings;

(c) Attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(d) Preserve important historic, cultural, and natural aspects of our national heritage;

(e) Maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(f) Achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(g) Enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(3) The legislature recognizes that each person has a fundamental and inalienable right to a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

RCW 43.21C.030

Guidelines for state agencies, local governments—Statements—Reports—Advice—Information.

The legislature authorizes and directs that, to the fullest extent possible: (1) The policies, regulations, and laws of the state of Washington shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all branches of government of this state, including state agencies, municipal and public corporations, and counties shall:

(a) Utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision making which may have an impact on the environment;

(b) Identify and develop methods and procedures, in consultation with the department of ecology and the ecological commission, which will insure that presently unquantified environmental amenities and values will be given appropriate consideration in decision making along with economic and technical considerations;

(c) Include in every recommendation or report on proposals for legislation and other major actions significantly affecting the quality of the 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 the 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;

(d) Prior to making any detailed statement, the responsible official shall consult with and obtain the comments of any public agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate federal, province, state, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the governor, the department of ecology, the ecological commission, and the public, and shall accompany the proposal through the existing agency review processes;

(e) Study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(f) Recognize the worldwide and long-range character of environmental problems and, where consistent with state policy, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of the world environment;

(g) Make available to the federal government, other states, provinces of Canada, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(h) Initiate and utilize ecological information in the planning and development of natural resource-oriented projects.

RCW 43.21C.110

Content of state environmental policy act rules.

It shall be the duty and function of the department of ecology:

(1) To adopt and amend rules of interpretation and implementation of this chapter, subject to the requirements of chapter 34.05 RCW, for the purpose of providing uniform rules and guidelines to all branches of government including state agencies, political subdivisions, public and municipal corporations, and counties. The proposed rules shall be subject to full public hearings requirements associated with rule adoption. Suggestions for modifications of the proposed rules shall be considered on their merits, and the department shall have the authority and responsibility for full and appropriate independent adoption of rules, assuring consistency with this chapter as amended and with the preservation of protections afforded by this chapter. The rule-making powers authorized in this section shall include, but shall not be limited to, the following phases of interpretation and implementation of this chapter:

(a) Categories of governmental actions which are not to be considered as potential major actions significantly affecting the quality of the environment, including categories pertaining to applications for water right permits pursuant to chapters 90.03 and 90.44 RCW. The types of actions included as categorical exemptions in the rules shall be limited to those types which are not major actions significantly affecting the quality of the environment. The rules shall provide for certain circumstances where actions which potentially are categorically exempt require environmental review. An action that is categorically exempt under the rules adopted by the department may not be conditioned or denied under this chapter.

(b) Rules for criteria and procedures applicable to the determination of when an act of a branch of government is a major action significantly affecting the quality of the environment for which a detailed statement is required to be prepared pursuant to RCW 43.21C.030.

(c) Rules and procedures applicable to the preparation of detailed statements and other environmental documents, including but not limited to rules for timing of environmental review, obtaining comments, data and other information, and providing for and determining areas of public

participation which shall include the scope and review of draft environmental impact statements.

(d) Scope of coverage and contents of detailed statements assuring that such statements are simple, uniform, and as short as practicable; statements are required to analyze only reasonable alternatives and probable adverse environmental impacts which are significant, and may analyze beneficial impacts.

(e) Rules and procedures for public notification of actions taken and documents prepared.

(f) Definition of terms relevant to the implementation of this chapter including the establishment of a list of elements of the environment. Analysis of environmental considerations under RCW 43.21C.030(2) may be required only for those subjects listed as elements of the environment (or portions thereof). The list of elements of the environment shall consist of the "natural" and "built" environment. The elements of the built environment shall consist of public services and utilities (such as water, sewer, schools, fire and police protection), transportation, environmental health (such as explosive materials and toxic waste), and land and shoreline use (including housing, and a description of the relationships with land use and shoreline plans and designations, including population).

(g) Rules for determining the obligations and powers under this chapter of two or more branches of government involved in the same project significantly affecting the quality of the environment.

(h) Methods to assure adequate public awareness of the preparation and issuance of detailed statements required by RCW 43.21C.030(2)(c).

(i) To prepare rules for projects setting forth the time limits within which the governmental entity responsible for the action shall comply with the provisions of this chapter.

(j) Rules for utilization of a detailed statement for more than one action and rules improving environmental analysis of nonproject proposals and encouraging better interagency coordination and integration between this chapter and other environmental laws.

(k) Rules relating to actions which shall be exempt from the provisions of this chapter in situations of emergency.

(l) Rules relating to the use of environmental documents in planning and decision making and the implementation of the substantive policies and requirements of this chapter, including procedures for appeals under this chapter.

(m) Rules and procedures that provide for the integration of environmental review with project review as provided in RCW 43.21C.240. The rules and procedures shall be jointly developed with the department of commerce and shall be applicable to the preparation of environmental documents for actions in counties, cities, and towns planning under RCW 36.70A.040. The rules and procedures shall also include procedures and criteria to analyze planned actions under RCW 43.21C.440 and revisions to the rules adopted under this section to ensure that they are compatible with the requirements and authorizations of chapter 347, Laws of 1995, as amended by chapter 429, Laws of 1997. Ordinances or procedures adopted by a county, city, or town to implement the provisions of chapter 347, Laws of 1995 prior to the effective date of rules adopted under this subsection (1)(m) shall continue to be effective until the adoption of any new or revised ordinances or procedures that may be required. If any revisions are required as a result of rules adopted under this subsection (1)(m), those revisions shall be made within the time limits specified in RCW 43.21C.120.

(2) In exercising its powers, functions, and duties under this section, the department may:

(a) Consult with the state agencies and with representatives of science, industry, agriculture, labor, conservation organizations, state and local governments, and other groups, as it deems advisable; and

(b) Utilize, to the fullest extent possible, the services, facilities, and information (including statistical information) of public and private agencies, organizations, and individuals, in order to avoid duplication of effort and expense, overlap, or conflict with similar activities authorized by law and performed by established agencies.

(3) Rules adopted pursuant to this section shall be subject to the review procedures of chapter 34.05 RCW.

RCW 77.04.012

Mandate of department and commission.

Wildlife, fish, and shellfish are the property of the state. The commission, director, and the department shall preserve, protect, perpetuate, and manage the wildlife and food fish, game fish, and shellfish in state waters and offshore waters.

The department shall conserve the wildlife and food fish, game fish, and shellfish resources in a manner that does not impair the resource. In a manner consistent with this goal, the department shall seek to maintain the economic well-being and stability of the fishing industry in the state. The department shall promote orderly fisheries and shall enhance and improve recreational and commercial fishing in this state.

The commission may authorize the taking of wildlife, food fish, game fish, and shellfish only at times or places, or in manners or quantities, as in the judgment of the commission does not impair the supply of these resources.

The commission shall attempt to maximize the public recreational game fishing and hunting opportunities of all citizens, including juvenile, disabled, and senior citizens.

Recognizing that the management of our state wildlife, food fish, game fish, and shellfish resources depends heavily on the assistance of volunteers, the department shall work cooperatively with volunteer groups and individuals to achieve the goals of this title to the greatest extent possible.

Nothing in this title shall be construed to infringe on the right of a private property owner to control the owner's private property.

RCW 77.125.050

Activities associated with the use of marine net pens for nonnative marine finfish aquaculture.

(1) The department may authorize or permit activities associated with the use of marine net pens for nonnative marine finfish aquaculture only if these activities are performed under a lease of state-owned aquatic lands in effect on June 7, 2018. The department may not authorize or permit any of these activities or operations after the expiration date of the relevant lease of state-owned aquatic lands in effect on June 7, 2018.

(2) For purposes of this section, "state-owned aquatic lands" has the same meaning as defined in RCW 79.105.060.

RCW 79.105.170

Nonnative finfish aquaculture—Department may not allow as an authorized use under any new lease or use authorization.

(1) The department may not allow nonnative marine finfish aquaculture as an authorized use under any new lease or other use authorization.

(2) The department may not renew or extend a lease or other use authorization in existence on June 7, 2018, where the use includes nonnative marine finfish aquaculture.

WAC 197-11-050

Lead agency.

(1) A lead agency shall be designated when an agency is developing or is presented with a proposal, following the rules beginning at WAC 197-11-922.

(2) The lead agency shall be the agency with main responsibility for complying with SEPA's procedural requirements and shall be the only agency responsible for:

(a) The threshold determination; and

(b) Preparation and content of environmental impact statements.

WAC 197-11-080

Incomplete or unavailable information.

(1) If information on significant adverse impacts essential to a reasoned choice among alternatives is not known, and the costs of obtaining it are not exorbitant, agencies shall obtain and include the information in their environmental documents.

(2) When there are gaps in relevant information or scientific uncertainty concerning significant impacts, agencies shall make clear that such information is lacking or that substantial uncertainty exists.

(3) Agencies may proceed in the absence of vital information as follows:

(a) If information relevant to adverse impacts is essential to a reasoned choice among alternatives, but is not known, and the costs of obtaining it are exorbitant; or

(b) If information relevant to adverse impacts is important to the decision and the means to obtain it are speculative or not known;

Then the agency shall weigh the need for the action with the severity of possible adverse impacts which would occur if the agency were to decide to proceed in the face of uncertainty. If the agency proceeds, it shall generally indicate in the appropriate environmental documents its worst case analysis and the likelihood of occurrence, to the extent this information can reasonably be developed.

(4) Agencies may rely upon applicants to provide information as allowed in WAC 197-11-100.

WAC 197-11-300

Purpose of this part.

This part provides rules for:

(1) Administering categorical exemptions for proposals that would not have probable significant adverse impacts;

(2) Deciding whether a proposal has a probable significant adverse impact and thus requires an EIS (the threshold determination);

(3) Providing a way to review and mitigate nonexempt proposals through the threshold determination;

(4) Integrating the environmental analysis required by SEPA into early planning to ensure appropriate consideration of SEPA's policies and to eliminate duplication and delay; and

(5) Integrating the environmental analysis required by SEPA into the project review process.

WAC 197-11-310

Threshold determination required.

(1) A threshold determination is required for any proposal which meets the definition of action and is not categorically exempt, subject to the limitations in WAC **197-11-600**(3) concerning proposals for which a threshold determination has already been issued, or statutorily exempt as provided in chapter **43.21C** RCW. A threshold determination is not required for a planned action (refer to WAC **197-11-164** through **197-11-172**).

(2) The responsible official of the lead agency shall make the threshold determination, which shall be made as close as possible to the time an agency has developed or is presented with a proposal (WAC **197-11-784**). If the lead agency is a GMA county/city, that agency must meet the timing requirements in subsection (6) of this section.

(3) The responsible official shall make a threshold determination no later than ninety days after the application and supporting documentation are determined to be complete. The applicant may request an additional thirty days for the threshold determination (RCW **43.21C.033**).

(4) The time limit in subsection (3) of this section shall not apply to a county/city that:

(a) By ordinance adopted prior to April 1, 1992, has adopted procedures to integrate permit and land use decisions with SEPA requirements; or

(b) Is planning under RCW **36.70A.040** (GMA) and is subject to the requirements of subsection (6) of this section.

(5) All threshold determinations shall be documented in:

(a) A determination of nonsignificance (DNS) (WAC **197-11-340**); or

(b) A determination of significance (DS) (WAC **197-11-360**).

(6) When a GMA county/city with an integrated project review process under RCW **36.70B.060** is lead agency for a project, the following timing requirements apply:

(a) If a DS is made concurrent with the notice of application, the DS and scoping notice shall be combined with the notice of application (RCW **36.70B.110**). Nothing in this subsection prevents the DS/scoping notice from being issued before the notice of application. If sufficient information is not available to make a threshold determination when the notice of application is issued, the DS may be issued later in the review process.

(b) Nothing in this section prevents a lead agency, when it is a project proponent or is funding a project, from conducting its review under SEPA or from allowing appeals of procedural determinations prior to submitting a project permit application.

(c) If an open record predecision hearing is required, the threshold determination shall be issued at least fifteen days before the open record predecision hearing (RCW **36.70B.110** (6)(b)).

(d) The optional DNS process in WAC **197-11-355** may be used to indicate on the notice of application that the lead agency is likely to issue a DNS. If this optional process is used, a separate comment period on the DNS may not be required (refer to WAC **197-11-355**(4)).

WAC 197-11-330

Threshold determination process.

An EIS is required for proposals for legislation and other major actions significantly affecting the quality of the environment. The lead agency decides whether an EIS is required in the threshold determination process, as described below.

(1) In making a threshold determination, the responsible official shall:

(a) Review the environmental checklist, if used:

(i) Independently evaluating the responses of any applicant and indicating the result of its evaluation in the DS, in the DNS, or on the checklist; and

(ii) Conducting its initial review of the environmental checklist and any supporting documents without requiring additional information from the applicant.

(b) Determine if the proposal is likely to have a probable significant adverse environmental impact, based on the proposed action, the information in the checklist (WAC 197-11-960), and any additional information furnished under WAC 197-11-335 and 197-11-350; and

(c) Consider mitigation measures which an agency or the applicant will implement as part of the proposal, including any mitigation measures required by development regulations, comprehensive plans, or other existing environmental rules or laws.

(2) In making a threshold determination, the responsible official should determine whether:

(a) All or part of the proposal, alternatives, or impacts have been analyzed in a previously prepared environmental document, which can be adopted or incorporated by reference (see Part Six).

(b) Environmental analysis would be more useful or appropriate in the future in which case, the agency shall commit to timely, subsequent environmental review, consistent with WAC 197-11-055 through 197-11-070 and Part Six.

(3) In determining an impact's significance (WAC 197-11-794), the responsible official shall take into account the following, that:

(a) The same proposal may have a significant adverse impact in one location but not in another location;

(b) The absolute quantitative effects of a proposal are also important, and may result in a significant adverse impact regardless of the nature of the existing environment;

(c) Several marginal impacts when considered together may result in a significant adverse impact;

(d) For some proposals, it may be impossible to forecast the environmental impacts with precision, often because some variables cannot be predicted or values cannot be quantified.

(e) A proposal may to a significant degree:

(i) Adversely affect environmentally sensitive or special areas, such as loss or destruction of historic, scientific, and cultural resources, parks, prime farmlands, wetlands, wild and scenic rivers, or wilderness;

(ii) Adversely affect endangered or threatened species or their habitat;

(iii) Conflict with local, state, or federal laws or requirements for the protection of the environment; and

(iv) Establish a precedent for future actions with significant effects, involves unique and unknown risks to the environment, or may affect public health or safety.

(4) If after following WAC 197-11-080 and 197-11-335 the lead agency reasonably believes that a proposal may have a significant adverse impact, an EIS is required.

(5) A threshold determination shall not balance whether the beneficial aspects of a proposal outweigh its adverse impacts, but rather, shall consider whether a proposal has any probable significant adverse

environmental impacts under the rules stated in this section. For example, proposals designed to improve the environment, such as sewage treatment plants or pollution control requirements, may also have significant adverse environmental impacts.

WAC 197-11-390

Effect of threshold determination.

(1) When the responsible official makes a threshold determination, it is final and binding on all agencies, subject to the provisions of this section and WAC 197-11-340, 197-11-360, and Part Six.

(2) The responsible official's threshold determination:

(a) For proposals listed in WAC 197-11-340(2), shall not be final until fourteen days after issuance.

(b) Shall not apply if another agency with jurisdiction assumes lead agency status under WAC 197-11-948.

(c) Shall not apply when withdrawn by the responsible official under WAC 197-11-340 or 197-11-360.

(d) Shall not apply when reversed on appeal.

(3) Regardless of any appeals, a DS or DNS issued by the responsible official may be considered final for purposes of other agencies' planning and decision making unless subsequently changed, reversed, or withdrawn.

WAC 197-11-400

Purpose of EIS.

(1) The primary purpose of an environmental impact statement is to ensure that SEPA's policies are an integral part of the ongoing programs and actions of state and local government.

(2) An EIS shall provide impartial discussion of significant environmental impacts and shall inform decision makers and the public of reasonable alternatives, including mitigation measures, that would avoid or minimize adverse impacts or enhance environmental quality.

(3) Environmental impact statements shall be concise, clear, and to the point, and shall be supported by the necessary environmental analysis. The purpose of an EIS is best served by short documents containing summaries of, or reference to, technical data and by avoiding excessively detailed and overly technical information. The volume of an EIS does not bear on its adequacy. Larger documents may even hinder the decision making process.

(4) The EIS process enables government agencies and interested citizens to review and comment on proposed government actions, including government approval of private projects and their environmental effects. This process is intended to assist the agencies and applicants to improve their plans and decisions, and to encourage the resolution of potential concerns or problems prior to issuing a final statement. An environmental impact statement is more than a disclosure document. It shall be used by agency officials in conjunction with other relevant materials and considerations to plan actions and make decisions.

WAC 197-11-440

EIS contents.

(1) An EIS shall contain the following, in the style and format prescribed in the preceding sections.

(2) **Fact sheet.** The fact sheet shall include the following information in this order:

(a) A title and brief description (a few sentences) of the nature and location (by street address, if applicable) of the proposal, including principal alternatives.

(b) The name of the person or entity making the proposal(s) and the proposed or tentative date for implementation.

(c) The name and address of the lead agency, the responsible official, and the person to contact for questions, comments, and information.

(d) A list of all licenses which the proposal is known to require. The licenses shall be listed by name and agency; the list shall be as complete and specific as possible.

(e) Authors and principal contributors to the EIS and the nature or subject area of their contributions.

(f) The date of issue of the EIS.

(g) The date comments are due (for DEISs).

(h) The time and place of public hearings or meetings, if any and if known.

(i) The date final action is planned or scheduled by the lead agency, if known. Agencies may indicate that the date is subject to change. The nature or type of final agency action should be stated unless covered in subsection (a) above.

(j) The type and timing of any subsequent environmental review to which the lead agency or other agencies have made commitments, if any.

(k) The location of a prior EIS on the proposal, EIS technical reports, background data, adopted documents, and materials incorporated by reference for this EIS, if any.

(l) The cost to the public for a copy of the EIS.

(3) **Table of contents.**

(a) The table of contents should list, if possible, any documents which are appended, adopted, or serve as technical reports for this EIS (but need not list each comment letter).

(b) The table of contents may include the list of elements of the environment (WAC 197-11-444), indicating those elements or portions of elements which do not involve significant impacts.

(4) **Summary.** The EIS shall summarize the contents of the statement and shall not merely be an expanded table of contents. The summary shall briefly state the proposal's objectives, specifying the purpose and need to which the proposal is responding, the major conclusions, significant areas of controversy and uncertainty, if any, and the issues to be resolved, including the environmental choices to be made among alternative courses of action and the effectiveness of mitigation measures. The summary need not mention every subject discussed in the EIS, but shall include a summary of the proposal, impacts, alternatives, mitigation measures, and significant adverse impacts that cannot be mitigated. The summary shall state when the EIS is part of a phased review, if known, or the lead agency is relying on prior or future environmental review (which should be generally identified). The lead agency shall make the summary sufficiently broad to be useful to the other agencies with jurisdiction.

(5) **Alternatives including the proposed action.**

(a) This section of the EIS describes and presents the proposal (or preferred alternative, if one or more exists) and alternative courses of action.

(b) Reasonable alternatives shall include actions that could feasibly attain or approximate a proposal's objectives, but at a lower environmental cost or decreased level of environmental degradation.

(i) The word "reasonable" is intended to limit the number and range of alternatives, as well as the amount of detailed analysis for each alternative.

(ii) The "no-action" alternative shall be evaluated and compared to other alternatives.

(iii) Reasonable alternatives may be those over which an agency with jurisdiction has authority to control impacts either directly, or indirectly through requirement of mitigation measures.

(c) This section of the EIS shall:

(i) Describe the objective(s), proponent(s), and principal features of reasonable alternatives. Include the proposed action, including mitigation measures that are part of the proposal.

(ii) Describe the location of the alternatives including the proposed action, so that a lay person can understand it. Include a map, street address, if any, and legal description (unless long or in metes and bounds).

(iii) Identify any phases of the proposal, their timing, and previous or future environmental analysis on this or related proposals, if known.

(iv) Tailor the level of detail of descriptions to the significance of environmental impacts. The lead agency should retain any detailed engineering drawings and technical data, that have been submitted, in agency files and make them available on request.

(v) Devote sufficiently detailed analysis to each reasonable alternative to permit a comparative evaluation of the alternatives including the proposed action. The amount of space devoted to each alternative may vary. One alternative (including the proposed action) may be used as a benchmark for comparing alternatives. The EIS may indicate the main reasons for eliminating alternatives from detailed study.

(vi) Present a comparison of the environmental impacts of the reasonable alternatives, and include the no action alternative. Although graphics may be helpful, a matrix or chart is not required. A range of alternatives or a few representative alternatives, rather than every possible reasonable variation, may be discussed.

(vii) Discuss the benefits and disadvantages of reserving for some future time the implementation of the proposal, as compared with possible approval at this time. The agency perspective should be that each generation is, in effect, a trustee of the environment for succeeding generations. Particular attention should be given to the possibility of foreclosing future options by implementing the proposal.

(d) When a proposal is for a private project on a specific site, the lead agency shall be required to evaluate only the no action alternative plus other reasonable alternatives for achieving the proposal's objective on the same site. This subsection shall not apply when the proposal includes a rezone, unless the rezone is for a use allowed in an existing comprehensive plan that was adopted after review under SEPA. Further, alternative sites may be evaluated if other locations for the type of proposed use have not been included or considered in existing planning or zoning documents.

(6) **Affected environment, significant impacts, and mitigation measures.**

(a) This section of the EIS shall describe the existing environment that will be affected by the proposal, analyze significant impacts of alternatives including the proposed action, and discuss reasonable mitigation measures that would significantly mitigate these impacts. Elements of the environment that are not significantly affected need not be discussed. Separate sections are not required for each subject (see WAC 197-11-430(3)).

(b) General requirements for this section of the EIS.

(i) This section shall be written in a nontechnical manner which is easily understandable to lay persons whenever possible, with the discussion commensurate with the importance of the impacts. Only significant impacts must be discussed; other impacts may be discussed.

(ii) Although the lead agency should discuss the affected environment, environmental impacts, and other mitigation measures together for each element of the environment where there is a significant impact, the responsible official shall have the flexibility to organize this section in any manner useful to decision makers and the public (see WAC 197-11-430(3)).

(iii) This subsection is not intended to duplicate the analysis in subsection (5) and shall avoid doing so to the fullest extent possible.

(c) This section of the EIS shall:

(i) Succinctly describe the principal features of the environment that would be affected, or created, by the alternatives including the proposal under consideration. Inventories of species should be avoided, although rare, threatened, or endangered species should be indicated.

(ii) Describe and discuss significant impacts that will narrow the range or degree of beneficial uses of the environment or pose long term risks to human health or the environment, such as storage, handling, or disposal of toxic or hazardous material.

(iii) Clearly indicate those mitigation measures (not described in the previous section as part of the proposal or alternatives), if any, that could be implemented or might be required, as well as those, if any, that agencies or applicants are committed to implement.

(iv) Indicate what the intended environmental benefits of mitigation measures are for significant impacts, and may discuss their technical feasibility and economic practicability, if there is concern about whether a mitigation measure is capable of being accomplished. The EIS need not analyze mitigation measures in detail unless they involve substantial changes to the proposal causing significant adverse impacts, or new information regarding significant impacts, and those measures will not be subsequently analyzed under SEPA (see WAC 197-11-660(2)). An EIS may briefly mention nonsignificant impacts or mitigation measures to satisfy other environmental review laws or requirements covered in the same document (WAC 197-11-402(8) and 197-11-640).

(v) Summarize significant adverse impacts that cannot or will not be mitigated.

(d) This section shall incorporate, when appropriate:

(i) A summary of existing plans (for example: Land use and shoreline plans) and zoning regulations applicable to the proposal, and how the proposal is consistent and inconsistent with them.

(ii) Energy requirements and conservation potential of various alternatives and mitigation measures, including more efficient use of energy, such as insulating, as well as the use of alternate and renewable energy resources.

(iii) Natural or depletable resource requirements and conservation potential of various alternatives and mitigation measures.

(iv) Urban quality, historic and cultural resources, and the design of the built environment, including the reuse and conservation potential of various alternatives and mitigation measures.

(e) Significant impacts on both the natural environment and the built environment must be analyzed, if relevant (WAC 197-11-444). This involves impacts upon and the quality of the physical surroundings, whether they are in wild, rural, or urban areas. Discussion of significant impacts shall include the cost of and effects on public services, such as utilities, roads, fire, and police protection, that may result from a proposal. EISs shall also discuss significant environmental impacts upon land and shoreline use, which includes housing, physical blight, and significant impacts of projected population on environmental resources, as specified by RCW 43.21C.110 (1)(d) and (f), as listed in WAC 197-11-444.

(7) **Appendices.** Comment letters and responses shall be circulated with the FEIS as specified by WAC 197-11-560. Technical reports and supporting documents need not be circulated with an EIS (WAC 197-11-425(4) and 197-11-440 (2)(k)), but shall be readily available to agencies and the public during the comment period.

(8) **(Optional)** The lead agency may include, in an EIS or appendix, the analysis of any impact relevant to the agency's decision, whether or not environmental. The inclusion of such analysis may be based upon comments received during the scoping process. The provision for combining documents may be used (WAC 197-11-640). The EIS shall

comply with the format requirements of this part. The decision whether to include such information and the adequacy of any such additional analysis shall not be used in determining whether an EIS meets the requirements of SEPA.

WAC 197-11-758

Lead agency.

"Lead agency" means the agency with the main responsibility for complying with SEPA's procedural requirements (WAC 197-11-050 and 197-11-922). The procedures for determining lead agencies are in Part Ten of these rules. "Lead agency" may be read as "responsible official" (WAC 197-11-788 and 197-11-910) unless the context clearly requires otherwise. Depending on the agency and the type of proposal, for example, there may be a difference between the lead agency's responsible official, who is at a minimum responsible for procedural determinations (such as WAC 197-11-330, 197-11-455, 197-11-460) and its decision maker, who is at a minimum responsible for substantive determinations (such as WAC 197-11-448, 197-11-655, and 197-11-660).

WAC 197-11-794

Significant.

(1) "Significant" as used in SEPA means a reasonable likelihood of more than a moderate adverse impact on environmental quality.

(2) Significance involves context and intensity (WAC 197-11-330) and does not lend itself to a formula or quantifiable test. The context may vary with the physical setting. Intensity depends on the magnitude and duration of an impact.

The severity of an impact should be weighed along with the likelihood of its occurrence. An impact may be significant if its chance of occurrence is not great, but the resulting environmental impact would be severe if it occurred.

(3) WAC 197-11-330 specifies a process, including criteria and procedures, for determining whether a proposal is likely to have a significant adverse environmental impact.

WAC 197-11-924

Determining the lead agency.

(1) The first agency receiving an application for or initiating a nonexempt proposal shall determine the lead agency for that proposal, unless the lead agency has been previously determined, or the agency receiving the proposal is aware that another agency is determining the lead agency. The lead agency shall be determined by using the criteria in WAC 197-11-926 through 197-11-944.

(2) If an agency determines that another agency is the lead agency, it shall mail to such lead agency a copy of the application it received, together with its determination of lead agency and an explanation. If the agency receiving this determination agrees that it is the lead agency, it shall notify the other agencies with jurisdiction. If it does not agree, and the dispute cannot be resolved by agreement, the agencies shall immediately petition the department of ecology for a lead agency determination under WAC 197-11-946.

(3) Any agency receiving a lead agency determination to which it objects shall either resolve the dispute, withdraw its objection, or petition the department for a lead agency determination within fifteen days of receiving the determination.

(4) An applicant may also petition the department to resolve the lead agency dispute under WAC 197-11-946.

(5) To make the lead agency determination, an agency must determine to the best of its ability the range of proposed actions for the proposal (WAC 197-11-060) and the other agencies with jurisdiction over some or all of the proposal. This can be done by:

(a) Describing or requiring an applicant to describe the main features of the proposal;

(b) Reviewing the list of agencies with expertise;

(c) Contacting potential agencies with jurisdiction either orally or in writing.

WAC 197-11-938

Lead agencies for specific proposals.

Notwithstanding the lead agency designation criteria contained in WAC 197-11-926 through 197-11-936, the lead agency for proposals within the areas listed below shall be as follows:

(1) For all governmental actions relating to energy facilities for which certification is required under chapter 80.50 RCW, the lead agency shall be the energy facility site evaluation council (EFSEC); however, for any public project requiring such certification and for which the study under RCW 80.50.175 will not be made, the lead agency shall be the agency initiating the project.

(2) For all private projects relating to the use of geothermal resources under chapter 79.76 RCW, the lead agency shall be the department of natural resources.

(3) For all private projects requiring a license or other approval from the oil and gas conservation committee under chapter 78.52 RCW, the lead agency shall be the department of natural resources; however, for projects under RCW 78.52.125, the EIS shall be prepared in accordance with that section.

(4) For private activity requiring a license or approval under the Forest Practices Act of 1974, chapter 76.09 RCW, the lead agency shall be either the department of natural resources or the city/county where the project is located, as set forth below:

(a) The interagency agreements authorized by WAC 222-50-030 between the department of natural resources and other governmental agencies may be used to identify SEPA lead agency status for forest practice applications. If used, this agreement shall meet the requirements for a lead agency agreement in WAC 197-11-942.

(b) If no interagency agreement exists, the SEPA lead agency determination shall be based on information in the environmental checklist required as part of the forest practice application requiring SEPA review. The applicant shall, as part of the checklist, submit all information on

future plans for conversion, and shall identify any known future license requirements.

(c) For any proposal involving forest practices (i) on lands being converted to another use, or (ii) on lands which, pursuant to RCW 76.09.070 as now or hereafter amended, are not to be reforested because of the likelihood of future conversion to urban development, the applicable county or city is the lead agency if the county or city will require a license for the proposal. Upon receipt of a forest practice application and environmental checklist, natural resources shall determine lead agency for the proposal. If insufficient information is available to identify necessary permits, natural resources shall ask the applicant for additional information. If a permit is not required from the city/county, natural resources shall be lead agency. If a city/county permit is required, natural resources shall send copies of the environmental checklist and forest practice application together with the determination of the lead agency to the city/county.

(d) Upon receipt and review of the environmental checklist and forest practice application, the city/county shall within ten business days:

(i) Agree that a city/county license is required, either now or at a future point, and proceed with environmental review as lead agency.

(ii) Determine that a license is not required from the city/county, and notify natural resources that the city/county is not lead agency; or

(iii) Determine there is insufficient information in the environmental checklist to identify the need for a license, and either:

(A) Assume lead agency status and conduct appropriate environmental analysis for the total proposal;

(B) Request additional information from the applicant; or

(C) Notify natural resources of the specific additional information needed to determine permit requirements, who shall request the information from the applicant.

(5) For all private projects requiring a license or lease to use or affect state lands, the lead agency shall be the state agency managing the lands in

question; however, this subsection shall not apply to the sale or lease of state-owned tidelands, harbor areas or beds of navigable waters, when such sale or lease is incidental to a larger project for which one or more licenses from other state or local agencies is required.

(6) For a pulp or paper mill or oil refinery not under the jurisdiction of EFSEC, the lead agency shall be the department of ecology, when a National Pollutant Discharge Elimination System (NPDES) permit is required under section 402 of the Federal Water Pollution Control Act (33 U.S.C. 1342).

(7) For proposals to construct a pipeline greater than six inches in diameter and fifty miles in length, used for the transportation of crude petroleum or petroleum fuels or oil or derivatives thereof, or for the transportation of synthetic or natural gas under pressure not under the jurisdiction of EFSEC, the lead agency shall be the department of ecology.

(8) For proposals that will result in an impoundment of water with a water surface in excess of forty acres, the lead agency shall be the department of ecology.

(9) For proposals to construct facilities on a single site designed for, or capable of, storing a total of one million or more gallons of any liquid fuel not under the jurisdiction of EFSEC, the lead agency shall be the department of ecology.

(10) For proposals to construct any new oil refinery, or an expansion of an existing refinery that shall increase capacity by ten thousand barrels per day or more not under the jurisdiction of EFSEC, the lead agency shall be the department of ecology.

(11) For proposed metal mining and milling operations regulated by chapter 78.56 RCW, except for uranium and thorium operations regulated under Title 70 RCW, the lead agency shall be the department of ecology.

(12) For proposals to construct, operate, or expand any uranium or thorium mill, any tailings areas generated by uranium or thorium milling or any low-level radioactive waste burial facilities, the lead agency shall be the department of health.

WAC 197-11-960

Environmental checklist.

ENVIRONMENTAL CHECKLIST

Purpose of checklist:

The State Environmental Policy Act (SEPA), chapter **43.21C** RCW, requires all governmental agencies to consider the environmental impacts of a proposal before making decisions. An environmental impact statement (EIS) must be prepared for all proposals with probable significant adverse impacts on the quality of the environment. The purpose of this checklist is to provide information to help you and the agency identify impacts from your proposal (and to reduce or avoid impacts from the proposal, if it can be done) and to help the agency decide whether an EIS is required.

Instructions for applicants:

This environmental checklist asks you to describe some basic information about your proposal. Governmental agencies use this checklist to determine whether the environmental impacts of your proposal are significant, requiring preparation of an EIS. Answer the questions briefly, with the most precise information known, or give the best description you can.

You must answer each question accurately and carefully, to the best of your knowledge. In most cases, you should be able to answer the questions from your own observations or project plans without the need to hire experts. If you really do not know the answer, or if a question does not apply to your proposal, write "do not know" or "does not apply." Complete answers to the questions now may avoid unnecessary delays later.

Some questions ask about governmental regulations, such as zoning, shoreline, and landmark designations. Answer these questions if you can. If you have problems, the governmental agencies can assist you.

The checklist questions apply to all parts of your proposal, even if you plan to do them over a period of time or on different parcels of land. Attach any additional information that will help describe your proposal or

its environmental effects. The agency to which you submit this checklist may ask you to explain your answers or provide additional information reasonably related to determining if there may be significant adverse impact.

Use of checklist for nonproject proposals:

For nonproject proposals complete this checklist and the supplemental sheet for nonproject actions (Part D). The lead agency may exclude any question for the environmental elements (Part B) which they determine do not contribute meaningfully to the analysis of the proposal.

For nonproject actions, the references in the checklist to the words "project," "applicant," and "property or site" should be read as "proposal," "proposer," and "affected geographic area," respectively.

A. BACKGROUND

1. Name of proposed project, if applicable:

2. Name of applicant:

3. Address and phone number of applicant and contact person:

4. Date checklist prepared:

5. Agency requesting checklist:

6. Proposed timing or schedule (including phasing, if applicable):

7. Do you have any plans for future additions, expansion, or further activity related to or connected with this proposal? If yes, explain.

8. List any environmental information you know about that has been prepared, or will be prepared, directly related to this proposal.

9. Do you know whether applications are pending for governmental approvals of other proposals directly affecting the property covered by your proposal? If yes, explain.

10. List any government approvals or permits that will be needed for your proposal, if known.

11. Give brief, complete description of your proposal, including the proposed uses and the size of the project and site. There are several questions later in this checklist that ask you to describe certain aspects of your proposal. You do not need to repeat those answers on this page. (Lead agencies may modify this form to include additional specific information on project description.)

12. Location of the proposal. Give sufficient information for a person to understand the precise location of your proposed project, including a street address, if any, and section, township, and range, if known. If a proposal would occur over a range of area, provide the range or boundaries of the site(s). Provide a legal description, site plan, vicinity map, and topographic map, if reasonably available. While you should submit any plans required by the agency, you are not required to duplicate maps or detailed plans submitted with any permit applications related to this checklist.

B. ENVIRONMENTAL ELEMENTS

1. **Earth**

a. General description of the site (circle one): Flat, rolling, hilly, steep slopes, mountainous, other.....

b. What is the steepest slope on the site (approximate percent slope)?

c. What general types of soils are found on the site (for example, clay, sand, gravel, peat, muck)? If you know the classification of agricultural soils, specify them and note any agricultural land of long-term commercial significance and whether the proposal results in removing any of these soils.

d. Are there surface indications or history of unstable soils in the immediate vicinity? If so, describe.

e. Describe the purpose, type, total area, and approximate quantities and total affected area of any filling, excavation, and grading proposed. Indicate source of fill.

f. Could erosion occur as a result of clearing, construction, or use? If so, generally describe.

g. About what percent of the site will be covered with impervious surfaces after project construction (for example, asphalt or buildings)?

h. Proposed measures to reduce or control erosion, or other impacts to the earth, if any:

2. **Air**

a. What types of emissions to the air would result from the proposal during construction, operation, and maintenance when the project is completed? If any, generally describe and give approximate quantities if known.

b. Are there any off-site sources of emissions or odor that may affect your proposal? If so, generally describe.

c. Proposed measures to reduce or control emissions or other impacts to air, if any:

3. **Water**

a. Surface:

1) Is there any surface water body on or in the immediate vicinity of the site (including year-round and seasonal streams, saltwater, lakes, ponds, wetlands)? If yes, describe type and provide names. If appropriate, state what stream or river it flows into.

2) Will the project require any work over, in, or adjacent to (within 200 feet) the described waters? If yes, please describe and attach available plans.

3) Estimate the amount of fill and dredge material that would be placed in or removed from surface water or wetlands and indicate the area of the site that would be affected. Indicate the source of fill material.

4) Will the proposal require surface water withdrawals or diversions? Give general description, purpose, and approximate quantities if known.

5) Does the proposal lie within a 100-year flood plain? If so, note location on the site plan.

6) Does the proposal involve any discharges of waste materials to surface waters? If so, describe the type of waste and anticipated volume of discharge.

b. Ground:

1) Will groundwater be withdrawn from a well for drinking water or other purposes? If so, give a general description of the well, proposed uses and approximate quantities withdrawn from the well? Will water be discharged to groundwater? Give general description, purpose, and approximate quantities if known.

2) Describe waste material that will be discharged into the ground from septic tanks or other sources, if any (for example: Domestic sewage; industrial, containing the following chemicals...; agricultural; etc.). Describe the general size of the system, the number of such systems, the number of houses to be served (if applicable), or the number of animals or humans the system(s) are expected to serve.

c. Water runoff (including stormwater):

1) Describe the source of runoff (including stormwater) and method of collection and disposal, if any (include quantities, if known). Where will this water flow? Will this water flow into other waters? If so, describe.

2) Could waste materials enter ground or surface waters? If so, generally describe.

3) Does the proposal alter or otherwise affect drainage patterns in the vicinity of the site? If so, describe.

d. Proposed measures to reduce or control surface, ground, runoff water, and drainage pattern impacts, if any:

4. **Plants**

a. Check the types of vegetation found on the site:

— Deciduous tree: Alder, maple, aspen, other
— Evergreen tree: Fir, cedar, pine, other
— Shrubs
— Grass
— Pasture
— Crop or grain
— Orchards, vineyards or other permanent crops.
— Wet soil plants: Cattail, buttercup, bullrush, skunk cabbage, other
— Water plants: Water lily, eelgrass, milfoil, other
— Other types of vegetation

b. What kind and amount of vegetation will be removed or altered?

c. List threatened and endangered species known to be on or near the site.

d. Proposed landscaping, use of native plants, or other measures to preserve or enhance vegetation on the site, if any:

e. List all noxious weeds and invasive species known to be on or near the site.

5. **Animals**

a. List any birds and other animals which have been observed on or near the site or are known to be on or near the site. Examples include:
Birds: Hawk, heron, eagle, songbirds, other:
Mammals: Deer, bear, elk, beaver, other:
Fish: Bass, salmon, trout, herring, shellfish, other:

b. List any threatened and endangered species known to be on or near the site.

c. Is the site part of a migration route? If so, explain.

d. Proposed measures to preserve or enhance wildlife, if any:

e. List any invasive animal species known to be on or near the site.

6. **Energy and natural resources**

a. What kinds of energy (electric, natural gas, oil, wood stove, solar) will be used to meet the completed project's energy needs? Describe whether it will be used for heating, manufacturing, etc.

b. Would your project affect the potential use of solar energy by adjacent properties? If so, generally describe.
c. What kinds of energy conservation features are included in the plans of this proposal? List other proposed measures to reduce or control energy impacts, if any:

7. **Environmental health**

a. Are there any environmental health hazards, including exposure to toxic chemicals, risk of fire and explosion, spill, or hazardous waste, that could occur as a result of this proposal? If so, describe.

