The ***Tulalip Tribes*** *of Washington Present:*

PARTICIPATING IN THE NATIONAL ENVIRONMENTAL POLICY ACT

DEVELOPING A TRIBAL ENVIRONMENTAL POLICY ACT

A Comprehensive Guide For AMERICAN INDIAN and ALASKA NATIVE Communities

Gillian Mittelstaedt, Dean Suagee, and Libby Halpin Nelson

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Gillian Mittelstaedt, Dean Suagee, and Libby Halpin Nelson

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This book is dedicated to Dean B. Suagee. Mr. Suagee is Director of the First Nations Environmental Law Program at Vermont Law School, of Counsel to Hobbs, Straus, Dean & Walker, LLP, and a member of the Cherokee Nation of Oklahoma. Mr. Suagee's scholarly legal work, meticulous research and thoughtful analysis of tribal NEPA matters laid the foundation for this book. On a broader scale, his insights and information help provide tribal governments with the tools they need to build their institutions, strengthen their sovereignty, and protect their cultural heritage.

- GDM

PREFACE

> *"In every deliberation, we must consider the impact of our decision on the next seven generations."*
>
> *Iroquois Confederacy* [i]

Long before the United States Congress adopted the National Environmental Policy Act (NEPA), the native inhabitants of this continent had their own form of environmental impact assessment. Unlike that of the twentieth century, theirs was neither documented nor legislated; rather, it was *lived*. Implicit in tribal decisionmaking was the need to consider the welfare of future generations. As time passed, tribes attempted to convey this message to the influx of European immigrants. Unfortunately, the settlers' desire for economic development, resource use, and expansion was too powerful to be restrained by a belief system foreign to their own.

Several centuries later, members of the United States Congress, responding largely to public opinion, acknowledged the deeply destructive consequences of uncontrolled growth and development. With the subsequent adoption of NEPA, the federal government was introduced to the centuries-old native concept of impact assessment. In the following years, NEPA would profoundly alter the manner in which federal projects and programs were conducted, and many would hail its success. Others, however, especially the tribes, would observe that the statute spawned less a substantive procedure than a hollow process.

Although NEPA does not always produce favorable decisions or champion tribal causes, many tribes are involved with the federal process. Unlike other federal statutes, NEPA is triggered by a broad range of *federal* actions. Given that NEPA casts such a wide net, it is inevitable that NEPA reviews frequently involve tribal lands and resources. Even though the execution of NEPA leaves much to be desired, its very existence presents tribes with opportunities that might

otherwise not exist. It carves one of many needed communication channels in the dynamic and ever-evolving relationship between sovereign tribal governments and agencies of the federal government. The NEPA/TEPA Project was developed with the belief that, through appropriate training and education of all involved, this channel can be widened. In this Guidance Document, we seek to further this widening by providing educational materials for tribes on environmental impact assessment, whether it be a federal, state, or tribal process.

Acknowledgements

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Jerry Pardilla and Maggie Gover, both at the National Tribal Environmental Council (NTEC), helped to make this project a success by providing administrative support and feedback throughout the duration of the project. NTEC's annual tribal conferences provided a much-needed and highly-informative avenue for direct communication with tribes during our research phase. Also during the research phase, we were aided by graduate students and faculty at Harvard's Native American Program. Program Director Lorie Graham provided valuable oversight during the tribal surveys that were conducted by students Brendan Smith and Sara Stokes. Anna Elliott, a graduate student at Western Washington University's Center for Geography and

Environmental Social Sciences, contributed the informative discussion on social impact assessment in Chapter 6.

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[i] As quoted in Rodes and Odell. 1992.

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Introduction

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I.1 Purpose of the Guidance

The purpose of this Guidance is to provide Indian tribes with a solid understanding of the National Environmental Policy Act (NEPA) process and to help restore their sovereign right to participate in and affect the decisions and actions of the federal government. Each year, thousands of federally approved, permitted, or financed land-use actions take place with potentially adverse effects on tribal resources. Urban growth, suburban sprawl, forestry, mining, agriculture, and industrial activities are only a few of the threats to tribal resources. Unchecked, such activities can seriously impair the cultural foundation, political integrity, economic security, health, and safety of tribal lands, resources, and families.

Since its passage in 1969, NEPA has made it largely unthinkable that such activities should proceed without a hard look at their long-term environmental, social, or economic impacts. To this extent, NEPA has become a valuable cornerstone of federal environmental protection efforts. Nevertheless, NEPA has not performed well for American Indian tribes, and development has had disproportionate impacts on and adjacent to tribal lands. Although tribes derive distinct benefits from NEPA, these are often overshadowed by other, less favorable factors.

Perhaps the most significant problem lies in NEPA's design. NEPA was written to serve the needs of federal agencies and the general public. As sovereign governments, American Indian tribes do not fit neatly into either category. In the NEPA process, they have less authority than federal agencies, but more authority (albeit unrecognized) than the general public. Thus the inherent structure of NEPA established an "uneven" playing field, laying the foundation for issues of environmental justice to emerge.

The implementation of NEPA has spawned a host of environmental justice issues over the years. In 1994, the Council on Environmental Quality (CEQ) recognized NEPA's 25th anniversary by conducting a national assessment of NEPA's effectiveness. The tribal component of the study corroborated what tribes themselves had long recognized: that NEPA's implementation was frequently inequitable, and that improvements

were critically needed. The common thread throughout the tribal responses was the absence of government-to-government relations between agencies and tribes. Without this paradigm to guide their interactions, federal agencies implementing NEPA could easily exert too much control over the NEPA process and, by extension, over tribal resources. In turn, tribes lacking the necessary governance capacity could easily have too little control over the NEPA process and its outcomes.

The tribal survey also collected recommendations from tribes about proposed changes in federal agency policy and procedure. Many tribes noted that the NEPA process would be strengthened if some form of NEPA "guidance" or training were offered specifically for tribes. Some expressed a desire to adopt their own, uniquely tribal version of NEPA that would apply to all on-reservation land-use activities. Responding to these recommendations, a consortium of tribal organizations and individuals came together to pursue development of NEPA training. A team was organized, formal objectives were identified, and soon thereafter funding was awarded from the U.S. Environmental Protection Agency's Environmental Justice and Pollution Prevention grant.

Members of the team included the Tulalip Tribes of Washington, the National Tribal Environmental Council (NTEC), the Harvard American Indian Program, and attorney Dean Suagee. Since its inception in 1996, the project has developed the document you are now reading on NEPA, distributed Pollution Prevention resource materials, and developed a model Tribal Environmental Policy Act (TEPA). The Tulalip Tribes, as coordinator and author of the CEQ's 1994 Tribal NEPA survey, coordinated the efforts of tribes, individuals, and organizations with expertise on the subject of NEPA. Tulalip staff gathered information and feedback from as many tribes as possible across the country, including Alaska, to ensure that their efforts reflected the diverse tribal situations and needs. NTEC assisted with project outreach and communication by coordinating project presentations at their conferences and in newsletter articles.

Part II of this Guidance explains how to use tribal sovereignty to establish a comprehensive environmental review process for proposals and projects that would affect the environment of Indian country. For actions proposed by federal agencies, the process established under NEPA has become the basic model for comprehensive environmental review. NEPA requires the responsible federal agency to consider the impacts of their decision-making on the environment and to prepare an

Environmental Impact Statement (EIS) before taking any ''major Federal action significantly affecting the quality of the human environment.''[1]

Many states have established review procedures similar to the federal NEPA process under state laws that are commonly known as "little NEPAs" or "mini-NEPAs." At the same time, many tribes have created their own version of NEPA, implementing a tribal environmental review process that suits their unique governmental needs and circumstances. Many of these tribes recognized that the enactment and implementation of a ''mini-NEPA" could benefit their tribe, as well as the people who live and do business in American Indian and Alaska Native communities.

In Chapters 8-10, we examine issues related to the development and implementation of a tribal mini-NEPA. With more than 500 federally recognized Indian tribes (including Alaska Native villages), one model simply cannot serve the needs of all. Moreover, many tribes already have established some kind of environmental review process. The goal of this discussion is not to create an environmental review process that will suite every tribe, but to consider the viability of using tribal law to establish a NEPA-type review processes. As well, we wish to highlight some key issues that should be considered by tribal officials and attorneys who are considering the enactment of such a law.

[1] 42 U.S.C. §4332(2)(C).

I.2 Organization and Content of the Guidance

Part I of this Guidance includes seven chapters that focus on NEPA. These chapters include information on the process and particulars of NEPA, exploring avenues to ensure that tribal sovereignty is recognized and that the tribal voice is heard.

The three chapters that constitute **Part II** provide information on, and a template for, development of a TEPA. These chapters give tribes the information and tools they need to begin developing (or considering) their own environmental impact assessment process.

The last chapter is a supplement devoted to the special needs of Alaska Natives. Each chapter is summarized in the following table.

THE ESSENTIALS OF TRIBAL NEPA PARTICIPATION
Chapter 1: Know NEPA's History, Performance, and Framework
Chapter 2: Know How and When NEPA is Triggered
Chapter 3: Know the Environmental Assessment Process: Its Function, Form, and Limitations
Chapter 4: Know How the EIS is Developed
Chapter 5: Know Your Options for Involvement
Chapter 6: Know How to Invoke Tribal Rights and Resources
Chapter 7: Know How to Challenge a NEPA Determination
Chapter 8: Know What a Tribal Environmental Policy Act Can Do For You
Chapter 9: Know How to Write a Tribal Environmental Policy Act
Chapter 10: A Model Code
Chapter 11: Alaska Supplemental Guidance

Part I: Participating in the National Environmental Policy Act

In Chapter 1… we provide information on the history, context, and framework of NEPA. By examining NEPA's origins and by reviewing its performance from the tribal perspective, we hope to provide future NEPA participants with insights that may further open the process to them. Key information in this chapter includes:

- How NEPA is intended to work.
- How the CEQ regulations guide the NEPA process.
- How federal agencies establish and employ their own NEPA rules.
- How tribes have been affected by and involved with NEPA.

In Chapter 2… we begin to describe the basic elements of NEPA. By understanding what triggers NEPA and what occurs once the process is set in motion, a tribal participant should be able to skillfully negotiate the process and help create a favorable outcome. Key information in this chapter includes:

- What types of actions trigger NEPA.
- How CEQ defines an "action" for the purposes of NEPA.
- How federal agencies classify and screen their actions.
- Which types of actions are typically subject to a NEPA review.

In Chapter 3… we continue our overview of NEPA, describing each stage and requirement of the process. Key information in this chapter includes:

- Descriptions of each stage of the NEPA process.
- Information on how, why, and when an Environmental Assessment (EA) is prepared.
- Information on how, why, and when an Environmental Impact Statement (EIS) is prepared.
- Specific **tools and tips** for ensuring meaningful tribal involvement at each stage of the process.

In Chapter 4… we look further into the EIS process, describing each stage and requirement in detail. The required procedural steps are explained and, as we move sequentially through the process, key concepts are introduced. Key information in this chapter includes:

- Detailed discussion of each stage of the EIS process.
- Analysis of how tribes can maximize their role and opportunities during this stage of the process.

In Chapter 5… we take a brief, but in-depth look at the specific roles and responsibilities of those involved with the NEPA process, including lead agencies, cooperating agencies, commenting parties, and the special roles of the BIA and EPA. We look at how tribes ***can*** be involved – and at how some tribes are involved. Key information in this chapter includes:

- An explanation of how Lead, Co-Lead, and Cooperating Agencies are determined, as well as what their responsibilities are.

- An analysis of the various roles tribes can assume, including the basic costs, benefits, and considerations associated with each role.
- A review of how different tribes have participated in NEPA, and a summary of their experiences.

In Chapter 6… we provide a range of different policy and analytical tools for strengthening tribal NEPA participation. The chapter explains what types and sources of information must receive special consideration in the NEPA process, and what analytical tools are used to evaluate information in the process. Key information in this chapter includes:

- A list of "policy" tools, namely, those laws, rules, and policies that govern federal agency behavior, and that can and should be integrated into the NEPA process.
- A list and discussion of "analytical" tools, referring to the process by which information in the NEPA process is weighed, analyzed, and applied, whether it be ecological, economic, social, cultural, or otherwise.

In Chapter 7… we look at the opportunities to appeal a federal agency's decision-making, including:

- Administrative appeals from BIA actions in which NEPA compliance is an issue, including what types of decisions can be appealed, who can file an appeal, etc.
- Judicial review of NEPA decisions, including final agency actions, exhaustion of administrative remedies, plaintiff standing in NEPA litigation, and statute of limitations.
- Opportunities to appeal a NEPA decision and the standards of review, including agency use of categorical exclusions, FONSIs, and EISs.
- Discussion of key Indian NEPA litigation.

Part II: Developing a Tribal Environmental Policy Act

In Chapter 8… we begin Part II, opening the discussion of ***Tribal*** Environmental Policy Acts, or "TEPAs." The purpose of this chapter is to help tribes determine whether adoption of a TEPA would help them achieve their self-governance and environmental management goals. Key information in this chapter includes:

- A review of circumstances under which a TEPA would be advantageous.
- An assessment of the requirements and implications for integrating a TEPA into existing tribal governance and administrative procedures.
- An outline of the requirements and responsibilities associated with adoption and implementation of a TEPA.

In Chapter 9… we examine several different approaches to developing a TEPA, from the most minimally involved process to the most comprehensive and formal of approaches. This chapter examines many of the administrative, legislative, and judicial issues associated with these approaches. These include:

- Making the federal NEPA process serve tribal purposes.
- Adapting portions of the federal NEPA process.
- Coordinating a tribal environmental assessment process with state environmental policy acts.
- Building an Environmental Review Process into an existing tribal program.

In Chapter 10… we have included a model code. The "Tribal Environmental Policy Act" includes seven sections, including:

- Section 1.0. Policy and Purposes.
- Section 2.0. Definitions.
- Section 3.0. Administration of Development Regulation.
- Section 4.0. Permit Requirements for Development.
- Section 5.0. Coordination with other Federal Environmental Laws.
- Section 6.0. Issuance of Permits.
- Section 7.0. Enforcement and Judicial Review.

In Chapter 11… we focus specifically on some of the key issues and unique circumstances facing Alaska Native peoples. Although each tribe throughout the country is a unique government, Alaska tribes share a distinctive ecological, social, and cultural landscape with major implications for their involvement in environmental assessment and decision-making. The purpose of this chapter is to ensure that this NEPA and TEPA guidance is both responsive and directly relevant to Alaska tribes. Topics covered include:

- Discussions by Alaska Native Villages on NEPA's challenges and opportunities.
- Specific tools for Alaska Native Villages to overcome NEPA's obstacles.
- The application of TEPA for Alaska Native Villages.

THE ESSENTIALS OF TRIBAL NEPA PARTICIPATION

Chapter 1: Know NEPA's History, Performance, and Framework

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Chapter 4:
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Chapter 5:
Know Your Options for Involvement

Chapter 6:
Know How to Invoke Tribal Rights and Resources

Chapter 7:
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Chapter 8:
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1: NEPA's History, Performance, and Framework

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This chapter lays a backdrop for the remainder of the NEPA Guidance, discussing NEPA's history, context, and process. It explains how NEPA and the Council on Environmental Quality (CEQ) came into existence, and how CEQ exercises and shares its NEPA responsibilities. This chapter should give the reader a general understanding of:

- The political and environmental factors that led to NEPA's adoption;
- The challenges and opportunities that tribes encounter in the NEPA process;
- How CEQ implements NEPA through rules it has issued; and,
- How federal agencies establish and employ their own rules related to NEPA.

1.1 A Brief History of NEPA

By the late 1960s, the American public had grown increasingly skeptical about industry and its unchecked environmental and social tax on society. Eventually, the public's vocal concerns created enough political momentum to nudge Congress into action. In 1969, Congress passed the

National Environmental Policy Act (hereafter "NEPA") and in doing so gave birth to what many regard as the Magna Carta of environmental protection in the United States. It was, after all, an attempt to profoundly alter the decision-making process of federal agencies, by requiring them to consider the environmental impacts of their actions. Specifically, the Act stated that all federal agencies 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 that 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;
>
> (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;

At the outset, the idea of applying NEPA to all federal "proposals for legislation and actions" seemed both an ambitious and an ambiguous task. If implemented to the letter of the law, this approach would clearly change the relationship between the federal government and its constituents, and many saw the difficulties of this task:

> The challenge was to approach environmental management in a comprehensive way. The new values of environmental policy had to intrude somehow into the most remote recesses of the federal administrative machinery and begin to influence the multitude of decisions being made by thousands of officials.[1]

Whether or not this change would benefit Indian tribes, by promoting federal recognition of tribal sovereignty, was debatable.

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[1] Dreyfus and Ingram, 1976, p. 243. Full source citations are given in the References.

Nowhere in the Act were Indian tribes explicitly mentioned, so it was difficult to foresee how they would be treated. There were, however, two noteworthy features of NEPA that might benefit tribes. One was the emphasis on **direct citizen participation** throughout the NEPA process; the other was NEPA's encouragement of **coordination among affected parties**. If properly implemented, these provisions could help a tribe assert its position as a sovereign government in the federal decision-making process.

1.1A Has NEPA Achieved Its Goals?

In many respects, NEPA has been successful. Lynton K. Caldwell, a principal author of the Act, looks back on the relatively short history of NEPA and observes that,

> Through the judicially enforceable process of impact analysis, NEPA has significantly modified the environmental behavior of governmental agencies and, indirectly, of private enterprises. Relative to other statutory policies, NEPA must be accounted an important success.[2]

In the early years of NEPA, this change in government behavior was largely a response to the constant legal threat under which federal agencies operated. Within nine years of NEPA's enactment, more than 1,000 lawsuits had been filed by a variety of plaintiffs.[3] Thus, to comply with NEPA, but more to avoid or overcome potential lawsuits, agencies began developing extensive Environmental Impact Statements (EISs). They included, "all available studies and other information of even *marginal* relevance to the proposed action, resulting in voluminous documents that often relied on weight rather than analytical content to prevail."[4]

Though regulations would later be adopted by the Council on Environmental Quality to clarify and improve the content of an EIS, in some respects this early pattern has prevailed. Many federal agencies still adhere to NEPA as an administrative procedure, rather than as a substantive policy mandate. One observer noted, "Most people now think of NEPA implementation in terms of the formal analyses or

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[2] Caldwell, 1997.
[3] *Ibid.*
[4] *Ibid.*

documents that are required for certain federal actions."[5] Practitioners and academics that observe this phenomenon have, for many years, sought to remedy the problem, and have significantly advanced the art and field of environmental impact assessment. Discernable improvements in the development of EISs include:

- Use of EISs by some federal agencies as a planning tool, with the consideration of alternatives being given more weight.
- Earlier and more meaningful public involvement in the development of NEPA documents.
- Consideration of certain qualitative (for example, "quality of life") versus quantitative (for example, economic) values in the analysis and decision-making.
- Recognition of the cumulative effects of certain projects and the use of best available science to study these impacts.
- Incorporation of other policy considerations into the decision-making process, such as environmental justice, risk assessment, and biodiversity conservation.

These improvements to the process of EIS have sometimes produced, in some agencies, better decisions and better projects. Still, there is widespread agreement that these improvements are not yet institutionalized. The many federal agencies have very different track records in how they apply them. Moreover, federal agencies, by law, implement NEPA according to their own internal regulations. Although these regulations will be discussed in Chapter 2, it is worth stating here that the distinctions among them are appreciable, compounded by differences of political will, staffing, and expertise from agency to agency.

[5] Weiner, 1997.

1.2 A Tribal Assessment of NEPA's Performance

The benefits of NEPA that were promised to the American public have been reaped disproportionately by Indian tribes. Certainly, the public involvement provisions of NEPA made great strides in opening up federal actions to Indian and non-Indian parties alike. In the relatively short history of NEPA, thousands of projects have been redesigned, scaled back, or prevented because of how they would have affected the natural environment. Many of these projects would have severed or limited access to cultural and historical sites, and further would have jeopardized species of tribal significance. The benefits of preventing such excesses cannot be overlooked. At the same time, many aspects of the NEPA process, alone and collectively, undermine tribal participation.

> There are many aspects of the NEPA process that, alone and collectively, undermine tribal participation.

In the 1994 CEQ survey[6], the issue of tribal involvement was explored in some detail. Tribal respondents had a variety of comments about NEPA, ranging from broad statements about the statute itself, to specific concerns about the manner in which it is implemented. Some of the key concerns included:

- As currently implemented, the NEPA process can be costly, overly burdened with paperwork, confusing, and time consuming.
- Many agency decisions appear to have been made prior to the scoping process.
- Agencies often conduct the NEPA process as a "formality."
- Some agencies bypass tribal governments and work directly with the Bureau of Indian Affairs (BIA).
- Agencies, the BIA in particular, do not have enough NEPA personnel.
- Many agencies address Indian tribes as interested parties rather than on a government-to-government basis.
- From agency to agency, and from region to region, NEPA is triggered inconsistently.

[6] Ordon and Mittelstaedt, 1994..

- The impacts of NEPA-related projects and actions are inconsistently monitored.
- Tribal documents are not always taken seriously.
- Agencies often notify tribes of an action too late for them to prepare adequately.

Circumstances such as these tend to undermine the ability of a tribe to effectively participate in the NEPA process. Whether deliberately or unintentionally, agencies conducting the NEPA process more often than not fail to treat tribes as sovereign governments. But it is not just agency actions that diminish NEPA's potential; in some respects, it is the law itself. What the statute lacks, for example, is an

> "inclusive, broadly understood definition of the cultural environment. As a result, important elements of the cultural environment 'fall through the cracks' between elements that are either defined in statute or broadly understood in practice."[7]

Those elements that are defined in the statute and are readily understood are, for example, the "natural environment" and, to a lesser degree, "the human environment." In contrast, a review of the standard environmental impact statements indicate that only two cultural considerations are routinely incorporated: *historic properties* and *socioeconomics*. The sensitive, vital, and complex issue of cultural resource protection in the NEPA process is explored in later chapters of this Guidance. However, here it is important to note that respondents in the tribal survey also saw many benefits of participating in NEPA.