1) Describe any known or possible contamination at the site from present or past uses.

2) Describe existing hazardous chemicals/conditions that might affect project development and design. This includes underground hazardous liquid and gas transmission pipelines located within the project area and in the vicinity.

3) Describe any toxic or hazardous chemicals that might be stored, used, or produced during the project's development or construction, or at any time during the operating life of the project.

4) Describe special emergency services that might be required.

5) Proposed measures to reduce or control environmental health hazards, if any:

b. **Noise**

1) What types of noise exist in the area which may affect your project (for example: traffic, equipment, operation, other)?

2) What types and levels of noise would be created by or associated with the project on a short-term or a long-term basis (for

example: traffic, construction, operation, other)? Indicate what hours noise would come from the site.

3) Proposed measures to reduce or control noise impacts, if any:

8. **Land and shoreline use**

a. What is the current use of the site and adjacent properties? Will the proposal affect current land uses on nearby or adjacent properties? If so, describe.

b. Has the project site been used as working farmlands or working forest lands? If so, describe. How much agricultural or forest land of long-term commercial significance will be converted to other uses as a result of the proposal, if any? If resource lands have not been designated, how many acres in farmland or forest land tax status will be converted to nonfarm or nonforest use?

1) Will the proposal affect or be affected by surrounding working farm or forest land normal business operations, such as oversize equipment access, the application of pesticides, tilling, and harvesting? If so, how:

c. Describe any structures on the site.

d. Will any structures be demolished? If so, what?

e. What is the current zoning classification of the site?

f. What is the current comprehensive plan designation of the site?

g. If applicable, what is the current shoreline master program designation of the site?

h. Has any part of the site been classified as a critical area by the city or county? If so, specify.

i. Approximately how many people would reside or work in the completed project?

j. Approximately how many people would the completed project displace?

k. Proposed measures to avoid or reduce displacement impacts, if any:

l. Proposed measures to ensure the proposal is compatible with existing and projected land uses and plans, if any:

m. Proposed measures to reduce or control impacts to agricultural and forest lands of long-term commercial significance, if any:

9. **Housing**

a. Approximately how many units would be provided, if any? Indicate whether high, middle, or low-income housing.

b. Approximately how many units, if any, would be eliminated? Indicate whether high, middle, or low-income housing.

c. Proposed measures to reduce or control housing impacts, if any:

10. **Aesthetics**

a. What is the tallest height of any proposed structure(s), not including antennas; what is the principal exterior building material(s) proposed?

b. What views in the immediate vicinity would be altered or obstructed?

c. Proposed measures to reduce or control aesthetic impacts, if any:

11. **Light and glare**

a. What type of light or glare will the proposal produce? What time of day would it mainly occur?

b. Could light or glare from the finished project be a safety hazard or interfere with views?

c. What existing offsite sources of light or glare may affect your proposal?

d. Proposed measures to reduce or control light and glare impacts, if any:

12. **Recreation**

a. What designated and informal recreational opportunities are in the immediate vicinity?

b. Would the proposed project displace any existing recreational uses? If so, describe.

c. Proposed measures to reduce or control impacts on recreation, including recreation opportunities to be provided by the project or applicant, if any:

13. **Historic and cultural preservation**

a. Are there any buildings, structures, or sites, located on or near the site that are over 45 years old listed in or eligible for listing in national, state, or local preservation registers? If so, specifically describe.

b. Are there any landmarks, features, or other evidence of Indian or historic use or occupation. This may include human burials or old cemeteries. Are there any material evidence, artifacts, or areas of cultural importance on or near the site? Please list any professional studies conducted at the site to identify such resources.

c. Describe the methods used to assess the potential impacts to cultural and historic resources on or near the project site. Examples include consultation with tribes and the department of archeology and historic preservation, archaeological surveys, historic maps, GIS data, etc.

d. Proposed measures to avoid, minimize, or compensate for loss, changes to, and disturbance to resources. Please include plans for the above and any permits that may be required.

14. **Transportation**

a. Identify public streets and highways serving the site or affected geographic area, and describe proposed access to the existing street system. Show on site plans, if any.

b. Is the site or affected geographic area currently served by public transit? If so, generally describe. If not, what is the approximate distance to the nearest transit stop?

c. How many additional parking spaces would the completed project or nonproject proposal have? How many would the project or proposal eliminate?

d. Will the proposal require any new or improvements to existing roads, streets, pedestrian, bicycle or state transportation facilities, not including driveways? If so, generally describe (indicate whether public or private).

e. Will the project or proposal use (or occur in the immediate vicinity of) water, rail, or air transportation? If so, generally describe.

f. How many vehicular trips per day would be generated by the completed project or proposal? If known, indicate when peak volumes would occur and what percentage of the volume would be trucks (such as commercial and nonpassenger vehicles). What data or transportation models were used to make these estimates?

g. Will the proposal interfere with, affect or be affected by the movement of agricultural and forest products on roads or streets in the area? If so, generally describe.

h. Proposed measures to reduce or control transportation impacts, if any:

15. **Public services**

a. Would the project result in an increased need for public services (for example: Fire protection, police protection, public transit, health care, schools, other)? If so, generally describe.

b. Proposed measures to reduce or control direct impacts on public services, if any.

16. **Utilities**

a. Circle utilities currently available at the site: Electricity, natural gas, water, refuse service, telephone, sanitary sewer, septic system, other.

b. Describe the utilities that are proposed for the project, the utility providing the service, and the general construction activities on the site or in the immediate vicinity which might be needed.

C. SIGNATURE

The above answers are true and complete to the best of my knowledge. I understand that the lead agency is relying on them to make its decision.

Signature: . . . . . .

Date Submitted: . . . . . .

D. SUPPLEMENTAL SHEET FOR NONPROJECT ACTIONS
(do not use this sheet for project actions)

Because these questions are very general, it may be helpful to read them in conjunction with the list of the elements of the environment.

When answering these questions, be aware of the extent the proposal, or the types of activities likely to result from the proposal, would affect the item at a greater intensity or at a faster rate than if the proposal were not implemented. Respond briefly and in general terms.

1. How would the proposal be likely to increase discharge to water; emissions to air; production, storage, or release of toxic or hazardous substances; or production of noise?

Proposed measures to avoid or reduce such increases are:

2. How would the proposal be likely to affect plants, animals, fish, or marine life?

Proposed measures to protect or conserve plants, animals, fish, or marine life are:

3. How would the proposal be likely to deplete energy or natural resources?

Proposed measures to protect or conserve energy and natural resources are:

4. How would the proposal be likely to use or affect environmentally sensitive areas or areas designated (or eligible or under study) for governmental protection; such as parks, wilderness, wild and scenic rivers, threatened or endangered species habitat, historic or cultural sites, wetlands, flood plains, or prime farmlands?

Proposed measures to protect such resources or to avoid or reduce impacts are:

5. How would the proposal be likely to affect land and shoreline use, including whether it would allow or encourage land or shoreline uses incompatible with existing plans?

Proposed measures to avoid or reduce shoreline and land use impacts are:

6. How would the proposal be likely to increase demands on transportation or public services and utilities?

Proposed measures to reduce or respond to such demand(s) are:

7. Identify, if possible, whether the proposal may conflict with local, state, or federal laws or requirements for the protection of the environment.

42 U.S. Code § 4332

Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(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.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which

has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, and shall accompany the proposal through the existing agency review processes;

(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:

(i) the State agency or official has statewide jurisdiction and has the responsibility for such action,

(ii) the responsible Federal official furnishes guidance and participates in such preparation,

(iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and

(iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.
The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this chapter; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction.

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(F) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United

States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(G) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(H) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(I) assist the Council on Environmental Quality established by subchapter II of this chapter.

40 C.F.R. § 1501.5 (2021)

Environmental assessments.

(a) An agency shall prepare an environmental assessment for a proposed action that is not likely to have significant effects or when the significance of the effects is unknown unless the agency finds that a categorical exclusion (§ 1501.4) is applicable or has decided to prepare an environmental impact statement.

(b) An agency may prepare an environmental assessment on any action in order to assist agency planning and decision making.

(c) An environmental assessment shall:

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

(2) Briefly discuss the purpose and need for the proposed action, alternatives as required by section 102(2)(E) of NEPA, and the environmental impacts of the proposed action and alternatives, and include a listing of agencies and persons consulted.

(d) For applications to the agency requiring an environmental assessment, the agency shall commence the environmental assessment as soon as practicable after receiving the application.

(e) Agencies shall involve the public, State, Tribal, and local governments, relevant agencies, and any applicants, to the extent practicable in preparing environmental assessments.

(f) The text of an environmental assessment shall be no more than 75 pages, not including appendices, unless a senior agency official approves in writing an assessment to exceed 75 pages and establishes a new page limit.

(g) Agencies may apply the following provisions to environmental assessments:

(1) Section 1502.21 of this chapter - Incomplete or unavailable information;

(2) Section 1502.23 of this chapter - Methodology and scientific accuracy; and

(3) Section 1502.24 of this chapter - Environmental review and consultation requirements.

40 C.F.R. § 1508.9 (2019; pre-2020 revisions)

Environmental assessment.

Environmental assessment:

(a) Means a concise public document for which a Federal agency is responsible that serves to:

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

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

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

(b) Shall include brief discussions of the need for the proposal, of alternatives as required by section 102(2)(E), of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.

Public Law 91-190

January 1, 1970
[S. 1075]

AN ACT

To establish a national policy for the environment, to provide for the establishment of a Council on Environmental Quality, and for other purposes.

National Environmental Policy Act of 1969.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "National Environmental Policy Act of 1969".

PURPOSE

SEC. 2. The purposes of this Act are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

TITLE I

DECLARATION OF NATIONAL ENVIRONMENTAL POLICY

Policies and goals.

SEC. 101. (a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

(b) In order to carry out the policy set forth in this Act, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

Administration.

SEC. 102. The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act, and (2) all agencies of the Federal Government shall—

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by title II of this Act, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(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.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, United States Code, and shall accompany the proposal through the existing agency review processes;

Copies of statements, etc.; availability.

81 Stat. 54.

(D) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(E) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(F) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(G) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(H) assist the Council on Environmental Quality established by title II of this Act.

Policy review.

SEC. 103. All agencies of the Federal Government shall review their present statutory authority, administrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of this Act and shall propose to the President not later than July 1, 1971, such measures as may be necessary to bring their authority and policies into conformity with the intent, purposes, and procedures set forth in this Act.

SEC. 104. Nothing in Section 102 or 103 shall in any way affect the specific statutory obligations of any Federal agency (1) to comply with criteria or standards of environmental quality, (2) to coordinate or consult with any other Federal or State agency, or (3) to act, or refrain from acting contingent upon the recommendations or certification of any other Federal or State agency.

SEC. 105. The policies and goals set forth in this Act are supplementary to those set forth in existing authorizations of Federal agencies.

TITLE II

COUNCIL ON ENVIRONMENTAL QUALITY

Report to Congress.

SEC. 201. The President shall transmit to the Congress annually beginning July 1, 1970, an Environmental Quality Report (hereinafter referred to as the "report") which shall set forth (1) the status and condition of the major natural, manmade, or altered environmental classes of the Nation, including, but not limited to, the air, the aquatic, including marine, estuarine, and fresh water, and the terrestrial environment, including, but not limited to, the forest, dryland, wetland, range, urban, suburban, and rural environment; (2) current and foreseeable trends in the quality, management and utilization of such environments and the effects of those trends on the social, economic, and other requirements of the Nation; (3) the adequacy of available natural resources for fulfilling human and economic requirements of the Nation in the light of expected population pressures; (4) a review of the programs and activities (including regulatory activities) of the Federal Government, the State and local governments, and nongovernmental entities or individuals, with particular reference to their effect on the environment and on the conservation, development and utilization of natural resources; and (5) a program for remedying the deficiencies of existing programs and activities, together with recommendations for legislation.

Council on Environmental Quality.

SEC. 202. There is created in the Executive Office of the President a Council on Environmental Quality (hereinafter referred to as the "Council"). The Council shall be composed of three members who shall be appointed by the President to serve at his pleasure, by and with the advice and consent of the Senate. The President shall designate one of the members of the Council to serve as Chairman. Each member shall be a person who, as a result of his training, experience, and attainments, is exceptionally well qualified to analyze and interpret environmental trends and information of all kinds; to appraise programs and activities of the Federal Government in the light of the policy set forth in title I of this Act; to be conscious of and responsive to the scientific, economic, social, esthetic, and cultural needs and interests of the Nation; and to formulate and recommend national policies to promote the improvement of the quality of the environment.

SEC. 203. The Council may employ such officers and employees as may be necessary to carry out its functions under this Act. In addition, the Council may employ and fix the compensation of such experts and consultants as may be necessary for the carrying out of its functions under this Act, in accordance with section 3109 of title 5, United States Code (but without regard to the last sentence thereof). 80 Stat. 416.

SEC. 204. It shall be the duty and function of the Council— Duties and functions.

(1) to assist and advise the President in the preparation of the Environmental Quality Report required by section 201;

(2) to gather timely and authoritative information concerning the conditions and trends in the quality of the environment both current and prospective, to analyze and interpret such information for the purpose of determining whether such conditions and trends are interfering, or are likely to interfere, with the achievement of the policy set forth in title I of this Act, and to compile and submit to the President studies relating to such conditions and trends;

(3) to review and appraise the various programs and activities of the Federal Government in the light of the policy set forth in title I of this Act for the purpose of determining the extent to which such programs and activities are contributing to the achievement of such policy, and to make recommendations to the President with respect thereto;

(4) to develop and recommend to the President national policies to foster and promote the improvement of environmental quality to meet the conservation, social, economic, health, and other requirements and goals of the Nation;

(5) to conduct investigations, studies, surveys, research, and analyses relating to ecological systems and environmental quality;

(6) to document and define changes in the natural environment, including the plant and animal systems, and to accumulate necessary data and other information for a continuing analysis of these changes or trends and an interpretation of their underlying causes;

(7) to report at least once each year to the President on the state and condition of the environment; and Report to President.

(8) to make and furnish such studies, reports thereon, and recommendations with respect to matters of policy and legislation as the President may request.

SEC. 205. In exercising its powers, functions, and duties under this Act, the Council shall—

(1) consult with the Citizens' Advisory Committee on Environmental Quality established by Executive Order numbered 11472, dated May 29, 1969, and with such representatives of science, industry, agriculture, labor, conservation organizations, State and local governments and other groups, as it deems advisable; and 16 USC 17k note.

(2) utilize, to the fullest extent possible, the services, facilities, and information (including statistical information) of public and private agencies and organizations, and individuals, in order that duplication of effort and expense may be avoided, thus assuring that the Council's activities will not unnecessarily overlap or conflict with similar activities authorized by law and performed by established agencies.

Tenure and compensation.

Post, p. 864.

SEC. 206. Members of the Council shall serve full time and the Chairman of the Council shall be compensated at the rate provided for Level II of the Executive Schedule Pay Rates (5 U.S.C. 5313). The other members of the Council shall be compensated at the rate provided for Level IV or the Executive Schedule Pay Rates (5 U.S.C. 5315).

Appropriations.

SEC. 207. There are authorized to be appropriated to carry out the provisions of this Act not to exceed $300,000 for fiscal year 1970, $700,000 for fiscal year 1971, and $1,000,000 for each fiscal year thereafter.

Approved January 1, 1970.

1971

SESSION LAWS

OF THE

STATE OF WASHINGTON

REGULAR SESSION
FORTY-SECOND LEGISLATURE

Convened January 11, 1971. Adjourned March 11, 1971.

1st EXTRAORDINARY SESSION
FORTY-SECOND LEGISLATURE

Convened March 12, 1971. Adjourned May 10, 1971.

Published at Olympia by the Statute Law Committee pursuant to Chapter 6, Laws of 1969.

RICHARD O. WHITE
Code Reviser

PERTINENT FACTS CONCERNING THE WASHINGTON SESSION LAWS

1. EDITIONS AVAILABLE

(a) *General information.* The session laws are printed successively in two editions;

(i) a temporary pamphlet edition consisting of a series of one or more paper bound pamphlets, which are published as soon as possible following the session, at random dates as accumulated; followed by

(ii) a bound volume edition containing the accumulation of all laws adopted in the legislative session. Both editions are accompanied by a subject index and tables indicating code sections affected.

(b) *Temporary pamphlet edition—where and how obtained—price.* The temporary session laws may be ordered from the Statute Law Committee, Legislative Building, Olympia, Washington 98504 at one dollar per set, remittance to accompany order. (No sales tax required)

(c) *Permanent bound edition—when and how obtained—price.* The permanent bound edition of the session laws may be ordered from the State Law Librarian, Temple of Justice, Olympia, Washington 98504 at four dollars per volume. (No sales tax required.) The laws of the 1971 regular and 1st extraordinary session will be published in one volume. All orders must be accompanied by remittance.

2. PRINTING STYLE—INDICATION OF NEW OR DELETED MATTER

Commencing with the Laws of 1969, both editions of the session laws are printed by the offset method to present the new laws in the form in which they were adopted by the legislature. This style quickly and graphically portrays the current changes to existing law as follows:

(a) In amendatory sections—

(i) underlined matter is new matter

(ii) deleted matter is ((~~lined out and bracketed between double parentheses~~))

(b) Complete new sections are prefaced by the words *NEW SECTION.*

3.—PARTIAL VETOES

(a) Vetoed matter is boxed and marginally noted as in the following examples:

(i) association, partnership, [society,] or any other organization — V

(ii)
> (3) "Community Mental Health Program" means any consciously adopted program designed to help people learn to avoid mental crisis. "Crisis" is any personal distress, acute or chronic.

— V

(b) Pertinent excerpts of the governor's explanation of partial veto are printed at the end of the chapter concerned.

4.—EDITORIAL CORRECTIONS. Words and clauses inserted herein pursuant to the authority of RCW 44.20.060 are enclosed in brackets [ ]. Brackets accompanied by an asterisk *[ ] indicate that the material contained within the brackets is offered in substitution for the word immediately preceding.

5. EFFECTIVE DATE OF LAWS

(a) The state Constitution provides that unless otherwise qualified, the laws of any session take effect ninety days after adjournment sine die. The pertinent date for the 1971 Regular Session is June 10, 1971 (midnight June 9) and the pertinent date for the 1971 1st Extraordinary Session is August 9, 1971 (midnight August 8).

(b) Laws which carry an emergency clause take effect immediately upon approval by the Governor.

(c) Laws which prescribe an effective date, take effect upon that date.

6. INDEX AND TABLES

An index and tables of all laws published herein may be found at the back of the book.

TABLE OF CONTENTS

AUTHENTICATION

I, Richard O. White, Code Reviser of the State of Washington, do hereby certify that, with the exception of such corrections as I have made in accordance with the powers vested in me by the provisions of RCW 44.20-.060, the laws published herein are a true and correct reproduction of the copies of the enrolled laws of the 1971 regular session and the 1971 1st extraordinary session (42nd Legislature) as certified and transmitted to the Statute Law Committee by the Secretary of State pursuant to RCW 44.20.020.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the State of Washington.

Dated at Olympia, Washington, this fifteenth day of July, 1971.

RICHARD O. WHITE
Code Reviser

amendatory act, and not in conflict with the provisions of this chapter are adopted as regulations applicable under the provisions of this chapter.

NEW SECTION. Sec. 5. There is added to chapter 146, Laws of 1969 ex. sess. and to chapter 16.74 RCW a new section to read as follows:

The purpose of this chapter is to promote uniformity of state legislation and regulations with the federal poultry products inspection act, 21 USC 451 et. seq., and regulations adopted thereunder. In accord with such purpose any regulation adopted under the federal poultry products inspection act and published in the federal register shall be deemed to have been adopted under the provisions of this chapter in accord with chapter 34.04 RCW as enacted or hereafter amended. The director shall, however, within thirty days of the publication of the adoption of any such regulation under the federal poultry products inspection act give public notice that a hearing will be held to determine if such regulations shall not be applicable under the provisions of this chapter. Such hearing shall be in accord with the requirements of chapter 34.04 RCW as enacted or hereafter amended.

Passed the Senate May 10, 1971.
Passed the House May 9, 1971.
Approved by the Governor May 19, 1971.
Filed in Office of Secretary of State May 20, 1971.

CHAPTER 109
[Senate Bill No. 545]
STATE ENVIRONMENTAL POLICY ACT OF 1971

AN ACT Relating to the environment; establishing state environmental policy; and creating new sections.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

NEW SECTION. Section 1. The purposes of this act are: (1) To declare a state policy which will encourage productive and enjoyable harmony between man and his environment; (2) to promote efforts which will prevent or eliminate damage to the environment and biosphere; (3) and stimulate the health and welfare of man; and (4) to enrich the understanding of the ecological systems and natural resources important to the state and nation.

NEW SECTION. Sec. 2. (1) The legislature, recognizing that man depends on his biological and physical surroundings for food, shelter, and other needs, and for cultural enrichment as well; and recognizing further the profound impact of man's activity on the

interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource utilization and exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the state of Washington, in cooperation with federal and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to: (1) Foster and promote the general welfare; (2) to create and maintain conditions under which man and nature can exist in productive harmony; and (3) fulfill the social, economic, and other requirements of present and future generations of Washington citizens.

(2) In order to carry out the policy set forth in this act, it is the continuing responsibility of the state of Washington and all agencies of the state to use all practicable means, consistent with other essential considerations of state policy, to improve and coordinate plans, functions, programs, and resources to the end that the state and its citizens may:

(a) Fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(b) Assure for all people of Washington safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(c) Attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(d) Preserve important historic, cultural, and natural aspects of our national heritage;

(e) Maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(f) Achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(g) Enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(3) The legislature recognizes that each person has a fundamental and inalienable right to a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

NEW SECTION. Sec. 3. The legislature authorizes and directs that, to the fullest extent possible: (1) The policies, regulations, and laws of the state of Washington shall be interpreted and administered in accordance with the policies set forth in this act,

and (2) all branches of government of this state, including state agencies, municipal and public corporations, and counties shall:

(a) Utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision making which may have an impact on man's environment;

(b) Identify and develop methods and procedures, in consultation with the department of ecology and the ecological commission, which will insure that presently unquantified environmental amenities and values will be given appropriate consideration in decision making along with economic and technical considerations;

(c) Include in every recommendation or report on proposals for legislation and other major actions significantly affecting the quality of the 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;

(d) Prior to making any detailed statement, the responsible official shall consult with and obtain the comments of any public agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate federal, province, state, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the governor, the department of ecology, the ecological commission, and the public, and shall accompany the proposal through the existing agency review processes;

(e) Study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(f) Recognize the worldwide and long-range character of environmental problems and, where consistent with state policy, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(g) Make available to the federal government, other states, provinces of Canada, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(h) Initiate and utilize ecological information in the planning and development of natural resource-oriented projects.

NEW SECTION. Sec. 4. All branches of government of this state, including state agencies, municipal and public corporations, and counties shall review their present statutory authority, administrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of this act and shall propose to the governor not later than January 1, 1972, such measures as may be necessary to bring their authority and policies in conformity with the intent, purposes, and procedures set forth in this act.

NEW SECTION. Sec. 5. Nothing in sections 3 or 4 of this act shall in any way affect the specific statutory obligations of any agency (1) to comply with criteria or standards of environmental quality, (2) to coordinate or consult with any other public agency, or (3) to act, or refrain from acting contingent upon the recommendations or certification of any other public agency.

NEW SECTION. Sec. 6. The policies and goals set forth in this act are supplementary to those set forth in existing authorizations of all branches of government of this state, including state agencies, municipal and public corporations, and counties.

NEW SECTION. Sec. 7. This act shall be known and may be cited as the "State Environmental Policy Act of 1971".

Passed the Senate May 10, 1971.
Passed the House May 9, 1971.
Approved by the Governor May 19, 1971.
Filed in Office of Secretary of State May 20, 1971.

CHAPTER 110
[Engrossed Senate Bill No. 605]
MOTOR VEHICLES--
HULK HAULERS AND SCRAP PROCESSORS

AN ACT Relating to motor vehicles; providing for licensing and regulating hulk haulers and scrap processors; and creating a new chapter in Title 46 RCW.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

NEW SECTION. Section 1. As used in this chapter and unless

[3125-01-M]

Title 40—Protection of Environment

CHAPTER V—COUNCIL ON ENVIRONMENTAL QUALITY

NATIONAL ENVIRONMENTAL POLICY ACT—REGULATIONS

Implementation of Procedural Provisions

AGENCY: Council on Environmental Quality, Exective Office of the President.

ACTION: Final regulations.

SUMMARY: These final regulations establish uniform procedures for implementing the procedural provisions of the National Environmental Policy Act. The regulations would accomplish three principal aims: to reduce paperwork, to reduce delays, and to produce better decisions. The regulations were issued in draft form in 43 FR 25230-25247 (June 9, 1978) for public review and comment and reflect changes made as a result of this process.

EFFECTIVE DATE: July 30, 1979. (See exceptions listed in § 1506.12.)

FOR FURTHER INFORMATION CONTACT:

Nicholas C. Yost, General Counsel, Council on Environmental Quality, Executive Office of the President, 722 Jackson Place NW., Washington, D.C. 20006 (telephone number 202-633-7032 or 202-395-5750).

SUPPLEMENTARY INFORMATION:

1. Purpose

We are publishing these final regulations to implement the procedural provisions of the National Environmental Policy Act. Their purpose is to provide all Federal agencies with efficient, uniform procedures for translating the law into practical action. We expect the new regulations to accomplish three principal aims: To reduce paperwork, to reduce delays, and at the same time to produce better decisions which further the national policy to protect and enhance the quality of the human environment.

The Council on Environmental Quality is responsbile for overseeing Federal efforts to comply with the National Environmental Policy Act ("NEPA"). In 1970, the Council issued Guidelines for the preparation of environmental impact statements (EISs) under Executive Order 11514 (1970). The 1973 revised Guidelines are now in effect. Although the Council conceived of the Guidelines as non-discretionary standards for agency decisionmaking, some agencies viewed them as advisory only. Similarly, courts differed over the weight which should be accorded the Guidelines in evaluating agency compliance with the statute.

The result has been an evolution of inconsistent agency practices and interpretations of the law. The lack of a uniform, government-wide approach to implementing NEPA has impeded Federal coordination and made it more difficult for those outside government to understand and participate in the environmental review process. It has also caused unnecessary duplication, delay and paperwork.

Moreover, by the terms of Executive Order 11514, the Guidelines were confined to Subsection (C) of Section 102(2) of NEPA—the requirement for environmental impact statements. The Guidelines did not address Section 102(2)'s other important provisions for agency planning and decisionmaking. Consequently, the environmental impact statement has tended to become an end in itself, rather than a means to making better decisions. Environmental impact statements have often failed to establish the link between what is learned through the NEPA process and how the information can contribute to decisions which further national environmental policies and goals.

To correct these problems, the President issued Executive Order 11991 on May 24, 1977 directing the Council to issue the regulations. The Executive Order was based on the President's Constitutional and statutory authority, including NEPA, the Environmental Quality Improvement Act, and Section 309 of the Clean Air Act. The President has a constitutional duty to insure that the laws are faithfully executed (U.S. Const. art. II, sec. 3), which may be delegated to appropriate officials. (Title 3 U.S.C., Sec. 301). In signing Executive Order 11991, the President delegated this authority to the agency created by NEPA, the Council on Environmental Quality.

In accordance with this directive, the Council's regulations are binding on all Federal agencies, replace some seventy different sets of agency regulations, and provide uniform standards applicable throughout the Federal government for conducting environmental reviews. The regulations also establish formal guidance from the Council on the requirements of NEPA for use by the courts in interpreting this law. The regulations address all nine subdivisions of Section 102(2) of the Act, rather than just the EIS provision covered by the Guidelines. Finally, as mandated by President Carter's Executive Order, the regulations are

"* * * designed to make the environmental impact statement more useful to decisionmakers and the public; and to reduce paperwork and the accumulation of extraneous background data, in order to emphasize the need to focus on real environmental issues and alternatives."

2. Summary of Major Innovations in the Regulations

Following this mandate in developing the new regulations, we have kept in mind the threefold objective of less paperwork, less delay, and better decisions.

A. REDUCING PAPERWORK

These regulations reduce paperwork requirements on agencies of government. Neither NEPA nor these regulations impose paperwork requirements on the public.

i. *Reducing the length of environmental impact statements.* Agencies are directed to write concise EISs (§ 1502.2(c)), which normally shall be less than 150 pages, or, for proposals of unusual scope or complexity, 300 pages (§ 1502.7).

ii. *Emphasizing real alternatives.* The regulations stress that the environmental analysis is to concentrate on alternatives, which are the heart of the process (§§ 1502.14, 1502.16); to treat peripheral matters briefly (§ 1502.2(b)); and to avoid accumulating masses of background data which tend to obscure the important issues (§§ 1502.1, 1502.15).

iii. *Using an early "scoping" process to determine what the important issues are.* A new "scoping" procedure is established to assist agencies in deciding what the central issues are, how long the EIS shall be, and how the responsibility for the EIS will be allocated among the lead agency and cooperating agencies (§ 1501.7). The scoping process is to begin as early in the NEPA process as possible—in most cases, shortly after the decision to prepare an EIS—and shall be integrated with other planning.

iv. *Using plain language.* The regulations strongly advocate writing in plain language (§ 1502.8).

v. *Following a clear format.* The regulations recommend a standard format intended to eliminate repetitive discussion, stress the major conclusions, highlight the areas of controversy, and focus on the issues to be resolved (§ 1502.10).

vi. *Requiring summaries of environmental impact statements.* The regulations are intended to make the document more usable by more people (§ 1502.12). With some exceptions, a summary may be circulated in lieu of the environmental impact statement if the latter is unusually long (§ 1502.19).

vii. *Eliminating duplication.* Under the regulations Federal agencies may prepare EISs jointly with State and local units of government which have "little NEPA" requirements (§ 1506.2).

They may also adopt another Federal agency's EIS (§ 1506.3).

viii. *Consistent terminology.* The regulations provide uniform terminology for the implementation of NEPA (§ 1508.1). For instance, the CEQ term "environmental assessment" will replace the following (nonexhaustive) list of comparable existing agency procedures: "survey" (Corps of Engineers), "environmental analysis" (Forest Service), "normal or special clearance" (HUD), "environmental analysis report" (Interior), and "marginal impact statement" (HEW) (§ 1508.9).

ix. *Incorporation by reference.* Agencies are encouraged to incorporate material by reference into the environmental impact statement when the material is not of central importance and when it is readily available for public inspection (§ 1502.21).

x. *Specific comments.* The regulations require that comments on environmental impact statements be as specific as possible to facilitate a timely and informative exchange of views among the lead agency and other agencies and the public (§ 1503.3).

xi. *Simplified procedures for making minor changes in environmental impact statements.* If comments on a draft environmental impact statement require only minor changes or factual corrections, an agency may circulate the comments, responses thereto, and the changes from language in the draft statement, rather than rewriting and circulating the entire document as a final environmental impact statement (§ 1506.4).

xii. *Combining documents.* Agencies may combine environmental impact statements and other environmental documents with any other document used in agency planning and decisionmaking (§ 1506.4).

xiii. *Reducing paperwork involved in reporting requirements.* The regulations will reduce the paperwork involved in reporting requirements as summarized below. In comparing the requirements under the existing Guidelines and the new CEQ regulations, it should be kept in mind that the regulations cover Sections 102(2)(A) through (I) of NEPA, while the Guidelines cover only Section 102(2)(C) (environmental impact statements). CEQ's new regulations will also replace more than 70 different existing sets of individual agency regulations. (Under the new regulations each agency will only issue implementing procedures to explain how the regulations apply to its particular policies and programs (§ 1507.3).)

Existing requirements (Applicable guidelines sections are noted)	New requirements (Applicable regulations sections are noted)
Assessment (optional under Guidelines on a case-by-case basis; currently required, however, by most major agencies in practice or in procedures) Sec. 1500.6.	*Assessment* (limited requirement: not required where there would not be environmental effects or where an EIS will be required) Secs. 1501.3, .4.
Notice of intent to prepare impact statement Sec. 1500.6.	*Notice of intent* to prepare EIS and commence scoping process Sec. 1501.7.
Quarterly list of notices of intent Sec. 1500.6.	Requirement abolished.
Negative determination (decision not to prepare impact statement) Sec. 1500.6.	*Finding of no significant impact* Sec. 1501.4.
Quarterly list of negative determinations Sec. 1500.6.	Requirement abolished.
Draft EIS Sec. 1500.7	*Draft EIS* Sec. 1502.9.
Final EIS Sec. 1500.6, .10	*Final EIS* Sec. 1502.9.
EISs on non-agency legislative reports ("agency reports on legislation initiated elsewhere") Sec. 1500.5(a)(1).	Requirment abolished.
Agency report to CEQ on implementation experience Sec. 1500.14(b).	Requirement abolished.
Agency report to CEQ on substantive guidance Secs. 1500.6(c), 14.	Requirement abolished.
Record of decision (no Guideline provision but required by many agencies' own procedures and in a wide range of cases generally under the Administrative Procedure Act and OMB Circular A-95, Part I, Sec. 6(c) and (d), Part II, Sec. 5(b)(4)).	*Record of decision* (brief explanation of decision based in part on EIS that was prepared; no circulation requirement) Sec. 1505.2.

B. REDUCING DELAY

The measures to reduce delay are listed below.

i. *Time limits on the NEPA process.* The regulations encourage lead agencies to set time limits on the NEPA process and require that time limits be set when requested by an applicant (§§ 1501.7(b)(2), 1501.8).

ii. *Integrating EIS requirements with other environmental review requirements.* Often the NEPA process and the requirements of other laws proceed separately, causing delay. The regulations provide for all agencies with jurisdiction over a proposal to cooperate so that all reviews may be conducted simultaneously (§§ 1501.7, 1502.25).

iii. *Integrating the NEPA process into early planning.* If environmental review is tacked on to the end of the planning process, then the process is prolonged, or else the EIS is written to justify a decision that has already been made and genuine consideration may not be given to environmental factors. The regulations require agencies to integrate the NEPA process with other planning at the earliest possible time (§ 1501.2).

iv. *Emphasizing interagency cooperation before the EIS is drafted.* The regulations emphasize that other agencies should begin cooperating with the lead agency before the EIS is prepared in order to encourage early resolution of differences (§ 1501.6). We hope that early cooperation among affected agencies in preparing a draft EIS will produce a better draft and will reduce delays caused by unnecessarily late criticism.

v. *Swift and fair resolution of lead agency disputes.* When agencies differ as to who shall take the lead in preparing an EIS, or when none is willing to take the lead, the regulations provide a means for prompt resolution of the dispute (§ 1501.5).

vi. *Preparing EISs on programs and not repeating the same material in project specific EISs.* Material common to many actions may be covered in a broad EIS, and then through "tiering" may be summarized and incorporated by reference rather than reiterated in each subsequent EIS (§§ 1502.4, 1502.20, 1502.21, 1508.28).

vii. *Legal delays.* The regulations provide that litigation, if any, should come at the end rather than in the middle of the process (§ 1500.3).

viii. *Accelerated procedures for legislative proposals.* The regulations provide accelerated, simplified procedures for environmental analysis of legislative proposals, to fit better with Congressional schedules (§ 1506.8).

ix. *Categorical exclusions.* Under the regulations, categories of actions which do not individually or cumulatively have a significant effect on the human environment may be excluded from environmental review requirements (§ 1508.4).

x. *Finding of no significant impact.* If an action has not been categorically excluded from environmental review under § 1508.4, but nevertheless will not significantly affect the quality of the human environment, the agency will issue a finding of no significant impact as a basis for not preparing an EIS (§ 1508.13).

C. BETTER DECISIONS

Most of the features described above will help to improve decisionmaking. This, of course, is the fundamental purpose of the NEPA process the end to which the EIS is a means. Section 101 of NEPA sets forth the substantive requirements of the Act, the policy to be implemented by the "action-forcing" procedures of Section 102. These procedures must be tied to their intended purpose, otherwise they are indeed useless paperwork and wasted time.

i. *Recording in the decision how the EIS was used.* The new regulations re-

quire agencies to produce a concise public record, indicating how the EIS was used in arriving at the decision (§ 1505.2). This record of decision must indicate which alternative (or alternatives) considered in the EIS is preferable on environmental grounds. Agencies may also discuss preferences among alternatives based on relevant factors including economic and technical considerations and agency statutory missions. Agencies should identify those "essential considerations of national policy", including factors not related to environmental quality, which were balanced in making the decision.

ii. *Insure follow-up of agency decisions.* When an agency requires environmentally protective mitigation measures in its decisions, the regulations provide for means to ensure that these measures are implemented and monitored (§ 1505.3).

iii. *Securing more accurate, professional documents.* The regulations require accurate documents as the basis for sound decisions. As provided by Section 102(2)(A) of NEPA, the documents must draw upon all the appropriate disciplines from the natural and social sciences, plus the environmental design arts (§ 1502.6). The lead agency is responsible for the professional integrity of environmental documents and requirements are established to ensure this result, such as special provisions regarding the use of data provided by an applicant (§ 1506.5). A list of people who helped prepare documents, and their professional qualifications, shall be included in the EIS to encourage professional responsibility and ensure that an interdisciplinary approach was followed (§ 1502.17).

The regulations establish a streamlined process, and one which has a broader purpose than the Guidelines they replace. The Guidelines emphasized a single document, the EIS, while the regulations emphasize the entire NEPA process, from early planning through assessment and EIS preparation through decisions and provisions for follow-up. They are designed to gear means to ends—to ensure that the action-forcing procedures of Section 102(2) of NEPA are used by agencies to fulfill the requirements of the Congressionally mandated policy set out in Section 101 of the Act. Furthermore, the regulations are uniform, applying in the same way to all Federal agencies, although each agency will develop its own procedures for implementing the regulations. With these new regulations we seek to carry out as faithfully as possible the original intent of Congress in enacting NEPA.

3. Background

The Council was greatly assisted by the hundreds of people who responded to our call for suggestions on how to make the NEPA process work better. In all, the Council sought the views of almost 12,000 private organizations, individuals, State and local agencies, and Federal agencies. In public hearings which we held in June 1977, we invited testimony from a broad array of public officials, organizations, and private citizens, affirmatively involving NEPA's critics as well as its friends.

Among those represented were the U.S. Chamber of Commerce, which coordinated testimony from business; the Building and Construction Trades Department of the AFL-CIO, which did so for labor; the National Conference of State Legislatures, for State and local governments; and the Natural Resources Defense Council, for environmental groups. Scientists, scholars, and the general public were also represented.

There was broad consensus among these diverse witnesses. All, without exception, expressed the view that NEPA benefited the public. Equally widely shared was the view that the process had become needlessly cumbersome and should be streamlined. Witness after witness said that the length and detail of EISs made it difficult to distinguish the important from the trivial. The degree of unanimity about the good and bad points of the NEPA process was such that at one point an official spokesperson for the oil inductry rose to say that he adopted in its entirety the presentation of the President of the Sierra Club.

After the hearings we culled the record to organize both the problems and the solutions proposed by witnesses into a 38-page "NEPA Hearing Questionnaire." The questionnaire was sent to all witnesses, every State governor, all Federal agencies, and everyone who responded to an invitation in the Federal Register. We received more than 300 replies, from a broad cross section of groups and individuals. By the comments we received from respondents we gauged our success in faithfully presenting the results of the public hearings. One commenter, an electric utility official, said that for the first time in his life he knew the government was listening to him, because all the suggestions made at the hearing turned up in the questionnaire. We then collated all the responses for use in drafting the regulations.

We also met with every agency of the Federal government to discuss what should be in the regulations. Guided by these extensive interactions with government agencies and the public, we prepared draft regulations which were circulated for comment to all Federal agencies in December, 1977. We then studied agency comments in detail, and consulted numerous Federal officials with special experience in implementing the Act. Informal redrafts were circulated to the agencies with greatest experience in preparing environmental impact statements.

At the same time that Federal agencies were reviewing the early draft, we continued to meet with, listen to, and brief members of the public, including representatives of business, labor, State and local governments, environmental groups, and others. Their views were considered during this early stage of the rulemaking. We also considered seriously and proposed in our regulations virtually every major recommendation made by the Commission on Federal Paperwork and the General Accounting Office in their recent studies on the environmental impact statement process. The studies by these two independent bodies were among the most detailed and informed reviews of the paperwork abuses in the impact statement process. In many cases, such as streamlining intergovernmental coordination, the proposed regulations go further than their recommendations.

On June 9, 1978 the regulations were proposed in draft form (43 FR at pages 25230-25247) and the Council announced that the period for public review of and comment on the draft regulations would extend for two months until August 11, 1978. During this period, the Council received almost 500 written comments on the draft regulations, most of which contained specific and detailed suggestions for improving them. These comments were again broadly representative of the various interests which are involved in the NEPA process.

The Council carefully reevaluated the regulations in light of the comments we received. The Council's staff read and analyzed each of the comments and developed recommendations for responding to them. A clear majority of the comments were favorable and expressed strong support for the draft regulations as a major improvement over the existing Guidelines. Some comments suggested further improvements through changes in the wording of specific provisions. A smaller number expressed more general concerns about the approach and direction taken by the regulations. In continuing efforts to resolve issues raised during the review, staff members conducted numerous meetings with individuals and groups who had offered comments and with representatives of affected Federal agencies. This process continued until most concerns with the proposals were alleviated or satisfied.

When, after discussions and review the Council determined that the comments raised valid concerns, we altered the regulations accordingly. When we

decided that reasons supporting the regulations were stronger than those for challenging them, we left the regulations unchanged. Part 4 of the Preamble describes section by section the more significant comments we received, and how we responded to them.

4. Comments and the Council's Response

PART 1500—PURPOSE, POLICY AND MANDATE

Comments on § 1500.3: Mandate. Section 1500.3 of the draft regulations stated that it is the Council's intention that judicial review of agency compliance with the regulations not occur before an agency has filed the final environmental impact statement, causes irreparable injury, or has made a finding of no significant impact. Some comments expressed concern that court action might be commenced under this provision following a finding of no significant impact which was only tentative and did not represent a final determination that an environmental impact statement would not be prepared.

The Council made two changes in response to this concern: First, the word "final" was inserted before the phrase "finding of no significant impact." Thus, the Council eliminated the possibility of interpreting this phrase to mean a preliminary or tentative determination. Second, a clarification was added to this provision to indicate the Council's intention that judicial review would be appropriate only where the finding of no significant impact would lead to action affecting the environment.

Several comments on § 1500.3 expressed concern that agency action could be invalidated in court proceedings as the result of trivial departures from the requirements established by the Council's regulations. This is not the Council's intention. Accordingly, a sentence was added to indicate the Council's intention that a trivial departure from the regulations not give rise to an independent cause of action under law.

PART 1501—NEPA AND AGENCY PLANNING

Comments on § 1501.2: Apply NEPA early in process. Section (d)(1) of § 1501.2 stated that Federal agencies should take steps to ensure that private parties and State and local entities initiate environmental studies as soon as Federal involvement in their proposals can be foreseen. Several commenters raised questions concerning the authority of a Federal agency to require that environmental studies be initiated by private parties, for example, even before that agency had become officially involved in the review of the proposal.

The Council's intention in this provision is to ensure that environmental factors are considered at an early stage in the planning process. The Council recognizes that the authority of Federal agencies may be limited before their duty to review proposals initiated by parties outside the Federal government officially begins. Accordingly, the Council altered subsection (d)(1) of § 1501.2 to require that in such cases Federal agencies must ensure that "[p]olicies or designated staff are available to advise potential applicants of studies or other information foreseeably required by later Federal action." The purpose of the amended provision is to assure the full cooperation and support of Federal agencies for efforts by private parties and State and local entities in making an early start on studies for proposals that will eventually be reviewed by the agencies.

Comments on § 1501.3: When to prepare an environmental assessment. One commenter asked whether an environmental assessment would be required where an agency had already decided to prepare an environmental impact statement. This is not the Council's intention. To clarify this point, the Council added a sentence to this provision stating that an assessment is not necessary if the agency has decided to prepare an environmental impact statement.

Comments on § 1501.5: Lead agencies. The Council's proposal was designed to insure the swift and fair resolution of lead agency disputes. Section 1501.5 of the draft regulations established procedures for resolving disagreements among agencies over which of them must take the lead in preparing an environmental impact statement. Under subsection (d) of this section, persons and governmental entities substantially affected by the failure of Federal agencies to resolve this question may request these agencies in writing to designate a lead agency forthwith. If this request has not been met "within a reasonable period of time," subsection (e) authorizes such persons and governmental entities to petition the Council for a resolution of this issue.

Several comments objected to the phrase "within a reasonable time" because it was vague, and left it uncertain when concerned parties could file a request with the Council. The comments urged that a precise time period be fixed instead. The Council adopted this suggestion and substituted 45 days for the phrase "within a reasonable period of time." With this change, the regulations require that a lead agency be designated, if necessary by the Council, within a fixed period following a request from concerned parties that this be done.

Several commenters suggested that the Council take responsibility for designating lead agencies in every case to reduce delay. These commenters recommended that all preliminary steps be dropped in favor of immediate Council action whenever the lead agency issue arose.

The Council determined, however, that individual agencies are in the best position to decide these questions and should be given the opportunity to do so. In view of its limited resources, the Council does not have the capability to make lead agency designations for all proposals. As a result of these factors, the Council determined not to alter this provision.

Several commenters opposed the concept of joint lead agencies authorized by subsection (b) of this section, particularly where two or more of the agencies are Federal. These commenters expressed doubt that Federal agencies could cooperate in such circumstances and stated their view that the environmental review process will only work where one agency is given primary responsibility for conducting it.

In the Council's judgment, however, the designation of joint lead agencies may be the most efficient way to approach the NEPA process where more than one agency plays a significant role in reviewing proposed actions. The Council believes that Federal agencies should have the option to become joint lead agencies in such cases.

Comments on § 1501.6: Cooperating agencies. The Council developed proposals to emphasize interagency cooperation before the environmental impact statement was prepared rather than comments on a completed document. Section 1501.6 stated that agencies with jurisdiction by law over a proposal would be required to become "cooperating agencies" in the preparation of an EIS should the lead agency request that they do so. Under subsection (b) of this provision, "cooperating agencies" could be required to assume responsibility for developing information and analysis within their special competence and to make staff support available to enhance the interdisciplinary capability of the lead agency.

Several comments pointed out that principal authority for environmental matters resides in a small number of agencies in the Federal government. Concern was expressed that these few agencies could be inundated with requests for cooperation in the preparation of EISs and, if required to meet these requests in every case, drained of resources required to fulfill other statutory mandates.

The Council determined that this was a valid concern. Accordingly, it added a new subsection (c) to this sec-

tion which authorizes a cooperating agency to decline to participate or otherwise limit its involvement in the preparation of an EIS where existing program commitments preclude more extensive cooperation.

Subsection (b)(5) of this section provided that a lead agency shall finance the major activities or analyses it requests from cooperating agencies to the extent available funds permit. Several commenters expressed opposition to this provision on grounds that a lead agency should conserve its funds for the fulfillment of its own statutory mandate rather than disburse funds for analyses prepared by other agencies.

The same considerations apply, however, to cooperating agencies. All Federal agencies are subject to the mandate of the National Environmental Policy Act. This provision of the regulations allows a lead agency to facilitate compliance with this statute by funding analyses prepared by cooperating agencies "to the extent available funds permit." In the Council's view, this section will enhance the ability of a lead agency to meet all of its obligations under law.

Section 1501.7: Scoping. The new concept of "scoping" was intended by the Council and perceived by the great preponderance of the commenters as a means for early identification of what are and what are not the important issues deserving of study in the EIS. Section 1501.7 of the draft regulations established a formal mechanism for agencies, in consultation with affected parties, to identify the significant issues which must be discussed in detail in an EIS, to identify the issues that do not require detailed study, and to allocate responsibilities for preparation of the document. The section provided that a scoping meeting must be held when practicable. One purpose of scoping is to encourage affected parties to identify the crucial issues raised by a proposal before an environmental impact statement is prepared in order to reduce the possibility that matters of importance will be overlooked in the early stages of a NEPA review. Scoping is also designed to ensure that agency resources will not be spent on analysis of issues which none concerned believe are significant. Finally, since scoping requires the lead agency to allocate responsibility for preparing the EIS among affected agencies and to identify other environmental review and consultation requirements applicable to the project, it will set the stage for a more timely, coordinated, and efficient Federal review of the proposal.

The concept of scoping was one of the innovations in the proposed regulations most uniformly praised by members of the public ranging from business to environmentalists. There was considerable discussion of the details of implementing the concept. Some commenters objected to the formality of the scoping process, expressing the view that compliance with this provision in every case would be time-consuming, would lead to legal challenges by citizens and private organizations with objections to the agency's way of conducting the process, and would lead to paperwork since every issue raised during the process would have to be addressed to some extent in the environmental impact statement. These commenters stated further that Federal agencies themselves were in the best position to determine matters of scope, and that public participation in these decisions was unnecessary because any scoping errors that were made by such agencies could be commented upon when the draft EIS was issued (as was done in the past) and corrected in the final document. These commenters urged that scoping at least be more open-ended and flexible and that agencies be merely encouraged rather than required to undertake the process.

Other commenters said that the Council had not gone for enough in imposing uniform requirements. These commenters urged the Council to require that a scoping meeting be held in every case, rather than only when practicable; that a scoping document be issued which reflected the decisions reached during the process; and that formal procedures be established for the resolution of disagreements over scope that arise during the scoping process. These commenters felt that more stringent requirements were necessary to ensure that agencies did not avoid the process.

In developing § 1501.7, the Council sought to ensure that the benefits of scoping would be widely realized in Federal decisionmaking, but without significant disruptions for existing procedures. The Council made the process itself mandatory to guarantee that early cooperation among affected parties would be initiated in every case. However, § 1501.7 left important elements of scoping to agency discretion. After reviewing the recommendations for more flexibility on the one hand, and more formality on the other, and while making several specific changes in response to specific comments, the Council determined that the proper balance had been struck in Section 1501.7 and did not change the basic outline of this provision. The Council did accept amendments to make clear that scoping meetings were permissive and that an agency might make provision for combining its scoping process with its environmental assessment process.

Comments on § 1501.8: Time limits. Reducing delay and uncertainty by the use of time limits is one of the Council's principal changes. Section 1501.8 of the draft regulations established criteria for setting time limits for completion of the entire NEPA process or any part of the process. These criteria include the size of the proposal and its potential for environmental harm, the state of the art, the number of agencies involved, the availability of relevant information and the time required to obtain it. Under this section, if a private applicant requests a lead agency to set time limits for an EIS review, the agency must do so provided that the time limits are consistent with the purposes of NEPA and other essential considerations of national policy. If a Federal agency is the sponsor of a proposal for major action, the lead agency is encouraged to set a timetable for the EIS review.

Several commenters objected to the concept of time limits for the NEPA process. In their opinion, the uncertainties involved in an EIS review and competing demands for limited Federal resources could make it difficult for agencies to predict how much time will be required to complete environmental impact statements on major proposals. These commenters were concerned that time limits could prompt agencies to forego necessary analysis in order to meet deadlines. In their view, the concept of time limits should be dropped from the regulations in favor of more flexible "targets" or "goals" which would be set only after consultation with all concerned parties.

On the other side of the question, the Council received several comments that the provision for time limits was not strict enough. These comments expressed concern that the criteria contained in the draft regulations were vague and would not serve effectively to encourage tight timetables for rapid completion of environmental reviews. The Council was urged to strengthen this section by including definite time limits for the completion of the EIS process in every case or by providing that CEQ itself set such limits for every environmental review, and by setting time limits for the establishment of time limits.

A primary goal of the Council's regulations is to reduce delays in the EIS process. The Council recognizes the difficulties of evaluating in advance the time required to complete environmental reviews. Nevertheless, the Council believes that a provision for time limits is necessary to concentrate agencies' attention on the timely completion of environmental impact statements and to provide private applicants with reasonable certainty as to how long the NEPA process will take. Section 1501.7(c) of the regulations

allows revision of time limits if significant new circumstances (including information) arise which bear on the proposal or its impacts.

At the same time, the Council believes that precise time limits to apply uniformly across government would be unrealistic. The factors which determine the time needed to complete an environmental review are various, including the state of the art, the size and complexity of the proposal, the number of Federal agencies involved, and the presence of sensitive ecological conditions. These factors may differ significantly from one proposal to the next. The same law that applies to a Trans-Alaska pipeline may also apply to a modest federally funded building in a historic district. In the Council's judgment, individual agencies are in the best position to perform this function. The Council does not have the resources to weigh these factors for each proposal. Accordingly, the Council determined not to change these provisions of § 1501.8 of the regulations.

PART 1502—ENVIRONMENTAL IMPACT STATEMENT

Comments on Section 1502.5: Timing. Several commenters noted that it has become common practice in informal rulemaking for Federal agencies to issue required draft environmental impact statements at the same time that rules are issued in proposed form. These commenters expressed the view that this procedure was convenient, time-saving and consistent with NEPA, and urged that the regulations provide for it. The Council added a new subsection (d) to § 1502.5 on informal rulemaking stating that this procedure shall normally be followed.

Comments on section 1502.7: Page limits. A principal purpose of these regulations is to turn bulky, often unused EISs into short, usable documents which are in fact used. Section 1502.7 of the draft regulations provided that final environmental impact statements shall normally be less than 150 pages long and, for proposals of unusual scope or complexity, shall normally be less than 300 pages. Numerous commenters expressed strong support for the Council's decision to establish page limits for environmental impact statements.

Several commenters objected to the concept of page limits for environmental impact statements on grounds that it could constrain the thoroughness of environmental reviews. Some said that the limits were too short and would preclude essential analysis; others contended that they were too long and would encourage the inclusion of unnecessary detail. One commenter proposed a "sliding scale" for page limits; another suggested that a limitation on the number of words would be more effective than a limitation on the number of pages. A number of commenters urged that page limits be simply recommended rather than established as standards that should normally be met.

The usefulness of the NEPA process to decisionmakers and the public has been jeopardized in recent years by the length and complexity of environmental impact statements. In accordance with the President's directive, a primary objective of the regulations is to insure that these documents are clear, concise, and to the point. Numerous provisions in the regulations underscore the importance of focusing on the major issues and real choices facing federal decisionmakers and excluding less important matters from detailed study. Other sections in the regulations provide that certain technical and background materials developed during the environmental review process may be appended but need not be presented in the body of an EIS.

The Council recognizes the tension between the requirement of a thorough review of environmental issues and a limitation on the number of pages that may be devoted to the analysis. The Council believes that the limits set in the regulations are realistic and will help to achieve the goal of more succinct and useful environmental documents. The Council also determined that a limitation on the number of words in an EIS was not required for accomplishing the objective of this provision. The inclusion of the term "normally" in this provision accords Federal agencies latitude if abnormal circumstances exist.

Others suggested that page limits might result in conflict with judicial precedents on adequacy of EISs, that the proverbial kitchen sink may have to be included to insure an adequate document, whatever the length. The Council trusts and intends that this not be the case. Based on its day-to-day experience in overseeing the administration of NEPA throughout the Federal government, the Council is acutely aware that in many cases bulky EISs are not read and are not used by decisionmakers. An unread and unused document quite simply cannot achieve the purpose Congress set for it. The only way to give greater assurance that EISs will be used is to make them usable and that means making them shorter. By way of analogy, judicial opinions are themselves often models of compact treatment of complex subjects. Departmental option documents often provide brief coverage of complicated decisions. Without sacrifice of analytical rigor, we see no reason why the material to be covered in an EIS cannot normally be covered in 150 pages (or 300 pages in extraordinary circumstances).

Comments on § 1502.10: Recommended format. Section 1502.10 stated that agencies shall normally use a standard format for environmental impact statements. This provision received broad support from those commenting on the draft regulations.

As part of the recommended format, environmental impact statements would be required to describe the environmental consequences of a proposed action before they described the environment that would be affected. Many commenters felt that these elements of the EIS should be reversed so that a description of the environmental consequences of a proposal would follow rather than precede a description of the affected environment. The commenters stated their view that it would be easier for the reader to appreciate the nature and significance of environmental consequences if a description of the affected environment was presented first. The Council concurs in this view and adopted the suggested change.

Comments on § 1502.13: Purpose and need. This section of the draft regulations provided that agencies shall briefly specify—normally in one page or less—the underlying purpose and need to which the agency is responding in proposing alternatives for action. Many commenters stated that in some cases this analysis would require more than one page. The Council responded to these comments by deleting the one page limitation.

Comments on § 1502.14: Alternatives including the proposed action. Subsection (a) of this section of the draft regulations provided, among other things, that agencies shall rigorously explore and objectively evaluate all reasonable alternatives. This provision was strongly supported by a majority of those who commented on the provision.

A number of commenters objected to the phrase "all reasonable alternatives" on the grounds that it was unduly broad. The commenters suggested a variety of ways to narrow this requirement and to place limits on the range and type of alternatives that would have to be considered in an EIS.

The phrase "all reasonable alternatives" is firmly established in the case law interpreting NEPA. The phrase has not been interpreted to require that an infinite or unreasonable number of alternatives be analyzed. Accordingly, the Council determined not to alter this subsection of the regulations.

Subsection (c) requires Federal agencies to consider reasonable alternatives not within the jurisdiction of the lead agency. Subsection (d) requires consideration of the no action alternative. A

few commenters inquired into the basis for these provisions. Subsections (c) and (d) are declaratory of existing law.

Subsection (e) of this section required Federal agencies to designate the "environmentally preferable alternative (or alternatives, if two or more are equally preferable)" and the reasons for identifying it. While the purpose of NEPA is better environmental decisionmaking, the process itself has not always successfully focused attention on this central goal. The objective of this requirement is to ensure that Federal agencies consider which course of action available to them will most effectively promote national environmental policies and goals. This provision was strongly supported in many comments on the regulations.

Some commenters noted that a wide variety of decisionmaking procedures are employed by agencies which are subject to NEPA and recommended flexibility to accommodate these diverse agency practices. In particular, the commenters recommended that agencies be given latitude to determine at what stage in the NEPA process—from the draft EIS to the record of decision—the environmentally preferable alternative would be designated.

The Council adopted this recommendation and deleted this requirement from the EIS portion of the regulations (§ 1502.14), while leaving it in § 1505.2 regarding the record of decision. Nothing in these regulations would preclude Federal agencies from choosing to identify the environmentally preferable alternative or alternatives in the environmental impact statement.

Comments on § 1502.15: Environmental consequences. Subsection (e) of this section requires an environmental impact statement to discuss energy requirements and conservation potential of various alternatives and mitigation measures. One commenter asked whether the subsection would require agencies to analyze total energy costs, including possible hidden or indirect costs, and total energy benefits of proposed actions. The Council intends that the subsection be interpreted in this way.

Several commenters suggested that the regulations expressly mention the quality of the urban environment as an environmental consequence to be discussed in an environmental impact statement. The Council responded by adding a new subsection (g) to this section requiring that EISs include a discussion of urban quality, historic and cultural resources, and the design of the built environment, including the reuse and conservation potential of various alternatives and mitigation measures. Section 1502.15 has been renumbered as § 1502.16.

Comments on § 1502.17: List of preparers. Section 1502.17 provided that environmental impact statements shall identify and describe the qualifications and professional disciplines of those persons who were primarily involved in preparing the document and background analyses. This section has three principal purposes: First, Section 102(2)(A) of NEPA requires Federal agencies to "utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and decisionmaking which may have an impact on man's environment." The list of preparers will provide a basis for evaluating whether such a "systematic interdisciplinary approach" was used in preparing the EIS. Second, publication of a list of preparers increases accountability for the analyses appearing in the EIS and thus tends to encourage professional competence among those preparing them. Finally, publication of the list will enhance the professional standing of the preparers by giving proper attribution to their contributions, and making them a recognized part of the literature of their disciplines. This provision received broad support from those commenting on the regulations.

Some commenters felt that a list of preparers would be used as a list of witnesses by those challenging the adequacy of an EIS in court proceedings. However, this information would ordinarily be available anyway through normal discovery proceedings.

Section 1502.17 was also criticized for failing expressly to mention expertise and experience as "qualifications" for preparing environmental impact statements. The Council added these two terms to this section to insure that the term "qualifications" would be interpreted in this way.

Some commenters suggested that the list of preparers should also specify the amount of time that was spent on the EIS by each person identified. These commenters felt that such information was required as a basis for accurately evaluating whether an interdisciplinary approach had been employed. While the Council felt there was much to be said for this suggestion, it determined that the incremental benefits gained from this information did not justify the additional agency efforts that would be required to provide it.

Comments on § 1502.19: Circulation of the environmental impact statement. If an EIS is unusually long, Section 1502.19 provided, with certain exceptions, that a summary can be circulated in lieu of the entire document. Several commenters suggested that private applicants sponsoring a proposal should receive the entire environmental impact statement in every case in view of their interest and probable involvement in the NEPA process. The Council concurs and altered this provision accordingly.

Comments on § 1502.20: Tiering. Section 1502.20 encouraged agencies to tier their environmental impact statements to eliminate repetitive discussions and to focus on the actual issues ripe for decision at each level of environmental review. Some commenters objected to tiering on grounds that it was not required by NEPA and would add an additional unauthorized layer to the environmental review process.

Section 1502.20 authorizes tiering of EISs; it does not require that it be done. In addition, the purpose of tiering is to simplify the EIS process by providing that environmental analysis completed at a broad program level not be duplicated for site-specific project reviews. Many agencies have already used tiering successfully in their decisionmaking. In view of these and other considerations, the Council determined not to alter this provision.

Comments on § 1502.22: Incomplete or unavailable information. Section 1502.22 provided, among other things, that agencies prepare a worst case analysis of the risk and severity of possible adverse environmental impacts when it proceeds with a proposal in the face of uncertainty. This provision received strong support from many commenters.

Several commenters expressed concern that this requirement would place undue emphasis on the possible occurence of adverse environmental consequences regardless of how remote the possiblity might be. In response, the Council added a phrase designed to ensure that the improbability as well as the probability of adverse environmental consequences would be discussed in worst case analyses prepared under this section.

Section 1502.22 stated that if information is essential to a reasoned choice among alternatives and is not known and the costs of obtaining it are not exorbitant, the agency shall include the information in the environmental impact statement. Some commenters inquired into the meaning of the term "costs." The Council intends for this word to be interpreted as including financial and other costs and adopted the phrase "overall costs" to convey this meaning.

PART 1503—COMMENTING

Comments on § 1503.1: Inviting comments. Section 1503.1 set forth the responsibility of Federal agencies to solicit comments on environmental impact statements. Several commenters observed that may Federal

agencies solicit comments from State and local environmental agencies through procedures established by Office of Management and Budget Circular A-95 and suggested that the Council confirm this approach in the regulations. The Council adopted this suggestion by adding an appropriate paragraph to the section.

Comments on § 1503.2: Duty to comment. Section 1503.2 set forth the responsibilities of Federal agencies to comment on environmental impact statements. Several commenters suggested reinforcing the requirement that Federal agencies are subject to the same time limits as those outside the Federal government in order to avoid delays. The Council concurred in this suggestion and amended the provision accordingly. The Council was constrained from further changes by the requirement of Section 102(2)(C) of NEPA that agencies "consult with and obtain" the comments of specified other agencies.

Comments on § 1503.3: Specificity of comments. Section 1503.3 of the draft regulations elaborated upon the responsibilities of Federal agencies to comment specifically upon draft environmental impact statements prepared by other agencies. Several commenters suggested that cooperating agencies should assume a particular obligation in this regard. They noted that cooperating agencies which are themselves required independently to evaluate and/or approve the proposal at some later stage in the Federal review process are uniquely qualified to advise the lead agency of what additional steps may be required to facilitate these actions. In the opinion of these commenters, cooperating agencies should be required to provide this information to lead agencies when they comment on draft EISs so that the final EIS can be prepared with further Federal involvement in mind.

The Council adopted this suggestion and amended § 1503.3 through the addition of new subsections (c) and (d). The new subsections require cooperating agencies, in their comments on draft EISs, to specify what additional information, if any, is required for them to fulfill other applicable environmental review and consultation requirements, and to comment adequately on the site-specific effects to be expected from issuance of subsequent Federal approvals for the proposal. In addition, if a cooperating agency criticizes the proposed action, this section now requires that it specify the mitigation measures which would be necessary in order for it to approve the proposal under its independent statutory authority.

Comments on § 1504.3: Procedure for referrals and response. Several commenters noted that § 1504.3 did not establish a role for members of the public or applicants in the referral process. The Council determined that such persons and organizations were entitled to a role and that their views would be helpful in reaching a proper decision on the referral. Accordingly, the Council added subsection (e) to this section, authorizing interested persons including the applicant to submit their views on the referral, and any response to the referral, in writing to the Council.

Subsection (d) of this section provided that the Council may take one of several actions within 25 days after the referral and agency responses to the referral, if any, are received. Several commenters observed, however, that this subsection did not establish a deadline for final action by the Council in cases where additional discussions, public meetings, or negotiations were deemed appropriate. These commenters expressed concern that the absence of a deadline could lead to delays in concluding the referral process. The Council concurred. Accordingly, the Council added subsection (g) to this section which requires that specified actions be completed within 60 days.

Several commenters noted that the procedures established by Section 1504.3 may be inappropriate for referrals which involve agency determinations required by statute to be made on the record after opportunity for public hearing. The Council agrees. The Council added subsection (h) to this section requiring referrals in such cases to be conducted in a manner consistent with 5 U.S.C. 557(d). Thus, communications to agency officials who made the decision which is the subject of the referral must be made on the public record and after notice to all parties to the referral proceeding. In other words, ex parte contacts with agency decisionmakers in such cases are prohibited.

PART 1505—NEPA AND AGENCY DECISIONMAKING

Comments on Section 1501.1: Agency decisionmaking procedures. Some commenters asked whether this or other sections of the regulations would allow Federal agencies to place responsibility for compliance with NEPA in the hands of those with decisionmaking authority at the field level. Nothing in the regulations would prevent this arrangement. By delegating authority in this way, agencies can avoid multiple approvals of environmental documents and enhance the role of those most directly involved in their preparation and use. For policy oversight and quality control, an environmental quality review office at the national level can, among other things, establish general procedures and guidance for NEPA compliance, monitor agency performance through periodic review of selected environmental documents, and facilitate coordination among agency subunits involved in the NEPA process.

Comments on § 1505.2: Record of decision in those cases requiring environmental impact statements. Section 1505.2 provided that in cases where an environmental statement was prepared, the agency shall prepare a concise public record stating what its final decision was. If an environmentally preferable alternative was not selected, § 1505.2 required the record of decision to state why other specific considerations of national policy overrode those alternatives.

This requirement was the single provision most strongly supported by individuals and organizations commenting on the regulations. These commenters stated, among things, that the requirement for a record of decision would be the most significant improvement over the existing process, would procedurally link NEPA's documentation to NEPA's policy, would relate the EIS process to agency decisionmaking, would ensure that EISs are actually considered by Federal decisionmakers, and was required as sound administrative practice.

As noted above, the Council decided that agencies shall identify the environmentally preferable alternative and the reasons for identifying it in the record of decision. *See* Comments on § 1502.14. The Council's decision does not involve the preparation of additional analysis in the EIS process; it simply affects where the analysis will be presented.

Some commenters objected to the concept of a public record of decision on actions subject to NEPA review. In the Council's opinion, however, a public record of decision is essential for the effective implementation of NEPA. As previously noted, environmental impact statement preparation has too often become an end in itself with no necessary role in agency decisionmaking. One serious problem with the administration of NEPA has been the separation between an agency's NEPA process and its decisionmaking process. In too many cases bulky EISs have been prepared and transmitted but not used by the decisionmaker. The primary purpose of requiring that a decisionmaker concisely record his or her decision in those cases where an EIS has been prepared is to tie means to ends, to see that the decisionmaker considers and pays attention to what the NEPA process has shown to be an environmentally sensitive way of doing things. Other factors may, on balance, lead the decisionmaker to decide that other policies outweigh the environmental ones, but at least

the record of decision will have achieved the original Congressional purpose of ensuring that environmental factors are integrated into the agency's decisionmaking.

Some commenters expressed the opinion that it could be difficult for Federal agencies to identify the environmentally preferable alternative or alternatives because of the multitude of factors that would have to be weighed in any such determination and the subjective nature of the balancing process. By way of illustration, commenters asked: Is clean water preferable to clean air, or the preservation of prime farmland in one region preferable to the preservation of wildlife habitat in another?

In response, the Council has amended the regulations to permit agencies to identify more than one environmentally preferable alternative, regardless of whether they are "equally" preferable, as originally proposed. Moreover, the "environmentally preferable alternative" will be that alternative which best promotes the national environmental policy as expressed in Section 101 of NEPA and most specifically in Section 101(b). Section 101(a) stresses that the policy is concerned with man and nature, to see that they exist in productive harmony and that the social, economic, and other requirements of present and future generations of Americans are fulfilled. Section 101(c) recognizes the need for a healthy environment and each person's responsibility to contribute to it. Section 101(b) contemplates Federal actions which will enable the Nation to fulfill the responsibilities of each generation as trustee for the environment for succeeding generations; to attain the widest range of beneficial uses of the environment; to preserve important historic, cultural and natural aspects of our national heritage; and to accomplish other important goals. The Council recognizes that the identification of the environmentally preferable alternative or alternatives may involve difficult assessments in some cases. The Council determined that the benefits of ensuring that decisionmakers consider and take account of environmental factors outweigh these difficulties. To assist agencies in developing and determining environmentally preferable alternatives, commenters on impact statements may choose to provide agencies with their views on this matter.

Several commenters expressed concern that the regulations did not authorize Federal agencies to express preferences based on factors other than environmental quality. In the opinion of these commenters, this emphasis on environmental considerations was misplaced and not consistent with the factors that agencies are expected to consider in decisionmaking.

The Council responded to these comments by reference to the statute, recognizing that Title II of NEPA and especially Section 101 clearly contemplate balancing of essential considerations of national policy. We provided that agencies may discuss preferences they have among alternatives based on relevant factors, including economic and technical considerations and agency statutory mission. Agencies should identify those considerations, including factors not related to environmental quality, which were balanced in making the decision. Nothing in the final regulations precludes Federal agencies from choosing to discuss these preferences and identifying these factors in the environmental impact statement.

Some commenters objected to the word "overrode" in this provision. The language of the Act and its legislative history make clear that Federal agencies must act in an environnmentally responsible fashion and not merely consider environmental factors. NEPA requires that each Federal agency use "all practicable means and measures" to protect and improve the environment "consistent with other essential considerations of national policy." Section 101(b). The Council determined to tie this provision of the regulations to NEPA's statutory provision in place of the "overrode" language.

Several commenters expressed concern that the phrase "national policy" would not allow agencies to refer to state and local policies in the record of decision. "National policy" is the phrase used by Congress in NEPA. However, in many cases specific statutory provisions require that Federal agencies adhere to or pay heed to State and local policies.

Finally, some commenters expressed concern that the requirement for a concise record of decision would involve additional agency efforts. The intention is not to require new efforts, but to see that environmental considerations are built into existing processes. Preparing such decision records is recognized as good administrative practice and the benefits of this requirement outweigh the difficulties of building environmental considerations into the decisionmaking process.

Subsection (c) of § 1505.2 states that for any mitigation adopted a monitoring and enforcement program where applicable shall be adopted and summarized in the record of decision. One commenter asked what the term "summarized" was intended to mean in this context. The Council intends this word to be interpreted as requiring a brief and concise statement describing the monitoring and enforcement program which has been adopted.

Comments on § 1505.3: Implementing the decision. Section 1505.3 provides for mitigation of adverse environmental effects. Several commenters expressed concern that this provision would grant broad authority to the lead agency for mandating that other agencies undertake and monitor mitigation measures without their consent. This is not the Council's intention and the language of the provision does not support this interpretation.

PART 1506—OTHER REQUIREMENTS OF NEPA

Comments on §1506.1: Limitations on actions during NEPA process. Section 1506.1 placed limitations on actions which can be taken before completion of the environmental review process because of the possibility of prejudicing or foreclosing important choices. Some commenters expressed concern that these limitations would impair the ability of those outside the Federal government to develop proposals for agency review and approval. Accordingly, the Council added a new paragraph (d) to this section which authorizes certain limited activities before completion of the environmental review process.

Comments on § 1506.2: Elimination of duplication with State and local procedures. This section received strong support from many commenters. Several commenters sought clarification of the procedures established by this section. It provides for coordination among Federal, State and local agencies in several distinct situations. First, subsection (a) of this section simply confirms that Federal agencies funding State programs have been authorized by Section 102(2)(D) of NEPA to cooperate with certain State agencies with statewide jurisdiction in conducting environmental reviews. Second, subsection (b) provides generally for Federal cooperation with all States in environmental reviews such as joint planning processes, joint research, joint public hearings, and joint environmental assessments. Third, subsection (c) specifically provides for Federal cooperation with those States and localities which administer "little NEPA's." The Federal agencies are directed to the fullest extent possible to reduce duplication between NEPA and comparable State and local requirements. Approximately half the states now have some sort of environmental impact statement requirement either legislatively adopted or administratively promulgated. In these circumstances, Federal agencies are required to cooperate in fulfilling these requirements as well as those of Federal laws so that one document will comply with all applicable laws. Finally, subsection (d) provides that Federal agencies generally shall in en-

vironmental impact statements discuss any inconsistency between a proposed action and any approved State or local plan or laws, regardless of whether the latter are Federally sanctioned.

Comments on § 1506.3: Adoption. Section 1506.3 authorized one Federal agency to adopt an environmental impact statement prepared by another in prescribed circumstances, provided that the statement is circulated for public comment in the same fashion as a draft EIS. Several commenters stated their view that recirculation was unnecessary if the actions contemplated by both agencies were substantially the same. The Council concurs and added a new paragraph (b) which provides that recirculation is not required in these circumstances.

Comments on § 1506.4: Combining documents. Section 1506.4 provided for the combination of environmental documents with other agency documents. Some commenters expressed the view that this section should enumerate the types of agency documents which could be combined under this provision. The Council concluded that such a list was not necessary and that such matters were better left to agency discretion. Thus, agencies may choose to combine a regulatory analysis review document, an urban impact analysis, and final decision or option documents with environmental impact statements.

Comments on § 1506.5: Agency responsibility. NEPA is a law which imposes obligations on Federal agencies. This provision is designed to insure that those agencies meet those obligations and to minimize the conflict of interest inherent in the situation of those outside the government coming to the government for money, leases or permits while attempting impartially to analyze the environmental consequences of their getting it. § 1506.5 set forth the responsibility of Federal agencies for preparing environmental documents, and addressed the role of those outside the Federal government. As proposed, subsection (b) of this section provided that environmental impact statements shall be prepared either by Federal agencies or by parties under contract to and chosen solely by Federal agencies. The purpose of this provision is to ensure the objectivity of the environmental review process.

Some commenters expressed the view that requiring Federal agencies to be a formal party to every contract for the preparation of an environmental impact statement was not necessary to ensure objectivity so long as the contractor was chosen solely by Federal agencies. These commenters contended that a requirement for formal Federal involvement in all such contracts could cause delay. The Council concurs and deleted the phrase "under contract" from this provision.

Several commenters noted that the existing procedures for a few Federal programs are not consistent with § 1506.5. The Council recognizes that this provision will in a few cases require additional agency efforts where, for example, agencies have relied on applicants for the preparation of environmental impact statements. The Council determined that such efforts were justified by the goal of this provision.

Several commenters expressed concern that environmental information provided by private applicants would not be adequately evaluated by Federal agencies before it was used in environmental documents. Other commenters wanted to insure that applicants were free to submit information to the agencies. Accordingly, the Council amended subsection (a) to allow receipt of such information while requiring Federal agencies to independently evaluate the information submitted and to be responsible for its accuracy. In cases where the information is used in an environmental impact statement, the persons responsible for that evaluation must be identified in the list of preparers required by § 1502.17.

Several commenters expressed the view that applicants should be allowed to prepare environmental assessments. These commenters noted that the number of assessments prepared each year is far greater than the number of environmental impact statements; that such authority was necessary to ensure environmental sensitivity was built into actions, which while ultimately Federal were planned outside the Federal government; that assessments are much shorter and less complex than EISs; and that it would be considerably less difficult for Federal agencies independently to evaluate the information submitted for an environmental assessment than for an environmental impact statement.

The Council concurs and has added a new subsection (b) to this section which authorizes the preparation of environmental assessments by applicants. The Council intends that this provision enable private and State and local applicants to build the environment into their own planning processes, while the Federal agency retains the obligation for the ultimate EIS. The Council emphasizes, however, that Federal agencies must independently evaluate the information submitted for environmental assessments and assume responsibility for its accuracy; make their own evaluation of environmental issues; and take responsibility for the scope and content of environmental assessments.

Comments on § 1506.6: Public involvement. Subsection (b)(3) of this section listed several means by which Federal agencies might provide notice of actions which have effects primarily of local concern. Several commenters urged that such notices be made mandatory, rather than permissive; other commenters felt these methods of public notice should not be listed at all. Some commenters suggested that additional methods be included in this subsection; others urged that one or more methods be deleted.

Subsection (b) of this section required agencies to provide public notice by means calculated to inform those persons and agencies who may be interested or affected. Paragraph 3 of the subsection merely identified alternative techniques that might be used for this purpose at the local level. Paragraph 3 is not intended to provide an exhaustive list of the means of providing adequate public notice. Nor are the measures it lists mandatory in nature. On the basis of these considerations, the Council determined not to alter this provision.

As proposed, subsection (f) of this section required Federal agencies to make comments on environmental impact statements available to the public. This subsection repeated the existing language on the subject that has been in the Guidelines since 1973 (40 CFR 1500.11(d)) relative to the public availability of comments. On the basis of comments received, the Council altered this provision to state that intra-agency documents need not be made available when the Freedom of Information Act allows them to be withheld.

Several commenters observed that subsection (f) did not establish limitations on charges for environmental impact statements as the Council's Guidelines had. Accordingly, the Council incorporated the standard of the Guidelines into this subsection. The standard provides that such documents shall be provided to the public without charge to the extent practicable, or at a fee which is not more than the actual costs incurred.

Comments on § 1506.8: Proposals for legislation. Section 1506.8 established modified procedures for the preparation of environmental impact statements on legislative proposals. Except in prescribed circumstances, this section provided for the transmittal of a single legislative EIS to the Congress and to Federal, State and local agencies and the public for review and comment. No revised EIS is required in such cases.

A few commenters objected to these procedures and urged that draft and final environmental impact statements be required for all legislative proposals. These commenters said that the

conventional final environmental impact statement, including an agency's response to comments, was no less important in this context than in a purely administrative setting.

However, the Council views legislative proposals as different from proposed actions to be undertaken by agencies, in several important respects. Unlike administrative proposals, the timing of critical steps (hearings, votes) is not under the control of the administrative agency. Congress will hold its hearings or take its votes when it chooses, and if an EIS is to influence those actions, it must be there in time. Congress may request Federal agencies to provide any additional environmental information it needs following receipt of a legislative EIS. Administration proposals are considered alongside other proposals introduced by members of Congress and the final product, if any, may be substantially different from the proposal transmitted by the Federal agency. Congress may hold hearings on legislative proposals and invite testimony on all aspects of proposed legislation including its environmental impacts. On the basis of these considerations, the Council determined that it would be overly burdensome and unproductive to require draft and final legislative environmental impact statements for all legislation, wherever it originates.

Several commenters also expressed concern about the requirement that the legislative environmental impact statement actually accompany legislative proposals when they are transmitted to Congress. These commenters noted that such proposals are often transmitted on an urgent basis without advance warning. Accordingly, the Council amended this section to provide for a period of thirty days for transmittal of legislative environmental impact statements, except that agencies must always transmit such EISs before the Congress begins formal deliberations on the proposal.

Comments on § 1506.10: Timing of agency action. Subsection (c) of this section provided that agencies shall allow not less than 45 days for comments on draft environmental impact statements. Several commenters felt that this period was too long; others thought it too short.

The Council recognizes that a balance must be struck between an adequate period for public comment on draft EIS's and timely completion of the environmental review process. In the Council's judgment, 45 days has proven to be the proper balance. This period for public comment was established by the Guidelines in 1973, and the Council determined not to alter it. Subsection (e) of this section authorizes the Environmental Protection Agency to reduce time periods for agency action for compelling reasons of national policy.

Comments on § 1506.11: Emergencies. Section 1506.11 provided for agency action in emergency circumstances without observing the requirements of the regulations. The section required the Federal agency "proposing to take the action" to consult with the Council about alternative arrangements.