1.2A Benefits of Tribal Participation in NEPA

Participants in the 1994 survey, and in subsequent, smaller surveys, have all indicated that participation in NEPA can be a worthwhile endeavor. As a policy tool, they felt that NEPA could be an effective and flexible means for protecting tribal resources. Through the scoping process, they found that it could address a wide range of environmental issues, both present and future. Moreover, they noted that the public involvement provisions assured that they would have an opportunity to introduce the tribal perspective. Several respondents noted that those federal agencies

[7] King, 1994.

which dealt with them on a government-to-government basis would automatically invite them to participate in scoping efforts.

Some tribes benefit from participating directly in the NEPA process. By sharing responsibility with the lead agency as a "co-lead," or acting as a "cooperating" agency, tribes felt that they were better able to control the process, influence the timing, and share resources with other agencies. Being involved from the outset, they felt, allowed them to experience greater rewards. In fact, direct participation yielded multiple benefits, for it helped some tribes build capacity, gain experience with NEPA, and create a network of relationships within some of the agencies. Although few agencies adequately address cultural resources, being directly involved at least gave tribes an opportunity to protect the habitats that support culturally important plant and wildlife species.

1.3 NEPA's Steward: The Council on Environmental Quality

1.3A The Creation of CEQ

The crafters of NEPA, in drafting the original statute, saw that creating a process of environmental review was not enough to effect profound, long-term change among federal agencies. They saw the need for an independent body that would, in addition to providing oversight of the NEPA process, "identify important environmental issues, monitor environmental performance, and advise the president and the Congress on appropriate action."[8]

To give this independent body more authority, and to "insulate" it from political influence, they placed it in the Executive Office of the President. After some deliberation, it was also agreed that a council format would best support the goals of NEPA, and so the Council on Environmental Quality (CEQ) was formed. Members of the Council would be appointed by the President and would draw upon their expertise to advise the President, Congress, and the agencies.

For detailed information on the specific duties and functions of CEQ, see Title II of NEPA, found in **Appendix A** of this Guidance.

[8] Caldwell, 1997.

1.3B The Role of CEQ in Implementing NEPA

Among the many responsibilities that were assigned to CEQ, perhaps the most important was its development of the regulations that implement NEPA. Because CEQ is not an actual "regulatory" agency, its authority to issue NEPA regulations had to be specifically awarded through Executive Orders of the President. Still, unlike other actual regulatory agencies, such as the Environmental Protection Agency, CEQ does not have the ability to either veto or control another agency's actions. Although CEQ may "referee" a disagreement concerning a NEPA action, it has no formal authority to dictate the outcome of an action or a decision under consideration. This role is generally left to the courts, with any opinions of CEQ being given substantial weight and deference.[9]

CEQ's role as a referee comes into play when there is a dispute among federal agencies as to how a particular NEPA process should be conducted. Often such disagreements arise when it is unclear who should act as "lead agency" or when there is a dispute over the decisions of a lead agency. Through Section 309 of the Clean Air Act, the Environmental Protection Agency (EPA) can also judge an Environmental Impact Statement (EIS) to be unsatisfactory and refer the matter to CEQ.[10]

> The role of EPA in reviewing NEPA documents will be discussed in further detail in Chapter 4.

Because of CEQ's limited role in resolving NEPA disputes, Indian tribes involved in NEPA may accurately sense that they have only a few options if there is a disagreement. Like others who may be aggrieved by a NEPA decision, they may find that the courts are their last and only resort. Aside from the obvious expense and commitment of taking legal action, the outcome might not favor the tribal position. Several later chapters will explore the fundamental issue of how tribes might strengthen their foothold in NEPA without resorting to the courts.

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[9] Kreske, 1996.
[10] *Ibid.*

1.4 The CEQ Regulations

In November of 1978, CEQ published regulations – in a very brief and broadly worded statute – describing how NEPA should be interpreted and implemented by federal agencies. Prior to this time, federal agencies had very little written guidance on what constituted a legitimate EIS; so hundreds of NEPA cases had to be resolved in court.[11] As a result, "priority was then placed on producing documents that would fulfill NEPA's procedural requirements as interpreted by federal judges, rather than whether the decisions were actually consistent with NEPA's policies."[12] Thus, when CEQ developed its regulations, it sought to remedy many of these problems by focusing on:

- Reduction of unnecessary delays in completing the NEPA process.
- Reduction of paperwork associated with NEPA.
- Better integration of NEPA with other planning and environmental review procedures.
- Encouragement of more effective public involvement.

The regulations also addressed one of the widely acknowledged problems in the early implementation of NEPA: the lack of uniformity among federal agency NEPA actions. By defining the framework of the NEPA process within which all federal agencies must operate, CEQ helped tribes and many other affected parties negotiate the process. For example, the CEQ regulations require federal agencies to:

- Issue or revise their own internal procedures, consistent with the CEQ regulations, to achieve the purposes of NEPA.
- Establish a "scoping process" for making an early and open decision about the scope and significant issues to be addressed in EISs.
- Establish a default standard format and page limits for EISs to improve the utility and readability.

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[11] In 1979, CEQ reported that by December 31, 1978, nine years after NEPA's enactment, more than 11,000 EISs had been filed by 70 different federal agencies. During that same period, 1,052 suits were filed by a variety of plaintiffs. Clark, 1997.

[12] Clark, 1997.

As part of the process of developing its regulations, CEQ worked hard to encourage involvement of federal agencies, state and local agencies, environmental groups, industry groups, and the general public. If CEQ actively sought the involvement of Indian tribes, it is not apparent from the record. The proposed regulations contained seven references to Indian tribes, and there was no mention of tribes in the preamble. The preamble to the final rules states that "[s]everal commentors stated that the regulations should clarify the role of Indian Tribes in the NEPA process," and that the CEQ responded by expressly identifying tribes as participants at several points in the process. Although the apparently limited involvement by tribes was regrettable, the overall level of public involvement was impressive and no doubt contributed to the widespread support that emerged when the regulations were issued.

As part of its oversight role, CEQ is responsible for interpreting both its regulations and the statute. Requests for interpretations may come from federal, state, local agencies, citizens, or tribes. Tribes seeking clarification during involvement in a NEPA process should not overlook this as an avenue, but should also recognize that, **on occasion, some federal agencies may interpret the NEPA requirements in an expedient, inconsistent, or insupportable manner.**

Not only does CEQ "interpret" its own regulations, but it is also responsible for approving any modifications or revisions to the NEPA procedures of other federal agencies. Moreover, from time to time, CEQ will issue guidance to address systematic problems with the NEPA process or in response to Presidential Executive Orders. In 1981, for example, CEQ issued guidance for NEPA participants on how to make better use of the scoping process. More recently, CEQ was given responsibility for oversight of the federal government's integration of NEPA and Executive Order 12898 on Environmental Justice.[13]

1.5 NEPA Procedures of Federal Agencies

The CEQ regulations require all federal agencies to adopt internal, agency-specific procedures for implementing NEPA. These procedures are designed to supplement the general language found in the CEQ regulations, by defining and clarifying precisely how each agency will implement NEPA.

[13] See Chapter 4 for a discussion of EO 12898.

Before describing these procedures, we should first note that some federal agencies are organized as a "department" (e.g., the Department of Interior). In this situation, the multiple agencies (sometimes called "bureaus" or "offices") that are housed within a department may publish their own implementing procedures, either as internal agency guidance or through the Code of Federal Regulations. Some, however, may be bound by their "parent" department's implementing procedures. For example, the Department of Interior publishes procedures in the Department Manual (DM) that apply to all agencies within Interior. For the NEPA participant seeking to become familiar with agency procedures, simply locating all this information can be a challenge. At the end of this chapter, we have included a section on where to find the NEPA procedures of many of the various federal agencies, bureaus, and departments.

1.5A How Federal Agency Procedures Vary

Certain federal agencies regularly take actions that affect the natural environment, and they are almost routinely involved with NEPA. Other agencies may rarely take actions that, individually or cumulatively, affect the environment; sometimes their activities may be classified as a "categorical exclusion." Either way, all federal agencies are required to adopt procedures that supplement the CEQ regulations. To help agencies decide which of their activities might be subject to NEPA, CEQ regulations define the term "action" as including:

- New or continuing activities.
- 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.
- Legislative proposals.

Actions, however, are **not** considered to include:

- Funding assistance solely in the form of general revenue sharing funds.
- Bringing judicial or administrative civil or criminal enforcement actions.

Once agencies decide which of their actions are potentially subject to NEPA, they are responsible for developing a set of internal "implementing procedures." Such procedures generally revolve around what types of agency actions will and will not trigger NEPA, and are included in each agency's NEPA manual or handbook. These handbooks also include specific direction for staff on an agency's NEPA policy, responsibilities, and any special procedures.

Those actions that trigger NEPA are then placed into one of three categories or "classes" of actions. These include:

1. Actions which normally do not require either an environmental impact statement or an environmental assessment (e.g., categorical exclusions).

2. Actions which normally do require environmental impact statements (EISs).

3. Actions which normally require environmental assessments but not necessarily environmental impact statements.

The first class of actions is called "categorical exclusions" and includes mostly administrative, procedural, and routine actions. The second class of actions – those that normally require an EIS – typically include large-scale or disruptive activities, such as new landfill siting, dredging, highway construction, dams, power plants, or mining projects. The final class of actions recognizes that some agency actions will fall into neither the first nor the second class. For any action within this last class, analysis will be needed to assess the potential for "significant" environmental impacts and thus whether an EIS is necessary.

In Chapter Two, these three classes of actions are discussed in greater detail. They are mentioned here to stress that every agency's NEPA procedures are going to differ, and that what triggers NEPA in one agency may not trigger NEPA in another. Some tribes participating in NEPA have been concerned that procedures may vary not only between federal agencies, but *within* them as well. What triggers a NEPA review in one regional office may be considered a categorical exclusion in another region of that same agency. As one NEPA expert has described it,

> **There are almost as many NEPAs as there are federal agencies**. Adopted procedures may share the basic canon of the NEPA statute and CEQ regulations, but they are separated and

> rendered idiosyncratic by individual mission, authorization, and statutory responsibilities; the nature and distribution of managed resources; sources and level of funding; and … administrative design.[14]

1.5B Locating Federal Agency NEPA Procedures

Appendix B to this Guidance includes citations for finding the various federal agency NEPA regulations. Often the materials can be found in the Code of Federal Regulations (CFR) or in the Federal Register (FR). Some agencies, however, include their NEPA procedures in a much larger body of internal documents. Although the number and/or title of these documents are listed here, it may still prove difficult to contact these agencies and obtain a copy. If so, consider contacting the federal agency or CEQ and requesting assistance in obtaining the specific agency procedures.

CEQ's website, NEPAnet, provides links to specific agency NEPA websites, many of which contain agency NEPA procedures, guidance documents, and manuals. See:
http://ceq.eh.doe.gov/nepa/nepanet.htm

or access the site through the White House website, at:
www.whitehouse.gov/CEQ.

[14] Dennis, 1997.

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2: How the NEPA Process is Triggered

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The next two chapters provide the reader with a basic understanding of the NEPA process. By understanding what triggers NEPA and what occurs once the process is set in motion, a tribal participant should be able to skillfully maneuver within the process and help promote an outcome that tribes regard as favorable.