Several commenters expressed concern that use of the phrase "proposing to take the action" would be interpreted to mean that agencies consult with the Council before emergency action was taken. In the view of these commenters, such a requirement might be impractical in emergency circumstances and could defeat the purpose of the section. The Council concurs and substituted the phrase "taking the action" for "proposing to take the action." Similarly, the Council amended the section to provide for consultation "as soon as feasible" and not necessarily before emergency action.

PART 1507—AGENCY COMPLIANCE

Comments on § 1507.2: Agency capability to comply. Section 1507.2 provided, among other things, that a Federal agency shall itself have "sufficient capability" to evaluate any analysis prepared for it by others. Several commenters expressed concern that this could be interpreted to mean that each agency must employ the full range of professionals including geologists, biologists, chemists, botanists and others to gain sufficient capability for evaluating work prepared by others. This is not the Council's intention. Agency staffing requirements will vary with the agency's mission and needs including the number of EIS's for which they are responsible.

Comments on § 1507.3: Agency procedures. Subsection (a) of § 1507.3 provided that agencies shall adopt procedures for implementation of the regulations within eight months after the regulations are published in the FEDERAL REGISTER. Several commenters noted that State and local agencies participating in the NEPA process under certain statutory highway and community development programs would also require implementing procedures but could not finally begin to develop them until the relevant Federal agencies had completed this task. Accordingly, the Council amended this provision to allow such state and local agencies an additional four months for the adoption of implementing procedures.

Several commenters suggested that agencies with similar programs should establish similar procedures, especially for the submission of information by applicants. The Council concurs and added a new sentence to subsection (a) stating that agencies with similar programs should consult with each other and the Council to coordinate their procedures, especially for programs requesting similar information from applicants.

Several commenters suggested that a committee be established to review agency compliance with these regulations. Under subsection (a), the Council will review agency implementing procedures for conformity with the Act and the regulations. Moreover, the Council regularly consults with Federal agencies regarding their implementation of NEPA and conducts periodic reviews on how the process is working. On the basis of these considerations, the Council determined that a committee for the review of agency compliance with NEPA should not be established.

PART 1508—TERMINOLOGY AND INDEX

Comments on § 1508.8: Effects. Several commenters urged that the term "effects" expressly include aesthetic, historic and cultural impacts. The Council adopted this suggestion and altered this provision accordingly.

Comments on § 1508.12: Federal agency. Several commenters urged that States and units of general local government assuming NEPA responsibilities under Section 104(h) of the Housing and Community Development Act of 1974 be expressly recognized as Federal agencies for purposes of these regulations. The Council adopted this suggestion and amended this provision accordingly.

Comments on § 1508.14: Human environment. In its proposed form, § 1508.14 stated that the term "human environment" shall be interpreted comprehensively to include the natural and physical environment and the interaction of people with that environment. A few commenters expressed concern that this definition could be interpreted as being limited to the natural and physical aspects of the environment. This is not the Council's intention. *See* § 1508.8 (relating to effects) and our discussion of the environment in the portion of this Preamble relating to § 1505.2. The full scope of the environment is set out in Section 101 of NEPA. Human beings are central to that concept. In § 1508.14 the Council replaced the work "interaction" with the work "relationship" to ensure that the definition is interpreted as being inclusive of the human environment.

The only line we draw is one drawn by the cases. Section 1508.14 stated that economic or social effects are not intended by themselves to require preparation of an environmental impact statement. A few commenters sought further explanation of this provision. This provision reflects the

Council's determination, which accords with the case law, that NEPA was not intended to require an environmental impact statement where the closing of a military base, for example, only affects such things as the composition of the population or the level of personal income in a region.

Comments on § 1508.16: Legislation. Section 1508.16 defined legislation to exclude requests for appropriations. Some commenters felt that this exclusion was inappropriate. Others noted that environmental reviews for requests for appropriations had not been conducted in the eight years since NEPA was enacted. On the basis of traditional concepts relating to appropriations and the budget cycle, considerations of timing and confidentiality, and other factors, the Council decided not to alter the scope of this provision. The Council is aware that this is the one instance in the regulations where we assert a position opposed to that in the predecessor Guidelines. Quite simply, the Council in its experience found that preparation of EISs is ill-suited to the budget preparation process. Nothing in the Council's determination, however, relieves agencies of responsibility to prepare statements when otherwise required on the underlying program or other actions. (We note that a petition for certiorari on this issue is now pending before the Supreme Court.) This section was renumbered as § 1508.17.

Comments on § 1508.17: Major Federal action. Section 1508.17 of the draft regulations addressed the issue of NEPA's application to Federal programs which are delegated or otherwise transferred to State and local government. Some commenters said that the application of NEPA in such circumstances is a highly complicated issue; that its proper resolution depends on a variety of factors that may differ significantly from one program to the next and should be weighed on a case-by-case basis; and that agencies themselves should be accorded latitude in resolving this issue, subject to judicial review. The Council concurs and determined not to address this issue in this context at the present time. This determination should not be interpreted as a decision one way or the other on the merits of the issue.

Section 1508.17 also stated that the term "major" reinforces but does not have a meaning independent of the term "significantly" in NEPA's phrase "major Federal action significantly affecting the quality of the human environment." A few commenters noted that courts have differed over whether these terms should have independent meaning under NEPA. The Council determined that any Federal action which significantly affects the quality of the human environment is "major" for purposes of NEPA. The Council's view is in accord with *Minnesota PIRG v. Butz*, 498 F. 2d 1314 (8th Cir., 1974).

Section 1508.17 was renumbered as § 1508.18.

Comments on § 1508.22: Proposal. Section 1508.22 stated that a proposal exists when an agency is "actively considering" alternatives and certain other factors are present. Several commenters expressed the view that this phrase could be interpreted to mean that a proposal exists too early in planning and decisionmaking, before there is any likelihood that the agency will be making a decision on the matter. In response to this concern, and to emphasize the link between EISs and actual agency decisions, the Council deleted the phrase "actively considering" and replaced it with the phrase "actively preparing to make a decision on" alternatives. The Council does not intend the change to detract from the importance of integrating NEPA with agency planning as provided in § 1501.2 of the regulations.

This section was renumbered as § 1508.23.

OTHER COMMENTS

Comments on the application of NEPA abroad. Several commenters urged that the question of whether NEPA applies abroad be resolved by these regulations. However, the President has publicly announced his intention to address this issue in an Executive Order. The Executive Order, when issued, will represent the position of the Administration on that issue.

Comments on the role of Indian tribes in the NEPA process. Several commenters stated that the regulations should clarify the role of Indian Tribes in the NEPA process. Accordingly, the Council expressly identified Indian Tribes as participants in the NEPA process in §§ 1501.2(d)(2), 1501.7(a)(1), 1502.15(c) and 1503.1(a)(2)(ii).

Comments on the Council's special environmental assessment for the NEPA regulations. The Council prepared a special environmental assessment for these regulations and announced in the preamble to the draft regulations that the document was available to the public upon request. Some commenters expressed the view that it did not contain an adequate evaluation of the effects of the regulations. For the reasons set out in the assessment, and the preamble to the proposed regulations, the Council confirmed its earlier determination that the special environmental assessment did provide an adequate evaluation for these procedural regulations.

Comments on the President's authority to issue Executive Order 11991 and the Council's authority to issue regulations. A few commenters questioned the authority of the President to issue Executive Order 11991, and the authority of the Council to issue the regulations. The President is empowered to issue regulations implementing the procedural provisions of NEPA by virtue of the authority vested in him as President of the United States under Article II, Section 3 of the Constitution and other provisions of the Constitution and laws of the United States. The President is empowered to delegate responsibility for performing this function to the Council on Environmental Quality under Section 301 of Title 3 of the United States Code and other laws of the United States.

Comments on the responsibilities of Federal agencies in the NEPA process. Agency responsibilities under the regulations often depend upon whether they have "jurisdiction by law" or "special expertise" with respect to a particular proposal. Several commenters noted that these terms were not defined in the regulations and could be subject to varying interpretations. Accordingly, the Council added definitions for these terms in §§ 1508.15 and 1508.26.

Comments on the role of State and areawide clearinghouses. At the request of several States, the Council recognized the role of state and areawide clearinghouses in distributing Federal documents to appropriate recipients. *See* e.g. §§ 1501.4(e)(2), 1503.1(2)(iii), and 1506.6(b)(3)(i).

Comments on the concept of a national data bank. When the Council issued the proposed regulations, it invited comment on the concept of a national data bank. The purpose of a data bank would be to provide for the storage and recall of information developed in one EIS for use in subsequent EISs. Most commenters expressed reservations about the idea on grounds of cost and practicality. The Council, while still intrigued by the concept did not change its initial conclusion that the financial and other resources that would be required are beyond the benefits that might be achieved.

Comments on Federal funding of public comments on EISs. The Council also invited comment on a proposal for encouraging Federal agencies to fund public comments on EISs when an important viewpoint would otherwise not be presented. Several commenters supported this proposal on grounds that it would broaden the range and improve the quality of public comments on EISs. Others doubted that the expenditure of Federal funds for this purpose would be worthwhile. Some felt that Congress should decide the question. The Council determined not to address the issue of Federal funding for public comments on EISs in the regu-

lations, but to leave the matter to individual agencies' discretion.

5. REGULATORY ANALYSES

The final regulations implement the policy and other requirements of Executive Order 12044 to the fullest extent possible. We intend agencies in implementing these regulations to minimize burdens on the public. The determinations required by Section 2(d) of the Order have been made by the Council and are available on request.

It is our intention that a Regulatory Analysis required by Section 3 of the Order be undertaken concurrently with and, where appropriate, integrated with an environmental impact statement required by NEPA and these regulations.

6. CONCLUSION

We could not, of course, adopt every suggestion that was made on the regulations. We have tried to respond to the major concerns that were expressed. In the process, we have changed 74 of the 92 sections, making a total of 340 amendments to the regulations. We are confident that any issues which arise in the future can be resolved through a variety of mechanisms that exists for improving the NEPA process.

We appreciate the efforts of the many people who participated in developing the regulations and look forward to their cooperation as the regulations are implemented by individual agencies.

CHARLES WARREN,
Chairman.

TABLE OF CONTENTS

PART 1500—PURPOSE, POLICY, AND MANDATE

Sec.
1500.1 Purpose.
1500.2 Policy.
1500.3 Mandate.
1500.4 Reducing paperwork.
1500.5 Reducing delay.
1500.6 Agency authority.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 et seq.), section 309 of the Clean Air Act, as amended (42 U.S.C. 7609) and Executive Order 11514, Protection and Enhancement of Environmental Quality (March 5, 1970 as amended by Executive Order 11991, May 24, 1977).

§ 1500.1 Purpose.

(a) The National Environmental Policy Act (NEPA) is our basic national charter for protection of the environment. It establishes policy, sets goals (section 101), and provides means (section 102) for carrying out the policy. Section 102(2) contains "action-forcing" provisions to make sure that federal agencies act according to the letter and spirit of the Act. The regulations that follow implement Section 102(2). Their purpose is to tell federal agencies what they must do to comply with the procedures and achieve the goals of the Act. The President, the federal agencies, and the courts share responsibility for enforcing the Act so as to achieve the substantive requirements of section 101.

(b) NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA. Most important, NEPA documents must con-

centrate on the issues that are truly significant to the action in question, rather than amassing needless detail.

(c) Ultimately, of course, it is not better documents but better decisions that count. NEPA's purpose is not to generate paperwork—even excellent paperwork—but to foster excellent action. The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment. These regulations provide the direction to achieve this purpose.

§ 1500.2 Policy.

Federal agencies shall to the fullest extent possible:

(a) Interpret and administer the policies, regulations, and public laws of the United States in accordance with the policies set forth in the Act and in these regulations.

(b) Implement procedures to make the NEPA process more useful to decisionmakers and the public; to reduce paperwork and the accumulation of extraneous background data; and to emphasize real environmental issues and alternatives. Environmental impact statements shall be concise, clear, and to the point, and shall be supported by evidence that agencies have made the necessary environmental analyses.

(c) Integrate the requirements of NEPA with other planning and environmental review procedures required by law or by agency practice so that all such procedures run concurrently rather than consecutively.

(d) Encourage and facilitate public involvement in decisions which affect the quality of the human environment.

(e) Use the NEPA process to identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment.

(f) Use all practicable means, consistent with the requirements of the Act and other essential considerations of national policy, to restore and enhance the quality of the human environment and avoid or minimize any possible adverse effects of their actions upon the quality of the human environment.

§ 1500.3 Mandate.

Parts 1500–1508 of this Title provide regulations applicable to and binding on all Federal agencies for implementing the procedural provisions of the National Environmental Policy Act of 1969, as amended (Pub. L. 91-190, 42 U.S.C. 4321 et seq.) (NEPA or the Act) except where compliance would be inconsistent with other statutory requirements. These regulations are issued pursuant to NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 et seq.) Section 309 of the Clean Air Act, as amended (42 U.S.C. 7609) and Executive Order 11514, Protection and Enhancement of Environmental Quality (March 5, 1970, as amended by Executive Order 11991, May 24, 1977). These regulations, unlike the predecessor guidelines, are not confined to Sec. 102(2)(C) (environmental impact statements). The regulations apply to the whole of section 102(2). The provisions of the Act and of these regulations must be read together as a whole in order to comply with the spirit and letter of the law. It is the Council's intention that judicial review of agency compliance with these regulations not occur before an agency has filed the final environmental impact statement, or has made a final finding of no significant impact (when such a finding will result in action affecting the environment), or takes action that will result in irreparable injury. Furthermore, it is the Council's intention that any trivial violation of these regulations not give rise to any independent cause of action.

§ 1500.4 Reducing paperwork.

Agencies shall reduce excessive paperwork by:

(a) Reducing the length of environmental impact statements (§ 1502.2(c)), by means such as setting appropriate page limits (§§ 1501.7(b)(1) and 1502.7).

(b) Preparing analytic rather than encyclopedic environmental impact statements (§ 1502.2(a)).

(c) Discussing only briefly issues other than significant ones (§ 1502.2(b)).

(d) Writing environmental impact statements in plain language (§ 1502.8).

(e) Following a clear format for environmental impact statements (§ 1502.10).

(f) Emphasizing the portions of the environmental impact statement that are useful to decisionmakers and the public (§§ 1502.14 and 1502.15) and reducing emphasis on background material (§ 1502.16).

(g) Using the scoping process, not only to identify significant environmental issues deserving of study, but also to deemphasize insignificant issues, narrowing the scope of the environmental impact statement process accordingly (§ 1501.7).

(h) Summarizing the environmental impact statement (§ 1502.12) and circulating the summary instead of the entire environmental impact statement if the latter is unusually long (§ 1502.19).

(i) Using programs, policy, or plan environmental impact statements and tiering from statements of broad scope to those of narrower scope, to eliminate repetitive discussions of the same issues (§§ 1502.4 and 1502.20).

(j) Incorporating by reference (§ 1502.21).

(k) Integrating NEPA requirements with other environmental review and consultation requirements (§ 1502.25).

(l) Requiring comments to be as specific as possible (§ 1503.3).

(m) Attaching and circulating only changes to the draft environmental impact statement, rather than rewriting and circulating the entire statement when changes are minor (§ 1503.4(c)).

(n) Eliminating duplication with State and local procedures, by providing for joint preparation (§ 1506.2), and with other Federal procedures, by providing that an agency may adopt appropriate environmental documents prepared by another agency (§ 1506.3).

(o) Combining environmental documents with other documents (§ 1506.4).

(p) Using categorical exclusions to define categories of actions which do not individually or cumulatively have a significant effect on the human environment and which are therefore exempt from requirements to prepare an environmental impact statement (§ 1508.4).

(q) Using a finding of no significant impact when an action not otherwise excluded will not have a significant effect on the human environment and is therefore exempt from requirements to prepare an environmental impact statement (§ 1508.13).

§ 1500.5 Reducing delay.

Agencies shall reduce delay by:

(a) Integrating the NEPA process into early planning (§ 1501.2).

(b) Emphasizing interagency cooperation before the environmental impact statement is prepared, rather than submission of adversary comments on a completed document (§ 1501.6).

(c) Insuring the swift and fair resolution of lead agency disputes (§ 1501.5).

(d) Using the scoping process for an early identification of what are and what are not the real issues (§ 1501.7).

(e) Establishing appropriate time limits for the environmental impact statement process (§§ 1501.7(b)(2) and 1501.8).

(f) Preparing environmental impact statements early in the process (§ 1502.5).

(g) Integrating NEPA requirements with other environmental review and consultation requirements (§ 1502.25).

(h) Eliminating duplication with State and local procedures by providing for joint preparation (§ 1506.2) and with other Federal procedures by providing that an agency may adopt ap-

propriate environmental documents prepared by another agency (§ 1506.3).

(i) Combining environmental documents with other documents (§ 1506.4).

(j) Using accelerated procedures for proposals for legislation (§ 1506.8).

(k) Using categorical exclusions to define categories of actions which do not individually or cumulatively have a significant effect on the human environment (§ 1508.4) and which are therefore exempt from requirements to prepare an environmental impact statement.

(l) Using a finding of no significant impact when an action not otherwise excluded will not have a significant effect on the human environment (§ 1508.13) and is therefore exempt from requirements to prepare an environmental impact statement.

§ 1500.6 Agency authority.

Each agency shall interpret the provisions of the Act as a supplement to its existing authority and as a mandate to view traditional policies and missions in the light of the Act's national environmental objectives. Agencies shall review their policies, procedures, and regulations accordingly and revise them as necessary to insure full compliance with the purposes and provisions of the Act. The phrase "to the fullest extent possible" in section 102 means that each agency of the Federal Government shall comply with that section unless existing law applicable to the agency's operations expressly prohibits or makes compliance impossible.

PART 1501—NEPA AND AGENCY PLANNING

Sec.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 et seq.), Section 309 of the Clean Air Act, as amended (42 U.S.C. 7609, and Executive Order 11514, Protection and Enhancement of Environmental Quality (March 5, 1970, as amended by Executive Order 11991, May, 24 1977).

§ 1501.1 Purpose.

The purposes of this part include:

(a) Integrating the NEPA process into early planning to insure appropriate consideration of NEPA's policies and to eliminate delay.

(b) Emphasizing cooperative consultation among agencies before the environmental impact statement is prepared rather than submission of adversary comments on a completed document.

(c) Providing for the swift and fair resolution of lead agency disputes.

(d) Identifying at an early stage the significant environmental issues deserving of study and deemphasizing insignificant issues, narrowing the scope of the environmental impact statement accordingly.

(e) Providing a mechanism for putting appropriate time limits on the environmental impact statement process.

§ 1501.2 Apply NEPA early in the process.

Agencies shall integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts. Each agency shall:

(a) Comply with the mandate of section 102(2)(A) to "utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment," as specified by § 1507.2.

(b) Identify environmental effects and values in adequate detail so they can be compared to economic and technical analyses. Environmental documents and appropriate analyses shall be circulated and reviewed at the same time as other planning documents.

(c) Study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources as provided by section 102(2)(E) of the Act.

(d) Provide for cases where actions are planned by private applicants or other non-Federal entities before Federal involvement so that:

(1) Policies or designated staff are available to advise potential applicants of studies or other information foreseeably required for later Federal action.

(2) The Federal agency consults early with appropriate State and local agencies and Indian tribes and with interested private persons and organizations when its own involvement is reasonably foreseeable.

(3) The Federal agency commences its NEPA process at the earliest possible time.

§ 1501.3 When to prepare an environmental assessment.

(a) Agencies shall prepare an environmental assessment (§ 1508.9) when necessary under the procedures adopted by individual agencies to supplement these regulations as described in § 1507.3. An assessment is not necessary if the agency has decided to prepare an environmental impact statement.

(b) Agencies may prepare an environmental assessment on any action at any time in order to assist agency planning and decisionmaking.

§ 1501.4 Whether to prepare an environmental impact statement.

In determining whether to prepare an environmental impact statement the Federal agency shall:

(a) Determine under its procedures supplementing these regulations (described in § 1507.3) whether the proposal is one which:

(1) Normally requires an environmental impact statement, or

(2) Normally does not require either an environmental impact statement or an environmental assessment (categorical exclusion).

(b) If the proposed action is not covered by paragraph (a) of this section, prepare an environmental assessment (§ 1508.9). The agency shall involve environmental agencies, applicants, and the public, to the extent practicable, in preparing assessments required by § 1508.9(a)(1).

(c) Based on the environmental assessment make its determination whether to prepare an environmental impact statement.

(d) Commence the scoping process (§ 1501.7), if the agency will prepare an environmental impact statement.

(e) Prepare a finding of no significant impact (§ 1508.13), if the agency determines on the basis of the environmental assessment not to prepare a statement.

(1) The agency shall make the finding of no significant impact available to the affected public as specified in § 1506.6.

(2) In certain limited circumstances, which the agency may cover in its procedures under § 1507.3, the agency shall make the finding of no significant impact available for public review (including State and areawide clearinghouses) for 30 days before the agency makes its final determination whether to prepare an environmental impact statement and before the action may begin. The circumstances are:

(i) The proposed action is, or is closely similar to, one which normally requires the preparation of an environmental impact statement under the procedures adopted by the agency pursuant to § 1507.3, or

(ii) The nature of the proposed action is one without precedent.

§ 1501.5 Lead agencies.

(a) A lead agency shall supervise the preparation of an environmental

impact statement if more than one Federal agency either:

(1) Proposes or is involved in the same action; or

(2) Is involved in a group of actions directly related to each other because of their functional interdependence or geographical proximity.

(b) Federal, State, or local agencies, including at least one Federal agency, may act as joint lead agencies to prepare an environmental impact statement (§ 1506.2).

(c) If an action falls within the provisions of paragraph (a) of this section the potential lead agencies shall determine by letter or memorandum which agency shall be the lead agency and which shall be cooperating agencies. The agencies shall resolve the lead agency question so as not to cause delay. If there is disagreement among the agencies, the following factors (which are listed in order of descending importance) shall determine lead agency designation:

(1) Magnitude of agency's involvement.

(2) Project approval/disapproval authority.

(3) Expertise concerning the action's environmental effects.

(4) Duration of agency's involvement.

(5) Sequence of agency's involvement.

(d) Any Federal agency, or any State of local agency or private person substantially affected by the absence of lead agency designation, may make a written request to the potential lead agencies that a lead agency be designated.

(e) If Federal agencies are unable to agree on which agency will be the lead agency or if the procedure described in paragraph (c) of this section has not resulted within 45 days in a lead agency designation, any of the agencies or persons concerned may file a request with the Council asking it to determine which Federal agency shall be the lead agency.

A copy of the request shall be transmitted to each potential lead agency. The request shall consist of:

(1) A precise description of the nature and extent of the proposed action;

(2) A detailed statement of why each potential lead agency should or should not be the lead agency under the criteria specified above in paragraph (c) of this section.

(f) A response may be filed by any potential lead agency concerned within 20 days after a request is filed with the Council. The Council shall determine as soon as possible but not later than 20 days after receiving the request and all responses to it which Federal agency shall be the lead agency and which other Federal agencies shall be cooperating agencies.

§ 1501.6 Cooperating agencies.

The purpose of this section is to emphasize agency cooperation early in the NEPA process. Upon request of the lead agency, any other Federal agency which has jurisdiction by law shall be a cooperating agency. In addition any other Federal agency which has special expertise with respect to any environmental issue, which should be addressed in the statement may be a cooperating agency upon request of the lead agency. An agency may request the lead agency to designate it a cooperating agency.

(a) The lead agency shall:

(1) Request the participation of each cooperating agency in the NEPA process at the earliest possible time.

(2) Use the environmental analysis and proposals of cooperating agencies with jurisdiction by law or special expertise, to the maximum extent possible consistent with its responsibility as lead agency.

(3) Meet with a cooperating agency at the latter's request.

(b) Each cooperating agency shall:

(1) Participate in the NEPA process at the earliest possible time.

(2) Participate in the scoping process (described below in § 1501.7).

(3) Assume on request of the lead agency responsibility for developing information and preparing environmental analyses including portions of the environmental impact statement concerning which the cooperating agency has special expertise.

(4) Make available staff support at the lead agency's request to enhance the latter's interdisciplinary capability.

(5) Normally use its own funds. The lead agency shall, to the extent available funds permit, fund those major activities or analyses it requests from cooperating agencies. Potential lead agencies shall include such funding requirements in their budget requests.

(c) A cooperating agency may in response to a lead agency's request for assistance in preparing the environmental impact statement (described in paragraph (b) (3), (4), or (5) of this section) reply that other program commitments preclude any involvement or the degree of involvement requested in the action that is the subject of the environmental impact statement. A copy of this reply shall be submitted to the Council.

§ 1501.7 Scoping.

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. This process shall be termed scoping. As soon as practicable after its decision to prepare an environmental impact statement and before the scoping process the lead agency shall publish a notice of intent (§ 1508.22) in the FEDERAL REGISTER except as provided in § 1507.3(e).

(a) As part of the scoping process the lead agency shall:

(1) Invite the participation of affected Federal, State, and local agencies, any affected Indian tribe, the proponent of the action, and other interested persons (including those who might not be in accord with the action on environmental grounds), unless there is a limited exception under § 1507.3(c). An agency may give notice in accordance with § 1506.6.

(2) Determine the scope (§ 1508.25) and the significant issues to be analyzed in depth in the environmental impact statement.

(3) Identify and eliminate from detailed study the issues which are not significant or which have been covered by prior environmental review (§ 1506.3), narrowing the discussion of these issues in the statement to a brief presentation of why they will not have a significant effect on the human environment or providing a reference to their coverage elsewhere.

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

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

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

(7) Indicate the relationship between the timing of the preparation of environmental analyses and the agency's tentative planning and decisionmaking schedule.

(b) As part of the scoping process the lead agency may:

(1) Set page limits on environmental documents (§ 1502.7).

(2) Set time limits (§ 1501.8).

(3) Adopt procedures under § 1507.3 to combine its environmental assessment process with its scoping process.

(4) Hold an early scoping meeting or meetings which may be integrated with any other early planning meeting the agency has. Such a scoping meeting will often be appropriate when the impacts of a particular action are confined to specific sites.

(c) An agency shall revise the determinations made under paragraphs (a) and (b) of this section if substantial changes are made later in the proposed action, or if significant new circumstances or information arise which bear on the proposal or its impacts.

§ 1501.8 Time limits.

Although the Council has decided that prescribed universal time limits for the entire NEPA process are too inflexible, Federal agencies are encouraged to set time limits appropriate to individual actions (consistent with the time intervals required by § 1506.10). When multiple agencies are involved the reference to agency below means lead agency.

(a) The agency shall set time limits if an applicant for the proposed action requests them: *Provided,* That the limits are consistent with the purposes of NEPA and other essential considerations of national policy.

(b) The agency may:

(1) Consider the following factors in determining time limits:

(i) Potential for environmental harm.

(ii) Size of the proposed action.

(iii) State of the art of analytic techniques.

(iv) Degree of public need for the proposed action, including the consequences of delay.

(v) Number of persons and agencies affected.

(vi) Degree to which relevant information is known and if not known the time required for obtaining it.

(vii) Degree to which the action is controversial.

(viii) Other time limits imposed on the agency by law, regulations, or executive order.

(2) Set overall time limits or limits for each constituent part of the NEPA process which may include:

(i) Decision on whether to prepare an environmental impact statement (if not already decided).

(ii) Determination of the scope of the environmental impact statement.

(iii) Preparation of the draft environmental impact statement.

(iv) Review of any comments on the draft environmental impact statement from the public and agencies.

(v) Preparation of the final environmental impact statement.

(vi) Review of any comments on the final environmental impact statement.

(vii) Decision on the action based in part on the environmental impact statement.

(3) Designate a person (such as the project manager or a person in the agency's office with NEPA responsibilities) to expedite the NEPA process.

(c) State or local agencies or members of the public may request a Federal Agency to set time limits.

PART 1502—ENVIRONMENTAL IMPACT STATEMENT

Sec.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 et seq.), Section 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and Executive Order 11514, Protection and Enhancement of Environmental Quality (March 5, 1970, as amended by Executive Order 11991, May 24, 1977).

§ 1502.1 Purpose.

The primary purpose of an environmental impact statement is to serve as an action-forcing device to insure that the policies and goals defined in the Act are infused into the ongoing programs and actions of the Federal Government. It shall provide full and fair discussion of significant environmental impacts and shall inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment. Agencies shall focus on significant environmental issues and alternatives and shall reduce paperwork and the accumulation of extraneous background data. Statements shall be concise, clear, and to the point, and shall be supported by evidence that the agency has made the necessary environmental analyses. An environmental impact statement is more than a disclosure document. It shall be used by Federal officials in conjunction with other relevant material to plan actions and make decisions.

§ 1502.2 Implementation.

To achieve the purposes set forth in § 1502.1 agencies shall prepare environmental impact statements in the following manner:

(a) Environmental impact statements shall be analytic rather than encyclopedic.

(b) Impacts shall be discussed in proportion to their significance. There shall be only brief discussion of other than significant issues. As in a finding of no significant impact, there should be only enough discussion to show why more study is not warranted.

(c) Environmental impact statements shall be kept concise and shall be no longer than absolutely necessary to comply with NEPA and with these regulations. Length should vary first with potential environmental problems and then with project size.

(d) Environmental impact statements 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.

(e) The range of alternatives discussed in environmental impact statements shall encompass those to be considered by the ultimate agency decisionmaker.

(f) Agencies shall not commit resources prejudicing selection of alternatives before making a final decision (§ 1506.1).

(g) Environmental impact statements shall serve as the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made.

§ 1502.3 Statutory requirements for statements.

As required by sec. 102(2)(C) of NEPA environmental impact statements (§ 1508.11) are to be included in every recommendation or report. On proposals (§ 1508.23). For legislation and (§ 1508.17). Other major Federal actions (§ 1508.18). Significantly (§ 1508.27). Affecting (§§ 1508.3, 1508.8). The quality of the human environment (§ 1508.14).

§ 1502.4 Major Federal actions requiring the preparation of environmental impact statements.

(a) Agencies shall make sure the proposal which is the subject of an environmental impact statement is properly defined. Agencies shall use the criteria for scope (§ 1508.25) to determine which proposal(s) shall be the subject of a particular statement. Proposals or parts or proposals which are related to each other closely enough to be, in effect, a single course of action shall

be evaluated in a single impact statement.

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

(c) 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:

(1) Geographically, including actions occurring in the same general location, such as body of water, region, or metropolitan area.

(2) Generically, including actions which have relevant similarities, such as common timing, impacts, alternatives, methods of implementation, media, or subject matter.

(3) 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. Statements shall be prepared on such programs and shall be available before the program has reached a stage of investment or commitment to implementation likely to determine subsequent development or restrict later alternatives.

(d) Agencies shall as appropriate employ scoping (§ 1501.7), tiering (§ 1502.20), and other methods listed in §§ 1500.4 and 1500.5 to relate broad and narrow actions and to avoid duplication and delay.

§ 1502.5 Timing.

An agency shall commence preparation of an environmental impact statement as close as possible to the time the agency is developing or is presented with a proposal (§ 1508.23) so that preparation can be completed in time for the final statement to be included in any recommendation or report on the proposal. The statement shall be prepared early enough so that it can serve practically as an important contribution to the decisionmaking process and will not be used to rationalize of justify decisions already made (§§ 1500.2(c), 1501.2, and 1502.2). For instance:

(a) For projects directly undertaken by Federal agencies the environmental impact statement shall be prepared at the feasibility analysis (go-no go) stage and may be supplemented at a later stage if necessary.

(b) For applications to the agency appropriate environmental assessments or statements shall be commenced no later than immediately after the application is received. Federal agencies are encouraged to begin preparation of such assessments or statements earlier, preferably jointly with applicable State or local agencies.

(c) For adjudication, the final environmental impact statement shall normally precede the final staff recommendation and that portion of the public hearing related to the impact study. In appropriate circumstances the statement may follow preliminary hearings designed to gather information for use in the statements.

(d) For informal rulemaking the draft environmental impact statement shall normally accompany the proposed rule.

§ 1502.6 Interdisciplinary preparation.

Environmental impact statements shall be prepared using an inter-disciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts (section 102(2)(A) of the Act). The disciplines of the preparers shall be appropriate to the scope and issues identified in the scoping process (§ 1501.7).

§ 1502.7 Page limits.

The text of final environmental impact statements (e.g., paragraphs (d) through (g) of § 1502.10) shall normally be less than 150 pages and for proposals of unusual scope or complexity shall normally be less than 300 pages.

§ 1502.8 Writing.

Environmental impact statements shall be written in plain language and may use appropriate graphics so that decisionmakers and the public can readily understand them. Agencies should employ writers of clear prose or editors to write, review, or edit statements, which will be based upon the analysis and supporting data from the natural and social sciences and the environmental design arts.

§ 1502.9 Draft, final, and supplemental statements.

Except for proposals for legislation as provided in § 1506.8 environmental impact statements shall be prepared in two stages and may be supplemented.

(a) Draft environmental impact statements shall be prepared in accordance with the scope decided upon in the scoping process. The lead agency shall work with the cooperating agencies and shall obtain comments as required in Part 1503 of this chapter. The draft statement must fulfill and satisfy to the fullest extent possible the requirements established for final statements in section 102(2)(C) of the Act. If a draft statement is so inadequate as to preclude meaningful analysis, the agency shall prepare and circulate a revised draft of the appropriate portion. The agency shall make every effort to disclose and discuss at appropriate points in the draft statement all major points of view on the environmental impacts of the alternatives including the proposed action.

(b) Final environmental impact statements shall respond to comments as required in Part 1503 of this chapter. The agency shall discuss at appropriate points in the final statement any responsible opposing view which was not adequately discussed in the draft statement and shall indicate the agency's response to the issues raised.

(c) Agencies:

(1) Shall prepare supplements to either draft or final environmental impact statements if:

(i) The agency makes substantial changes in the proposed action that are relevant to environmental concerns; or

(ii) There are significant new circumstances, or information relevant to environmental concerns and bearing on the proposed action or its impacts.

(2) May also prepare supplements when the agency determines that the purposes of the Act will be furthered by doing so.

(3) Shall adopt procedures for introducing a supplement into its formal administrative record, if such a record exists.

(4) Shall prepare, circulate, and file a supplement to a statement in the same fashion (exclusive of scoping) as a draft and final statement unless alternative procedures are approved by the Council.

§ 1502.10 Recommended format.

Agencies shall use a format for environmental impact statements which will encourage good analysis and clear presentation of the alternatives including the proposed action. The following standard format for environmental impact statements should be followed unless the agency determines that there is a compelling reason to do otherwise:

(a) Cover sheet.

(b) Summary.

(c) Table of Contents.

(d) Purpose of and Need for Action.

(e) Alternatives Including Proposed Action (secs. 102(2)(C)(iii) and 102(2)(E) of the Act).

(f) Affected Environment.

(g) Environmental Consequences (especially sections 102(2)(C) (i), (ii), (iv), and (v) of the Act.

(h) List of Preparers.

(i) List of Agencies, Organizations, and Persons to Whom Copies of the Statement Are Sent.

(j) Index.

(k) Appendices (if any).

If a different format is used, it shall include paragraphs (a), (b), (c), (h), (i), and (j), of this section and shall include the substance of paragraphs (d), (e), (f), (g), and (k) of this section, as further described in §§ 1502.11–1502.18, in any appropriate format.

§ 1502.11 Cover sheet.

The cover sheet shall not exceed one page. It shall include:

(a) A list of the responsible agencies including the lead agency and any cooperating agencies.

(b) The title of the proposed action that is the subject of the statement (and if appropriate the titles of related cooperating agency actions), together with the State(s) and county(ies) (or other jurisdiction if applicable) where the action is located.

(c) The name, address, and telephone number of the person at the agency who can supply further information.

(d) A designation of the statement as a draft, final, or draft or final supplement.

(e) A one paragraph abstract of the statement.

(f) The date by which comments must be received (computed in cooperation with EPA under § 1506.10).

The information required by this section may be entered on Standard Form 424 (in items 4, 6, 7, 10, and 18).

§ 1502.12 Summary.

Each environmental impact statement shall contain a summary which adequately and accurately summarizes the statement. The summary shall stress the major conclusions, areas of controversy (including issues raised by agencies and the public), and the issues to be resolved (including the choice among alternatives). The summary will normally not exceed 15 pages.

§ 1502.13 Purpose and need.

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

§ 1502.14 Alternatives including the proposed action.

This section is the heart of the environmental impact statement. 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 form, 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:

(a) 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.

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

(c) Include reasonable alternatives not within the jurisdiction of the lead agency.

(d) Include the alternative of no action.

(e) 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.

(f) Include appropriate mitigation measures not already included in the proposed action or alternatives.

§ 1502.15 Affected environment.

The environmental impact statement shall succinctly describe the environment of the area(s) to be affected or created by the alternatives under consideration. The descriptions shall be no longer than is necessary to understand the effects of the alternatives. Data and analyses in a statement shall be commensurate with the importance of the impact, with less important material summarized, consolidated, or simply referenced. Agencies shall avoid useless bulk in statements and shall concentrate effort and attention on important issues. Verbose descriptions of the affected environment are themselves no measure of the adequacy of an environmental impact statement.

§ 1502.16 Environmental consequences.

This section forms the scientific and analytic basis for the comparisons under § 1502.14. It shall consolidate the discussions of those elements required by secs. 102(2)(C) (i), (ii), (iv), and (v) of NEPA which are within the scope of the statement and as much of sec. 102(2)(C)(iii) as is necessary to support the comparisons. The discussion will include the environmental impacts of the alternatives including the proposed action, any adverse environmental effects which cannot be avoided should the proposal be implemented, the relationship between short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and any irreversible or irretrievable commitments of resources which would be involved in the proposal should it be implemented. This section should not duplicate discussions in § 1502.14. It shall include discussions of:

(a) Direct effects and their significance (§ 1508.18).

(b) Indirect effects and their significance (§ 1508.8).

(c) Possible conflicts between the proposed action and the objectives of Federal, regional, State, and local (and in the case of a reservation, Indian tribe) land use plans, policies and controls for the area concerned. (See § 1506.2(c).)

(d) The environmental effects of alternatives including the proposed action. The comparisons under § 1502.14 will be based on this discussion.

(e) Energy requirements and conservation potential of various alternatives and mitigation measures.

(f) Natural or depletable resource requirements and conservation potential of various alternatives and mitigation measures.

(g) Urban quality, historic and cultural resources, and the design of the built environment, including the reuse and conservation potential of various alternatives and mitigation measures.

(h) Means to mitigate adverse environmental impacts (if not fully covered under § 1502.14(f)).

§ 1502.17 List of preparers.

The environmental impact statement shall list the names, together with their qualifications (expertise, experience, professional disciplines), of the persons who were primarily responsible for preparing the environmental impact statement or significant background papers, including basic components of the statement (§§ 1502.6 and 1502.8). Where possible the persons who are responsible for a particular analysis, including analyses in background papers, shall be identified. Normally the list will not exceed two pages.

§ 1502.18 Appendix.

If an agency prepares an appendix to an environmental impact statement the appendix shall:

(a) Consist of material prepared in connection with an environmental impact statement (as distinct from material which is not so prepared and which is incorporated by reference (§ 1502.21)).

(b) Normally consist of material which substantiates any analysis fundamental to the impact statement.

(c) Normally be analytic and relevant to the decision to be made.

(d) Be circulated with the environmental impact statement or be readily available on request.

§ 1502.19 Circulation of the environmental impact statement.

Agencies shall circulate the entire draft and final environmental impact statements except for certain appendices as provided in § 1502.18(d) and unchanged statements as provided in § 1503.4(c). However, if the statement is unusually long, the agency may circulate the summary instead, except that the entire statement shall be furnished to:

(a) Any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved and any appropriate Federal, State or local agency authorized to develop and enforce environmental standards.

(b) The applicant, if any.

(c) Any person, organization, or agency requesting the entire environmental impact statement.

(d) In the case of a final environmental impact statement any person, organization, or agency which submitted substantive comments on the draft.

If the agency circulates the summary and thereafter receives a timely request for the entire statement and for additional time to comment, the time for that requestor only shall be extended by at least 15 days beyond the minimum period.

§ 1502.20 Tiering.