Knowing the nuts and bolts of the process, however, is only part of making NEPA work. Many agencies lean heavily toward procedure, at the expense of NEPA's substantive goals. And though the courts generally support the comprehensive intent of NEPA, the Supreme Court has ruled that its mandate to federal agencies is essentially *procedural*. Subsequent chapters will explore ways in which tribes can help agencies implement both the letter and the *spirit* of the law. This chapter is designed to help the reader:

- Understand what triggers the NEPA process.
- Recognize which types of actions are typically subject to a NEPA review.

2.1. Proposed Actions: Defining the Terms

NEPA requires that an EIS be prepared for "every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment." Not surprisingly, these vague terms have become the most litigated language in NEPA, having been the subject of more than two thousand lawsuits.

Thankfully, one basic purpose of the CEQ regulations is to help agencies decide whether or not the EIS requirement applies to a specific proposed action.

To help agencies make this threshold determination, the CEQ regulations provide guidance on the meaning of key words and phrases in NEPA. A "**proposal**"[1] exists when an agency "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 ... a proposal may exist in fact as well as by agency declaration that one exists." "**Legislation**"[2] does not include requests for appropriations, but it does include "a bill or legislative proposal to Congress developed by or with the significant cooperation and support of a Federal agency."[3]

A "**Major Federal Action**"[4] includes both continuing and new activities as well as *failures* of an agency to take a certain action. The CEQ regulations also state that federal actions tend to fall into one of four categories: policies, plans, programs, or specific projects. The category of specific projects includes "actions approved by permit or other regulatory decision, as well as federal and federally assisted activities."

"**Significantly**"[5] is perhaps the most important word in section 102(2)(C). The regulations state that the use of this word "requires considerations of both context and intensity." "**Context**" means that a proposed action must be analyzed in terms of its effects on "society as a whole (human, national), the affected region, the affected interests, and the locality."

"**Intensity**"[6] is a term used to describe the severity of environmental impacts, and the regulations list ten factors that should be considered, including:

- adverse effects on public health or safety;
- adverse effects on unique environmental characteristics;
- the degree of controversy regarding environmental effects;
- unique or unknown risks;
- whether the proposed action would set a precedent for or otherwise be linked to other actions that may have cumulative impacts;

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[1] 40 CFR §1508.23.

[2] 40 CFR §1508.17.

[3] Generally speaking, lawsuits that seek to force an agency to conduct an EIS for a piece of legislation have not been successful.

[4] 40 CFR §1508.18.

[5] 40 CFR §1508.27.

[6] *Ibid*.

- adverse effects on historic properties;
- adverse effects on endangered or threatened species or the habitat of such species; and
- whether the proposed action might violate a federal, state, or local environmental law.

"**Affecting**"[7] means that an action "will or may have an effect on," and "effects" means both "direct effects" and "indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." "**Effects**"[8] and "**impacts**" are used as synonyms. "**Human environment**"[9] is defined "comprehensively to include both the natural and physical environment and the relationship of people with that environment." An EIS must include analyses of social and economic effects that would be caused by a proposed action. However, an EIS is *not* required for a proposed action that will cause social or economic effects unless the proposed action may or will *also* cause significant effects on the natural or physical environment.

2.2. The NEPA screening process

The CEQ regulations go beyond providing definitions such as those discussed above; they also help agencies decide what level of review is needed for a given action. In the regulations, agencies are required to establish a screening process, a consistent manner of deciding what specific actions require an EIS and what actions do not. This screening process has worked well to help agencies avoid becoming entangled in the threshold question of whether or not an EIS is required. In mandating this screening process, CEQ recognized that although there are some classes of actions for which the decision to prepare an EIS is clear-cut, there are also many broad classes of actions in which a **case-by-case approach** is generally warranted.

For those classes of actions in this middle ground, an environmental assessment (EA) must usually be prepared to assess whether a specific action will require an EIS. Accordingly, the CEQ regulations require each federal agency to adopt criteria that enable it to

[7] 40 CFR § 1508.3.
[8] 40 CFR §1508.8.
[9] 40 CFR § 1508.14.

place all classes of actions that the agency might propose in one of three categories:

1. Those which normally require environmental impact statements;
2. Those which normally do not require either an environmental impact statement or an environmental assessment (categorical exclusions (§ 1508.4));
3. Those which normally require environmental assessments but not necessarily environmental impact statements.

2.2A EIS normally required

Not surprisingly, identifying all the different actions that any given agency takes, or might take in the future, and sorting them among those three categories was not an easy task. Agencies are quite understandably not eager to prepare EISs, and therefore tend to limit the kinds of actions included in the first category -- those actions which normally do require an EIS. The regulations recognize that even this category should allow for exceptions; for example, a proposed action that falls within this category might not have significant environmental impacts.

In such a case, an agency may decide to prepare an EA rather than an EIS, but the regulations impose additional requirements regarding public notice, including waiting at least 30 days after making the finding of no significant impact (FONSI). This procedure makes the EA available for public review before there can be a final agency decision about whether an EIS should be prepared. The additional notice requirements also apply to any proposed action that is without precedent for an agency.

2.2B Categorical exclusions (and exceptions)

To help agencies reduce both paperwork and delay, the CEQ regulations allow for entire categories of actions to be excluded from the NEPA process. These categories of actions that normally do not require either an EIS or an EA are called "categorical exclusions." Even in this category, however, there may be exceptions or “extraordinary circumstances”[10] and an EIS must nonetheless be prepared. Although the

[10] 40 CFR § 1508.4

CEQ regulations require agency implementing procedures to identify such exceptions, the regulations do not provide detailed guidance on how to do so.

Many agencies seek to define as many of their actions as possible as categorical exclusions. Given the financial and human resources constraints within which all agencies function, it makes little sense to prepare EAs on a great multitude of actions, most of them highly unlikely to result in significant environmental impacts. Examples of categorical exclusions include:

- Routine administrative, personnel and fiscal actions.
- Data collection and information gathering that involves no physical changes to the environment.
- Routine repair and maintenance of facilities and equipment.

Occasionally, there are "categorically excluded" actions that may actually have significant impacts. In theory, the "exception" process should catch these. Yet how well this process works in practice is subject to empirical evaluation of each agency. Probably some actions that should be identified as exceptions **do** slip through the screening process without EAs being prepared. That some actions slip through, however, does not necessarily mean that significant environmental damage will result.

The environmental impacts of a "missed" exception can be just as real and serious as the impacts of an action for which an EIS was prepared. Consequently, tribes, concerned citizens, and public interest organizations can play an important role in monitoring federal agency use of categorical exclusions.

If, for example, a nonfederal party notifies an agency that an exception clearly applies, that federal agency may well decide to prepare an EA. Most find the alternative –subjecting themselves to potential litigation – undesirable. Resources permitting, tribes may thus find it quite worthwhile to monitor the flow of an agency's NEPA information, and not rely on the agency's decision about whether tribal rights or interests will be affected.

It can be difficult to know when agencies are taking actions that they treat as categorical exclusions, and when an exception might actually apply. Yet if a tribe has established an ongoing consultation process with an agency, the tribe could make this a topic for discussion. Through regular consultation, tribes can alert agencies about possible exceptions to categorical exclusions, bringing issues such as trust responsibility, treaty-protected species, and tribal laws to their attention.

If an action is categorically excluded, **but** has the potential to violate an environmental regulation, then that action is considered an **exception** and may require development of an EA or EIS.

If **tribal environmental regulations** were violated by a proposed action, they too could cause a categorically excluded action to be reconsidered.

Example: The BIA's List of Exceptions to Categorical Exclusions

The following list of BIA exceptions applies to individual actions within categorical exclusions (CX). Environmental documents must be prepared for actions that may:

(a) Have significant adverse effects on public health or safety.

(b) Have adverse effects on such unique geographic characteristics as historic or cultural resources, park, recreation or refuge lands, wilderness areas, wild or scenic rivers, sole or principal drinking water aquifers, prime farmlands, wetlands, flood plains or ecologically significant or critical areas, including those listed on the Department's National Register of Natural Landmarks.

(c) Have highly controversial environmental effects.

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

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

(f) Be related to other actions with individually insignificant but cumulatively significant environmental effects.

(g) Have adverse effects on properties listed or eligible for listing on the National Register of Historic Places.

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

(i) Require compliance with Executive Order 11988 (Protection of Wetlands), or the Fish and Wildlife Coordination Act.

(j) Threaten to violate a federal, state, local, or tribal law or requirement imposed for the protection of the environment.[11]

2.2C Environmental Assessments (EAs)

In the NEPA screening process, the third category is for those actions that normally require an EA but not necessarily an EIS. The CEQ regulations state that if a proposed action is not a categorical exclusion, but does not require an EIS, then an agency must prepare an EA. Though the basic purpose of an EA is to decide whether or not an EIS is required, agencies are also encouraged to prepare an EA:

- "On any action at any time in order to assist agency planning and decision-making."
- To "…aid an agency's compliance with NEPA when no EIS is necessary" and,
- To "facilitate preparation of an EIS when one is necessary."

The importance of EAs in the NEPA process should not be underestimated. For most federal agencies, particularly land-managing agencies, this category includes many different actions. A typical land- managing agency may prepare hundreds of EAs every year, with only a relative few resulting in decisions to prepare an

An EA.. is not a statutory requirement, but rather ***a tool established by the regulations to help determine whether an EIS is required.***

[11] 516 DM 2.3A(3).

EIS. (Roughly 500 EISs are written each year, compared to more than 50,000 EAs.)

Though the CEQ regulations provide direct guidance, an EA is supposed to be a concise document that contains enough detail to determine whether the environmental impacts of a proposed action may or will be significant. At a minimum, an EA must include "brief discussions of the need for the proposal, of alternatives as required by section 102(2)(E) [of NEPA], of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted." Beyond the minimal requirements, the CEQ regulations provide little guidance on the preparation of EAs.

If the EA supports a conclusion that the impacts will not be significant, the responsible federal official signs a finding of no significant impact (FONSI). After a FONSI has been made available to the public, the agency can proceed with the proposed action. **There is no "waiting period" specified in the CEQ regulations except, as noted above, for actions that normally require an EIS and actions that are without precedent.**[12]

If, however, an EA does not support a FONSI – more precisely, if the analyses and data presented in an EA lead to the conclusion that the proposed action will or may result in significant environmental impacts – and the agency is committed to proceeding with the proposed action, then the agency must publish in the *Federal Register* a notice of intent (NOI) to prepare an EIS.

In such cases, failure to proceed directly to preparation of an EIS may result in unnecessary delay, since this failure means that the minimum time periods prescribed in the regulations will take longer to elapse. If an agency is not firmly committed to proceeding with the proposed action, however, further work on the EA may lead to the development of an alternative that would avoid the possibility of significant environmental impacts.