Agencies are encouraged to tier their environmental impact statements to eliminate repetitive discussions of the same issues and to focus on the actual issues ripe for decision at each level of environmental review (§ 1508.28). Whenever a broad environmental impact statement has been prepared (such as a program or policy statement) and a subsequent statement or environmental assessment is then prepared on an action included within the entire program or policy (such as a site specific action) the subsequent statement or environmental assessment need only summarize the issues discussed in the broader statement and incorporate discussions from the broader statement by reference and shall concentrate on the issues specific to the subsequent action. The subsequent document shall state where the earlier document is available. Tiering may also be appropriate for different stages of actions. (Sec. 1508.28).

§ 1502.21 Incorporation by reference.

Agencies shall incorporate material into an environmental impact statement by reference when the effect will be to cut down on bulk without impeding agency and public review of the action. The incorporated material shall be cited in the statement and its content briefly described. No material may be incorporated by reference unless it is reasonably available for inspection by potentially interested persons within the time allowed for comment. Material based on proprietary data which is itself not available for review and comment shall not be incorporated by reference.

§ 1502.22 Incomplete or unavailable information.

When an agency is evaluating significant adverse effects on the human environment in an environmental impact statement and there are gaps in relevant information or scientific uncertainty, the agency shall always make clear that such information is lacking or that uncertainty exists.

(a) If the information relevant to adverse impacts is essential to a reasoned choice among alternatives and is not known and the overall costs of obtaining it are not exorbitant, the agency shall include the information in the environmental impact statement.

(b) If (1) the information relevant to adverse impacts is essential to a reasoned choice among alternatives and is not known and the overall costs of obtaining it are exorbitant or (2) the information relevant to adverse impacts is important to the decision and the means to obtain it are not known (e.g., the means for obtaining it are beyond the state of the art) the agency shall weigh the need for the action against the risk and severity of possible adverse impacts were the action to proceed in the face of uncertainty. If the agency proceeds, it shall include a worst case analysis and an indication of the probability or improbability of its occurrence.

§ 1502.23 Cost-benefit analysis.

If a cost-benefit analysis relevant to the choice among environmentally different alternatives is being considered for the proposed action, it shall be incorporated by reference or appended to the statement as an aid in evaluating the environmental consequences. To assess the adequacy of compliance with sec. 102(2)(B) of the Act the statement shall, when a cost-benefit analysis is prepared, discuss the relationship between that analysis and any analyses of unquantified environmental impacts, values, and amenities. For purposes of complying with the Act, the weighing of the merits and drawbacks of the various alternatives need not be displayed in a monetary cost-benefit analysis and should not be when there are important qualitative considerations. In any event, an environmental impact statement should at least indicate those considerations, including factors not related to environmental quality, which are likely to be relevant and important to a decision.

§ 1502.24 Methodology and scientific accuracy.

Agencies shall insure the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements. They shall identify any methodologies used and shall make explicit reference by footnote to the scientific and other sources relied upon for conclusions in the statement. An agency may place discussion of methodology in an appendix.

§ 1502.25 Environmental review and consultation requirements.

(a) To the fullest extent possible, agencies shall prepare draft environmental impact statements concurrently with and integrated with environmental impact analyses and related surveys and studies required by the Fish and Wildlife Coordination Act (16 U.S.C. Sec. 661 et seq.) the National Historic Preservation Act of 1966 (16 U.S.C. Sec. 470 et seq.), the Endangered Species Act of 1973 (16 U.S.C. Sec. 1531 et seq.), and other environmental review laws and executive orders.

(b) The draft environmental impact statement shall list all Federal permits, licenses, and other entitlements which must be obtained in implementing the proposal. If it is uncertain whether a Federal permit, license, or other entitlement is necessary, the draft environmental impact statement shall so indicate.

PART 1503—COMMENTING

Sec.
1503.1 Inviting Comments.
1503.2 Duty to Comment.
1503.3 Specificity of Comments.
1503.4 Response to Comments.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 et seq.), Section 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and Executive Order 11514, Protection and Enhancement of Environmental Quality (March 5, 1970, as amended by Executive Order 11991, May 24, 1977).

§ 1503.1 Inviting comments.

(a) After preparing a draft environmental impact statement and before preparing a final environmental impact statement the agency shall:

(1) Obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved or which is authorized to develop and enforce environmental standards.

(2) Request the comments of:

(i) Appropriate State and local agencies which are authorized to develop and enforce environmental standards;

(ii) Indian tribes, when the effects may be on a reservation; and

(iii) Any agency which has requested that it receive statements on actions of the kind proposed.

Office of Management and Budget Circular A-95 (Revised), through its system of clearinghouses, provides a means of securing the views of State and local environmental agencies. The clearinghouses may be used, by mutual agreement of the lead agency and the clearinghouse, for securing State and local reviews of the draft environmental impact statements.

(3) Request comments from the applicant, if any.

(4) Request comments from the public, affirmatively soliciting comments from those persons or organizations who may be interested or affected.

(b) An agency may request comments on a final environmental impact statement before the decision is finally made. In any case other agencies or persons may make comments before the final decision unless a different time is provided under § 1506.10

§ 1503.2 Duty to comment.

Federal agencies with jurisdiction by law or special expertise with respect to any environmental impact involved and agencies which are authorized to develop and enforce environmental standards shall comment on statements within their jurisdiction, expertise, or authority. Agencies shall comment within the time period specified for comment in § 1506.10. A Federal agency may reply that it has no comment. If a cooperating agency is satisfied that its views are adequately reflected in the environmental impact statement, it should reply that it has no comment.

§ 1503.3 Specificity of comments.

(a) Comments on an environmental impact statement or on a proposed action shall be as specific as possible and may address either the adequacy of the statement or the merits of the alternatives discussed or both.

(b) When a commenting agency criticizes a lead agency's predictive methodology, the commenting agency should describe the alternative methodology which it prefers and why.

(c) A cooperating agency shall specify in its comments whether it needs additional information to fulfill other applicable environmental reviews or consultation requirements and what information it needs. In particular, it shall specify any additional information it needs to comment adequately on the draft statement's analysis of significant site-specific effects associated with the granting or approving by that cooperating agency of necessary Federal permits, licenses, or entitlements.

(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 requirements or concurrences.

§ 1503.4 Response to comments.

(a) An agency preparing a final environmental impact statement shall assess and consider comments both individually and collectively, and shall respond by one or more of the means listed below, stating its response in the final statement. Possible responses are to:

(1) Modify alternatives including the proposed action.

(2) Develop and evaluate alternatives not previously given serious consideration by the agency.

(3) Supplement, improve, or modify its analyses.

(4) Make factual corrections.

(5) Explain why the comments do not warrant further agency response, citing the sources, authorities, or reasons which support the agency's position and, if appropriate, indicate those circumstances which would trigger agency reappraisal or further response.

(b) All substantive comments received on the draft statement (or summaries thereof where the response has been exceptionally voluminous), should be attached to the final statement whether or not the comment is thought to merit individual discussion by the agency in the text of the statement.

(c) If changes in response to comments are minor and are confined to the responses described in paragraphs (a) (4) and (5) of this section, agencies may write them on errata sheets and attach them to the statement instead of rewriting the draft statement. In such cases only the comments, the responses, and the changes and not the final statement need be circulated (§ 1502.19). The entire document with a new cover sheet shall be filed as the final statement (§ 1506.9).

PART 1504—PREDECISION REFERRALS TO THE COUNCIL OF PROPOSED FEDERAL ACTIONS DETERMINED TO BE ENVIRONMENTALLY UNSATISFACTORY

Sec.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 et seq.), Section 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and Executive Order 11514, Protection and Enhancement of Environmental Quality (March 5, 1970, as amended by Executive Order 11991, May 24, 1977).

§ 1504.1 Purpose.

(a) This part establishes procedures for referring to the Council Federal interagency disagreements concerning proposed major Federal actions that might cause unsatisfactory environmental effects. It provides means for early resolution of such disagreements.

(b) Under section 309 of the Clean Air Act (42 U.S.C. 7609), the Administrator of the Environmental Protection Agency is directed to review and comment publicly on the environmental impacts of Federal activities, including actions for which environmental impact statements are prepared. If after this review the Administrator determines that the matter is "unsatisfactory from the standpoint of public health or welfare or environmental quality," section 309 directs that the matter be referred to the Council (hereafter "environmental referrals").

(c) Under section 102(2)(C) of the Act other Federal agencies may make similar reviews of environmental impact statements, including judgments on the acceptability of anticipated environmental impacts. These reviews must be made available to the President, the Council and the public.

§ 1504.2 Criteria for referral.

Environmental referrals should be made to the Council only after concerted, timely (as early as possible in the process), but unsuccessful attempts to resolve differences with the lead agency. In determining what environmental objections to the matter are appropriate to refer to the Council, an agency should weigh potential adverse environmental impacts, considering:

(a) Possible violation of national environmental standards or policies.

(b) Severity.

(c) Geographical scope.

(d) Duration.

(e) Importance as precedents.

(f) Availability of environmentally preferable alternatives.

§ 1504.3 Procedure for referrals and response.

(a) A Federal agency making the referral to the Council shall:

(1) Advise the lead agency at the earliest possible time that it intends to refer a matter to the Council unless a satisfactory agreement is reached.

(2) Include such advice in the referring agency's comments on the draft environmental impact statement, except when the statement does not

contain adequate information to permit an assessment of the matter's environmental acceptability.

(3) Identify any essential information that is lacking and request that it be made available at the earliest possible time.

(4) Send copies of such advice to the Council.

(b) The referring agency shall deliver its referral to the Council not later than twenty-five (25) days after the final environmental impact statement has been made available to the Environmental Protection Agency, commenting agencies, and the public. Except when an extension of this period has been granted by the lead agency, the Council will not accept a referral after that date.

(c) The referral shall consist of:

(1) A copy of the letter signed by the head of the referring agency and delivered to the lead agency informing the lead agency of the referral and the reasons for it, and requesting that no action be taken to implement the matter until the Council acts upon the referral. The letter shall include a copy of the statement referred to in (c)(2) below.

(2) A statement supported by factual evidence leading to the conclusion that the matter is unsatisfactory from the standpoint of public health or welfare or environmental quality. The statement shall:

(i) Identify any material facts in controversy and incorporate (by reference if appropriate) agreed upon facts,

(ii) Identify any existing environmental requirements or policies which would be violated by the matter,

(iii) Present the reasons why the referring agency believes the matter is environmentally unsatisfactory,

(iv) Contain a finding by the agency whether the issue raised is of national importance because of the threat to national environmental resources or policies or for some other reason,

(v) Review the steps taken by the referring agency to bring its concerns to the attention of the lead agency at the earliest possible time, and

(vi) Give the referring agency's recommendations as to what mitigation alternative, further study, or other course of action (including abandonment of the matter) are necessary to remedy the situation.

(d) Not later than twenty-five (25) days after the referral to the Council the lead agency may deliver a response to the Council, and the referring agency. If the lead agency requests more time and gives assurance that the matter will not go forward in the interim, the Council may grant an extension. The response shall:

(1) Address fully the issues raised in the referral.

(2) Be supported by evidence.

(3) Give the lead agency's response to the referring agency's recommendations.

(e) Interested persons (including the applicant) may deliver their views in writing to the Council. Views in support of the referral should be delivered not later than the referral. Views in support of the response shall be delivered not later than the response.

(f) Not later than twenty-five (25) days after receipt of both the referral and any response or upon being informed that there will be no response (unless the lead agency agrees to a longer time), the Council may take one or more of the following actions:

(1) Conclude that the process of referral and response has successfully resolved the problem.

(2) Initiate discussions with the agencies with the objective of mediation with referring and lead agencies.

(3) Hold public meetings or hearings to obtain additional views and information.

(4) Determine that the issue is not one of national importance and request the referring and lead agencies to pursue their decision process.

(5) Determine that the issue should be further negotiated by the referring and lead agencies and is not appropriate for Council consideration until one or more heads of agencies report to the Council that the agencies' disagreements are irreconcilable.

(6) Publish its findings and recommendations (including where appropriate a finding that the submitted evidence does not support the position of an agency).

(7) When appropriate, submit the referral and the response together with the Council's recommendation to the President for action.

(g) The Council shall take no longer than 60 days to complete the actions specified in paragraph (f) (2), (3), or (5) of this section.

(h) When the referral involves an action required by statute to be determined on the record after opportunity for agency hearing, the referral shall be conducted in a manner consistent with 5 U.S.C. 557(d) (Administrative Procedures Act).

PART 1505—NEPA AND AGENCY DECISIONMAKING

Sec.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 et seq.), Section 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and Executive Order 11514, Protection and Enhancement of Environmental Quality (March 5, 1970, as amended by Executive Order 11991, May 24, 1977).

§ 1505.1 Agency decisionmaking procedures.

Agencies shall adopt procedures (§ 1507.3) to ensure that decisions are made in accordance with the policies and purposes of the Act. Such procedures shall include but not be limited to:

(a) Implementing procedures under section 102(2) to achieve the requirements of sections 101 and 102(1).

(b) Designating the major decision points for the agency's principal programs likely to have a significant effect on the human environment and assuring that the NEPA process corresponds with them.

(c) Requiring that relevant environmental documents, comments, and responses be part of the record in formal rulemaking or adjudicatory proceedings.

(d) Requiring that relevant environmental documents, comments, and responses accompany the proposal through existing agency review processes so that agency officials use the statement in making decisions.

(e) Requiring 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 environmental impact statement. 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.

§ 1505.2 Record of decision in cases requiring environmental impact statements.

At the time of its decision (§ 1506.10) or, if appropriate, its recommendation to Congress, each agency shall prepare a concise public record of decision. The record, which may be integrated into any other record prepared by the agency, including that required by OMB Circular A-95 (Revised), part I, sections 6 (c) and (d), and part II, section 5(b)(4), shall:

(a) State what the decision was.

(b) Identify all alternatives considered by the agency in reaching its decision, specifying the alternative or alternatives which were considered to be environmentally preferable. An agency may discuss preferences among alternatives based on relevant factors including economic and technical considerations and agency statutory missions. An agency shall identify and discuss all such factors including any essential considerations of national policy which were balanced by the agency in making its decision and

state how those considerations entered into its decision.

(c) State whether all practicable means to avoid or minimize environmental harm from the alternative selected 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.

§ 1505.3 Implementing the decision.

Agencies may provide for monitoring to assure that their decisions are carried out and should do so in important cases. Mitigation (§ 1505.2(c)) and other conditions established in the environmental impact statement or during its review and committed as part of the decision shall be implemented by the lead agency or other appropriate consenting agency. The lead agency shall:

(a) Include appropriate conditions in grants, permits or other approvals.

(b) Condition funding of actions on mitigation.

(c) 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.

(d) Upon request, make available to the public the results of relevant monitoring.

PART 1506—OTHER REQUIREMENTS OF NEPA

Sec.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 et seq.), Section 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and Executive Order 11514, Protection and Enhancement of Environmental Quality (March 5, 1970, as amended by Executive Order 11991, May 24, 1977).

§ 1506.1 Limitations on actions during NEPA process.

(a) Until an agency issues a record of decision as provided in § 1505.2 (except as provided in paragraph (c) of this section), no action concerning the proposal shall be taken which would:

(1) Have an adverse environmental impact; or

(2) Limit the choice of reasonable alternatives.

(b) If any agency is considering an application from a non-Federal entity, and is aware that the applicant is about to take an action within the agency's jurisdiction that would meet either of the criteria in paragraph (a) of this section, then the agency shall promptly notify the applicant that the agency will take appropriate action to insure that the objectives and procedures of NEPA are achieved.

(c) 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:

(1) Is justified independently of the program;

(2) Is itself accompanied by an adequate environmental impact statement; and

(3) Will not prejudice the ultimate decision on the program. Interim action prejudices the ultimate decision on the program when it tends to determine subsequent development or limit alternatives.

(d) This section does not preclude development by applicants of plans or designs or performance of other work necessary to support an application for Federal, State or local permits or assistance. Nothing in this section shall preclude Rural Electrification Administration approval of minimal expenditures not affecting the environment (*e.g.* long leadtime equipment and purchase options) made by nongovernmental entities seeking loan guarantees from the Administration.

§ 1506.2 Elimination of duplication with State and local procedures.

(a) Agencies authorized by law to cooperate with State agencies of statewide jurisdiction pursuant to section 102(2)(D) of the Act may do so.

(b) Agencies shall cooperate with State and local agencies to the fullest extent possible to reduce duplication between NEPA and State and local requirements, unless the agencies are specifically barred from doing so by some other law. Except for cases covered by paragraph (a) of this section, such cooperation shall to the fullest extent possible include:

(1) Joint planning processes.

(2) Joint environmental research and studies.

(3) Joint public hearings (except where otherwise provided by statute).

(4) Joint environmental assessments.

(c) Agencies shall cooperate with State and local agencies to the fullest extent possible to reduce duplication between NEPA and comparable State and local requirements, unless the agencies are specifically barred from doing so by some other law. Except for cases covered by paragraph (a) of this section, such cooperation shall to the fullest extent possible include joint environmental impact statements. In such cases one or more Federal agencies and one or more State or local agencies shall be joint lead agencies. Where State laws or local ordinances have environmental impact statement requirements in addition to but not in conflict with those in NEPA, Federal agencies shall cooperate in fulfilling these requirements as well as those of Federal laws so that one document will comply with all applicable laws.

(d) To better integrate environmental impact statements into State or local planning processes, statements shall discuss any inconsistency of a proposed action with any approved State or local plan and laws (whether or not federally sanctioned). Where an inconsistency exists, the statement should describe the extent to which the agency would reconcile its proposed action with the plan or law.

§ 1506.3 Adoption.

(a) An agency may adopt a Federal draft or final environmental impact statement or portion thereof provided that the statement or portion thereof meets the standards for an adequate statement under these regulations.

(b) If the actions covered by the original environmental impact statement and the proposed action are substantially the same, the agency adopting another agency's statement is not required to recirculate it except as a final statement. Otherwise the adopting agency shall treat the statement as a draft and recirculate it (except as provided in paragraph (c) of this section).

(c) A cooperating agency may adopt without recirculating the environmental impact statement of a lead agency when, after an independent review of the statement, the cooperating agency concludes that its comments and suggestions have been satisfied.

(d) When an agency adopts a statement which is not final within the agency that prepared it, or when the action it assesses is the subject of a referral under part 1504, or when the statement's adequacy is the subject of a judicial action which is not final, the agency shall so specify.

§ 1506.4 Combining documents.

Any environmental document in compliance with NEPA may be combined with any other agency document to reduce duplication and paperwork.

§ 1506.5 Agency responsibility.

(a) *Information.* If an agency requires an applicant to submit environmental information for possible use by the agency in preparing an environmental impact statement, then the agency should assist the applicant by outlining the types of information required. The agency shall independently evaluate the information submitted and shall be responsible for its accuracy. If the agency chooses to use the information submitted by the applicant in the environmental impact statement, either directly or by reference, then the names of the persons responsible for the independent evaluation shall be included in the list of preparers (§ 1502.17). It is the intent of this subparagraph that acceptable work not be redone, but that it be verified by the agency.

(b) *Environmental assessments.* If an agency permits an applicant to prepare an environmental assessment, the agency, besides fulfilling the requirements of paragraph (a) of this section, shall make its own evaluation of the environmental issues and take responsibility for the scope and content of the environmental assessment.

(c) *Environmental impact statements.* Except as provided in §§ 1506.2 and 1506.3 any environmental impact statement prepared pursuant to the requirements of NEPA shall be prepared directly by or by a contractor selected by the lead agency or where appropriate under § 1501.6(b), a cooperating agency. It is the intent of these regulations that the contractor be chosen solely by the lead agency, or by the lead agency in cooperation with cooperating agencies, or where appropriate by a cooperating agency to avoid any conflict of interest. Contractors shall execute a disclosure statement prepared by the lead agency, or where appropriate the cooperating agency, specifying that they have no financial or other interest in the outcome of the project. If the document is prepared by contract, the responsible Federal official shall furnish guidance and participate in the preparation and shall independently evaluate the statement prior to its approval and take responsibility for its scope and contents. Nothing in this section is intended to prohibit any agency from requesting any person to submit information to it or to prohibit any person from submitting information to any agency.

§ 1506.6 Public involvement.

Agencies shall: (a) Make diligent efforts to involve the public in preparing and implementing their NEPA procedures.

(b) Provide public notice of NEPA-related hearings, public meetings, and the availability of environmental documents so as to inform those persons and agencies who may be interested or affected.

(1) In all cases the agency shall mail notice to those who have requested it on an individual action.

(2) In the case of an action with effects of national concern notice shall include publication in the FEDERAL REGISTER and notice by mail to national organizations reasonably expected to be interested in the matter and may include listing in the *102 Monitor*. An agency engaged in rulemaking may provide notice by mail to national organizations who have requested that notice regularly be provided. Agencies shall maintain a list of such organizations.

(3) In the case of an action with effects primarily of local concern the notice may include:

(i) Notice to State and areawide clearinghouses pursuant to OMB Circular A-95 (Revised).

(ii) Notice to Indian tribes when effects may occur on reservations.

(iii) Following the affected State's public notice procedures for comparable actions.

(iv) Publication in local newspapers (in papers of general circulation rather than legal papers).

(v) Notice through other local media.

(vi) Notice to potentially interested community organizations including small business associations.

(vii) Publication in newsletters that may be expected to reach potentially interested persons.

(viii) Direct mailing to owners and occupants of nearby or affected property.

(ix) Posting of notice on and off site in the area where the action is to be located.

(c) Hold or sponsor public hearings or public meetings whenever appropriate or in accordance with statutory requirements applicable to the agency. Criteria shall include whether there is:

(1) Substantial environmental controversy concerning the proposed action or substantial interest in holding the hearing.

(2) A request for a hearing by another agency with jurisdiction over the action supported by reasons why a hearing will be helpful. If a draft environmental impact statement is to be considered at a public hearing, the agency should make the statement available to the public at least 15 days in advance (unless the purpose of the hearing is to provide information for the draft environmental impact statement).

(d) Solicit appropriate information from the public.

(e) Explain in its procedures where interested persons can get information or status reports on environmental impact statements and other elements of the NEPA process.

(f) make environmental impact statements, the comments received, and any underlying documents available to the public pursuant to the provisions of the Freedom of Information Act (5 U.S.C. 552), without regard to the exclusion for interagency memoranda where such memoranda transmit comments of Federal agencies on the environmental impact of the proposed action. Materials to be made available to the public shall be provided to the public without charge to the extent practicable, or at a fee which is not more than the actual costs of reproducing copies required to be sent to other Federal agencies, including the Council.

§ 1506.7 Further guidance.

The Council may provide further guidance concerning NEPA and its procedures including:

(a) A handbook which the Council may supplement from time to time, which shall in plain language provide guidance and instructions concerning the application of NEPA and these regulations.

(b) Publication of the Council's Memoranda to Heads of Agencies.

(c) In conjunction with the Environmental Protection Agency and the publication of the 102 Monitor, notice of:

(1) Research activities;

(2) Meetings and conferences related to NEPA; and

(3) Successful and innovative procedures used by agencies to implement NEPA.

§ 1506.8 Proposals for legislation.

(a) The NEPA process for proposals for legislation (§ 1508.17) significantly affecting the quality of the human environment shall be integrated with the legislative process of the Congress. A legislative environmental impact statement is the detailed statement required by law to be included in a recommendation or report on a legislative proposal to Congress. A legislative environmental impact statement shall be considered part of the formal transmittal of a legislative proposal to Congress; however, it may be transmitted to Congress up to 30 days later in order to allow time for completion of an accurate statement which can serve as the basis for public and Congressional debate. The statement must be available in time for Congressional hearings and deliberations.

(b) Preparation of a legislative environmental impact statement shall conform to the requirements of these regulations except as follows:

(1) There need not be a scoping process.

(2) The legislative statement shall be prepared in the same manner as a draft statement, but shall be considered the "detailed statement" required by statute; *Provided*, That when any of the following conditions exist both the draft and final environmental impact statement on the legislative proposal shall be prepared and circulated as provided by §§ 1503.1 and 1506.10.

(i) A Congressional Committee with jurisdiction over the proposal has a rule requiring both draft and final environmental impact statements.

(ii) The proposal results from a study process required by statute (such as those required by the Wild and Scenic Rivers Act (16 U.S.C. 1271 et esq.) and the Wilderness Act (16 U.S.C. 1131 et seq.)

(iii) Legislative approval is sought for Federal or federally assisted construction or other projects which the agency recommends be located at specific geographic locations. For proposals requiring an environmental impact statement for the acquisition of space by the General Services Administration a draft statement shall accompany the Prospectus or the 11(b) Report of Building Project Surveys to the Congress, and a final statement shall be completed before site acquisition.

(iv) The agency decides to prepare draft and final statements.

(c) Comments on the legislative statement shall be given to the lead agency which shall forward them along with its own responses to the Congressional committees with jurisdiction.

§ 1506.9 Filing requirements.

Environmental impact statements together with comments and responses shall be filed with the Environmental Protection Agency, attention Office of Federal Activities (A-104), 401 M Street SW., Washington, D.C. 20460. Statements shall be filed with EPA no earlier than they are also transmitted to commenting agencies and made available to the public. EPA shall deliver one copy of each statement to the Council, which shall satisfy the requirement of availability to the President. EPA may issue guidelines to agencies to implement its responsibilities under this section and § 1506.10 below.

§ 1506.10 Timing of agency action.

(a) The Environmental Protection Agency shall publish a notice in the FEDERAL REGISTER each week of the environmental impact statements filed during the preceding week. The minimum time periods set forth in this section section shall be calculated from the date of publication of this notice.

(b) No decision on the proposed action shall be made or recorded under § 1505.2 by a Federal agency until the later of the following dates:

(1) Ninety (90) days after publication of the notice described above in paragraph (a) of this section for a draft environmental impact statement.

(2) Thirty (30) days after publication of the notice described above in paragraph (a) of this section for a final environmental impact statement. An exception to the rules on timing may be made in the case of an agency decision which is subject to a formal internal appeal. Some agencies have a formally established appeal process which allows other agencies or the public to take appeals on a decision and make their views known, after publication of the final environmental impact statement. In such cases, where a real opportunity exists to alter the decision, the decision may be made and recorded at the same time the environmental impact statement is published. This means that the period for appeal of the decision and the 30-day period prescribed in paragraph (b)(2) of this section may run concurrently. In such cases the environmental impact statement shall explain the timing and the public's right of appeal. An agency engaged in rulemaking under the Administrative Procedures Act or other statute for the purpose of protecting the public health or safety, may waive the time period in paragraph (b)(2) of this section and publish a decision on the final rule simultaneously with publication of the notice of the availability of the final environmental impact statement as described in paragraph (a) of this section.

(c) If the final environmental impact statement is filed within ninety (90) days after a draft environmental impact statement is filed with the Environmental Protection Agency, the minimum thirty (30) day period and the minimum ninety (90) day period may run concurrently. However, subject to paragraph (d) of this section agencies shall allow not less than 45 days for comments on draft statements.

(d) The lead agency may extend prescribed periods. The Environmental Protection Agency may upon a showing by the lead agency of compelling reasons of national policy reduce the prescribed periods and may upon a showing by any other Federal agency of compelling reasons of national policy also extend prescribed periods, but only after consultation with the lead agency. (Also see § 1507.3(d).) Failure to file timely comments shall not be a sufficient reason for extending a period. If the lead agency does not concur with the extension of time, EPA may not extend it for more than 30 days. When the Environmental Protection Agency reduces or extends any period of time it shall notify the Council.

§ 1506.11 Emergencies.

Where emergency circumstances make it necessary to take an action with significant environmental impact without observing the provisions of these regulations, the Federal agency taking the action should consult with the Council about alternative arrangements. Agencies and the Council will limit such arrangements to actions necessary to control the immediate impacts of the emergency. Other actions remain subject to NEPA review.

§ 1506.12 Effective date.

The effective date of these regulations is July 30, 1979, except that for agencies that administer programs that qualify under sec. 102(2)(D) of the Act or under sec. 104(h) of the Housing and Community Development Act of 1974 an additional four months shall be allowed for the State or local agencies to adopt their implementing procedures.

(a) These regulations shall apply to the fullest extent practicable to ongoing activities and environmental documents begun before the effective date. These regulations do not apply to an environmental impact statement or supplement if the draft statement was filed before the effective date of these regulations. No completed environmental documents need be redone by reasons of these regulations. Until these regulations are applicable, the Council's guidelines published in the FEDERAL REGISTER of August 1, 1973, shall continue to be applicable. In cases where these regulations are applicable the guidelines are superseded. However, nothing shall prevent an agency from proceeding under these regulations at an earlier time.

(b) NEPA shall continue to be applicable to actions begun before January 1, 1970, to the fullest extent possible.

PART 1507—AGENCY COMPLIANCE

Sec.
1507.1 Compliance.
1507.2 Agency Capability to Comply.
1507.3 Agency Procedures.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 et seq.), Section 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and Executive Order 11514, Protection and Enhancement of Environmental Quality (March 5, 1970, as amended by Executive Order 11991, May 24, 1977).

§ 1507.1 Compliance.

All agencies of the Federal Government shall comply with these regulations. It is the intent of these regulations to allow each agency flexibility in adapting its implementing proce-

dures authorized by § 1507.3 to the requirements of other applicable laws.

§ 1507.2 Agency capability to comply.

Each agency shall be capable (in terms of personnel and other resources) of complying with the requirements enumerated below. Such compliance may include use of other's resources, but the using agency shall itself have sufficient capability to evaluate what others do for it. Agencies shall:

(a) Fulfill the requirements of Sec. 102(2)(A) of the Act to utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on the human environment. Agencies shall designate a person to be responsible for overall review of agency NEPA compliance.

(b) Identify methods and procedures required by Sec. 102(2)(B) to insure that presently unquantified environmental amenities and values may be given appropriate consideration.

(c) Prepare adequate environmental impact statements pursuant to Sec. 102(2)(C) and comment on statements in the areas where the agency has jurisdiction by law or special expertise or is authorized to develop and enforce environmental standards.

(d) Study, develop, and describe alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources. This requirement of Sec. 102(2)(E) extends to all such proposals, not just the more limited scope of Sec. 102(2)(C)(iii) where the discussion of alternatives is confined to impact statements.

(e) Comply with the requirements of Sec. 102(2)(H) that the agency initiate and utilize ecological information in the planning and development of resource-oriented projects.

(f) Fulfill the requirements of sections 102(2)(F), 102(2)(G), and 102(2)(I), of the Act and of Executive Order 11514, Protection and Enhancement of Environmental Quality, Sec. 2.

§ 1507.3 Agency procedures.

(a) Not later than eight months after publication of these regulations as finally adopted in the FEDERAL REGISTER, or five months after the establishment of an agency, whichever shall come later, each agency shall as necessary adopt procedures to supplement these regulations. When the agency is a department, major subunits are encouraged (with the consent of the department) to adopt their own procedures. Such procedures shall not paraphrase these regulations. They shall confine themselves to implementing procedures. Each agency shall consult with the Council while developing its procedures and before publishing them in the FEDERAL REGISTER for comment. Agencies with similar programs should consult with each other and the Council to coordinate their procedures, especially for programs requesting similar information from applicants. The procedures shall be adopted only after an opportunity for public review and after review by the Council for conformity with the Act and these regulations. The Council shall complete its review within 30 days. Once in effect they shall be filed with the Council and made readily available to the public. Agencies are encouraged to publish explanatory guidance for these regulations and their own procedures. Agencies shall continue to review their policies and procedures and in consultation with the Council to revise them as necessary to ensure full compliance with the purposes and provisions of the Act.

(b) Agency procedures shall comply with these regulations except where compliance would be inconsistent with statutory requirements and shall include:

(1) Those procedures required by §§ 1501.2(d), 1502.9(c)(3), 1505.1, 1506.6(e), and 1508.4.

(2) Specific criteria for and identification of those typical classes of action:

(i) Which normally do require environmental impact statements.

(ii) Which normally do not require either an environmental impact statement or an environmental assessment (categorical exclusions (§ 1508.4)).

(iii) Which normally require environmental assessments but not necessarily environmental impact statements.

(c) Agency procedures may include specific criteria for providing limited exceptions to the provisions of these regulations for classified proposals. They are proposed actions which are specifically authorized under criteria established by an Executive Order or statute to be kept secret in the interest of national defense or foreign policy and are in fact properly classified pursuant to such Executive Order or statute. Environmental assessments and environmental impact statements which address classified proposals may be safeguarded and restricted from public dissemination in accordance with agencies' own regulations applicable to classified information. These documents may be organized so that classified portions can be included as annexes, in order tht the unclassified portions can be made available to the public.

(d) Agency procedures may provide for periods of time other than those presented in § 1506.10 when necessary to comply with other specific statutory requirements.

(e) Agency procedures may provide that where there is a lengthy period between the agency's decision to prepare an environmental impact statement and the time of actual preparation, the notice of intent required by § 1501.7 may be published at a reasonable time in advance of preparation of the draft statement.

PART 1508—TERMINOLOGY AND INDEX

Sec.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*), Section 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and Executive Order 11514, Protection and Enhancement of Environmental Quality (March 5, 1970, as amended by Executive Order 11991, May 24, 1977).

§ 1508.1 Terminology.

The terminology of this part shall be uniform throughout the Federal Government.

§ 1508.2 Act.

"Act" means the National Environmental Policy Act, as amended (42 U.S.C. 4321, et seq.) which is also referred to as "NEPA."

§ 1508.3 Affecting.

"Affecting" means will or may have an effect on.

§ 1508.4 Categorical exclusion.

"Categorical Exclusion" means a category of actions which do not individually or cumulatively have a significant effect on the human environment

and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations (§ 1507.3) and for which, therefore, neither an environmental assessment nor an environmental impact statement is required. An agency may decide in its procedures or otherwise, to prepare environmental assessments for the reasons stated in § 1508.9 even though it is not required to do so. Any procedures under this section shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect.

§ 1508.5 Cooperating agency.

"Cooperating Agency" means any Federal agency other than a lead agency which has jurisdiction by law or special expertise with respect to any environmental impact involved in a proposal (or a reasonable alternative) for legislation or other major Federal action significantly affecting the quality of the human environment. The selection and responsibilities of a cooperating agency are described in § 1501.6. A State or local agency of similar qualifications or, when the effects are on a reservation, an Indian Tribe, may by agreement with the lead agency become a cooperating agency.

§ 1508.6 Council.

"Council" means the Council on Environmental Quality established by Title II of the Act.

§ 1508.7 Cumulative impact.

"Cumulative impact" is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

§ 1508.8 Effects.

"Effects" include:

(a) Direct effects, which are caused by the action and occur at the same time and place.

(b) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.

Effects and impacts as used in these regulations are synonymous. Effects includes ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative. Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.

§ 1508.9 Environmental assessment.

"Environmental Assessment":

(a) Means a concise public document for which a Federal agency is responsible that serves to:

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

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

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

(b) Shall include brief discussions of the need for the proposal, of alternatives as required by sec. 102(2)(E), of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.

§ 1508.10 Environmental document.

"Environmental document" includes the documents specified in § 1508.9 (environmental assessment), § 1508.11 (environmental impact statement), § 1508.13 (finding of no significant impact), and § 1508.22 (notice of intent).

§ 1508.11 Environmental impact statement.

"Environmental Impact Statement" means a detailed written statement as required by Sec. 102(2)(C) of the Act.

§ 1508.12 Federal agency.

"Federal agency" means all agencies of the Federal Government. It does not mean the Congress, the Judiciary, or the President, including the performance of staff functions for the President in his Executive Office. It also includes for purposes of these regulations States and units of general local government and Indian tribes assuming NEPA responsibilities under section 104(h) of the Housing and Community Development Act of 1974.

§ 1508.13 Finding of no significant impact.

"Finding of No Significant Impact" means a document by a Federal agency briefly presenting the reasons why an action, not otherwise excluded (§ 1508.4), will not have a significant effect on the human environment and for which an environmental impact statement therefore will not be prepared. It shall include the environmental assessment or a summary of it and shall note any other environmental documents related to it (§ 1501.7(a)(5)). If the assessment is included, the finding need not repeat any of the discussion in the assessment but may incorporate it by reference.

§ 1508.14 Human Environment.

"Human Environment" shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment. (See the definition of "effects" (§ 1508.8).) This means that economic or social effects are not intended by themselves to require preparation of an environmental impact statement. When an environmental impact statement is prepared and economic or social and natural or physical environmental effects are interrelated, then the environmental impact statement will discuss all of these effects on the human environment.

§ 1508.15 Jurisdiction By Law.

"Jurisdiction by law" means agency authority to approve, veto, or finance all or part of the proposal.

§ 1508.16 Lead agency.

"Lead Agency" means the agency or agencies preparing or having taken primary responsibility for preparing the environmental impact statement.

§ 1508.17 Legislation.

"Legislation" includes a bill or legislative proposal to Congress developed by or with the significant cooperation and support of a Federal agency, but does not include requests for appropriations. The test for significant cooperation is whether the proposal is in fact predominantly that of the agency rather than another source. Drafting does not by itself constitute significant cooperation. Proposals for legislation include requests for ratification of treaties. Only the agency which has primary responsibility for the subject matter involved will prepare a legislative environmental impact statement.

§ 1508.18 Major Federal action.

"Major Federal action" includes actions with effects that may be major and which are potentially subject to Federal control and responsibility. Major reinforces but does not have a meaning independent of significantly (§ 1508.27). Actions include the circumstance where the responsible officials fail to act and that failure to act is reviewable by courts or administrative tribunals under the Administrative Procedure Act or other applicable law as agency action.

(a) Actions include new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies; new or revised agency rules, regulations, plans, policies, or procedures; and legislative proposals (§§ 1506.8, 1508.17). Actions do not include funding assistance solely in the form of general revenue sharing funds, distributed under the State and Local Fiscal Assistance Act of 1972, 31 U.S.C. 1221 et seq., with no Federal agency control over the subsequent use of such funds. Actions do not include bringing judicial or administrative civil or criminal enforcement actions.

(b) Federal actions tend to fall within one of the following categories:

(1) Adoption of official policy, such as rules, regulations, and interpretations adopted pursuant to the Administrative Procedure Act, 5 U.S.C. 551 et seq.; treaties and international conventions or agreements; formal documents establishing an agency's policies which will result in or substantially alter agency programs.

(2) Adoption of formal plans, such as official documents prepared or approved by federal agencies which guide or prescribe alternative uses of federal resources, upon which future agency actions will be based.

(3) Adoption of programs, such as a group of concerted actions to implement a specific policy or plan; systematic and connected agency decisions allocating agency resources to implement a specific statutory program or executive directive.

(4) Approval of specific projects, such as construction or management activities located in a defined geographic area. Projects include actions approved by permit or other regulatory decision as well as federal and federally assisted activities.

§ 1508.19 Matter.

"Matter" includes for purposes of Part 1504:

(a) With respect to the Environmental Protection Agency, any proposed legislation, project, action or regulation as those terms are used in Section 309(a) of the Clean Air Act (42 U.S.C. 7609).

(b) With respect to all other agencies, any proposed major federal action to which section 102(2)(C) of NEPA applies.

§ 1508.20 Mitigation.

"Mitigation" includes:

(a) Avoiding the impact altogether by not taking a certain 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.

§ 1508.21 NEPA process.

"NEPA process" means all measures necessary for compliance with the requirements of Section 2 and Title I of NEPA.

§ 1508.22 Notice of intent.

"Notice of Intent" means a notice that an environmental impact statement will be prepared and considered. The notice shall briefly:

(a) Describe the proposed action and possible alternatives.

(b) Describe the agency's proposed scoping process including whether, when, and where any scoping meeting will be held.

(c) State the name and address of a person within the agency who can answer questions about the proposed action and the environmental impact statement.

§ 1508.23 Proposal.

"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. Preparation of an environmental impact statement on a proposal should be timed (§ 1502.5) so that the final statement may be completed in time for the statement to be included in any recommendation or report on the proposal. A proposal may exist in fact as well as by agency declaration that one exists.

§ 1508.24 Referring agency.

"Referring agency" means the federal agency which has referred any matter to the Council after a determination that the matter is unsatisfactory from the standpoint of public health or welfare or environmental quality.

§ 1508.25 Scope.

Scope consists of the range of actions, alternatives, and impacts to be considered in an environmental impact statement. The scope of an individual statement may depend on its relationships to other statements (§§1502.20 and 1508.28). To determine the scope of environmental impact statements, agencies shall consider 3 types of actions, 3 types of alternatives, and 3 types of impacts. They include:

(a) Actions (other than unconnected single actions) which may be:

(1) Connected actions, which means that they are closely related and therefore should be discussed in the same impact statement. Actions are connected if they:

(i) Automatically trigger other actions which may require environmental impact statements.