2.2D Impacts sufficiently covered in an earlier environmental document

In addition to these categories, there is a fourth category of actions: those that may have environmental impacts, but whose impacts have been sufficiently addressed in an earlier EIS or EA. This category of actions is not specifically listed in the CEQ regulations, but it is a logical fourth

[12] 40 CFR § 1501.4(2)(e)(i)(ii)

category, and it is specifically included in the Department of Interior's implementing procedures. An example of an action that might fit into this category would be a specific action included within the broad or programmatic scope of an EA or EIS that had been previously prepared. Another example is actions taken on a periodic basis, such as a lease or permit renewal. In such cases, analysis of environmental impacts, and the EA or EIS that was first prepared, are considered sufficient. However, supplementary documentation will need to be developed if the previous information becomes outdated, if new information is introduced, or if circumstances change.[13]

2.3. BIA Activities that Trigger NEPA

Like any other federal agency, BIA's NEPA compliance is Congressionally mandated, and is triggered by any BIA action that is necessary in order to implement a proposal. Under the definition of "action" in the CEQ regulations, an action can be:

1. New or continuing activities.
2. Projects and programs entirely or partly financed, assisted, conducted, regulated or approved by federal agencies.
3. New or revised agency rules, regulations, plans, policies, or procedures.
4. Legislative proposals.

Thus any activity on Indian lands that requires the approval, funding, or assistance of the BIA is a federal action, and for many tribes, such actions are common occurrences. Still, for many activities on tribal lands, NEPA is either not triggered or the proposed action is *within* a categorical exclusion and therefore not subject to *intensive* review. Yet it is not uncommon for tribes to express frustration about a proposed action, in that neither they nor the BIA are clear about whether NEPA is in fact triggered.

Given the large number and broad range of interactions between tribes and the BIA, such confusion is inevitable – to a point. Tribal governments may be applicants, may be affected by a proposed action of the BIA, or may be affected by the proposed action of another federal

[13] 40 CFR § 1502.9(c)(1)(ii)

agency that, in turn, needs BIA review. Moreover, the BIA may be issuing a permit, granting approval, or providing funds for a project.

Needless to say, there is considerable potential for uncertainty about how and when NEPA is triggered. Nonetheless, many of the interactions between tribes and the BIA are of a consistent or similar nature (e.g., leases), and the issue of NEPA compliance in such situations should be fairly straightforward. In 1993, the BIA amended its NEPA procedures to provide more specific NEPA compliance guidance. Specifically, the BIA:

- Updated their organizational responsibilities for compliance;
- Added to the list of actions normally requiring an EIS; and
- Updated and added to the list of actions that are categorically excluded from the NEPA process.

Additional sources of the agencies' NEPA compliance procedures include:

- NEPA implementing procedures issued by the Department of Interior (DOI), which are binding on all agencies within DOI, codified in the Departmental Manual. 516 DM 1-7.
- An appendix to the DOI NEPA implementing procedures providing information specific to the BIA. 516 DM 6, Appendix 4.
- The BIA's NEPA Handbook issued through the BIA Manual system as a Manual Supplement. 30 BIAM Supp.1.
- The BIA's basic Manual issuance on environmental protection. 30 BIAM.

In the section providing guidance to tribal governments, the BIA clarifies that a tribal government may be an applicant and/or be affected by a proposed action. Where tribal governments are affected by a proposed action, the procedures state that the tribe "shall be consulted during the preparation of environmental documents and, at their option, may cooperate in the review or preparation of such documents." In cases where a tribe prepared the environmental documents, the regulations point out that the BIA retains "sole responsibility and discretion in all

NEPA compliance matters."[14] **Appendix C** to this Guidance includes a copy of the **BIA's NEPA Implementing Procedures**.

[14] 61 FR § 67846, December 24, 1996; Section 4.2(A)(2)(a)

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This chapter builds on previous chapters to continue providing the basic "building blocks" of NEPA, focusing now on process, format, and requirements. We discuss how and when an Environmental Assessment is prepared, and emphasize the key role it plays in discovering long-term or cumulative impacts on tribal resources. This chapter is thus designed to help the reader:

- Understand when and how an Environmental Assessment (EA) is prepared.
- Recognize critical issues that may affect the quality or outcome of an EA document.
- Understand how an agency makes its threshold determination from an EA.
- Understand how mitigation measures are used to keep a project below the "significant" threshold.

3.1 Environmental Assessments: The Critical Filter

3.1A The Function of the EA Process

In the early years of NEPA, well before the CEQ regulations were issued, both interpretation and implementation of NEPA was ambiguous. Academicians and practitioners of NEPA regard this as a

unique phase in the history of the Act, one in which vast resources were spent not in trying to improve agency decision-making, but in avoiding litigation. The problem arose largely from one brief sentence out of the entire statute. This well-known and intensely debated clause requires federal agencies to develop a detailed statement wherever their actions "***significantly*** affect the quality of the human environment." Use of the inherently subjective term "significant" paved the way for an era of encyclopedic Environmental Impact Statements and unprecedented use of the courts to resolve agency/public disputes.

When CEQ adopted its NEPA regulations, it drew upon a decade of experience and many court cases pertaining to the statute. The result, in 1978, was adoption of a remarkable set of guidelines that are still today considered a model of clarity and functionality. But the regulations were more than just well written; they provided the direction necessary to change the way NEPA was implemented. As the regulations themselves state,

> 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.[1]

An observer close to the process remarked that, "The NEPA regulations reflected a fundamental shift from a focus on EIS preparation in the guidelines to the overall 'environmental review process'."[2] To make this shift happen, CEQ created a flexible, yet consistent process by which agencies could more carefully and more routinely examine the effects of their planning and decision-making. The process they came up with was the concept of Environmental Assessments (EAs) and project "screening." Using EAs would help agencies make more rational, non-political decisions about an action's potential for significant impacts.

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[1] 40 CFR §1500.1(c).
[2] Weiner, 1997.

3.1B The Reality of the EA Process

In previous chapters, we described the NEPA screening process and how agencies are allowed to use discretion in deciding on the appropriate level of environmental review. We also mentioned the fact that, for a variety of reasons, most agencies seek to avoid a full-blown NEPA process and the preparation of an EIS. That relatively few EISs are produced each year is thus not a sign of NEPA's failure.. If the EA process is being used appropriately, then the number of EISs produced should simply reflect the number of significant federal actions taking place. The challenge is ensuring effective and legitimate use of the EA process.

Ensuring that the EA process functions as intended is just one reason that tribes may wish to focus on this stage of NEPA. Time spent reviewing and monitoring an agency's EA documents may not seem well-spent, but such reviewing may be the most effective way to prevent environmentally damaging actions from slipping through NEPA. Projects that in themselves do not require an EIS may still require important modifications, and the EA process presents this opportunity.

Another reason tribes and others might focus on the EA process is that, for environmental protection, those actions which are automatically subject to an EIS may, in fact, be of somewhat less concern. Actions subjected to the EIS process receive extensive scrutiny, with environmental impacts being studied in detail. The public process is usually inclusive, and potentially affected parties are typically involved from the outset. Though the decisions made in the process may not be favorable to all involved, the voluminous evaluation of impacts means that few issues will be neglected. Moreover, mitigation is an almost expected component of such major projects.

In contrast, actions subject to an EA do not always receive adequate scrutiny. Though the amount of analysis varies, depending on the type of action and the agency involved, most EAs are brief. The CEQ regulations, which say little about the content of an EA, recommend that an agency keep the EA to a maximum of 15 pages, though an EA can sometimes be much longer. Regardless of an EA's length, however, the nature of the process dictates that analyses will be nominal. Time, agency resources, and technical expertise may allow few issues to be raised in an EA. The depth and breadth of analyses is constrained also

> The number of **issues raised in an EA may be limited** by time, agency resources, and technical expertise.

because some agency staff want to minimize the apparent impacts of a proposed action.

Between 1970 and 1992, CEQ reported annually on the number and nature of NEPA cases filed.[3] In almost every year, the most common complaint and reason for litigation was the failure of an agency to develop an EIS. These agencies, in most cases, had prepared an EA that was neither comprehensive nor inclusive enough. In most of these cases, the plaintiffs were citizen and environmental groups, for whom the absence of an EIS meant the absence of a genuine public-involvement process.

The importance of EAs in the NEPA process should thus not be underestimated. A typical land-managing agency may prepare hundreds of EAs every year, with only a few resulting in decisions to prepare an EIS. Staff in these agencies are responsible for determining whether the proposed action addressed in the EA will have significant adverse impacts. Yet what is *significant* to the staff person who is making this "threshold determination" may be quite different from what the affected communities perceive as significant.

Although "significance" is inherently subjective, a good definition comes from the State of California. In their state environmental review procedures, "significance" is defined as a project that would substantially:

- Degrade environmental quality.
- Reduce fish or wildlife habitat.
- Cause a fish or wildlife population to drop below self-sustaining levels.
- Threaten to eliminate a plant or animal community.
- Reduce the numbers or range of a rare or endangered species.
- Eliminate important examples of the major periods of California history or prehistory.
- Achieve short-term goals to the disadvantage of long-term goals.
- Have possible environmental effects that are individually limited but cumulatively considerable when viewed in connection with past, current, and probable future projects.
- Have environmental effects that will directly or indirectly cause substantial adverse effects on human beings.[4]

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[3] Council on Environmental Quality, Twenty-fourth Annual Report, 1993.
[4] Duke University and the CEQ, 1992. EPA Section; State of California.

The challenge for tribes is that projects that are environmentally, culturally, or economically significant to them may not be considered significant *enough* by the responsible federal agency.

The point to consider is that the EA process is a subjective one, and should not be overlooked. A recent study of the effectiveness of NEPA concluded that

> Sometimes agencies try to cut the process short, stopping with an EA rather than conducting a more in-depth analysis via an EIS. If an EA with mitigation will reduce impacts below a level of significance while otherwise complying with NEPA, decision makers often select that route. However, mitigated EAs can entail less rigorous scientific analysis, little or no public involvement, and consideration of fewer alternatives.[5]

Because thousands of EAs are produced each year, and because so little attention is focused on developing or reviewing them, EAs may be one of NEPA's most genuine challenges. From the standpoint of communities and individuals that depend on ecological preservation, the EA process and the actions it permits may be analogous to death by a thousand tiny cuts.

3.2 Tips for the EA Process

What options does a tribe have for ensuring optimal agency use of the EA process? What might a tribe encounter if it does find itself involved with an EA? The following discussion seeks to address these questions, providing suggestions that tribes may find helpful. For those tribes who have already developed their own solutions to these issues, we hope this information will serve as a useful supplement.

3.2A Ensure Optimal Agency Use of the EA Process

A federal agency's procedures can be a maze to negotiate, and the EA process, by its very nature, leaves some of those key pathways closed. Still, there are things that tribes can do to help them establish a foothold in the process. Suggestions include:

[5] Welles, 1997.

1. **Become familiar with the agency's NEPA procedures.** If there are one or more agencies that your tribe deals with regularly, tribal staff should become very familiar with the NEPA procedures of those agencies. Specifically, a careful review of their screening procedures will tell you which projects or actions warrant special consideration (e.g., those actions that are not categorically excluded, but do not automatically require an EIS). A tribe also may have concerns about certain kinds of actions that an agency treats as categorical exclusions.

   Note: On occasion, agencies will revise their NEPA procedures and must go through a public process before adopting any changes. Such proposed changes are routinely published in the *Federal Register* for public comment. It is critical that tribes – or any other affected party – be aware of the proposed changes and be prepared to comment.

2. **Establish a relationship with the agency personnel assigned to NEPA matters.** In most agencies (at the regional level), there is one individual who organizes NEPA activities for the agency. Knowing this individual is essential. Making sure they know who you are – and how to reach you – is important.

3. **Propose an early or formal notification process with the key agencies**. Requesting that agencies contact you during the EA process is helpful, because the CEQ regulations do not establish any requirements for notice, consultation, or public comment, at least not until a FONSI has been signed. A notice sent without adequate time to respond, however, is not of much help. Timing – especially in the EA process – is critical. Knowing that an action will receive limited analysis means that the information you provide must be that much more compelling and robust. This is not easily accomplished if you have little time to work because of late or insufficient notice. Ask the responsible NEPA official to routinely contact your tribe by phone, in addition to sending the regular notice.

4. **Be familiar with the BIA's procedures for development of EAs.** How the BIA prepares EAs depends on whether the proposal is internally or externally initiated. When proposals are

internally initiated,[6] the EA is normally prepared by the program staff which has identified the need for a proposed action and which has lead responsibility for implementing the action. Assistance in preparation of the EA will come from the Area and Central Office environmental staff. Other staff members, from other programs, will assist in preparing EAs if the alternatives or mitigation measures include their areas of responsibility or if their involvement would improve interdisciplinary analyses.

When the proposed Bureau action is a response to an **externally initiated** proposal[7], such as a lease of trust land, the applicant typically prepares the EA. If an EA is required, the applicant must also provide supporting information and analyses as appropriate. The Bureau, however, makes its own evaluation of the environmental issues and is responsible for the scope and content of the EA.

3.2B Know What To Expect in the EA Process

The EA process generally produces one of three outcomes. If the proposed action is given a "Finding of No Significant Impact" or "FONSI," then no further environmental review is required by NEPA. If the proposed action will involve mitigation measures that lower the environmental impacts below the threshold of "significant," then a "Mitigated FONSI" is issued. It is not uncommon, in fact, for agencies to rework an EA, or to direct an applicant to rework the EA, so that mitigation measures are sufficient to avoid "significance." Finally, if an agency concludes that an action will have significant impacts, then an Environmental Impact Statement is required. Outcome aside, what usually warrants scrutiny is *how* an agency arrives at their determination and *what* information they use to get there.

How an agency makes its threshold determination depends on a combination of mostly internal, agency-specific factors. That the decision is overly internalized, and that the process varies so much from agency to agency, is a common complaint among those involved with NEPA. These problems, because they are both procedural and institutional in nature, can be exasperating for anyone who participates in the EA process only on occasion. The following questions and answers are included here to help those in this situation.

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[6] See the BIA's 516 Department Manual 1.4B.
[7] See the BIA's 516 Department Manual 1.4C.

Q: How much involvement can the public expect in EAs?

A: Not much. By definition, an EA is a "public" document. Yet Blaug (1992) reported that only 38 percent of federal agencies have procedures for public participation in the EA process. Moreover, *no* federal agency has provided the same level of public involvement for EAs and Categorical Exclusions (CXs) as they have for the EIS process. Therefore, EAs and CXs do not provide public involvement opportunities comparable to those provided by EISs[8].

When public involvement opportunities do occur, the volume of paper generated overwhelms many interested parties. Tribes, non-governmental organizations, and members of the public may not have the resources to quickly distill relevant information and to sort out the non-relevant. They may need more time to review and address the salient issues in an EA.

Q: Do tribes have any special rights in the EA process, such as early notification?

A: While no such formal rights exist, tribes can ask agencies to contact them about proposed actions even *before* the screening process begins. Establishing an informal dialogue prior to screening can help tribes find out an agency's commitment to a given project and what alternatives they may be considering. Tribes may also ask to be notified when an agency decides to prepare, or requires an applicant to prepare, an EA for certain types of actions. In particular, tribes may ask to be notified about actions that would affect certain geographic areas, where they might have:

- Special expertise or data.
- Jurisdiction by law.
- Rights under federal statutes (Nat'l. Historic Preservation Act, Nat'l. Graves Protection and Repatriation Act, etc.).
- Special treaty rights.

Q: What if we don't agree with an agency's FONSI determination?

A: If an agency issues a FONSI and elects not to prepare an EIS, there are certain conditions under which a court may overturn the agency's

[8] Clark, 1997, p. 266.

decision. In 1989, the U.S. Supreme Court indicated that the "arbitrary and capricious" standard should be used in reviewing an agency's decision not to prepare an EIS.[9] Under this standard, an agency's decision must be based on "relevant factors" and must not have demonstrated a "clear error of judgment." As long as an agency's action is not considered "arbitrary and capricious," meaning also that they followed NEPA's *procedural* requirements, then they may proceed with their proposed action.

The standard of review that the courts apply is sometimes called the "hard look" doctrine. In a case involving the U.S. Forest Service,[10] both district and circuit courts held that the agency was not required to prepare an EIS, because in their EA they had taken a "hard look" at the problem. This included identifying relevant areas of environmental concern, making a convincing case that impacts would be insignificant, and establishing that changes in the project sufficiently reduced danger of impacts to a minimum. In general, the courts are unwilling to substitute their judgment for an agency's substantive decision. Rather, their focus is on an agency's compliance with NEPA procedures, and on whether or not the agency's decision was supported by reason.

Q: Are there other ways we can resolve EA-related disputes with an agency?

A: Yes. Given the inherent limitations of the legal system in resolving certain types of NEPA disputes, it seems obvious that other methods of conflict resolution should be pursued. Yet until recently, mediation techniques were not always used in resolving NEPA disputes. Gradually, however, mediation has become a more accepted and reliable tool, along with other Alternative Dispute Resolution (ADR) tools, such as negotiation and arbitration.

Although ADR is discussed in detail in Chapter 5, we raise the concept here to stress its importance and potential in resolving EA-related disputes. The flexibility and level playing field that ADR seeks to create is precisely what many NEPA-related conflicts lack. And the emphasis on equal involvement by all parties is precisely what tribes have often found missing in NEPA disputes.

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[9] Marsh v. Oregon Natural Resources Council (1989).
[10] Cabinet Mountains v. Peterson, 685 F.2d 678 (D.C. Cir. 1982).

Q: Does an EA have to address cumulative or indirect effects?

A: Yes, to some degree. NEPA requires that all analyses, whether in an EA or in an EIS, must consider the impacts of "past, present, and reasonably foreseeable future actions."[11] Still, agencies tend not to include detailed analyses in their EAs; as a result, cumulative or indirect effects are given little consideration.

An important court case on the issue of cumulative impacts speaks to this situation. In Fritiofson v. Alexander, the court "drew a distinction between cumulative impacts which a NEPA analysis, in that case an EA, must examine and the scope of cumulative actions which an EIS must include."[12] Specifically, the court stated "we do not mean to suggest that the consideration of cumulative impacts at the threshold stage [in an EA] will necessarily involve extensive study or analysis of the impacts of that action."

Though this decision appears to downplay the role of cumulative impact assessment in the EA process, it did clearly mandate the consideration of cumulative impacts in making the threshold determination. Another important case, Thomas v. Peterson,[13] supports this view, finding that cumulative impacts of potential concern may be enough to require preparation of an EIS.

The questions of whether cumulative impacts are adequately considered in the EA process, and of whether these considerations propel an agency to prepare an EIS, are of paramount significance for tribes. Without cumulative impact assessment, thousands of actions are deemed environmentally insignificant, and are approved with little public or tribal involvement. The extent to which NEPA can protect tribal resources thus, in many ways, depends on the ability of the federal government to consistently and adequately consider the scope and extent of cumulative impacts.

Q: Does an EA have to address social and economic impacts?

A: Not extensively. By definition, EAs must examine the impacts of a proposed action on the human environment, which *includes* social and economic impacts. Yet significant social and economic impacts, by

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[11] 40 CFR §1508.7.
[12] Cohen and Miller, 1997.
[13] 753 F.2d (9th Cir. 1985).

themselves, do not require development of an EIS. NEPA requires social and economic effects to be addressed only in an EIS, and only if they would be caused by *environmental* impacts.[14] In fact, the "emphasis on physical and biological impacts of proposed actions may diminish NEPA requirements for social and economic components as part of informed decision making for EAs and CXs."[15]

Though agencies tend to rely on biological and physical measurements of impact, there is increasing recognition that a community's rights, values, needs, and well-being are often altered by major projects. Tribes historically involved with NEPA have actually been a major catalyst for this change in thinking, having continually stressed the need for federal agencies to address cultural impacts. Still, some agencies' approach to environmental impact assessment is one that "excludes examination of social impacts in EAs, thus stripping the decision makers of the value of integrating social, economic, and environmental considerations into one analysis."[16]

3.2C Mitigation and the EA

With more than 50,000 EAs and only 500 EISs produced each year,[17] we can deduce that agencies have found ways to avoid the time- and resource-intensive, full-blown EIS process. Much of the time, the mitigated FONSI serves this purpose for agencies.

By using mitigation measures to hold the potential impacts of their project below a "significant" threshold, agencies can avoid preparation of an EIS. Although this tactic may appear to run counter to NEPA's original intent, courts have found that, within reason, agencies may use this approach, especially if they can prove that their EA process involved a "hard look" at the impacts and that those impacts were addressed through a mitigation plan.

Many tribes have encountered the "mitigated FONSI," and are aware that it presents several issues of concern. A primary concern is whether or not these mitigation plans are enforceable, and if so, who will be responsible for ensuring compliance. Another concern is over the use of "compensatory mitigation," in which mitigation (ecological or monetary) is

See Chapter 6 for more information on the enforcement of mitigation measures in EAs or EISs.

[14] 40 CFR §1508.14
[15] Solomon, Yonts-Shepard, and Supulski, 1997.
[16] Clark, 1997.
[17] Reported by CEQ.

allowed outside the ecosystem or watershed that is being affected.

To help address these issues, the CEQ regulations[18] provide a definition of "mitigation." In addition, the U.S. EPA and the Army Corps of Engineers have adopted guidelines under Section 404(b) of the Clean Water Act.[19] In these guidelines, they interpret the CEQ definition of mitigation as suggesting a hierarchy, wherein compensatory mitigation is considered only if "avoidance, minimization, and restoration are not 'practicable.'"[20]

Q: Can Mitigation Measures be Imposed in EAs and FONSIs?

A: CEQ's "40 Most Asked Questions" addresses this very issue. It reads:

> Can an EA and FONSI be used to impose enforceable mitigation measures, monitoring programs, or other requirements, even though there is no requirement in the regulations in such cases for a formal Record of Decision?
>
> Yes. In cases where an environmental assessment is the appropriate environmental document, there still may be mitigation measures or alternatives that would be desirable to consider and adopt even though the impacts of the proposal will not be "significant." In such cases, the EA should include a discussion of these measures or alternatives to "assist [46 FR 18038] agency planning and decisionmaking" and to "aid an agency's compliance with [NEPA] when no environmental impact statement is necessary."[21] The appropriate mitigation measures can be imposed as enforceable permit conditions, or adopted as part of the agency final decision in the same manner mitigation measures are adopted in the formal Record of Decision that is required in EIS cases.

Q: Is It Appropriate for an Agency to Use Mitigation to Avoid Preparation of an EIS?