(ii) Cannot or will not proceed unless other actions are taken previously or simultaneously.

(iii) Are interdependent parts of a larger action and depend on the larger action for their justification.

(2) Cumulative actions, which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement.

(3) Similar actions, which when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental consequencies together, such as common timing or geography. An agency may wish to analyze these actions in the same impact statement. It should do so when the best way to assess adequately the combined impacts of similar actions or reasonable alternatives to such actions is to treat them in a single impact statement.

(b) Alternatives, which include: (1) No action alternative. (2) Other reasonable courses of actions. (3) Mitigation measures (not in the proposed action).

(c) Impacts, which may be: (1) Direct. (2) Indirect. (3) Cumulative.

§ 1508.26 Special expertise.

"Special expertise" means statutory responsibility, agency mission, or related program experience.

§ 1508.27 Significantly.

"Significantly" as used in NEPA requires considerations of both context and intensity:

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

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

(1) Impacts that may be both beneficial and adverse. A significant effect

may exist even if the Federal agency believes that on balance the effect will be beneficial.

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

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

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

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

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

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

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

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

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

§ 1508.28 Tiering.

"Tiering" refers to the coverage of general matters in broader environmental impact statements (such as national program or policy statements) with subsequent narrower statements or environmental analyses (such as regional or basinwide program statements or ultimately site-specific statements) incorporating by reference the general discussions and concentrating solely on the issues specific to the statement subsequently prepared. Tiering is appropriate when the sequence of statements or analyses is:

(a) From a program, plan, or policy environmental impact statement to a program, plan, or policy statement or analysis of lesser scope or to a site-specific statement or analysis.

(b) From an environmental impact statement on a specific action at an early stage (such as need and site selection) to a supplement (which is preferred) or a subsequent statement or analysis at a later stage (such as environmental mitigation). Tiering in such cases is appropriate when it helps the lead agency to focus on the issues which are ripe for decision and exclude from consideration issues already decided or not yet ripe.

INDEX

INDEX—Continued

[FR Doc. 78-33362 Filed 11-27-78; 8:45 am]

Pac. Coast Fed'n of Fishermen's Ass'ns v. United States DOI, 655 Fed. Appx. 595

Copy Citation

United States Court of Appeals for the Ninth Circuit

March 28, 2016, Resubmitted; July 25, 2016, Filed

No. 14-15514

Reporter

655 Fed. Appx. 595 * | 2016 U.S. App. LEXIS 13538 **

PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS; et al., Plaintiffs - Appellants, v. UNITED STATES DEPARTMENT OF THE INTERIOR; et al., Defendants - Appellees, and WESTLANDS WATER DISTRICT; et al., Intervenor-Defendants - Appellees.

Notice: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Prior History: [**1] Appeal from the United States District Court for the Eastern District of California. D.C. No. 1:12-cv-01303-LJO-MJS. Lawrence J. O'Neill, District Judge, Presiding. February 9, 2016, Argued and Submitted, San Francisco, California; February 9, 2016, Submission Withdrawn.
Pac. Coast Fed'n of Fishermen's Ass'ns v. United States DOI, 996 F. Supp. 2d 887, 2014 U.S. Dist. LEXIS 15072 (E.D. Cal., 2014)
Pac. Coast Fedn. of Fishermen's Ass'ns v. United States DOI, 2016 U.S. App. LEXIS 5717 (9th Cir. Cal., 2016)

Disposition: AFFIRMED in part, REVERSED in part, and REMANDED.

Core Terms

quantities, renewal, interim, contracts, no action, reduction, district court, plaintiffs', long-term, Impacts,

summary judgment, environmental, delivery, effects, maximum

Case Summary

Overview

HOLDINGS: [1]-Even though two-year contracts for the delivery of water to California water districts expired, an appeal of plaintiffs' action under the NEPA was not moot because the short duration and serial nature of the U.S. Bureau of Reclamation's interim water contracts placed their claims within the mootness exception for disputes capable of repetition yet evading review; [2]-No action alternative in environmental assessment (EA) did not comply with NEPA because it assumed continued interim contract renewal and there was no support for district court's finding that the Bureau of Reclamation was required to enter into interim contracts; [3]-District court erred by granting summary judgment on plaintiffs' claim that the EA was inadequate because it did not give full and meaningful consideration to the alternative of a reduction in maximum water quantities.

Outcome

The court affirmed in part, reversed in part, and remanded.

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > Appeals > Summary Judgment Review > Standards of Review

HN1 **Standards of Review, De Novo Review**
A court of appeals reviews de novo a dismissal for failure to state a claim under Fed. R. Civ. P. 12(b)(6). The court also reviews de novo a district court's ruling on summary judgment. More like this Headnote

Shepardize® - Narrow by this Headnote

Administrative Law > Judicial Review > Standards of Review > Abuse of Discretion

Environmental Law > Natural Resources & Public Lands > National Environmental Policy Act

Administrative Law > Judicial Review > Standards of Review > Unlawful Procedures

Administrative Law > Judicial Review > Standards of Review >
Arbitrary & Capricious Standard of Review

HN2 Standards of Review, Abuse of Discretion
Claims under the National Environmental Policy Act (NEPA) are reviewed under the standards of the Administrative Procedure Act, which provides that an agency action must be upheld unless it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C.S. § 706(2)(A). More like this Headnote

Shepardize® - Narrow by this Headnote

Environmental Law > Assessment & Information Access > Environmental Assessments

Environmental Law > Natural Resources & Public Lands > National Environmental Policy Act

HN3 Assessment & Information Access, Environmental Assessments
An environmental assessment's "no action" alternative may be defined as no change from a current management direction or historical practice. 43 C.F.R. § 46.30. But a "no action" alternative is meaningless if it assumes the existence of the very plan being proposed. Rather, the "no action" alternative looks at effects of not approving the action under consideration. § 46.30. More like this Headnote

Shepardize® - Narrow by this Headnote

Environmental Law > Assessment & Information Access > Environmental Assessments

Environmental Law > Natural Resources & Public Lands > National Environmental Policy Act

HN4 Assessment & Information Access, Environmental Assessments
When an agency action is mandatory, the "no action" alternative in 43 C.F.R. § 46.30 is properly defined as the carrying out of that action. More like this Headnote

Shepardize® - Narrow by this Headnote

Governments > Legislation > Interpretation

HN5 Legislation, Interpretation
Normally, when "may" and "shall" are used in the same statute, the inference is that each is being used in its ordinary sense -- the one being permissive, the other mandatory. More like this Headnote

Shepardize® - Narrow by this Headnote

Environmental Law > Natural Resources & Public Lands > National Environmental Policy Act

HN6 **Natural Resources & Public Lands, National Environmental Policy Act**
The National Environmental Policy Act (NEPA) imposes obligations on agencies considering major federal actions that may affect the environment. An agency may not evade these obligations by contracting around them. More like this Headnote

Shepardize® - Narrow by this Headnote

Environmental Law > Natural Resources & Public Lands > National Environmental Policy Act

HN7 **Natural Resources & Public Lands, National Environmental Policy Act**
Under the National Environmental Policy Act (NEPA), an agency must analyze all environmental consequences of an action. More like this Headnote

Shepardize® - Narrow by this Headnote

Environmental Law > Natural Resources & Public Lands > National Environmental Policy Act

HN8 **Natural Resources & Public Lands, National Environmental Policy Act**
Under the National Environmental Policy Act (NEPA), an agency must balance the need for comprehensive analysis against considerations of practicality. More like this Headnote

Shepardize® - Narrow by this Headnote

Counsel: For Pacific Coast Federation of Fishermen's Associations, Inc., San Francisco Crab Boat Owners Association, Inc., Plaintiffs - Appellants: Daniel Paul Garrett-Steinman, Esquire, Jamey M.B. Volker, Stephan Coles Volker, Esquire, Attorney, Law Offices of Stephan C. Volker, Oakland, CA.

For United States Department of The Interior, United States Bureau of Reclamation, Defendants - Appellees: Joseph H. Kim, Trial Attorney, Emily Anne Polachek, Attorney, U.S. Department of Justice, Environment & Natural Resources Division, Washington, DC.

For Westlands Water District, San Luis Water District, Panoche Water District, Intervenors-Defendants - Appellees: Norman C. Hile, Attorney, Cynthia Joy Larsen, Esquire, Attorney, Martin Ruano, Orrick, Herrington & Sutcliffe LLP, Sacramento, CA.

Judges: Before: SILVERMAN, FISHER, and TALLMAN, Circuit Judges.

Opinion

Pacific Coast Federation of Fishermen's Associations, Inc., and San Francisco Crab Boat Owners Association, Inc. ("plaintiffs") appeal the district court's partial dismissal and partial summary judgment of their action under the National Environmental Policy Act ("NEPA") against the United States Department of the Interior and the United States Bureau of Reclamation. We have jurisdiction under 28 U.S.C. § 1291. We affirm in part, reverse in part, and remand.

Prior to approving eight interim two-year contracts for the delivery of water from the Central Valley Project to California water districts, Reclamation issued an environmental assessment ("EA") and a finding of no significant impact ("FONSI"). Plaintiffs seek declaratory and injunctive relief on the basis of alleged violations of NEPA in (1) an inadequate EA and FONSI and (2) failure to prepare an environmental impact statement ("EIS") for the interim contracts. The district court dismissed plaintiffs' claims that an EIS was required and that the EA's "no action" alternative was deficient, and it granted summary judgment in favor of defendants on the remaining challenges to the EA.

Even [**3] though the two-year contracts expired on February 28, 2014, this appeal is not moot. The short duration and serial nature of Reclamation's interim water contracts place plaintiffs' claims within the mootness exception for disputes capable of repetition yet evading review. *See A.D. ex rel. L.D. v. Haw. Dep't of Educ.*, 727 F.3d 911, 914 (9th Cir. 2013).

HN1 We review de novo a dismissal for failure to state a claim under Fed. R. Civ. P. 12(b)(6). *Chubb Custom Ins. Co. v. Space Sys./Loral, Inc.*, 710 F.3d 946, 956 (9th Cir. 2013). We also review de novo the district court's ruling on summary judgment. *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 601 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 948, 190 L. Ed. 2d 830 & 135 S. Ct. 950, 190 L. Ed. 2d 830 (2015). ***HN2*** Claims under NEPA are reviewed under the standards of the Administrative Procedure Act, which provides that an agency action must be upheld unless it is "'arbitrary, **[*598]** capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Id.* (quoting 5 U.S.C. § 706(2)(A)).

I. "No Action" Alternative

The EA's "no action" alternative, which assumed continued interim contract renewal, did not comply with NEPA. ***HN3*** A "no action" alternative may be defined as no change from a current management direction or historical practice. 43 C.F.R. § 46.30. But a "no action" alternative is "meaningless" if it assumes the existence of the very plan being proposed. *Friends of Yosemite Valley v. Kempthorne*, 520 F.3d 1024, 1038 (9th Cir. 2008). Rather, the "no action alternative looks at effects of not approving the action under consideration." 43 C.F.R. § 46.30. Here, the action under consideration [**4] was the renewal of the water delivery contracts. *See Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 768, 784 (9th Cir. 2006) (holding that extensions of Bureau of Land Management leases permitting production of geothermal energy did not preserve the status quo where the extensions were not mandatory). *Ass'n of Pub. Agency Customers, Inc. v. Bonneville Power Admin.*, 126 F.3d 1158 (9th Cir. 1997), is not to the contrary. There, the "no action" alternative was not defined as the status quo of continuing existing power contracts; instead, the proposed action was a new business strategy that would result in "profound alterations in [Bonneville Power Administration's] relationships with certain large industrial customers," and the "no action" alternative analyzed in the EIS, and upheld by this court, was continued operations under the existing management strategy. *Id.* at 1163, 1168, 1188.

HN4 When an agency action is mandatory, the "no action" alternative is properly defined as the carrying out of that action. *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 769, 124 S. Ct. 2204, 159 L. Ed. 2d 60 (2004). But we do not agree with the district court that the Central Valley Project Improvement Act ("CVPIA"), a part of the Reclamation Projects Authorization and Adjustment Act of 1992, required Reclamation to enter into the interim contracts. The CVPIA requires "appropriate environmental review," including the preparation of a programmatic EIS ("PEIS"), before Reclamation is [**5] authorized to renew an existing long-term water service contract. CVPIA § 3404(c)(1). After the completion of the PEIS, Reclamation "shall, upon request, renew any existing long-term repayment or water service contract for the delivery of water from the Central Valley Project for a period of twenty-five years." *Id.* Prior to the completion of the PEIS, Reclamation "may" renew water service contracts for interim three-or two-year periods. *Id.* As the district court acknowledged, ***HN5*** normally, when "may" and "shall" are used in the same statute, the "'inference is that each is being used in its ordinary sense—the one being permissive, the other mandatory.'" *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 450 F.3d 930, 935 (9th Cir. 2006) (quoting *Haynes v. United States*, 891 F.2d 235, 239-40 (9th Cir. 1989)) (interpreting Endangered Species Act). We also reject Reclamation's argument that the contracts themselves mandated renewal. ***HN6*** NEPA imposes obligations on agencies considering major federal

themselves mandated renewal. NEPA imposes obligations on agencies considering major federal actions that may affect the environment. An agency may not evade these obligations by contracting around them.

Accordingly, the district court erred in dismissing plaintiffs' claim regarding the "no action" alternative.

II. Statement of Purpose and Need

The EA's statement of purpose and need did not unreasonably narrow Reclamation's **[*599]** consideration of alternatives. [**6] *See Alaska Survival v. Surface Transp. Bd.*, 705 F.3d 1073, 1084 (9th Cir. 2013). The statement did not assume that contract quantities would remain the same, and it was not an abuse of discretion. *See id.*

III. Reduction in Water Quantity

Reclamation's decision not to give full and meaningful consideration to the alternative of a reduction in maximum interim contract water quantities was an abuse of discretion, and the agency did not adequately explain why it eliminated this alternative from detailed study. *See Te-Moak Tribe of W. Shoshone of Nev. v. U.S. Dep't in Interior*, 608 F.3d 592, 602 (9th Cir. 2010); *Native Ecosys. Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1245 (9th Cir. 2005). The four reasons set forth in the EA do not establish the non-viability of the alternative of maximum water quantity reduction. *See W. Watersheds Project v. Abbey*, 719 F.3d 1035, 1050 (9th Cir. 2013) (holding that existence of viable but unexamined alternative renders EA inadequate).

The first reason given by Reclamation was that the Reclamation Project Act mandates renewal of existing contract quantities when beneficially used. *See* 43 U.S.C. § 485h-1(1) & (4). The EA stated that the water districts had complied with contract terms, and, according to water needs assessments performed by Reclamation, each water district's needs equaled or exceeded the current total contract quantity. Plaintiffs exhausted administrative remedies as to their argument that Reclamation did not know whether existing water quantities were "beneficially used" because [**7] Reclamation did not conduct a proper water needs assessment, as contractually required, and Reclamation's 2006 assessment was inadequate because it was prepared with data from 1999 that predated a land retirement project. *See Barnes v. U.S. Dep't of Transp.*, 655 F.3d 1124, 1132 (9th Cir. 2011) (holding that issue was exhausted when agency had independent knowledge of EA flaw); *Lands Council v. McNair*, 629 F.3d 1070, 1076 (9th Cir. 2010) (holding that issue is exhausted if agency is provided sufficient information to give it a chance to bring its expertise to bear to resolve the claim). As plaintiffs argue, Reclamation acted unreasonably by relying on stale water needs data. *See W. Watersheds Project*, 719 F.3d at 1052 (holding that "an agency errs when it relies on old data without showing that the data remain accurate").

Reclamation's second reason for concluding that consideration of a reduction in interim contract water quantities was not warranted was that the Central Valley Project-wide PEIS for long-term contract renewal selected a preferred alternative of renewal "for the full contract quantities." Additionally, the PEIS took into account the balancing requirements of the CVPIA, which provides, among other things, for the weighing of fish, wildlife, and habitat restoration goals. The PEIS did not, however, address site-specific impacts of individual [**8] contracts. *See W. Watersheds Project*, 719 F.3d at 1050-51 (holding that when modification of grazing practices was not considered at programmatic level, it must be given hard and careful look at site-specific level). The government's position that the consideration of reduced-quantity alternatives should be required only with respect to "long-term contract renewals" (Answering Brief at 47) is unreasonable under the circumstances presented here, involving an ongoing — and hence long-term — series of interim renewals.

Reclamation's third reason was that a shortage provision in the interim contracts provided it with a mechanism for annual adjustments in water supplies. As plaintiffs **[*600]** argue, however, the existence of a mechanism for adjusting water quantities after contract approval did not relieve Reclamation of its obligation to consider a reduction in quantities prior to contract approval. *See id.* at 1050.

Reclamation's fourth reason was that "retaining the full historic water quantities under contract provides the contractors with assurance the water would be made available in wetter years and is necessary to support investments for local storage, water conservation improvements and capital repairs." This reasoning in large part reflects [**9] a policy decision to promote the economic security of agricultural users, rather than an explanation of why reducing maximum contract quantities was so infeasible as to preclude study of its environmental impacts. *See id.* Moreover, given the shortage provisions in the interim contracts and recent drought conditions, the water districts have not been able to rely on delivery

of consistent quantities.

We therefore reverse as to the district court's grant of summary judgment on plaintiffs' claim that the EA was inadequate because it did not give full and meaningful consideration to the alternative of a reduction in maximum water quantities. *See id.*

IV. Geographic Scope

Plaintiffs contend that the EA's geographic scope was improperly limited to the delivery areas and should also have considered the effects, including cumulative effects, of interim contract renewal on the California River Delta, the source of the water, and on the Delta's fish and other wildlife. *See Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1122 (9th Cir. 2004) (holding that***HN7*** agency must analyze all environmental consequences of action). This contention lacks merit because the EA was tiered off of the PEIS, which addressed Central Valley Project-wide effects of long-term contract renewal. [**10] *See* 40 C.F.R. § 1508.28 (describing tiering). In light of Reclamation's obligation to conduct a more comprehensive analysis in the PEIS, it would be impractical to require the agency to trace the incremental effects of each two-year water service contract on the Delta and all Central Valley Project waters. *See Friends of the Wild Swan v. Weber*, 767 F.3d 936, 943 (9th Cir. 2014) (stating that ***HN8*** agency must balance need for comprehensive analysis against considerations of practicality).

V. Impacts on Listed Species and Cumulative Impacts

Plaintiffs waived their argument that the EA's analysis of the giant garter snake and the California least tern impermissibly equated a finding of no jeopardy under the Endangered Species Act with a finding of no significant impact under NEPA. *See Lands Council*, 629 F.3d at 1076. Impacts on salmonids and green sturgeon, as well as cumulative impacts related to drainage and selenium, were more appropriately addressed in the PEIS and the San Luis Drainage Feature Re-Evaluation Final EIS, rather than the EA for interim contract renewal. *See Friends of the Wild Swan*, 767 F.3d at 943.

We affirm the district court's judgment in part. We reverse in part and remand with instructions for the district court to vacate its grant of summary judgment in favor of defendants on plaintiffs' claim that the EA was inadequate because [**11] it did not give full and meaningful consideration to the alternative of a reduction in maximum water quantities. On remand, the district court shall direct Reclamation consider such an alternative in any future EA for an interim contract renewal. In satisfying this duty, Reclamation may rely upon any water needs assessment for which the data **[*601]** remain accurate. *See W. Watersheds Project*, 719 F.3d at 1052. We also reverse the district court's dismissal of plaintiffs' claim that the "no action" alternative set forth in the EA was inadequate under NEPA.

Each party shall bear its own costs.

AFFIRMED in part, REVERSED in part, and REMANDED.

Footnotes

* This disposition is not appropriate [**2] for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Content Type: Cases

Terms: 655 Fed. App'x 595

Narrow By: -None-

Date and Time: Mar 19, 2021 03:02:46 p.m. EDT

Print

Cookie Policy

Terms & Conditions

Wild Fish Conservancy v. United States EPA, 2010 U.S. Dist. LEXIS 41838

Copy Citation

United States District Court for the Western District of Washington

April 28, 2010, Decided; April 28, 2010, Filed

C08-0156-JCC

Reporter

2010 U.S. Dist. LEXIS 41838 * | 72 ERC (BNA) 1150

WILD FISH CONSERVANCY, Plaintiff, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al., Defendants, and ICICLE ACQUISITION SUBSIDIARY LLC, d.b.a. AMERICAN GOLD SEAFOODS, Intervenor.

Prior History: Wild Fish Conservancy v. United States Epa, 2009 U.S. Dist. LEXIS 145038 (W.D. Wash., Dec. 18, 2009)

Core Terms

salmon, recovery plan, farms, consultation, endangered species, populations, scientific, regulations, sea, memorandum, lice, orca, federal agency, marine, agencies, adversely affect, habitat, pens, threatened species, fail to use, environmental, water-quality, endangered, sediment, fish, Clean Water Act, approve, summary judgment, discharges, species

Counsel: **[*1]** For Wild Fish Conservancy, Plaintiff: Richard Adam Smith, LEAD ATTORNEY, Brian Alan Knutsen, SMITH & LOWNEY PLLC, SEATTLE, WA.

For United States Enviromental Protection Agency, Stephen L Johnson, Elin Miller, Defendants: Mark A Nitczynski, US DEPARTMENT OF JUSTICE/ENRD, DENVER, CO; Rickey D Turner, US DEPT OF JUSTICE, WILDLIFE & MARINE RESOURCES SECTION, WASHINGTON, DC

JUSTICE, WILDLIFE & MARINE RESOURCES SECTION, WASHINGTON, DC.

For Icicle Acquisition Subsidiary LLC d/b/a American Gold Seafoods, Intervenor Defendant:

Elaine L Spencer, Zachary R Hiatt, GRAHAM & DUNN (SEA), SEATTLE, WA.

Judges: The Honorable John C. Coughenour, United States District Judge.

Opinion by: John C. Coughenour

Opinion

ORDER

This matter comes before the Court on Plaintiff's motion for summary judgment (Dkt. No. 52), and Defendants' cross-motion for summary judgment. (Dkt. No. 59). With respect to Plaintiff's motion, the Court has also considered Intervenor's response (Dkt. No. 56), Federal Defendants' response (Dkt. No. 59), and Plaintiff's reply. (Dkt. No. 62). With respect to Defendants' cross-motion, the Court has also considered Plaintiff's response (Dkt. No. 62), and Defendants' reply. (Dkt. No. 65).

After carefully considering these submissions along with the parties' supporting declarations and **[*2]** exhibits, the Court has determined that oral argument is unnecessary. For the reasons explained below, the Court hereby GRANTS Plaintiff's motion, DENIES Defendants' cross-motion, and rules as follows.

I. INTRODUCTION

Plaintiff filed this lawsuit in January 2008, arguing that the Environmental Protection Agency (EPA) and the National Marine Fisheries Service violated the Clean Water Act and the Endangered Species Act by approving Washington State regulations which exempt Puget Sound salmon farms from general sediment-management standards. (*See* Second Amended Complaint 19-21 (Dkt. No. 27)). Plaintiff argues that the EPA violated the Clean Water Act by approving regulations that are inconsistent with the Act's requirements, and that both agencies violated the Endangered Species Act by ignoring the best scientific and commercial data when they engaged in an interagency consultation process. Plaintiff points with particular force to data about sea lice and the hazards they create for wild fish. (*See id.* 12-18). According to Plaintiff, the EPA and the Fisheries Service ignored scientific literature tending to show that sea lice are likely to adversely affect native species of fish like the **[*3]** Chinook salmon, Chum salmon, and Steelhead trout. (*Id.* 16-17).

II. STATUTORY AND REGULATORY FRAMEWORK

A. Clean Water Act

Congress passed the Clean Water Act "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The Act prohibits any person from discharging any pollutant into protected waters, *id.* § 1311(a), unless the person first secures a discharge permit from the EPA. *See id.* § 1342; *see also* 40 C.F.R. § 122 (implementing the National Pollutant Discharge Elimination System, and listing requirements for permits). Each of the fifty states is required to periodically establish water-quality standards, which it must then submit to the EPA for review. *See* 33 U.S.C. § 1313(c). The Agency must either approve the proposed standards, or disapprove them and notify the state of required changes. *Id.* § 1313(c)(3). If the EPA rejects a state's proposed water-quality

standards and the state fails to adopt the required changes within ninety days, the Agency itself promulgates the standards. *Id.* § 1313(c)(4).

B. Endangered Species Act

Congress enacted the Endangered Species Act in 1973 "to provide a means whereby the ecosystems upon which **[*4]** endangered species and threatened species depend may be conserved[.]" 16 U.S.C. § 1531(b). The Act requires any federal agency contemplating action to consult with the appropriate federal environmental oversight body "to insure that any action authorized, funded, or carried out by such agency is not likely to jeopardize the continued existence of any endangered species or threatened species, or result in the destruction or adverse modification of [critical] habitat." *Id.* § 1536(a)(2). In this case, the appropriate federal environmental body was the Fisheries Service, and the applicant agency was the EPA.

Consultation between the Fisheries Service and an applicant agency can be either informal or formal, but necessarily requires that each agency "use the best scientific and commercial data available." *Id.* § 1536(a)(2). Informal consultation is an optional process, and includes all discussions between a federal agency and the Fisheries Service. If the Fisheries Service determines that an agency's proposed action is "not likely to adversely affect [endangered or threatened] species or critical habitat, the consultation process is terminated, and no further action is required." 50 C.F.R. § 402.13. **[*5]** If, on the other hand, the Fisheries Service determines that an agency's proposed action "may affect [endangered or threatened] species or critical habitat," then formal consultation is required. *Id.* § 402.14.

C. Summary

Under the Clean Water Act, the EPA has the responsibility of approving or disapproving proposed state water-quality standards. Because the proposed standards in this case potentially affected certain endangered wild salmon populations, the Endangered Species Act required that the EPA consult with the Fisheries Service, either formally or informally, before reaching a final decision.

III. FACTUAL BACKGROUND

In 1991, the Washington State Department of Ecology proposed sediment-quality standards governing marine, low-salinity, and freshwater surface sediments. The proposed regulations imposed restrictions on the chemical composition of the marine sediments in the Puget Sound. *See* WASH. ADMIN. CODE § 173-204-320 (limiting the arsenic content of the Puget Sound to fifty-seven parts per million, *inter alia*). The EPA approved the State's regulations the same year. Plaintiff does not challenge these 1991 regulations.

Plaintiff challenges 1995 amendments to the regulations, which **[*6]** exempt Puget Sound salmon farms from various water-quality standards of general application. *See* WASH. ADMIN. CODE § 173-204-412 (exempting "marine finfish rearing facilities and their associated discharges" from "authority and purpose standards," "marine sediment-quality standards," "sediment impact zone maximum criteria," and "sediment impact zone standards"). The State Department of Ecology proposed the challenged regulations in December 1995, two years after the State Legislature passed a law requiring the Department to "adopt criteria . . . for allowable sediment impacts from organic enrichment due to marine finfish rearing facilities[,]" and to "adopt standards . . . for waste discharges from marine finfish rearing facilities." 1993 WASH. LEGIS. SERV. ch. 296, *codified at* WASH. REV. CODE § 90.48.220.

The EPA failed to approve or reject the 1995 amendments for more than ten years. In November 2007, Plaintiff notified the EPA that it intended to sue under the citizen-suit provision of the Clean Water Act unless the Agency promptly acted. (*See* Notice Letter (Dkt. No. 1 at 11-13)). The EPA's response was swift: By June 2008, the EPA and the Fisheries Service had determined that they **[*7]** could forego the lengthy formal consultation that the Endangered Species Act generally requires. Formal consultation was unnecessary, the federal agencies concluded, because the proposed regulations were unlikely to adversely affect endangered and threatened species or their critical habitat. On September 18, 2008, the EPA therefore formally approved the State's proposed regulations and prepared a twenty-six-page technical justification of the decision. (Approval Materials I.A (Dkt. No. 38))

technical justification of the decision. (Approval Materials 1.A (Dkt. No. 58)).

A. Scientific Data Used by the Federal Agencies

In concluding that the State's proposed regulations were unlikely to adversely affect threatened and endangered fish species, the EPA and the Fisheries Service primarily relied on three memoranda prepared by the National Oceanic and Atmospheric Administration. The first memorandum, titled *The Net-Pen Salmon Farming Industry in the Pacific Northwest,* was prepared in 2001. It identifies three issues as the greatest environmental risks from salmon farms: (1) the impact of fish feces and uneaten food on the environment below the net pens; (2) the impact on benthic communities of the accumulation of heavy metals in sediment below the pens; and (3) the impact **[*8]** on non-target organisms by the use of therapeutic compounds. (2001 Memorandum (Dkt. No. 52-4 at 80-99)). The report concludes that these risks can be most effectively mitigated by the responsible selection of fish-farm sites. (*Id.* (Dkt. No. 52-4 at 91)).

The second memorandum, titled *Review of Potential Impacts of Atlantic Salmon Culture on Puget Sound Chinook Salmon and Hood Canal Summer-Run Chum Salmon Evolutionarily Significant Units,* was prepared in 2002. It differs from the 2001 memorandum in that it addresses the effects of salmon net pens that are specific to the Puget Sound. With respect to water quality, the memorandum concludes that the Puget Sound's unique grading and tidal attributes ameliorate any adverse effects the net pens might otherwise cause. With respect to sea lice and their effects on wild salmon populations, the memorandum notes that sea lice have not been "reported to be a significant problem in marine net-pens in the Puget Sound." (2002 Memorandum 27 (Dkt. No. 52-5 at 101)).

The third memorandum, prepared in 2007, is titled *Beneficial Environmental Effects of Marine Finfish Mariculture.* As its title indicates, the memorandum focuses on the environmental *benefits* **[*9]** that flow from salmon net pens. It disputes the "popular media-distributed notion" of fish-farming pens as "biological wastelands, heavily impacted by fish feces, waste feed, antibiotics and chemicals." (2007 Memorandum (Dkt. No. 52-5 at 80)). As the memorandum states:

> Nothing could be further from the truth for Washington State fish farms. . . . Antibiotics are rarely used (vaccines are used instead), no sea lice problems exist due to naturally reduced salinity levels, and farm siting involves locations with fast currents or relatively great depth that distribute wastes over large areas where they may be incorporated into the food web while maintaining aerobic surficial sea bottom sediments.

(*Id.*).

B. Scientific Studies the Agencies Failed to Use

Plaintiff points to several scientific studies that the EPA and Fisheries Service failed to use during the informal consultation process. As discussed above, the agencies declined to engage in formal consultation because of their unlikely-to-adversely-affect conclusion. Plaintiff argues that this conclusion would have been different had the agencies considered, *inter alia,* a salmon recovery plan prepared by the Fisheries Service, and an orca **[*10]** recovery plan also prepared by the Fisheries Service.

a. Salmon Recovery Plan

The Fisheries Service is required to prepare "develop and implement [recovery] plans . . . for the conservation and survival of endangered species and threatened species[.]" 16 U.S.C. § 1533(f). In 2007, the Service adopted a recovery plan for the Chinook Puget Sound salmon. *See* 72 Fed. Reg. 2493-95 (Jan. 19, 2007). The salmon recovery plan reads in part:

> This plan was developed with a strong partnership between scientists and policy makers at local and regional levels. The intent behind such a partnership is to make the best decisions to achieve a future that supports people and the environment. This plan is based on years of scientific observation, testing of hypotheses, multiple lines of evidence, monitoring and learning. *The policy and technical elements in this plan incorporate the best available science to date for salmon recovery.*

(Salmon Plan 11-12 (Dkt. No. 52-3 at 8-9)) (emphasis added).

The salmon recovery plan specifically addresses the risks that commercial salmon farms create for wild salmon populations. It identifies two chief dangers: First, farmed salmon can escape their pens, and either interbreed **[*11]** with wild populations or compete with wild populations for food. The plan points to a 1997 accident in which three-hundred thousand farmed salmon escaped from a Washington facility. (Salmon Plan 4-30 (Dkt. No. 52-3 at 74)). Second, commercial salmon farms are likely to pollute the Puget Sound in ways that harm wild salmon populations. As the recovery plan states, "Four salmon net pens in the State of Washington in 1997 discharged ninety-three percent of the total amount of visible solids into Puget Sound." (*Id.*). It continues. "Discharges from salmon farms can also contain antibiotics and other chemicals that are used to kill salmon parasites." (*Id.*).

b. Orca Recovery Plan

The Fisheries Service adopted a recovery plan for the orca whale in 2008. *See* 73 Fed. Reg. 4176-77 (Jan. 24, 2008). Because orca whales feed on wild salmon populations, the recovery plan discusses environmental threats to wild salmon. As it states, "Reductions in prey availability [*i.e.,* wild salmon] may force the whales to spend more time foraging and could lead to reduced reproductive rates and higher mortality." (Orca Plan II-72 (Dkt. No. 52-4 at 16)). Like the salmon recovery plan, the orca recovery plan describes **[*12]** itself as "*based on the best available science* and the current understanding of the threats." (*Id.* I-1 (Dkt. No. 52-4 at 9)) (emphasis added).

The orca recovery plan specifically discusses the dangers that commercial salmon farms create for the orca whale's chief prey: wild salmon. It states, "Concerns center primarily over 1) marine net-penned Atlantic salmon transmitting infectious diseases to adjoining wild salmon populations, and 2) escaped Atlantic salmon becoming established in the wild and competing with, preying on, or interbreeding with wild Pacific salmon." (*Id.* II-84 (Dkt. No. 52-4 at 28)). The plan ultimately concludes that improved fish-farming techniques have largely ameliorated these dangers. (*Id.*).

Finally, the recovery plan also discusses the possibility that farm-raised salmon can infect wild salmon populations with sea lice, although it declines to discuss the harms that sea lice might cause wild salmon. As the orca recovery plan states, "There is compelling evidence that sea lice . . . are transmitted from salmon farms to wild salmon, but the severity of impacts to wild fish remains uncertain." (*Id.* II-85 (Dkt. No. 52-4 at 29)). It continues, "Sea lice from farms **[*13]** have been linked to a decline of wild pink salmon populations in British Columbia's Broughton Archipelago, although this finding has been disputed and may simply reflect a normal downward fluctuation in the populations." (*Id.*).

IV. LEGAL STANDARD

The Endangered Species Act requires that all involved federal agencies "use the best scientific and commercial data available[.]" 16 U.S.C. § 1536(a)(2). This requirement prevents the haphazard implementation of the Act "on the basis of speculation or surmise[.]" *Selkirk Conservation Alliance v. Forsgren,* 336 F.3d 944, 954 (9th Cir. 2003) (quoting *Bennett v. Spear,* 520 U.S. 154, 176, 117 S. Ct. 1154, 137 L. Ed. 2d 281 (1997)). The best available data requirement "prohibits [an agency] from disregarding available scientific evidence that is in some way better than the evidence [it] relies on." *Kern County Farm Bureau v. Allen,* 450 F.3d 1072, 1080 (9th Cir. 2006) (quoting *Southwest Ctr. for Biological Diversity v. Babbitt,* 215 F.3d 58, 60, 342 U.S. App. D.C. 58 (D.C.Cir. 2000)). Judicial review of administrative decisions is governed by the Administrative Procedure Act. *See* 5 U.S.C. § 706. This Court may set aside an agency action if it was, *inter alia,* "without observance of procedure required by law." **[*14]** 5 U.S.C. § 706(2)(D); *Pyramid Lake Paiute Tribe of Indians v. U.S. Dep't of the Navy,* 898 F.2d 1410, 1414 (9th Cir. 1990).

Summary judgment is appropriate if, after viewing the evidence in the light most favorable to the nonmoving party, the Court determines there are no genuine issues of material fact. FED. R. CIV. P. 56(c)(2). There is no genuine issue of fact for a trial where the record, taken as a whole, could not lead a rational finder of fact to find for the nonmoving party. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). The Court must inquire into "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 251-52, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

V. DISCUSSION

The parties in this case have submitted lengthy briefs containing dozens of different arguments. They have filed an administrative record that spans thousands of pages. (*See* Administrative Record (Dkt. Nos. 34 & 38)). They have traded literary allusions, comparing the salmon and orca recovery plans to Holy Bible, and they have cited to literary works as far afield **[*15]** as William Shakespeare's HAMLET. (*See* Intervenor's Response 16 (Dkt. No. 56); Plaintiff's Reply 7 (Dkt. No. 62)). For the Court, however, this case boils down to a single fact, which reduces the bulk of the parties' lengthy arguments and filings to nothing more than "sound and fury, signifying nothing." WILLIAM SHAKESPEARE, MACBETH act 5 sc. 5.

The plain fact of the matter is that the Fisheries Service and EPA ignored a salmon recovery plan and an orca recovery plan that the Fisheries Service itself describes as "incorporat[ing] the best available science to date for salmon recovery[,]" and "based on the best available science[,]" respectively. They ignored these plans when concluding that proposed Washington State water-quality regulations were "not likely to adversely affect [wild salmon populations] or [their] critical habitat." It is difficult for the Court to square the agencies' failure to use the recovery plans with the requirement under the Endangered Species Act that federal agencies "use the best scientific and commercial data available." *See* 16 U.S.C. § 1536(a)(2). It goes without saying that the Fisheries Service's own recovery plans were available to the Fisheries Service **[*16]** when it reached its conclusion. Because the recovery plans constitute the best available science, and because the record demonstrates that the agencies failed to use them in reaching their decision, an obvious conclusion follows: The agencies failed to use the best available science in determining that formal consultation was unnecessary. The agencies thereby ran afoul of the Endangered Species Act.

The federal agencies state in their response brief that scientists with the Fisheries Service in fact "consider[ed] the recovery plans to the extent appropriate in conducting the consultation." (Defendant's Opp'n Brief 19-20 n.4 (Dkt. No. 59)). The Court cannot accept this unsupported assertion: It is black-letter administrative law that a reviewing federal court must uphold or strike down administrative action based upon those grounds "upon which *the record discloses* that [the] action was based." *Securities & Exchange Comm'n v. Chenery Corp.,* 318 U.S. 80, 87, 63 S. Ct. 454, 87 L. Ed. 626 (1943) (emphasis added). In this case, the record contains a letter from the Fisheries Service to the EPA concurring in the latter's conclusion that the proposed Washington State standards were "unlikely to adversely affect listed species." **[*17]** (Letter (Dkt. No. 52-2 at 7-14)). It concludes with a one-page list of the relevant scientific literature that the letter relies upon. Altogether, four sources are listed: the three memoranda prepared by the National Oceanic and Atmospheric Administration, and a report prepared by the Washington State Department of Natural Resources. (*Id.* (Dkt. No. 52-2 at 14)). Nowhere in the letter are the recovery plans discussed or cited. (*Id.*). In fact, the agencies have pointed to *nowhere in the record* that would demonstrate that they availed themselves of the recovery plans when reaching their decision. Given this dearth of support in the record, the Court cannot uphold the administrative action at issue based on an unsupported and nebulous assertion--offered for the first time in a brief's footnote--that scientists considered the plans "to the extent appropriate[.]"

The parties' lengthy briefs contain many other arguments, none of which affects the Court's holding. For example, Intervenor argues that principles of collateral estoppel preclude Plaintiffs from litigating this matter in the first place. Intervenor notes that the Washington State Pollution Control Hearings Board rejected Plaintiff's **[*18]** 1998 argument that the state water-sediment standards endanger wild salmon populations. (*See* Intervenor Response 17-19 (Dkt. No. 56)). The state hearing went to the merits of a state agency's decision, however, whereas this matter deals with whether federal agencies have complied with federal procedural requirements. Collateral estoppel therefore does not apply. *See Steen v. John Hancock Mut. Life Ins. Co.,* 106 F.3d 904, 912 (9th Cir. 1997) (stating that "[t]he party asserting collateral estoppel must first show that the estopped issue is identical to an issue litigated in a previous action").

The parties also argue about what standard federal agencies should apply when determining whether formal consultation is required under the Endangered Species Act. Plaintiff argues that formal consultation is required whenever proposed federal action "may affect listed species or their critical habitat." (Plaintiff's Motion 13 (Dkt. No. 52)). Defendants and Intervenor argue instead that formal consultation is only necessary if a proposed federal action "may affect" and is "likely to adversely affect" a listed species or its critical habitat. (Defendant's Opp'n 13 (Dkt. No. 59)); (Intervenor Opp'n **[*19]** 21 (Dkt. No. 56)).

The Court need not resolve this issue: The Endangered Species Act unambiguously declares that federal agencies must "use the best scientific and commercial data available." *See* 16 U.S.C. § 1536(a)(2). Because the agencies failed to use the best data available, the Court must set aside their determination, regardless of whether they applied the correct legal standard. Principles of judicial forbearance counsel against further discussion. *See Chevron U.S.A. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 843 (stating that federal courts defer to an agency's reasonable construction of a statute Congress has delegated it authority to administer).

Similarly, this Court need not decide whether the Puget Sound's salmon farms actually infect wild salmon populations with sea lice, or whether sea lice create a danger for wild salmon. (*See, e.g.,* Plaintiff's Motion 30-32 (Dkt. No. 52)). Also unnecessary is discussion about those parts of the recovery plans that

do not mention salmon farming. (*See* Intervenor's Opp'n 15-16 (Dkt. No. 56)). This case is actually relatively straight-forward: When making decisions that require them to "use the best available scientific and **[*20]** commercial data available," the Fisheries Service and the EPA failed to use recovery plans that the Fisheries Service itself describes as containing the "best scientific evidence available." For this reason, the Court must set aside the agencies' conclusion--which they reached after informal consultation--that the Washington State proposed water-quality regulations are "not likely to adversely affect [endangered or threatened] species or critical habitat."

VI. CONCLUSION

For the reasons explained above, the Court hereby GRANTS Plaintiff's motion for summary judgment. (Dkt. No. 52). The Court therefore SETS ASIDE the EPA's 2008 decision to approve Washington State's proposed water-quality standards dealing with salmon farms. The Court ORDERS the Fisheries Service and the EPA to re-consider whether formal consultation is required--this time taking into account the best available science.

For the same reasons explained above, the Court hereby DENIES Defendant's cross-motion for summary judgment. (Dkt. No. 59).

SO ORDERED this 28th day of April, 2010.

/s/ John C Coughenour

JOHN C. COUGHENOUR

United States District Judge

Wild Fish Conservancy v. Cooke Aquaculture Pac. LLC, 2019 U.S. Dist. LEXIS 70974

Copy Citation

United States District Court for the Western District of Washington

April 26, 2019, Decided; April 26, 2019, Filed

CASE NO. C17-1708-JCC

Reporter

2019 U.S. Dist. LEXIS 70974 * | 86 ERC (BNA) 5788 | 2019 WL 1880035

WILD FISH CONSERVANCY, Plaintiff, v. COOKE AQUACULTURE PACIFIC LLC, Defendant.

Prior History: Wild Fish Conservancy v. Cooke Aquaculture Pac., LLC, 2019 U.S. Dist. LEXIS 67194 (W.D. Wash., Apr. 19, 2019)

Core Terms

plans, inspection, Pollution, notice, fish, alleged violation, disposal, permits, chemicals, Conditions, violations, disease control, argues, feed, harvest, blood, cage, storage, partial summary judgment, medicated, predation, asserts, mooring, iodine, violation of condition, solid waste, practices, tracking, surface, annual

Counsel: **[*1]** For Wild Fish Conservancy, Plaintiff: Brian Alan Knutsen, LEAD ATTORNEY, KAMPMEIER & KNUTSEN, PLLC, PORTLAND, OR; Kevin M Cassidy, EARTHRISE LAW CENTER, LEAD ATTORNEY, PRO HAC VICE, LEWIS & CLARK LAW SCHOOL, PORTLAND, OR; Paul August Kampmeier, LEAD ATTORNEY, KAMPMEIER & KNUTSEN, SEATTLE, WA.

For Cooke Aquaculture Pacific LLC, Defendant: Diane M. Meyers, NORTHWEST RESOURCE LAW PLLC, SEATTLE, WA

SEATTLE, WA.

Judges: HONORABLE John C. Coughenour, UNITED STATES DISTRICT JUDGE.

Opinion by: John C. Coughenour

Opinion

ORDER

This matter comes before the Court on Plaintiff's motion for partial summary judgment (Dkt. No. 29). Having thoroughly considered the parties' briefing and the relevant record, the Court finds oral argument unnecessary and hereby GRANTS in part and DENIES in part the motion for the reasons explained herein.

I. BACKGROUND

Defendant Cooke Aquaculture farms Atlantic salmon at net pen facilities located throughout Puget Sound. (*See* Dkt. No. 15 at 2.) The Clean Water Act ("CWA") requires any entity that discharges pollutants into the waters of the United States to hold and comply with the terms of a National Pollutant Discharge Elimination System ("NPDES") permit. 33 U.S.C. § 1342. Pursuant to the CWA, authorized state agencies may issue **[*2]** NPDES permits; in Washington, the Department of Ecology performs the functions necessary to "meet the requirements" of the CWA, including issuing permits. *See* 33 § U.S.C. 1342(b); Wash. Rev. Code. § 90.48.260. A NPDES permit holder must prepare and implement certain plans to minimize and monitor the release of pollutants. *Id.* at § 1342(a)(2). Defendant operates its facilities pursuant to NPDES permits, which require, among other things, the preparation of a Pollution Prevention Plan and a Release Prevention and Monitoring Plan ("Release Prevention Plan") (together, "the plans") that satisfy the conditions of its permits. (*See* Dkt. No. 29-2 at 11-12.)

Defendant operated eight net pen facilities across Puget Sound until the collapse of its Cypress Site 2 ("Cypress 2") facility on or about August 20, 2017. (*See* Dkt. No. 1 at 9-10.) The collapse resulted in the release of thousands of Atlantic salmon into Puget Sound. (*Id.*) While Cypress 2 is no longer operational, Defendant continues to operate its other seven net pen facilities under its NPDES permits.[1] On August 24, 2017, Plaintiff sent Defendant a "Notice of Intent to Sue Under the Clean Water Act" letter ("notice letter") and sent a supplemental notice letter on September **[*3]** 6, 2017. (*Id.* at 22, 30.) On November 13, 2017, Plaintiff filed a complaint against Defendant asserting several CWA violations, including that Defendant's plans are facially noncompliant with their respective permits. (*See id.* at 2.) Plaintiff's motion for partial summary judgment asks the Court to find that Defendant's plans violated Conditions S6 and S7 of their NPDES permits. (Dkt. No. 29 at 5-6.)

II. DISCUSSION

A. Legal Standards

1. Summary Judgment

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In making such a determination, the Court must view the facts and justifiable inferences to be drawn therefrom in the light most favorable to the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106

the light most favorable to the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). Once a motion for summary judgment is properly made and supported, the opposing party "must come forward with 'specific facts showing that there is a genuine issue for trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986) (quoting Fed. R. Civ. P. 56(e)). Material facts are those that may affect the outcome of the case, and a dispute about a material fact is genuine if there is sufficient evidence for a reasonable jury to return a verdict for the non-moving party. *Anderson*, 477 U.S. at 248-49. Ultimately, summary **[*4]** judgment is appropriate against a party who "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

2. Clean Water Act

The CWA's purpose is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251. Private citizens may initiate actions against alleged violators of the CWA's requirements, including violations of permit conditions. *Ass'n to Protect Hammersley, Eld, & Totten Inlets v. Taylor Res., Inc.*, 299 F.3d 1007, 1012 (9th Cir. 2002). In order to bring a CWA citizen suit, a plaintiff must satisfy the procedural requirement of providing notice to: (1) the alleged violator; (2) the Environmental Protection Agency ("EPA"); and (3) the state agency tasked with enforcing the CWA where the alleged violation occurred. *See* 33 U.S.C. § 1365(b). The CWA "authorizes citizens to enforce all permit conditions." *Nw. Envtl. Advocates v. City of Portland*, 56 F.3d 979, 986 (9th Cir. 1995).

As a threshold matter, a plaintiff must have statutory and Article III standing to bring a CWA claim. *Nat. Res. Def. Council v. Sw. Marine, Inc.*, 236 F.3d 985, 998 (9th Cir. 2000). A citizen has statutory standing to bring an enforcement action under the CWA for "ongoing" violations. *Id.* A citizen plaintiff can prove ongoing violations by demonstrating that either the violations continue on or after the complaint is filed, or **[*5]** that a reasonable trier of fact "could find a continued likelihood of a recurrence in intermittent or sporadic violations." *Id.* To establish Article III standing, a plaintiff must demonstrate that: (1) he or she has suffered a concrete injury; (2) that the injury is fairly traceable to the defendant's conduct; and (3) that the injury can be redressed by prevailing in the case. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000).2

B. Sufficiency of Plaintiff's 60-day Notice Letter

Plaintiff asserts that Defendant's Pollution Prevention Plans violate Conditions S6.F, S6.D, and S6.E of its permits, and that its Release Prevention Plans violate Condition S7.6 and the general requirements of Condition S7 of its permits.3 (*See* Dkt. No. 1 at 23-26). Defendant argues that Plaintiff's notice letter was insufficient with respect to alleged violations of Conditions S6.D, S6.E, and S7, such that the Court lacks jurisdiction over the alleged violations. (Dkt. No. 36 at 18.)4

For district courts to have jurisdiction over CWA citizen suits, a plaintiff must provide notice to the alleged violator that contains "sufficient information to permit the recipient to identify the specific standard, limitation, or order alleged to have been violated," **[*6]** and "the activity alleged to constitute a violation." U.S.C. § 1365(b); 40 C.F.R. § 135.3(a). The Ninth Circuit requires that a plaintiff's 60-day notice letter includes "reasonably specific" information, so that the alleged violator will be able to "take corrective actions [to] avert a lawsuit." *Sw. Marine*, 236 F.3d at 996; *San Francisco BayKeeper, Inc. v. Tosco Corp.*, 309 F.3d 1153, 1158 (9th Cir. 2002). If a plaintiff fails to provide reasonably specific notice of an alleged violation, then the Court lacks jurisdiction over the claim. *Sw. Marine*, 236 F.3d at 997.

The Ninth Circuit does not require a citizen plaintiff to "list every specific aspect or detail of every violation" in its notice letter, as long as it "is reasonably specific" and gives an alleged violator the "opportunity to correct the problem." *Waterkeepers N. California v. AG Indus. Mfg., Inc.*, 375 F.3d 913, 917 (9th Cir. 2004). "The key language in the notice regulation is the phrase 'sufficient information to permit the recipient to identify' the alleged violations and bring itself into compliance." *Id.* at 916 (citing *Cmty. Ass'n for Restoration of the Env't v. Henry Bosma Dairy*, 305 F.3d 943, 951 (9th Cir. 2002)).

1. Conditions S6.D and S6.E

Plaintiff's notice letter stated that Defendant was in violation of its permits for failing to "prepare a Pollution Prevention Plan for each net pen facility that addresses 'operations, spill prevention, spill response, solid waste, and storm water discharge practices which will prevent or minimize the release of pollutants from **[*7]** the facility to waters of the state.' Condition S6." (Dkt. No. 29-2 at 11.) Condition S6.D requires that Defendant's plans address "practices for the storage and, if necessary, disposal of disease control chemicals." (*Id.*) Condition S6.E requires that Defendant's plans address "how solid and biological wastes are collected, stored, and ultimately disposed. Among the solid wastes of concern are . . . blood from harvesting operations." (*Id.*) Plaintiff alleges that Defendant's plans failed to account for the storage and disposal of medicated feed, iodine, and the anesthetic MS-222, and that its plans contained no mention of the collection, storage, or disposal of harvest blood, in violation of Conditions S6.D and S6.E. (Dkt. No. 29 at 15.) Defendant argues that Plaintiff's notice letter was inadequate because it did not specifically identify Conditions S6.D or S6.E as alleged violations. (Dkt. No. 36 at 13.)

Although plaintiff's notice letter did not specifically list Conditions S6.D and S6.E, it provided sufficient information for Defendant to identify and correct the alleged violations. Condition S6 requires that Defendant's plans address "solid waste" and practices to "prevent or minimize **[*8]** the release of pollutants from the facility" into the state's waters. (Dkt. No. 29-2 at 11.) By specifically referencing that language, Plaintiff gave Defendant notice that it was allegedly in violation of sub-conditions dealing with the handling of pollutants—disease control chemicals and solid waste from harvest blood. (*See* Dkt. No. 1 at 25.) Condition S6 specifically lists substances which are pollutants, including harvest blood and disease control chemicals. (Dkt. No. 29-2 at 11.) The Plans also identify blood from harvesting operations under the category of "solid wastes of concern." (*Id.*) By reading the language of Condition S6 in conjunction with its sub-conditions, Defendant could have reasonably identified that Plaintiff was alleging violations of Defendant's plans' provisions for disease control chemicals, harvest blood, or other pollutants and solid wastes listed under Condition S6.

Therefore, Plaintiff's notice letter provided reasonably specific notice to allow Defendant to identify alleged violations under Conditions S6.D and S6.E.

2. Condition S7's "Best Management Practices" Requirement

Plaintiff's notice letter alleged that Defendant failed "to identify and implement technology **[*9]** that will minimize fish escapes" under a heading titled "Violations of the Fish Release Prevention & Monitoring Plan." (Dkt. No. 1 at 4-5.) Condition S7 requires, *inter alia*, that Defendant's Release Prevention Plan include "identification and implementation of technology . . . [and] [r]outine procedures and best management practices used" to minimize the risk of fish escapements. (Dkt. No. 29-2 at 12.)

Plaintiff asserts that Defendant's mooring inspection intervals are not best management practices, as required by Condition S7, based on the annual mooring inspection requirement in Condition S6. (*See* Dkt. No. 29 at 19.) Specifically, Plaintiff argues that Defendant's 2012 and 2014 Release Prevention Plans violated its permits' requirements by providing for inspections of the high-current-end moorings every three years and for other moorings to be inspected every six years. (*Id.*) Plaintiff also asserts that Defendant's 2017 Release Prevention Plan provides for high-current-end moorings inspections every three years and does not address inspection intervals for the other moorings. (*Id.*) Condition S7 does not require specific inspection periods. (*See* Dkt. No. 29-2 at 11.)

Defendant could **[*10]** not have reasonably identified Plaintiff's claim that Defendant was in violation of Condition S7 based on an inspection regime imposed by Condition S6. This section of the notice letter was clearly intended to address the Release Prevention Plans, which are governed by Condition S7, not Condition S6. (*See* Dkt. No. 29-2 at 11-12.) Moreover, Condition S7 does not require specific inspection intervals. (*See id.* at 12.) Plaintiff did not provide notice that would allow Defendant to identify what alleged violation that it needed to cure in order to avoid a lawsuit. As such, the Court cannot exercise jurisdiction over this claim. *See Sw. Marine*, 236 F.3d at 996.

The Court finds that Plaintiff's notice letter did not provide Defendant with sufficient notice as to this claim. Therefore, Plaintiff's motion for partial summary judgment is DENIED as to the alleged permit violations of Condition S7.

C. Permit Requirements and Defendant's Plans

The Court has jurisdiction over Plaintiff's claims regarding Conditions S6.D, S6.E, S6.F, and S7.6. [5] The Court next considers whether Plaintiff has demonstrated that no dispute of material fact exists as to whether Defendant's plans violated these permit conditions.

1. Condition S6.F

Condition **[*11]** S6.F requires that the plans include that Defendant will "[a]t least once per year, conduct an inspection of the main cage structure and anchoring components above and below the water line." (Dkt. No 29-2 at 11.) Plaintiff alleges that Defendant's Pollution Prevention Plans violate Condition S6.F by failing to include adequate procedures for annual inspections of its main cage structure. (Dkt. No. 29 at 13.) Specifically, Plaintiff asserts that Defendant's 2012, 2015, and April 2017 Pollution Prevention Plans do not contain any main cage inspection requirements and that Defendant's October 2017 plan only requires inspection of the "cage system" as a whole after "a major storm event or any physical accident involving the farm site." (*Id.*; Dkt. No. 29-2 at 131.)

Defendant does not dispute that its plans prior to October 2017 were non-compliant with Condition S6.F, but argues that its updated October 2017 plan provides for, across various sections, at least annual inspections of the components of the main cage structure. (*See* Dkt. No. 36 at 18-21.) Defendant states that the "main cage structure" includes: (1) the cage system's floating walkway; (2) the stock (fish containment) nets; and **[*12]** (3) the predator nets. (*Id.* at 19-20.) Defendant asserts that its "Weekly Surface Inspection Sheet," which is attached to the October 2017 plan, provides for weekly inspection of the floating walkway, in satisfaction of Condition S6.F. (Dkt. No. 29-2 at 131.) The Weekly Surface Inspection Sheet requires Defendant to visually inspect the system mooring points; surface shackles, thimbles, and hardware; mooring lines; surface chain connections; walkway hinge points; and walkway grading condition. (*Id.* at 133.) The Weekly Surface Inspection Sheet does not include inspection of the floatation devices that support the walkway, which Plaintiff argues are part of the "below the water line" main cage structure. (*Id.*; Dkt. No. 29 at 14.)

With respect to the fish and predation nets, Defendant argues that the October 2017 plan's provisions for cleaning and repairing its nets satisfy Condition S6.F. (Dkt. No. 36 at 19.) Defendant's plan states that fish containment nets are "typically pulled to the surface once per year" and that fish containment nets and predator nets are removed at the end of a growing cycle for repair and cleaning. (Dkt. No. 29-2 at 129.) However, the plan's net cleaning procedures, included under **[*13]** the section titled "Net Washing Practices," do not provide for annual inspection of the fish or predator nets, only that the nets are "to be pulled from the water and transported to a land based cleaning and repair facility" after a growing cycle. (*Id.*) Defendant's plan does not specify how often a growing cycle ends, or whether the cleaning and repair of nets represent the inspection that is required by Condition S6.F. (*See id.*) Facially, it appears that Defendant's net washing provisions are intended to satisfy the permit's requirement to include net cleaning procedures, not for annual "inspection of the main cage structure and anchoring components above and below the water line." (*Id.* at 11.)

The Court finds that Defendant's 2012, 2015, April 2017, and October 2017 Pollution Prevention plans failed to include annual inspection of the main cage system as required by Condition S6.F. Therefore, Plaintiff's motion for partial summary judgment is GRANTED as to Defendant's permit violations of Condition S6.F.

2. Condition S6.D

Condition S6.D requires that the plan address "[p]ractices for storage, and if necessary, disposal of disease control chemicals." (Dkt. No. 29-2 at 11.) Plaintiff argues that **[*14]** Defendant failed to include provisions to store and dispose of disease control chemicals in its 2012, 2015, April 2017, and October 2017 Pollution Prevention Plans. (Dkt. No. 29 at 15-16.) Plaintiff asserts that Defendant used medicated fish feed, iodine, and the anesthetic MS-222 as disease control chemicals, which its plans do not properly address. (*Id.*)

With respect to medicated fish feed, Plaintiff asserts that while Defendant's 2012 and 2015 Pollution Prevention Plans provided that the feed must be stored in leak proof containers, the plans failed to account for the disposal of medicated feed. (*Id.*) Defendant's 2012 and 2015 plans provide that "[a]ny medicated feed will be clearly marked on the label . . . [and] stored in leak-proof containers while at the facility." (Dkt. No. 29-2 at 113, 121.) Defendant's plans do not account for the disposal of medicated feed, which is required by Condition S6.D. (*See id.* at 11, 113, 121.) Defendant's April and October 2017 Pollution Prevention Plans discuss medicated feed under the section "Disease Control Chemicals." (*See*

id. at 125, 130.) Defendant's April and October 2017 plans provide that "any unused medicated feed that remains after the treatment period ends will be removed **[*15]** from the net pen site and transported back to an upland facility for covered storage" and that expired feed "will be disposed of at a solid waste facility." (*Id.*) Defendant's 2017 plans provided for storage of the feed *after* it is no longer at the facility, but do not address how it is stored when it is used to treat the fish at the facility.

Defendant argues that iodine and MS-222 are not disease control chemicals and therefore do not need to be addressed in its plans. (Dkt. No. 36 at 25.) With respect to iodine, Defendant states that "[i]odine is used as a disinfectant, primarily of boots." (*Id.*) Defendant's 2012, 2015, and April 2017, and October 2017 Pollution Prevention Plans list "disinfectants used for footbaths, dive nets, and other equipment" under the heading of "Disease Control Chemicals." (Dkt. No. 29-2 at 113, 121, 125, 130.) In response to an interrogatory asking it to "[d]escribe all efforts to treat, reduce, and/or prevent diseases . . . including the method and/or substances used," Defendant responded by stating, "[a]s with all biosecurity measures at the net pens, the mortality extraction bags used to collect the dead fish are disinfected after each use, using a 24 **[*16]** hour soak in an iodine solution." (*Id.* at 258-261.) Additionally, Defendant listed iodine and MS-222 on the 2016 "Annual Disease Control Chemical Use Report" required by its permits. (*Id.* at 247-55.) None of Defendant's Pollution Prevention Plans include procedures for the storage of iodine. (*See id.* at 113, 121, 125, 130.) Defendant's 2012 and 2015 plans addressed the disposal of iodine, but Defendant's April and October 2017 plans do not. (*See id.*) Defendant's plans do not mention MS-222. (*See id.*)

The Court finds that Defendant failed to address the storage and disposal of disease control chemicals in its 2012, 2015, April 2017, and October 2017 Pollution Prevention Plans. Therefore, Plaintiff's motion for partial summary judgment is GRANTED as to Defendant's permit violations of Condition S6.D.

3. Condition S6.E

Condition S6.E requires that the Pollution Prevention Plans address "[h]ow solid and biological wastes are collected, stored, and ultimately disposed. (Dkt. No. 29-2 at 11.) Plaintiff argues that Defendant's Pollution Prevention Plans fail to account for the collection, storage, and disposal of harvest blood. (Dkt. No. 29 at 16-17.) Defendant claims that its plan "adequately addresses how harvest blood is collected, stored, **[*17]** and disposed" because it does not bleed fish at the facilities. (Dkt. No. 36 at 26.) Defendant's plans do not address how it collects, stores, and disposes of harvest blood. (*See id.* at 113, 121, 125, 130.) Even if Defendant does not bleed fish at its facilities, its plans still had to address procedures for blood generated from harvesting operations. (Dkt. No. 29-2 at 11.) The plans' complete silence on this issue places it in facial violation of the permits. Therefore, Plaintiff's motion for partial summary judgment is GRANTED as to Defendant's permit violations of Condition S6.E.

4. Condition S7.6

Condition S7.6 requires that Defendant's plans include procedures for "routinely tracking the number of fish within the pens, the number of fish lost due to predation and mortality, and the number of fish lost due to escapement." (Dkt. No. 29-2 at 12.) Plaintiff argues that Defendant's plans fail to address procedures to routinely track the number of fish lost to predation or escapement. (Dkt. No. 29 at 17-18.) Defendant argues that its plans provide for routine tracking of mortalities in a variety of systems and that "[p]redation losses are simply a variety of mortalities at the site." (Dkt. No. 36 at 22.)

Defendant's **[*18]** 2012, 2014, and 2017 Release Prevention Plans state under the heading "Procedures for Routinely Tracking the Number of Fish" that fish are observed from the surface and that mortalities are removed and accounted for in a database (2012), log books (2014 plan), or an inventory system (2017 plan) after removal. (Dkt. No. 29-2 at 142, 157, 187.) Even if Defendant does track predation and escapement routinely, its permits state that the plan "must include . . . the following elements . . . " [p]rocedures for routinely tracking . . . the number of fish lost due to predation and mortality and the number of fish lost due to escapement." (*Id.* at 12.) Defendant's Release Prevention Plans fail to provide for such tracking. (*See id.* at 142, 157, 187.) Thus, Defendant's argument is based on what it was allegedly doing in practice, not what was included in the plans.

The Court finds that Defendant's 2012, 2014, and 2017 Release Prevention Plans did not satisfy Condition S7.6 of the permits. Therefore, Plaintiff's motion for partial summary judgment is GRANTED as to Defendant's permit violations of Condition S7.6.

III. CONCLUSION

For the foregoing reasons, Plaintiff's motion for partial summary judgment (Dkt. No. 29) is:

(1) GRANTED **[*19]** as to permit violations relating to Condition S6.F;

(2) GRANTED as to permit violations relating to Condition S6.D for Defendant's 2012, 2015, April 2017, and October 2017 Pollution Prevention Plans;

(3) GRANTED as to permit violations relating to Condition S6.E for Defendant's 2012, 2015, April 2017, and October 2017 Pollution Prevention Plans;

(4) GRANTED as to permit violations relating to Condition S7.6 for Defendant's 2012, 2014, and 2017, and Release Prevention Plans; and

(5) DENIED as to permit violations relating to Condition S7.

DATED this 26th day of April 2019.

/s/ John C. Coughenour

John C. Coughenour

UNITED STATES DISTRICT JUDGE

Footnotes

1 The Court does not address whether Cypress 2's plans violated the conditions of its permit in this order. Defendant asserts in its cross-motion for partial summary judgment that Plaintiff's alleged violations with respect to its permit for Cypress 2 are not ongoing or are moot. (*See* Dkt. No. 41 at 4.) In the interest of judicial economy, this order applies to all of Defendant's facilities except Cypress 2, which the Court will discuss in a separate order addressing Defendant's cross-motion for summary judgment.

2 Defendant does not dispute and the Court finds that Plaintiff has representational standing to sue on behalf of its members because: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purposes; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Ecological Rights Found. v. Pac. Lumber Co.*, 230 F.3d 1141, 1147 (9th Cir. 2000) (quoting *Hunt v. Wash. State Apple Advertising Com'n*, 432 U.S. 333, 343, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977)).

3 The permits for all of Defendant's seven net pen facilities were substantively identical. (*See* Dkt. No. 29-2 at 7-62.) Therefore, the Court's analysis of Plaintiff's claims applies to all of Defendant's facilities, except for Cypress 2 as previously explained. *See supra*, footnote 1.

4

Defendant concedes that Plaintiff provided proper notice for alleged violations of Conditions S6.F and S7.6. (*Id.*)

5 Plaintiff alleges that the permit violations in Defendant's October 2017 Pollution Prevention Plan and the 2017 Release Prevention Plan are also present in Defendant's prior plans during the five-year statute of limitations period. (Dkt. No. 29 at 7, 12.) Because violations in the prior plans can give rise to daily penalties, this order discusses alleged violations with regard to all of Defendant's plans during the relevant statute of limitations period. *See* *Borden Ranch P'ship v. U.S. Army Corps of Engineers*, 261 F.3d 810, 817 (9th Cir. 2001), *aff'd*, 537 U.S. 99, 123 S. Ct. 599, 154 L. Ed. 2d 508 (2002).

Wild Fish Conservancy v. Cooke Aquaculture Pac. LLC, 2019 U.S. Dist. LEXIS 204382

Copy Citation

United States District Court for the Western District of Washington

November 25, 2019, Decided; November 25, 2019, Filed

CASE NO. C17-1708-JCC

Reporter

2019 U.S. Dist. LEXIS 204382 * | 2019 WL 6310660

WILD FISH CONSERVANCY, Plaintiff, v. COOKE AQUACULTURE PACIFIC LLC, Defendant.

Prior History: Wild Fish Conservancy v. Cooke Aquaculture Pac., LLC, 2019 U.S. Dist. LEXIS 67194 (W.D. Wash., Apr. 19, 2019)

Core Terms

inspections, fish, pens, anchor, mooring, permits, argues, site, violations, records, notice, partial summary judgment, Pollution, declarations, collapse, summary judgment motion, civil penalty, facilities, expert opinion, Annual, citizen suit, tracking, lines, res judicata, deposition, escapes, dive, feet, moot, risk of failure

Counsel: **[*1]** For Wild Fish Conservancy, Plaintiff: Brian Alan Knutsen, LEAD ATTORNEY, KAMPMEIER & KNUTSEN, PLLC, PORTLAND, OR; Kevin M Cassidy, LEAD ATTORNEY, PRO HAC VICE, EARTHRISE LAW CENTER, PORTLAND, OR; Paul August Kampmeier, LEAD ATTORNEY, KAMPMEIER & KNUTSEN, SEATTLE, WA.

For Cooke Aquaculture Pacific LLC, Defendant: Diane M. Meyers, NORTHWEST RESOURCE LAW PLLC, SEATTLE, WA

SEATTLE, WA.

Judges: HONORABLE John C. Coughenour, UNITED STATES DISTRICT JUDGE.

Opinion by: John C. Coughenour

Opinion

ORDER

This matter comes before the Court on Defendant's motion to exclude expert opinions (Dkt. No. 82), Plaintiff's motion for partial summary judgment (Dkt. No. 79), and Defendant's motion for partial summary judgment (Dkt. No. 84). Having thoroughly considered the parties' briefing and the relevant record, the Court finds oral argument unnecessary and hereby DENIES Defendant's motion to exclude expert opinions (Dkt. No. 82), GRANTS in part and DENIES in part Plaintiff's motion for partial summary judgment (Dkt. No. 79), and DENIES Defendant's motion for partial summary judgment (Dkt. No. 84) for the reasons explained herein.

I. BACKGROUND

This lawsuit arises out of the 2017 collapse of one of Defendant Cooke Aquaculture Pacific LLC's Atlantic **[*2]** salmon net-pen facilities ("Cypress 2") in Deepwater Bay off Cypress Island, Washington. (*See* Dkt. No. 1 at 9-10.) The Clean Water Act ("CWA") prohibits discharges of pollutants into the waters of the United States, except pursuant to a National Pollutant Discharge Elimination System ("NPDES") permit. 33 U.S.C. § 1342. As provided by the CWA, authorized state agencies may issue NPDES permits and enforce permit requirements. *See* 33 U.S.C. § 1342(b). In Washington, the Department of Ecology ("Ecology") performs the functions necessary to "meet the requirements" of the CWA, including issuing NPDES permits. Wash. Rev. Code. § 90.48.260.

Prior to the collapse of Cypress 2, Defendant operated eight Atlantic salmon net-pen facilities across Puget Sound pursuant to separate NPDES permits issued by Ecology. (*See* Dkt. Nos. 29-2 at 7-62, 44 at 4-33.) The net pens are floating facilities into which Defendant transfers Atlantic salmon smolts from its freshwater hatchery to be reared to a marketable size. (Dkt. No. 15 at 4.) The pens are made of metal walkways from which nets are hung. (Dkt. No. 29-2 at 70-73.) The net pens are held in place by a mooring system comprised of mooring chains or ropes attached to anchors. (*Id.* at 70-71, 87-88.) Defendant's NPDES **[*3]** permits impose numerous requirements for minimizing the discharge of pollutants from the facilities. (*See* Dkt. No. 44 at 8-21.) Defendant's NPDES permit for Cypress 2 was issued in October 2007 and was in force at all times relevant to this lawsuit. (Dkt. Nos. 42 at 5, 14; 44 at 1.)[1] Defendant operates its facilities on lands leased from the Washington State Department of Natural Resources ("DNR"). (*E.g.*, Dkt. No. 52-1 at 37-69.)

On August 19, 2017, Cypress 2 experienced mooring failures during very strong tidal currents. (Dkt. No. 42 at 2.) These mooring failures progressed over the following days and resulted in the facility's collapse and eventual destruction. (*Id.* at 2-3.) The catastrophic collapse of Cypress 2 resulted in the estimated release of more than 200,000 Atlantic salmon into Puget Sound. (Dkt. No. 29-2 at 200.) The collapse also resulted in the release of other debris from the facility into Puget Sound. (*Id.* at 211-12.) On August 24, 2017, Plaintiff sent Defendant a "Notice of Intent to Sue Under the Clean Water Act" letter ("notice letter") and sent a supplemental notice letter on September 6, 2017. (Dkt. No. 1 at 22, 30.) On the same dates, Plaintiff mailed copies of the notice letter to the **[*4]** Administrator of the Environmental Protection Agency ("EPA"), the Regional Administrator of Region 10 of the EPA, and the Director of Ecology. (Dkt. No. 1 at 2-3.) On November 13, 2017, Plaintiff filed a complaint against Defendant asserting several CWA violations related to the Cypress 2 collapse, as well as violations at Defendant's seven other Puget Sound net-pen facilities. (*See generally id.*)

On August 25, 2017, DNR notified Defendant that it had defaulted on its obligations under the parties' lease and demanded that Defendant remove all damaged materials from the Cypress 2 site. (Dkt. No. 52-1 at 145.) DNR stated that it may terminate the lease if Defendant did not cure the default by September 24, 2017. (*Id.*) In a letter to DNR dated September 1, 2017, Defendant stated that it had

"been implementing its Fish Escape Prevention Plan" and "reserve[d] all rights with respect to the Lease." (*Id.* at 149.) Defendant proceeded to conduct cleanup, salvage, and remediation at and around the Cypress 2 site throughout the rest of 2017 and into 2018. (*See* Dkt. Nos. 42, at 3-4, 29-2 at 210-12.)

On January 30, 2018, Ecology issued a $332,000 administrative penalty against Defendant arising from the Cypress **[*5]** 2 collapse. (Dkt. No. 52-1 at 160-66.) Ecology concluded that Defendant violated its NPDES permit by negligently allowing the release of farmed salmon, failing to inspect anchoring components deeper than 100 feet, and not adequately cleaning the facility's nets. (*Id.* at 163-64.) On March 1, 2018, Defendant appealed Ecology's penalty to the Washington State Pollution Control Hearings Board. (Dkt. Nos. 42 at 4, 52-1 at 169); *see also* Wash. Rev. Code §§ 43.21B.010, 43.21B.110.

On February 2, 2018, DNR terminated Defendant's lease for Cypress 2. (Dkt. No. 42 at 4.) Defendant responded on March 1, 2018, by filing a complaint in Thurston County Superior Court challenging DNR's termination of the lease. (Dkt. No. 52-1 at 11-32.) Among other relief, Defendant sought a declaratory judgment that DNR was not "entitled to withhold its consent to [Defendant's] reconstruction of [Cypress] 2 . . . and that it is entitled to restock [Cypress] 2 as soon as it has been rebuilt." (*Id.* at 28.)

On March 22, 2018, Washington's governor signed legislation that prohibits DNR from either granting new leases of aquatic lands for non-native finfish aquaculture projects or renewing or extending a lease in existence as of June 7, 2018, that includes non-native finfish aquaculture. **[*6]** *See* Wash. Rev. Code § 79.105.170; *see also* H.B. 2957, 65th Leg., Reg. Sess. (Wash. 2018).

On April 24, 2019, Defendant and Ecology entered a consent decree to resolve Defendant's liability related to the Cypress 2 collapse and the corresponding violations identified by Ecology in its notice of administrative penalty. (*See* Dkt. No. 74-1 at 4-11.) On April 25, 2019, the Pollution Control Board, pursuant to the consent decree, dismissed Defendant's appeal of Ecology's administrative penalty. (*Id.* at 18.) Defendant has not conducted net-pen operations at Cypress 2 since its collapse in August 2017. (Dkt. No. 43 at 3.) In fact, the Cypress 2 facility no longer exists, and its remains were ultimately salvaged and removed from the site following the collapse. (*Id.*; *see* Dkt. No. 29-2 at 210-12.) Defendant states that it has no intention of rebuilding Cypress 2. (Dkt. No. 43 at 3.) On December 21, 2018, Defendant requested that Ecology terminate the permit for Cypress 2. (Dkt. No. 86 at 4.) On August 29, 2019, Ecology informed Defendant that it had completed its closure monitoring of Cypress 2 and that the permit would be terminated as of September 28, 2019. (See Dkt. No. 86 at 6.) Defendant has represented that it has not appealed **[*7]** the decision. (*See* Dkt. No. 84 at 9.) Defendant continues to operate its other seven net pen facilities under its NPDES permits. (*See* Dkt. Nos. 29-2 at 7-62, 44 at 4-33.)

Defendant now moves to exclude Plaintiff's expert opinions on risk of failure (Dkt. No. 82), Plaintiff moves for partial summary judgment on multiple claims (Dkt. No. 79), and Defendant moves for partial summary judgment on the grounds of *res judicata* and mootness (Dkt. No. 84).

II. DISCUSSION

A. Legal Standards

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In making such a determination, the Court must view the facts and justifiable inferences to be drawn therefrom in the light most favorable to the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). Once a motion for summary judgment is properly made and supported, the opposing party "must come forward with 'specific facts showing that there is a *genuine issue for trial*.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986) (quoting Fed. R. Civ. P. 56(e)). Material facts are those that may affect the outcome of the case, and a dispute about a material fact is genuine if there is sufficient evidence for a reasonable jury to return a verdict **[*8]** for the non-moving party. *Anderson*, 477 U.S. at 248-49. Conclusory, non-specific statements in affidavits are not sufficient, and "missing facts" will not be "presumed." *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888-89, 110 S. Ct. 3177, 111 L. Ed. 2d 695 (1990). Ultimately, summary judgment is appropriate against a party who "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

B. Defendant's *Daubert* Motion to Exclude Dr. Tobias Dewhurst's Expert Opinions Regarding Risk of Failure

The trial court has the "task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 597, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (1) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (2) the testimony is based on sufficient facts or data; (3) the testimony is the product of reliable principles and methods; and (4) the expert has reliably applied the principles and methods to the facts of the case. Fed. R. Evid. 702.

In *Daubert*, the Supreme Court rejected **[*9]** the rigid "general acceptance" test for the admissibility of scientific evidence. 509 U.S. at 596. The Court reasoned that "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Id.* When determining admissibility, the text is "a flexible one," with a focus on principles and methodology. *Id.* at 595. Rule 702 is generally construed liberally. *United States v. Hankey*, 203 F.3d 1160, 1168 (9th Cir. 2000). And in determining the admissibility of expert testimony, "there is less danger that a trial court will be 'unduly impressed by the expert's testimony or opinion' in a bench trial." *FTC v. BurnLounge, Inc.*, 753 F.3d 878, 888 (9th Cir. 2014).

Dr. Tobias Dewhurst is a marine engineering expert retained by Plaintiff to evaluate the safety of Defendant's net pens. (Dkt. No. 83-1 at 6.) To establish predicted environmental conditions at the net pens, Dewhurst used an international standard, the Norwegian Aquaculture Standard 9415 ("NS9415"), to analyze data on local environmental conditions as measured by TerraSond, a company Defendant has retained. (*Id.* at 21-22.) Dewhurst used these predicted conditions to calculate the loading forces exerted on the net pets. (*Id.* at 27-28.) Dewhurst then compared the net pen manufacturer **[*10]** specifications with the predicted environmental conditions for each site. (Dkt. No. 79-3 at 11-12.) Defendant argues that the Court should exclude from trial Dewhurst's opinion that each of Defendant's current net pen facilities are "at risk of failure." (Dkt. No. 82.) Defendant offers three reasons to exclude Dewhurst's testimony as unreliable under Rule 702. (*See id.*)

First, Defendant argues that Dewhurst should have performed analytical modeling to quantify the risk of failure. (*Id.* at 10-12.) This criticism is not an attack on the reliability of the expert's methodology, but instead an argument as to how to weigh the opinion. Thus, it is not a ground to exclude the testimony under *Daubert*. *See* 509 U.S. at 595-96. Defendant cites an out-of-circuit case in which the district court exercised its discretion to exclude an opinion in which an expert offered an opinion on the degree of risk posed by contamination. (*See* Dkt. No. 82 at 13.) But that court concluded the expert opinion lacked a sufficient basis in facts or data under Rule 702, not that the expert's methodology was unreliable. *See Lewis v. FMC Corp.*, 786 F. Supp. 2d 690, 702-03 (W.D.N.Y. 2011) (noting that the expert conceded further investigation was required to determine the extent of the contamination).

Second, Defendant contends **[*11]** that Dewhurst's opinion should be excluded because he equates the net pen manufacturer specifications with the net pen's safe operating limits. Defendant argues that manufacturer specifications are too conservative a basis for determining whether the net pen operations are safe, arguing that a non-compliant net pen could still be shown to be safe based on an engineer's analysis. (Dkt. Nos. 82 at 13-14, 104 at 3-7.) But it is hard to see how Defendant could seriously contend that a manufacturer's product specifications are not at least relevant to the safe operations of a product. Indeed, Defendant's own expert conducted a similar analysis of predicted environmental conditions compared to conditions allowed by the manufacturer. (Dkt. No. 83-1 at 22.) Thus, Defendant's assertion that a non-compliant net pen *might* still be safe likewise goes to the weight, not reliability, of Dewhurst's testimony. *Daubert*. *See* 509 U.S. at 595-96.