A: Here again, CEQ's "40 Most-Asked Questions" state CEQ's position on this issue:

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[18] 40 CFR §Part 1508.20
[19] 33 U.S.C. 1344(b)
[20] Weiner, 1997.
[21] Section 1501.3(b), 1508.9(a)(2).

If an environmental assessment indicates that the environmental effects of a proposal are significant but that, with mitigation, those effects may be reduced to less than significant levels, may the agency make a finding of no significant impact rather than prepare an EIS? Is that a legitimate function of an EA and scoping[22]?

Mitigation measures may be relied upon to make a finding of no significant impact only if they are imposed by statute or regulation, or submitted by an applicant or agency as part of the original proposal. **As a general rule, the regulations contemplate that agencies should use a broad approach in defining significance and should not rely on the possibility of mitigation as an excuse to avoid the EIS requirement.**[23]

If a proposal appears to have adverse effects which would be significant, and certain mitigation measures are then developed during the scoping or EA stages, the existence of such possible mitigation does not obviate the need for an EIS. Therefore, if scoping or the EA identifies certain mitigation possibilities without altering the nature of the overall proposal itself, the agency should continue the EIS process and submit the proposal, and the potential mitigation, for public and agency review and comment. This is essential to ensure that the final decision is based on all the relevant factors and that the full NEPA process will result in enforceable mitigation measures through the Record of Decision.

In some instances, where the proposal itself so integrates mitigation from the beginning that it is impossible to define the proposal without including the mitigation, the agency may then rely on the mitigation measures in determining that the overall effects would not be significant (e.g., where an application for a permit for a small hydro dam is based on a binding commitment to build fish ladders, to permit adequate down stream flow, and to replace any lost wetlands, wildlife habitat and recreational potential). In those instances, agencies should make the FONSI and EA available for 30 days of public comment before taking

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[22] Courts have disagreed with CEQ's position in this question. The 1987-88 CEQ Annual Report stated that CEQ intended to issue additional guidance on this topic.

[23] Sections §1508.8, §1508.27.

action.[24]

Similarly, scoping may result in a redefinition of the entire project, as a result of mitigation proposals. In that case, the agency may alter its previous decision to do an EIS, as long as the agency or applicant resubmits the entire proposal and the EA and FONSI are available for 30 days of review and comment. One example of this would be where the size and location of a proposed industrial park are changed to avoid affecting a nearby wetland area.

[24] Section §1501.4(e)(2).

THE ESSENTIALS OF TRIBAL NEPA PARTICIPATION

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Know NEPA's History, Performance and Framework

Chapter 2:
Know How and When NEPA is Triggered

Chapter 3:
Know the Environmental Assessment Process: Its Function, Form, and Limitations

Chapter 4:
Know How the EIS is Developed

Chapter 5:
Know Your Options for Involvement

Chapter 6:
Know How to Invoke Tribal Rights and Resources

Chapter 7:
Know How to Challenge a NEPA Determination

Chapter 8:
Know What a Tribal Environmental Policy Act Can Do For You

Chapter 9:
Know How to Write a Tribal Environmental Policy Act

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4: How the Environmental Impact Statement is Developed

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This chapter walks through the stages and requirements involved in preparation of an EIS. Once an agency has decided that an EIS must be prepared for a proposed action, the regulations establish requirements for both the content of the EIS and the procedure through which the EIS is

prepared, reviewed, and revised. In this section, the required procedural steps are explained, and as we move sequentially through the process, the key concepts are introduced. First, however, it is helpful to identify the different types of EISs that can be produced.

4.1 Types of EISs

There are several different types of EISs, and which type of EIS is developed in a given situation depends on several factors. Foremost, what guides the type of EIS is the specific type of action or project being proposed. Other factors determining the type of EIS include the stage at which an EIS is first considered, the agency or agencies involved, and the amount of information available. The different types of EISs, and a description of their uses, are shown in the table on page 57.

4.2 Scoping

The first procedural step in the preparation of an EIS is the publication of a notice of intent to prepare an EIS in the Federal Register. The actual preparation of an EIS begins with a scoping process. The lead federal agency is required to invite "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)"[1] to participate in the scoping process. The regulations provide that the scoping process may include one or more scoping meetings, but such meetings are not required.

Determination of Lead Agency is discussed in Chapter 4

Type of EIS	Application
Project-Specific	• Used most commonly; applies whenever there is a proposed action in a specified location, with known characteristics.

[1] 40 CFR §1501.7(a)(1)

Type of EIS	Application
Tiered or Programmatic	• Applies whenever a broad analysis will lead to more narrow analyses (e.g., when an EIS is prepared on a policy or plan, and then later specific actions or projects are taken as part of that policy or plan).
Supplemental	• Only prepared if substantial changes are made in a proposed action that are relevant to environmental concerns, or • If there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action.[2]
Legislative	• 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. [3] • Scoping is not required, and usually the statement is prepared just like a draft statement.[4]

4.2A The Intent of "Scoping"

As the name suggests, a basic purpose of the scoping process is to determine the "scope" of an EIS. This involves looking at the range of actions, alternatives, and impacts of a proposed project, and should address both the geographic or physical area to be studied, and the specific issues related to the project.

The kinds of actions to be considered include connected, cumulative, and similar actions. Alternatives to be considered include the "no action" alternative and other reasonable courses of action. Impacts to be considered include direct, indirect, and cumulative impacts.

The scoping process included in NEPA is somewhat akin to a "primary election" in which the field of candidates is narrowed. If issues will be considered in the draft and final EIS, then they usually must be raised during scoping. Once the draft EIS is issued, comments are welcome, but previously unaddressed issues raised at this stage will

[2] 40 CFR §1502.9.
[3] 40 CFR §1508.17.
[4] 40 CFR §1506.8.

probably not be given much attention. A good scoping process raises issues, generates discussion, and produces new information right up until the draft EIS is issued – not just at initial meetings or public hearings. As well, a good scoping process is neither too narrow (e.g., eliminating many crucial alternatives) nor too broad (e.g., making the process too burdensome and unmanageable).

The Format of Scoping

Although scoping is thought of as a formal process, it can actually take on many different forms and involve a range of participants. Most often, scoping is conducted at one or more meetings, held at designated times and locations. A formal hearing process, in which individuals are asked to testify, is often used, helping to ensure that the information, concerns, and opinions of interested parties are well documented. Yet scoping meetings may also be quite informal, conducted in the format of "community meetings" or "workshops." At these meetings, attendees usually include the project proponent, any federal agencies that are involved, and concerned or interested members of the public. Potentially affected parties, such as tribes or a specific community, are encouraged to attend these meetings, as their involvement from the outset is critical. State and local government agencies routinely participate, because they have special expertise or because they have jurisdiction over some aspect of the proposal. Tribal government agencies may participate for the same reasons, even if it is not apparent from the outset that tribal officials have particular concerns about the proposal.

Among the many types of issues raised during scoping, those heard most often are ones that pertain to the "environmental setting." These include:

- Geology, Topography, and Soils
- Groundwater Resources
- Surface Water Resources
- Terrestrial and Aquatic Communities
- Environmentally Sensitive Areas
- Air Quality
- Land Use, Transportation and Infrastructure
- Demographics
- Sound Levels
- Socioeconomics
- Cultural Resources

What the Scoping Process Should Produce

Tribes participating as a co-lead or cooperating agency should consider the scoping process to be an essential element of their involvement. As in any negotiation, as many tribes well know, the degree of openness, information sharing, and cooperation established at this early stage can carry through the remainder of the process. Moreover, from a strictly administrative standpoint, the scoping process should produce several clearly defined outcomes,[5] including:

- Determination of an interdisciplinary team and/or team leader.
- Determination of a work plan, if needed.
- Identification of all agencies and organizations involved.
- Identification of any existing documents.
- Refinement of issues.
- Preliminary exploration of draft alternatives.
- Refinement of project design.
- Determination of data needs.
- Formulation of analysis/decision criteria.
- Creation of feedback/early opinions.

4.2B The Analysis of Data

Another critical function of scoping is the selection of, and agreement upon, the *type* and *level* of analysis to be used. There is increasing recognition that the traditional type of analysis used in the scoping process was based on an "ad-hoc selection of issues, and is inadequate for considering cumulative effects and biodiversity." A more appropriate scope, for example, is at the ***ecosystem level.*** Using this approach, in which cumulative effects and biodiversity are central to the analysis, the threshold for determination of significance is the carrying capacity of the potentially impacted ecosystem.

In addition to ecosystem-based analysis, there are a variety of other methods for assessing and forecasting environmental impacts. Many of those used in the NEPA process are very accurate, but others engender considerable debate. Thus during scoping, or as early in the

[5] Duke University and CEQ, 1992.

NEPA process as possible, it is important to ask certain questions. In their NEPA Training Manual,[6] CEQ recommends these questions:

- Are there sufficient predictive models and site-specific data to support a quantitative assessment of environmental impacts?
- Is there a quantitative threshold (e.g., a standard or generally accepted criterion) that can be used to distinguish significant levels of environmental impacts from all possible levels of impacts?
- Are there quantitative/statistical methodologies available for objectively describing levels of impacts, or will subjective scoring be used at one or more stages of the assessment?
- Are there prior, related assessments that have been conducted on similar actions?

In the training manual, the ''ideal circumstance'' for data analysis is described as

> where there is a substantial base of data specific to the site or area being evaluated, where there are well-tested predictive models that use those categories of data, where there is general agreement among professionals as to the level of environmental impact that would be deemed "significant," where the need for subjective scoring is minimal or absent, and where documentation of other similar assessments is available. It is unlikely, however, that there will be many situations where these ideal conditions will be satisfied, and most EIAs require a substantial input of professional judgment.

The manual also describes the different methodologies that have been used to conduct NEPA analyses. The chart below identifies the different approaches.

[6] *Ibid.*

NEPA Analysis Methodologies	
Habitat Evaluation Methods	Assessment of the existing quality of various habitats can be standardized through the derivation of a set of habitat evaluation models that assign certain values (which may be minor, incremental, or continuous) to certain environmental conditions.
Ecological Indices	Indices simplify complex data sets to scales of 0-1 or 0-100 for uniformity.
Mathematical Modeling	In this approach to environmental impact assessment, the principal cause-effect relationships of a proposed action are described by means of mathematical functions and combined to yield a mathematical model that can predict future environmental conditions.
Delphi Technique	This method uses the opinions of knowledgeable experts and, through a repetitive process, converges toward group consensus.
Other Methodologies: ❖ Multivariate Statistical Methods ❖ Graphical Overlays ❖ Geographical Information Systems (GISs) ❖ Simulation ❖ Risk Assessment ❖ Cost-Benefit Analysis	

4.2C Tips for Making Effective Use of the Scoping Process

The following observations about the scoping process are taken from guidance issued by CEQ in a 1981 Memorandum:

Scoping is a new opportunity for you to enter the earliest phase of the decision-making process on proposals that affect you. Through this process you have access to public officials before decisions are made and the right to explain your objections and concerns. But this opportunity carries with it a new responsibility. No longer may individuals hang back until the process is almost complete and then spring forth with a significant issue or alternative that might have been raised earlier. You are now part of the review process, and your role is to inform the responsible agencies of the potential impacts that should be studied, the problems a proposal may cause that you foresee, and the alternatives and mitigating measures that offer promise.