Third, Defendant argues that Dewhurst's opinion should be excluded because he does not quantify the degree of risk of failure for each net pen site and has not differentiated as to whether there is a low or high risk of failure for each site. (Dkt. No. 82 at 14-15.) Once again, **[*12]** this is an attack on weight, not reliability, of the expert opinion. *Daubert*. *See* 509 U.S. at 595-96.

Thus, Defendant has not raised any serious challenge to the reliability of the principles or methodology supporting Dewhurst's expert opinion. *See* Fed. R. Evid. 702. Defendant remains free to challenge the expert opinion through "[v]igorous cross-examination" and "presentation of contrary evidence." *See Daubert*, 509 U.S. at 596. Therefore, Defendant's motion to exclude Dewhurst's risk of failure testimony is DENIED on these grounds.

C. Plaintiff's Motion for Partial Summary Judgment

1. Plaintiff's Request to Strike

In a summary judgment ruling, a trial court may consider only evidence which could be admissible at trial. *See* Fed. R. Civ. P. 56(c); *Nilsson v. City of Mesa*, 503 F.3d 947, 952 n.2 (9th Cir. 2007). Plaintiff requests that the Court strike several items of evidence that Defendant has submitted in opposition to Plaintiff's motion for partial summary judgment. (*See* Dkt. No. 95 at 5-7.) The Court considers each request in turn.

a. *Declarations of Stephen Weatherford and Bill French*

Federal Rule of Civil Procedure 26(a) requires that parties disclose the names of "each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses." Fed. R. Civ. P. 26(a)(1)(A)(i). A party must supplement **[*13]** its disclosure "in a timely manner if the party learns that . . . the disclosure . . . is incomplete or incorrect, and if the additional or corrective information has not otherwise been made know to the other parties during the discovery process or in writing." Fed. R. Civ. P 26(e)(1)(A). Where a party fails to disclose its intent to rely on a witness either without substantial justification or where the nondisclosure was not harmless, Rule 37(c)(1) provides that the party is "not allowed to use that information or witness" at trial. Fed. R. Civ. P. 37(c)(1); *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001).

In opposition to Plaintiff's motion for partial summary judgment, Defendant submitted the declarations of Stephen Weatherford and Bill French. (Dkt. Nos. 90, 91.) Their declarations primarily concern the inspections Defendant performed of anchoring components. (*See id.*) Defendant did not previously disclose its intent to rely on these witnesses to Plaintiff. (*See* Dkt. No. 95-1 at 4-7.) Weatherford and French are Defendant's employees, and it appears there is no justification for failing to timely identify these witnesses. This omission is not harmless because Plaintiff has repeatedly sought discovery of information on Defendant's inspections of anchoring systems. Because the failure to disclose **[*14]** is neither substantially justified nor harmless, Defendants may not introduce these witnesses. *See* Fed. R. Civ. P. 37(c)(1). *Yeti by Molly, Ltd.*, 259 F.3d at 1106. Therefore, the Court GRANTS Plaintiff's request to strike the declarations of Stephen Weatherford and Bill French on this ground.

b. *Sham affidavit rule*

Under the "sham affidavit rule," a party cannot create an issue of fact with an affidavit contradicting prior statements that the party made under oath. *Yeager v. Bowlin*, 693 F.3d 1076, 1079-80 (9th Cir. 2012); *see Miller v. Glenn Miller Prods., Inc.*, 454 F.3d 975, 980 (9th Cir. 2006). The rule applies to "clear and unambiguous" contradictions that cannot be resolved with "a reasonable explanation." *Yeager*, 693 F.3d at 1080-81 (citing *Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 806-07, 119 S. Ct. 1597, 143 L. Ed. 2d 966 (1999)). However, the rule "should be applied with caution because it is in tension with the principle that the court is not to make credibility determinations when granting or denying summary judgment." *Id.* at 1080. "[T]he non-moving party is not precluded from elaborating upon, explaining or clarifying prior testimony elicited by opposing counsel on deposition; minor inconsistencies that result from an honest discrepancy, a mistake, or newly discovered evidence afford no basis for excluding an opposition affidavit. *Messick v. Horizon Indus. Inc.*, 62 F.3d 1227, 1231 (9th Cir. 1995).

Plaintiff requests to strike under the sham affidavit rule portions of declarations by James Parsons and Randy Hodgin that assert Defendant conducted mooring **[*15]** inspections for which records do not exist. (Dkt. No. 95 at 5.) Defendant designated Parsons as its representative for a 30(b)(6) deposition on the topics of Defendant's inspections of the net pen anchoring components, including how the inspections were documented. (*See* Dkt. No. 46-1 at 11, 21, 70.) At his deposition, Parsons stated that he was prepared to testify on these topics. (*See, e.g.*, Dkt. 46-1 at 70.) Parsons repeatedly testified that the information Plaintiff sought is contained in the records.[2] (Dkt. No. 46-1 at 156-59, 178-79.) For

example, in response to Plaintiff's inquiry as to the names of the divers who conducted mooring inspections of Cypress 1 in 2016, Parsons stated, "[i]t would have been any member of the dive team." (*Id.* at 156-57.) And when asked for the dates of when those inspections occurred, Parsons stated, "[t]hey would be available in the dive logs and daily records." (Dkt. No. 46-1 at 156-57.)

In its opposition to Plaintiff's motion to compel a second 30(b)(6) deposition, Defendant represented to the Court that, with respect to "specific details regarding the names, dates, and locations of routinely conducted mooring inspections. . . . [a]ll of the information sought **[*16]** by Plaintiff was contained in the tens of thousands of pages of business records produced to [Plaintiff] before deposition, and all of the information could have been obtained by [Plaintiff] simply by reviewing those documents."[3] (Dkt. No. 49 at 2.) Defendant stated that the records of "which [] employee conducted which inspection on which day at which site—were provided to Plaintiff many times in a variety of ways." (*Id.* at 3.)

The Court allowed Plaintiff to depose Defendant for one additional day. (Dkt. No. 66 at 6.) At that deposition, Parsons testified that it was likely that not all inspections were reflected in the records, (Dkt. No. 79-1 at 215), that just "[b]ecause the records may not exist doesn't mean that it wasn't done," (*id.* at 217), that the daily logs and dive logs are incomplete for Cypress, (*id.* at 220), that "we have good records that [inspections] were occurring at all of the other sites," (*id.* at 220), and that additional information could be obtained from current and former employees, (*e.g.*, *id.* at 132, 258). Thus, Defendant has changed its answer about its practice of recording mooring system inspections: while Defendant initially maintained that all such information was in its records, Defendant now maintains that **[*17]** not all inspections were logged in the records, and further information can be obtained from its employees.

Plaintiff argues that Defendant's change in position amounts to a clear contradiction of its own sworn testimony that *all* of the information on mooring inspections is contained in the records. (Dkt. 95 at 5-6.) Defendant's misleading initial testimony frustrated Plaintiff's ability to develop testimony on the topic of mooring systems inspections. (Dkt. No. 66 at 5-6.) Defendant has not attempted to reconcile the difference in its initial position by explaining the discrepancy as an honest mistake or caused by newly discovered evidence.[4] (*See* Dkt. No. 87 at 19.) But Defendant's new position is arguably an elaboration or clarification of Defendant's prior evasive testimony. *See Messick*, 62 F.3d at 1231. Especially given the Ninth's Circuit caution to avoid credibility determinations at summary judgment, Defendant's discrepancy is not such a clear and unambiguous contradiction as to require striking Parsons's and Hodgin's declarations under the sham affidavit rule. *See Yeager*, 693 F.3d at 1080-81. Therefore, the Court DENIES Plaintiff's request to strike Parsons's and Hodgin's declarations.

c. *Parsons declaration and Defendant's **[*18]** interrogatory responses*

Plaintiff requests that the Court strike portions of the Parsons declaration that Plaintiff asserts lacks foundation and are based on hearsay. (Dkt. No. 95 at 6.) Plaintiff also requests the Court strike Defendant's interrogatory responses attached to the declaration of Douglas Steding. (*See id.* at 7.) The Court recognizes that assertions in conclusory, self-serving affidavits are insufficient, standing alone, to create a genuine issue of material fact. *Nilsson*, 503 F.3d at 952 n.2.

d. *Mott MacDonald Report*

Plaintiff requests that the Court strike the Mott MacDonald reports attached to James Parsons's declaration. (Dkt. No. 95 at 6.) Plaintiff argues that these unsworn reports constitute inadmissible hearsay and that Parsons is not competent to testify as to the expert opinions the reports contain. (*Id.*) Plaintiff does not dispute the authenticity of these reports that Mott MacDonald prepared for DNR. (*See id.*) Indeed, Plaintiff appears to have submitted at least two of the same reports in support of its motions. (*Compare* Dkt. No. 79-2 at 81, 87, *with* Dkt. No. 94 at 25, 32.) Given the likelihood that the material in the reports could ultimately "be presented in a form that would be admissible in **[*19]** evidence" at trial, the Court declines to strike them. *See* Fed. R. Civ. P. 56(c)(2).

2. Implementation of Technology to Minimize Fish Escapement

Condition S7.1 of the permits requires that Defendant identify and implement technology that will

minimize fish escapements. (Dkt. No. 29-2 at 12.) In its enforcement of NPDES permits, Ecology incorporates Washington's "AKART" standard, which requires "all known, available, and reasonable methods of treatment" to minimize water pollution. *See* Wash. Admin. Code § 173-220-130(1)(a); *see also Snohomish County v. Pollution Control Hearings Bd.*, 187 Wn.2d 346, 386 P.3d 1064, 1067 (Wash. 2016).

a. *Pre-suit notice of violation of Condition S7.1*

For district courts to have jurisdiction over CWA citizen suits, a plaintiff must provide notice to the alleged violator that contains "sufficient information to permit the recipient to identify the specific standard, limitation, or order alleged to have been violated," and "the activity alleged to constitute a violation." 33 U.S.C. § 1365(b); 40 C.F.R. § 135.3(a). "The key language in the notice regulation is the phrase 'sufficient information to permit the recipient to identify' the alleged violations and bring itself into compliance." *Waterkeepers N. California v. AG Indus. Mfg., Inc.*, 375 F.3d 913, 916 (9th Cir. 2004) (citing *Cmty. Ass'n for Restoration of the Env't v. Henry Bosma Dairy*, 305 F.3d 943, 951 (9th Cir. 2002)).

Defendant contends that Plaintiff failed to provide notice regarding these claims because its notice letter did not cite NS9415 or specifically allege Plaintiff's **[*20]** contention that Defendant needs to conduct further engineering analyses of the cages. (Dkt. No. 87 at 17.) Plaintiff's notice letter specifically lists Condition S7.1 and contains the language at issue for this claim. (Dkt. No. 1 at 25-26.) The letter alleged that Defendant violated permit requirements "at all eight of its Puget Sound net pen facilities by failing to identify and implement technology that will minimize fish escapements." (*Id.*) Thus, Defendant could have reasonably identified Plaintiff's claims that Defendant failed to implement technology to minimize fish escapes. Therefore, the Court FINDS that Plaintiff's notice letter provided reasonably specific notice to allow Defendant to identify the alleged violations under Condition S7.1.

b. *Technology necessary to evaluate suitability of salmon farms for their locations*

Plaintiff argues that the Washington's AKART standard for technology requires Defendant to reevaluate whether its salmon farm systems and configurations are suitable for the local environmental conditions at each site. (Dkt. No. 79 at 11-13.) Plaintiff relies on Dewhurst's opinion stating that since 2006, aquaculture standards including NS9415 have been available **[*21]** for conducting a current analysis to determine whether Defendant's net pen systems were suitable for those locations. (*Id.* at 12.) Plaintiff argues that following promulgation of the NS9415 standard, Defendant should have studied its equipment then in use and subsequently installed to determine whether it could withstand the local conditions. (*Id.* at 11-13.) Plaintiff argues Defendant's failure to conduct theses analyses violated Condition S7.1. (*Id.*)

Defendant argues that it has complied with Condition S7.1 by providing Release Prevention Plans that appropriately describe new cage systems as technology that has been or would be implemented. (Dkt. No. 87 at 12.) Defendant argues that it is standard industry practice to make suitability determinations at the time of installation or when making substantial changes to the facility, and thus the standard that Dewhurst cites, NS9415, should not come into play. (Dkt. No. 87 at 13.) It argues that AKART standards for technology are fully addressed during permit issuance. (*Id.* at 14.) Defendant contends that the relevant AKART standard is set forth in a different section of the Washington Administrative Code, § 173-221A. (*Id.* at 15.) Finally, Defendant contends that it would not be reasonable under the AKART standard to **[*22]** require replacement of the net pens prior to the end of their useful life. (*Id.*)

Thus, material issues of fact remain as whether Condition S7.1 requires Defendant to undertake a suitability analysis of its net pen systems. Therefore, Plaintiff's motion for summary judgment is DENIED on this ground.

c. *Improvement to net pen structures*

In Defendant's Release Prevention Plans, Defendant has identified improved cage systems to be implemented in the future. (Dkt. No. 29-2 at 136.) Plaintiff argues that these plans required Defendant

implemented in the future. (Dkt. No. 79-2 at 130.) Plaintiff argues that these plans required Defendant to undertake replacement of existing net pens. (Dkt. No. 79 at 13-14.) Plaintiff further contends that the current net pens are at risk of failure because they do not comply with manufacturer recommendations and because there has not been adequate independent analysis of the suitability of the systems. (Dkt.

No. 79 at 14.). Plaintiff relies on Dewhurst's expert opinions that conclude the systems are at risk of failure. (*Id.*)

Defendant does not contest that its Release Prevention Plans required it to implement new cage systems. (*See* Dkt. No. 87 at 15-17.) However, Defendant argues that its net pens are safe and are not at risk of failure. (*Id.*) Defendant relies **[*23]** on Dean Steinke's expert testimony that the manufacturer ratings are guidelines but do not indicate the true limits of the net pens. (*Id.* at 16-17.) Steinke asserts that the ratings lack detail and cannot be compared to NS9415 values. (Dkt. No. 92 at 4-8.) Steinke also argues that Dewhurst's calculations of drag force are flawed because they fail to account for net deflection that reduces projected surface area. (*Id.*)

Thus, material issues of fact remain as whether Defendant's net pen structures violate Condition S7.1. Therefore, Plaintiff's motion for summary judgment is DENIED on this ground.

3. Annual Inspection of Anchoring Components

Condition S6.F of Defendant's NPDES permit requires the preparation and implementation of a Pollution Prevention Plan that provides for at least annual inspections of the anchoring components above and below the water line. (*See* Dkt. 44 at 19-20.) Plaintiff argues that Defendant has violated this requirement by failing to annually inspect all underwater mooring components, and Plaintiff further argues that Defendant's violations of this requirement are ongoing because they have recurred since the complaint was filed. (*See* Dkt. No. 79 at 17.)

a. *Cypress Sites 1 and **[*24]** 3 (2013-2016)*

Altogether, Defendant's Cypress sites had a total of 71 anchor lines: Cypress 1 has 25 lines, Cypress 2 had 19 lines, and Cypress 3 has 27 anchoring lines. (Dkt. No. 46-1 at 147, 163, 173.) Defendant's records indicate that in 2013, one dive may have inspected two or three anchor lines and seven additional dives might have involved work on up to 14 anchor lines. (*Id.* at 251-53.) In 2014, one dive may have involved an inspection of a Cypress anchor line, and four dives may have involved work on up to eight Cypress anchor lines. (*Id.* at 236-39.) In 2015, Defendant performed work on two anchor chains at Cypress 2 and three anchor chains at Cypress 3, and some surface inspections occurred. (*Id.* at 223-25, 232.) In 2016, records show Defendant may have inspected the uppermost chain components plus one anchor chain. (Dkt. No. 79-1 at 193, 198-200, 211-13.) Thus, Plaintiff has made a showing that Defendant made spotty inspections of its mooring systems and thus failed to complete the required annual inspections of the 25 mooring lines at Cypress 1 and 27 mooring lines at Cypress 3 in 2013, 2014, 2015, and 2016.

In opposition to Plaintiff's motion, Defendant does not point to a single additional record to demonstrate that **[*25]** it conducted a below-water inspection of these mooring systems. (*See* Dkt. No. 87 at 20-21.) Defendant relies instead on its responses to Interrogatory Topic No. 5 and the Rule 30(b)(6) deposition of Defendant in which Parsons testified. (*Id.* at 18-20.) In the responses and deposition, Defendant stated that it conducted the required annual inspections. (*See* Dkt. Nos. 93 at 24-26, 94 at 301-320.) But self-serving declarations not based upon personal knowledge are insufficient to demonstrate a factual dispute. *Nilsson*, 503 F.3d at 952 n.2.

Parsons testified that he was prepared to testify as to record-keeping practices and that all inspections were in the records. (Dkt. No. 46-1 at 70, 156-59, 178-78.) Parsons later testified at his second deposition that the absence of an inspection record does not necessarily mean that an inspection did not occur. (Dkt. No. 79-1 at 217.) Defendant has admitted that the records collected in response to Interrogatory No. 5 "mostly only tangentially contained evidence of anchor inspections." (Dkt. No. 87 at 20.) Defendant now argues that "the absence of a non-mandatory record does not entitle [Plaintiff] to an inference that the inspections did not occur." (*Id.* at 17.)

On a summary judgment motion, credibility determinations **[*26]** are not appropriate, and a court must draw all justifiable inferences in the light most favorable to the nonmoving party. *See Liberty Lobby*, 477 U.S. at 255. A reasonable trier of fact could infer that the absence of non-mandatory anchor inspection records does not prove that Defendant failed to make the anchor inspections. Thus, material issues of

fact remain as to whether anchor inspections occurred at Cypress 1 and 3 between 2013 and 2016. Therefore, Plaintiff's motion for summary judgment is DENIED on this ground.

b. *Anchoring components deeper than 100 feet*

Five of Defendant's sites have mooring components deeper than 100 feet: Orchard Rocks, Clam Bay, Port Angeles, and Cypress 1 and 3. (Dkt. No. 46-1 at 68, 110-11, 136, 147, 173.) The Permits unambiguously require inspections of the entire mooring components, not only those above 100 feet. (Dkt. 29-2 at 11.) Defendant's employees may not dive deeper than 100 feet. (*See* Dkt. No. 25-1 at 63.) Until 2017, Defendant conducted visual inspections only of the shallower components of these systems, but Defendant contends that it "inspected" the deeper components by examining the condition of the shallower components and by checking line tension or pulling up anchors. **[*27]** (*See* Dkt No. 46-1 at 61, 87 at 22, 89 at 2-3.) Ecology concluded that this form of examination does not meet permit requirements for "inspection." (Dkt. No. 52-1 at 163-64.)

A court shall interpret an NPDES permit like any other contract. *Nat. Res. Def. Council, Inc. v. County of Los Angeles*, 725 F.3d 1194, 1204-05 (9th Cir. 2013). If the language is plain, the court construes its meaning. *Id.* If the language is ambiguous, the court "may turn to extrinsic evidence to interpret its terms." *Id.* As the agency charged with enforcing NPDES permits, Ecology's interpretation of the ambiguous term "inspection" is entitled to substantial deference. *See Russian River Watershed Prot. Comm. v. City of Santa Rosa*, 142 F.3d 1136, 1141 (9th Cir. 1998) (holding that the district court properly deferred to the agency authorized to enforce NPDES permits); *Nat. Res. Def. Council, Inc.*, 725 F.3d at 1205. Thus, Plaintiff has shown that Defendant violated the permits by not inspecting mooring components deeper than 100 feet at Orchard Rocks, Clam Bay, Port Angeles, and Cypress 1 and 3 in 2012, 2013, 2014, 2015, and 2016. Therefore, Plaintiff's motion for summary judgment is GRANTED on this ground.

c. *Cypress 1 and 3 (2018) and Port Angeles (2017)*

Defendant's Pollution Prevention Plan that went into effect in October 2017 required it to use either a contracted dive service or a remotely operated vehicle to conduct inspections of its moorings **[*28]** below the employee diver depth limit of 100 feet. (Dkt. No. 29-2 at 11, 131.) The plan further required Defendant to document its visual inspection of each anchoring line and identify maintenance concerns. (*Id.* at 131, 134.) The permits require Defendant to operate its facilities in accordance with the plan. (*E.g.*, *id.* at 11.)

As part of DNR's investigation of Defendant following the collapse of Cypress 2, DNR hired Mott MacDonald and its subcontractor Collins Engineers. (Dkt. No. 79-2 at 631-34.) Mott MacDonald evaluated Cypress 1 and 3 in 2018 and Port Angeles in 2017. Defendant relies on the inspections that Mott MacDonald performed to fulfill its anchor inspection requirements for Cypress 1 and 3 in 2018 and Port Angeles in 2017. (Dkt. Nos. 46-1 at 333-34, 89 at 24-25.)

But the report was prepared for use by DNR and other state agencies; it was "limited in scope" and "[d]etailed inspection and physical material sampling were not performed," and the report did not make repair or maintenance recommendations. (Dkt. No. 79-2 at 632.) Defendant reviewed the report's conclusion but did not undertake additional steps to determine whether maintenance work was needed. (*See* Dkt. No. 79-2 at 147-53.) Parsons testified **[*29]** that Defendant's employees did inspect the mooring systems at Port Angeles in 2017, but he admits that the mooring lines and anchors were not inspected below 100 feet. (*See* Dkt. No. 79-1 at 185-90.) Thus, Plaintiff has demonstrated that Defendant violated the permits by failing to inspect mooring components at Cypress 1 and 3 in 2018 and at Port Angeles in 2017 in the manner required by the permits and the October 2017 Pollution Prevention Plan. Therefore, Plaintiff's motion for summary judgment is GRANTED on this ground.

d. *Completion of inspection forms (2017-2018)*

Defendant's October 2017 Pollution Prevention Plan also required it to complete an Annual Below Surface Visual Inspection form "to record the condition of the mooring components and identify specific

Visual Inspection form" to record the condition of the mooring components and identify specific maintenance concerns." (Dkt. 29-2 at 131-32, 134.) The form requires a detailed assessment of the mooring system, including an assessment of (1) each component of each mooring line, (2) whether routine or immediate repairs are needed, (3) the dates when repairs were identified and completed, (4) a description of the repair, (5) the name of the person completing the repair, (6) the name of the person completing the inspection **[*30]** form, and (6) the date the form was completed. (*Id.* at 134.) As mentioned above, the permits require Defendant to operate in accordance with the plan. (*E.g.*, Dkt. 29-2 at 11.)

It is undisputed that Defendant completed the form for its Hope Island site in 2017 and 2018. (*See* Dkt. Nos. 79 at 25, 79-1 at 142-45, 274-77.) It is likewise undisputed that Defendant failed to complete the form for the remainder of its sites. (*See generally* Dkt. Nos. 79, 87, 95.) 5 Under the Clean Water Act, Defendant is strictly liable for failure to use the required form. *See Sierra Club v. Union Oil of Cal.*, 813 F.2d 1480, 1490-91 (9th Cir. 1987). Thus, Plaintiff has demonstrated that Defendant violated the permits by failing to complete the required Annual Below Surface Visual Inspection forms for Cypress 1 and 3, Port Angeles, Orchard Rocks, Fort Ward, and Clam Bay in 2017 and 2018. Therefore, Plaintiff's motion for summary judgment is GRANTED on this ground.

4. Reporting of Fish Escapement and Tracking Fish Numbers

The permits require Defendant provide in its Release Prevention Plan "[p]rocedures for routinely tracking the number of fish within the pens, the number of fish lost due to predation and mortality, and the number of fish lost due to escapement." (Dkt. No. 29-2 at 12.) The permits **[*31]** further require Defendant to submit an Annual Fish Release Report by January 30 of each year, which "must include, to the extent possible, all fish released or escaped to state waters, including all Significant Fish Releases (see S8)." (*Id.* at 12.) Condition S8 defines a release as "significant" when it involves "1,500 or more fish whose average weight exceeds 1 kilogram (kg) or 3,000 or more fish whose average weight is equal to or less than 1 kg." (*Id.* at 13.) Such releases must be reported within 24 hours. (*Id.*) Thus, the permits require immediate reporting of significant fish escapes and annual reporting of all fish escapes. (*Id.* at 12-13.)

Defendant tracks its fish using a software program called FishTalk. (Dkt. No. 79-1 at 428-29.) First, Defendant uses electronic counters to count the number of fish it places into trucks for transport to its pens. (*Id.* at 296-97, 431.) Then Defendant assumes (without verification) a loss during transport of five percent and enters this revised number into FishTalk. (*Id.* at 297-98, 315.) While fish are rearing in the pens, there may be further losses through mortality or removal for other reasons; Defendant states that these are entered into FishTalk. (*Id.* at 300-01, 429.) Finally, Defendant counts the fish with electronic counters **[*32]** again when they are harvested. (*Id.* at 306-07.) Defendant states that its electronic counters are accurate to plus or minus two percent. (*Id.* at 297, 307.)

Defendant has represented in its Annual Fish Release Reports that it has lost no fish through escapement. (Dkt. No. 79-2 at 584, 589, 593, 597, 601, 604, 609.) From 2012 to 2015, Defendant reported that there were no "significant" fish escapes. (*Id.* at 585, 589, 593, 597.) In the subsequent years, Defendant reported that there were no fish escapes. (*Id.* 601, 604, 609.) However, Defendant's data shows that there have been downward variations every year between the number of fish it puts in its pens and the number of fish it removes and harvests. (*See id.* at 615-28.) The parties disagree as to whether this data shows that Defendant failed to report fish escapes or whether these discrepancies are within an acceptable range of error.

Plaintiff argues that Defendant's fish inventory data should be evaluated based on variations within each individual pen. (Dkt. No. 79 at 27-29, 95 at 16.) This analysis shows that there were negative deviations of more than four percent and up to 17 percent in numerous pens (called "Units" in the data), including Unit 111 at Cypress 1 in January 2016; Unit F12 at Fort Ward in May 2016, **[*33]** Unit R08 at Orchard Rocks in June 2016, Unit 10 at Hope Island in August 2016, Unit 06 at Port Angeles in December 2016, Units 121 and 124 at Cypress 1 in January 2018, and Units 315 and 324 at Cypress 3 in January 2018. (*See* Dkt. No. 79-2 at 619-25.) Plaintiff contends that because these deviations in 2016 and 2018 were too large to explain by a four percent margin of error, Defendant violated the requirement to report fish escapements. (Dkt. No. 79 at 29.)

In contrast, Defendant argues that its fish inventory data should be evaluated based on variations within each facility, not each pen. (Dkt. Nos. 26-27.) In support of this argument, Defendant points to its expert report by Cormac O'Sullivan. (*Id.*) O'Sullivan states that it is standard industry practice to "look at the entire farm, not the individual pens." (Dkt. No. 88 at 6.) O'Sullivan calculates that, across all eight farms, there was an average site variance of - 2.65 percent, which is below the Best Aquaculture Practices Standards ("BAP") of three percent for accuracy of inventory tracking. (*Id.*) O'Sullivan therefore concludes that there is "no indication" of either "large escape events from *any* of the sites or leakage from **[*34]** the sites." (*Id.* at 5-6.) Additionally, O'Sullivan applies the BAP standard to conclude that

Defendant's fish tracking practices generally comply with best practices for accurate tracking. (Dkt. No. 88 at 4.)

The language of the NPDES permit is plain that Defendant must report all fish escapes "to the extent possible." It was possible for Defendant to identify in its data that there were downward variations that exceeded three percent per pen in 2016 and 2018. (*See* Dkt. No. 79-2 at 615-28.) Extrinsic evidence of industry standards does not alter the plain meaning of the permit. *Nat. Res. Def. Council, Inc.*, 725 F.3d at 1204-05. Because the permits also require accurate fish tracking, Defendant cannot avoid this requirement by arguing that human error explains the variation. A failure to accurately track is likewise a violation of the permits. (Dkt. No. 29-2 at 12.) Furthermore, in the years 2012-2015, Defendant reported only whether there were "significant releases." (*See* Dkt. No. 79-1 at 585, 589, 593, 597.) This violates the Permits' requirement to report "all fish releases or escaped," and not only "significant" releases. (*E.g.*, Dkt. No. 29-2 at 12.) Thus, Plaintiff has demonstrated that in 2012-2015, 2016 and 2018, Defendant violated the **[*35]** permit requirement to track the number of fish in its net pens and report all fish escapements. Therefore, Plaintiff's motion for summary judgment is GRANTED on this ground.

D. Defendant's Motion for Partial Summary Judgment

Defendant moves for partial summary judgment on Plaintiff's claims relating to Defendant's Cypress 2 facility, arguing that the S1 claims are barred by *res judicata* and all the Cypress 2 claims are moot. (*See* Dkt. No. 84 at 5.)

1. *Res Judicata and Plaintiff's S1 Claims*

"Congress is understood to legislate against a background of common-law adjudicatory principles." *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108, 111 S. Ct. 2166, 115 L. Ed. 2d 96 (1991). The common-law principle of *res judicata*, also known as claim preclusion, is generally presumed to apply to administrative decisions. *See Littlejohn v. United States*, 321 F.3d 915, 921-22 (9th Cir. 2003). Courts, however, do not "have free rein to impose rules of preclusion, as a matter of policy, when the interpretation of a statute is at hand." *Astoria*, 501 U.S. at 108. When "a statutory purpose to the contrary is evident," then the statutory claim preclusion bar applies instead of common law *res judicata*. *See id.*; *Littlejohn*, 321 F.3d at 921-22.

In its 1987 amendments to the Clean Water Act, Congress added a provision that specifies when claims for civil penalties are precluded by state or federal enforcement actions. **[*36]** *See* 33 U.S.C. § 1319(g)(6)(A). Claims for civil penalties are barred for any violation

> (i) with respect to which the Administrator or the Secretary has commenced and is diligently prosecuting an action under this subsection,
>
> (ii) with respect to which a State has commenced and is diligently prosecuting an action under a State law comparable to this subsection, or
>
> (iii) for which the Administrator, the Secretary, or the State has issued a final order not subject to further judicial review and the violator has paid a penalty assessed under this subsection, or such comparable State law

See 33 U.S.C. § 1319(g)(6)(A).

At the same time, Congress created an exception to the statutory bar for citizen suits in which the plaintiffs, prior to the enforcement action, either (1) filed suit or (2) provided notice to the Environmental Protection Agency or to the state with respect to the alleged violation. *See* 33 U.S.C. § 1319(g)(6)(B); *Black Warrior Riverkeeper, Inc. v. Cherokee Mining, LLC*, 548 F.3d 986, 991 (11th Cir. 2008) (holding that the prior-filed citizen suit exception to the civil penalties bar applies in both state and federal enforcement actions); *Thiebaut v. Colo. Springs Utils.*, 2007 U.S. Dist. LEXIS 63963, 2007 WL 2491853 at *5 (D. Colo. Aug. 29, 2007) (concluding that the prior-commenced exception limits the applicability of *res judicata*), *aff'd*, 455 F. App'x 795 (10th Cir. 2011). Congress's intent to create an exception to the statutory bar is evident in § 1319(g)(6) of the Clean Water Act; for that **[*37]** reason, there is no "legislative default" to common-law claim preclusion principles. *See Astoria*, 501 U.S. at 110. By creating this exception, "Congress reiterated its commitment to citizen suits, which a Senate Report described as 'a proven enforcement tool.'" *Black Warrior Riverkeeper, Inc.*, 548 F.3d at 988 (quoting the legislative

a proven enforcement tool." *Black Warrior Riverkeeper, Inc.*, 548 F.3d at 988 (quoting the legislative record). The Clean Water Act thus alters the ordinary *res judicata* rule to allow a prior-commenced citizen suit to pursue a claim for civil penalties, even after a federal or state enforcement action related to the same violation has been resolved. *See id.*

This prior-commenced exception for citizen suits applies here.[6] On August 24, 2017, Plaintiff notified the EPA and Ecology of its intent to sue Defendant, and Plaintiff provided a supplemental notice letter on September 6, 2017. (Dkt. No. 1 at 22, 30.) On November 13, 2017, Plaintiff filed its complaint against Defendant asserting several CWA violations related to the Cypress 2 collapse and violations at Defendant's seven other Puget Sound net-pen facilities. (*See* Dkt. No. 1.) Ecology issued its notice of penalty on January 30, 2018. (Dkt. No. 52-1 at 160-66.) On April 24, 2019, Defendant and Ecology entered into a consent decree regarding the Cypress 2 collapse, and on April **[*38]** 25, 2019, the Pollution Control Board, pursuant to the consent decree, dismissed Defendant's appeal of Ecology's administrative penalty. (*See* Dkt. No. 74-1 at 4-11, 18.) Because Plaintiff commenced its action before Ecology, the entry of the consent decree between Defendant and Ecology cannot preclude its enforcement action. *See* 33 U.S.C. § 1319(g)(6)(A)-(B).

Defendant argues that, notwithstanding § 1319(g)(6), the common-law principle of *res judicata* precludes Plaintiff's S1 claims because there is a final order in Ecology's state enforcement action on the identical CWA violations. (*See* Dkt. No. 103 at 2-4.) Defendant relies on a pre-*Astoria* case in which the Ninth Circuit concluded that the 1972 amendments to the Clean Water Act did not modify "the normal rules of preclusion." (Dkt. No. 103 at 4 (citing *United States v. ITT Rayonier, Inc.*, 627 F.2d 996 (9th Cir. 1980).) But *IIT Rayonier* did not interpret Congress's 1984 amendments to the Clean Water Act, nor did it apply the principles that the Supreme Court announced in *Astoria*. *See ITT Rayonier, Inc.*, 627 F.2d at 1000-02. Defendant also argues that a Ninth Circuit case involving a class action of sport fishers alleging state law violations demonstrates that § 1319(g)(6) did not alter normal claim preclusion rules. (*See* Dkt. No. 103 at 11 (citing *Alaska Sport Fishing Ass'n v. Exxon Corp.*, 34 F.3d 769 (9th Cir. 1994).) But the parties in that case did **[*39]** not argue, and the court of appeals did not consider, that § 1319(g)(6) created a specific statutory preclusion rule for citizen suits. *See Alaska Sport Fishing Ass'n.*, 34 F.3d at 773-74.

Defendant's interpretation would render meaningless the prior-commenced citizen suit exception. "If the statutory language is plain, [a court] must enforce it according to its terms." *See King v. Burwell*, 135 S. Ct. 2480, 2489, 192 L. Ed. 2d 483 (2015). Accordingly, the Court begins and ends its analysis with the plain language of the statute, which clearly permits prior-commenced citizen suits to proceed notwithstanding a final order in a state-initiated administrative enforcement proceeding. *See Burwell*, 135 S. Ct. at 2489. Thus, Plaintiff's S1 claims are not barred by *res judicata*, and Defendant's motion for partial summary judgment is DENIED on this ground.

2. Mootness

To establish mootness, a defendant must show that the district court cannot order any effective relief. *See City of Erie v. Pap's A.M.*, 529 U.S. 277, 287, 120 S. Ct. 1382, 146 L. Ed. 2d 265 (2000); *Sierra Club*, 853 F.2d at 669) ("The burden of proving that the case is moot is on the defendant."). The cessation of illegal conduct following the commencement of a suit "ordinarily does not suffice to moot a case" because civil penalties still serve as a deterrent to future violations. *Friends of the Earth v. Laidlaw*, 528 U.S. 167, 193, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000) (holding that a citizen suit was not moot where the polluting facility at issue had been "permanently closed, **[*40]** dismantled, and put up for sale, and all discharges from the facility had permanently ceased."). "Only when it is 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur' will events following the commencement of a suit moot a claim for civil penalties." *San Francisco BayKeeper, Inc. v. Tosco Corp.*, 309 F.3d 1153, 1160 (9th Cir. 2002) (quoting *Laidlaw*, 528 U.S. at 189). This is because civil penalties under the Clean Water Act serve "to deter future violations and thereby redress the injuries that prompted a citizen suitor to commence litigation." *Laidlaw*, 528 U.S. at 174. The deterrent effect of civil penalties is no less potent when the defendant no longer operates or owns the polluting facility. *See San Francisco BayKeeper*, 309 F.3d at 1160. "Allowing polluters to escape liability for civil penalties for their past violations by selling their polluting assets would undermine the enforcement mechanisms established by the Clean Water Act." *Id.*

Here, Defendant argues that Plaintiff's claim for civil penalties for violations at Cypress 2 should be dismissed as moot. (Dkt. No. 84 at 17.)[7] Cypress 2 was destroyed and is no longer operational. (*See* Dkt. Nos. 29-2 at 210-212, 43 at 3.) Ecology completed its closure monitoring of the site, and Defendant has represented that the Cypress 2 permit has been terminated as **[*41]** of September 28, 2019. (*See* Dkt. No. 86 at 6.) But in its previous order, the Court found that it could still provide Plaintiff effective relief in the form of civil penalties because it was not absolutely clear whether the site could be rebuilt and because Defendant continued to operate its other seven net-pen facilities in Puget Sound under

identical permits. (*See* Dkt. No. 76 at 16.) Now, it seems clear that Cypress 2 is permanently closed, but Defendant continues its operations in Puget Sound. Thus, civil penalties still serve to deter future Clean Water Act violations. *See* *Laidlaw*, 528 U.S. at 193; *San Francisco BayKeeper*, 309 F.3d at 1160. Therefore, Defendant's motion for partial summary judgment in DENIED on this ground.

III. CONCLUSION

For the foregoing reasons, Defendant's motion to exclude expert opinions (Dkt. No. 82) is DENIED. Plaintiff's motion for partial summary judgment (Dkt. No. 79) GRANTED in part and DENIED in part as follows:

1. Plaintiff's request to strike the declarations of Stephen Weatherford and Bill French is GRANTED, and Plaintiff's request to strike Parsons's and Hodgin's declarations is DENIED;

2. Plaintiff's motion for summary judgment its Condition S7.1 claim is DENIED;

3. Plaintiff's motion for summary judgment on its **[*42]** S6.F claim is:

   a. DENIED as to Cypress 1 and 3 between 2013 and 2016,

   b. GRANTED as to inspections of anchoring components deeper than 100 feet at Orchard Rocks, Clam Bay, Port Angeles, and Cypress 1 and 3 in 2012, 2013, 2014, 2015, and 2016. 2012 to 2016;

   c. GRANTED as to Cypress Island Sites 1 and 3 (2018) and Port Angeles (2017); and

   d. GRANTED as to completion of the Annual Below Surface Visual Inspection forms for Cypress Island Sites 1 and 3, Port Angeles, Orchard Rocks, Fort Ward, and Clam Bay in 2017 and 2018.

4. Plaintiff's motion for summary judgment is GRANTED as to its claim that in 2012-2015, 2016 and 2018, Defendant violated the permit requirement to report all fish escapements and track the number of fish in its net pens.

Defendant's motion for partial summary judgment (Dkt. No. 84) is DENIED.

DATED this 25th day of November 2019.

/s/ John C. Coughenour

John C. Coughenour

UNITED STATES DISTRICT JUDGE

Footnotes

1 Although scheduled to expire in 2012, the Cypress 2 permit was administratively extended multiple times. (Dkt. Nos. 42 at 9, 44 at 4.).

2 In its order on Plaintiff's motion to compel, the Court evaluated Parson's responses at length and found them evasive. (*See* Dkt. No. 66 at 3-5.) The Court found this evasiveness, combined with Defendant's last-minute disclosure of over 30,000 documents days before deposition, frustrated Plaintiff's ability to develop testimony on the topic of mooring system inspections. (Dkt. No. 66 at 5-6.)

3 A court has discretion to consider whether a statement of fact contained in a brief may be considered an admission *Am. Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 227 (9th Cir. 1988).

4 Instead, Defendant blames Plaintiff for failing to conduct fact witness depositions based on Defendant's roster of over 200 employees and its response to Interrogatory No. 5. (*See* Dkt. No. 87 at 19.)

5 Defendant observes that the Court has already found that the 2017 Pollution Prevention Plans were deficient, (Dkt. No. 68), and suggests that "if any violation exists here, it is at most a failure to implement a plan that the Court already has determined was insufficient." (Dkt. No. 87.)

6 In a prior order, the Court found that the only Clean Water Act statutory bar to citizen suits that "could conceivably apply" to Ecology's enforcement action is § 1319(g)(6)(A)(iii), which bars citizen suits in which a state agency has issued a final order under the Clean Water Act, or comparable state law, and the violator has paid the penalty assessed. (*See* Dkt. No. 76 at 19.)

7 The Court previously dismissed as moot Plaintiff's claims for injunctive relief at Cypress 2. (Dkt. No. 76 at 15.)