As noted above, and in 40 Questions and Answers, no longer will a comment raised for the first time after the draft EIS is finished be accorded the same serious consideration it would otherwise have merited if the issue had been raised during scoping. Thus you have a responsibility to come forward early with known issues. In return, you get the chance to meet the responsible officials and to make the case for your alternative before they are committed to a course of action. To a surprising degree this avenue has been found to yield satisfactory results. There's no guarantee, of course, but when the alternative you suggest is really better, it is often hard for a decision-maker to resist. There are several problems that commonly arise that public participants should be aware of:

- **Public input is often only negative**: Thus public participants in scoping should reduce the emotion level wherever possible and use the opportunity to make thoughtful, rational presentations on impacts and alternatives. Polarizing over issues too early hurts all parties. If agencies get positive and useful public responses from the scoping process, they will more frequently come forward with proposals early enough that they can be materially improved by your suggestions.

- **Issues are too broad**: The issues that participants tend to identify during scoping are much too broad to be useful for analytical purposes. For example, "cultural impacts" – what does this mean? What precisely are the impacts that should be examined? When the EIS preparers encounter a comment as

vague as this, they will have to make their own judgment about what you meant, and you may find that your issues are not covered. Thus, you should refine the broad general topics, and specify which issues need evaluation and analysis.

- **Impacts are not identified**: Similarly, people (including agency staff) frequently identify "causes" as issues but fail to identify the principal "effects" that the EIS should evaluate in depth. For example, oil and gas development is a cause of many impacts. Simply listing this generic category is of little help. You must go beyond the obvious causes to the specific effects that are of concern. If you want scoping to be seen as more than just another public meeting, you will need to put in extra work.

In this same guidance, CEQ also noted that:

- There are several reasons to attend a scoping meeting. First, some of the best effects of scoping stem from the fact that all parties have the opportunity to meet one another and to listen to the concerns of the others. This will allow you to submit written comments following the meeting (time permitting) that rebut any of the potential disagreements raised at the meeting.

- Scoping is a process, not an event or a meeting. It continues throughout the planning for an EIS, and may involve a series of meetings, telephone conversations, or written comments from different interested groups. Because it is a process, participants must remain flexible. The scope of an EIS occasionally may need to be modified later if a new issue surfaces, no matter how thorough the scoping was. But it makes sense to try to set the scope of the statement as early as possible.[7]

4.2D Tiering

In determining the scope of an EIS, the relationship between the proposed action and other federal actions can sometimes be addressed through the concept of "**tiering.**" Tiering refers to the way in which one

[7] CEQ Executive Memorandum, 1981.

EIS builds on another, incorporating earlier documentation by reference and deferring analysis of some issues for later *environmental documents* in order to focus on the issues that are ripe for decision.

Through the scoping process, the *lead agency*, with input from others who chose to participate in scoping, is responsible for a broad range of tasks, including:

- Identifying both the significant issues that will be analyzed in detail in the EIS and those issues that will be eliminated from detailed study, either because they are not significant or because they have been covered in a prior environmental review.
- Identifying other EISs and EAs that have been prepared or are planned for actions that are related to but not part of the scope of the EIS under consideration.
- Identifying other environmental review and consultation requirements so that the necessary analyses can be integrated into the EIS.
- Allocating assignments among itself and cooperating agencies for preparation of the EIS; and
- Indicating the relationship between the timing of the EIS and the agency's decision-making schedule.
- Setting page and/or time limits for the EIS (optional).

4.2E Other environmental review and consultation requirements

One of the basic purposes for inviting other governmental agencies to participate in scoping, possibly by becoming cooperating agencies, is to ensure that the EIS integrates compliance with environmental review and consultation requirements established by laws other than NEPA. This purpose is in keeping with one of the "three principal aims" of the CEQ regulations discussed earlier – to reduce unnecessary delay.

The regulations state: "To the fullest extent possible, agencies shall prepare draft environmental impact statements concurrently with and integrated with" analyses conducted to comply with the requirements of "other environmental review laws and executive

orders."[8] These other environmental review and consultation requirements include a wide array of laws, regulations, and executive orders. In the regulations, however, only three such requirements are specifically listed: the Fish and Wildlife Coordination Act, the National Historic Preservation Act, and the Endangered Species Act.

As the words imply, if an "environmental review" requirement applies to a proposed action, the action usually cannot be taken without a permit or other approval from an agency which has "jurisdiction by law." Examples include the issuance of a dredge and fill permit by the U.S. Army Corps of Engineers pursuant to §404 of the Clean Water Act, and certification (by a state agency or the Environmental Protection Agency) of compliance with water quality standards pursuant to §401 of the Clean Water Act.

If a *tribe* has received EPA's ''Treatment-similar-to-a-State" status for a provision of the Clean Water Act (or for any other federal environmental statute), then proposed actions within that tribe's jurisdiction must comply with the review requirements.

Consultations

A "consultation" is a requirement that applies to certain proposed federal actions. When consultations are required, the lead agency must consult during the NEPA process with any other federal or non-federal government agency that has "special expertise." This distinction between consultation and a review requirement is that the agency being consulted does not have the authority to veto the proposed action.

A good example of a consultation requirement is §106 of the **National Historic Preservation Act** (NHPA). NHPA applies when a federal agency has direct or indirect jurisdiction over a federal or federally assisted undertaking, and when that action may affect a property either listed on or eligible for listing on the National Register of Historic Places. When this occurs, the federal agency must give the **Advisory Council on Historic Places** an opportunity to comment – before the expenditure of funds, and before the issuance of any permit or license for the proposed undertaking.

Usually, the Advisory Council requires consultation with the relevant State Historic Preservation Officer rather than, or at least prior to, consultation with the Advisory Council itself. It may sometimes be difficult to distinguish between a *review* requirement and a *consultation* requirement. Moreover, compliance with a consultation requirement may

[8] 40 CFR §1502.25. Environmental review and consultation requirements.

sometimes take so long that the opportunity to carry out a proposed action is effectively foreclosed.

Cultural Resource Protection

Review and consultation requirements can be grouped into categories, according to the resources and other public values that they are intended to protect. Tribes are frequently concerned with a category that is often referred to by federal agencies as "cultural resources" or "cultural resources management." Three of the most important statutes that address cultural resources are:

- The National Historic Preservation Act[9] of 1966 (**NHPA**)
- The Archaeological Resources Protection Act[10] of 1979 (**ARPA**), and
- The Native American Graves Protection and Repatriation Act[11] of 1990 (**NAGPRA**).

The regulations implementing these three statutes include important provisions that enable Indian tribes to assert control over federal actions affecting Indian lands. Moreover, through these statutes, tribes can influence federal actions affecting properties of religious or cultural importance that are *outside* tribal jurisdiction.

ARPA applies to Indian lands *and* public lands, and tribes are entitled to receive notice and be consulted if the issuance of a permit to conduct an archaeological excavation on public lands would affect a property of tribal cultural or religious importance. **NAGPRA** applies to human remains and other "cultural items" located on "tribal lands" (a term that includes all lands with reservation boundaries) and federal lands. The primary consultation requirement established by the **NHPA** is §106, which was discussed briefly above.

Although §106 consultation has been problematic for many tribes, in large part because of the prominent role of the State Historic Preservation Officers (SHPOs), some tribes have achieved a measure of success in litigation involving §106. In 1992, the NHPA was amended to provide that tribes could assume the roles of SHPOs for lands within their reservations. The amendments also gave tribes a statutory right to

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[9] 16 U.S.C. §470f (1988).
[10] Pub.L. 96-95, 93 Stat. 721 (codified at 16 U.S.C. § 470aa-47011 (1979)).
[11] 25 U.S.C. §3001 *et seq.*

be involved in the §106 consultation process for any federal undertaking that may affect a historic property *to which the tribe attaches religious and cultural significance*. In 1999, the Advisory Council completed the revision process and issued its new NHPA consultation regulations.[12]

Because there are so many other environmental review and consultation requirements, and because it is often not readily apparent whether a particular review requirement applies, agencies that have jurisdiction by law must be vigilant in monitoring the NEPA activities of other federal agencies. Tribes and other nonfederal entities that wish to expedite the processing of a proposed action can help by raising key questions during scoping. Doing so helps ensure that review and consultation requirements for the proposed action (and its alternatives) are addressed in the draft EIS.

Another way in which tribes can help to expedite compliance with other environmental review and consultation requirements is to maintain working relationships at staff levels with relevant federal and state agencies. Although tribes justifiably resist attempts by state agencies to assert civil regulatory jurisdiction within Indian Country, consultation that does not amount to regulatory review can be mutually beneficial. If tribal staffs have working relationships with federal and state agency staff, consultation can be accomplished without inordinate delay.

4.3 Draft EIS

The CEQ regulations provide that, except for legislative proposals, the EIS is to be prepared in two stages: draft and final. A *draft* EIS is circulated to the public for review and comment, and must conform to certain standards for format and content. Some of these standards are prescribed by the NEPA statute itself; others are based on CEQ's objective of making the EIS more useful to decision makers and the public.

4.3A Purpose and Content of the Draft EIS

The purpose of an EIS is to ''insure that the policies and goals defined in [NEPA] are infused into the ongoing programs and actions of the Federal Government."[13] An EIS is thus intended to be an aid to federal officials

[12] 64 FR 27043 (May 18, 1999).
[13] 40 CFR §1502.1.

in their decision making, not a means to justify the decisions that they have already made. To this end, an EIS is supposed to be written in plain language and should be "concise, clear, and to the point."[14] Agencies should also avoid producing an encyclopedic EIS, but should focus instead on substantive analysis. Finally, each EIS is required to 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 [NEPA] and other environmental laws and policies."[15]

4.3B Format

The regulations call for agencies to use a recommended format, which in practice has become the standard format:

(a) Cover sheet.
(b) Summary.
(c) Table of contents.
(d) Purpose of and need for action.
(e) Alternatives including proposed action.
(f) Affected environment.
(g) Environmental consequences.
(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).

4.3C The Interdisciplinary Approach

One of the more unique and progressive requirements written into NEPA is the requirement that an *interdisciplinary approach* be used. The regulations state that an EIS "shall be prepared using an interdisciplinary 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.’’[16]

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[14] *Ibid.*
[15] 40 CFR §1502.2(d).
[16] 40 CFR §1502.6

A *critical function of cooperating agencies* is to strengthen the lead agency's interdisciplinary capability, by making staff support and data available. Thus when agencies with jurisdiction by law choose to be cooperating agencies, not only can they help integrate compliance with the laws and regulations they administer, but they can also improve the quality of the EIS by supporting the interdisciplinary capability of the team preparing the EIS. Similarly, tribes may find themselves concerned that the lead agency might prepare an EIS without using the professional expertise appropriate for consideration of tribal interests. If a tribe has such expertise on staff, or has access to such expertise, the tribe could become a cooperating agency in order to provide such expertise to the interdisciplinary team that is charged with preparing the EIS.

"If a tribe has such expertise on staff, or has access to such expertise, **the tribe could become a cooperating agency for the purpose of providing such expertise to the interdisciplinary team** that is charged with preparing the EIS."

4.3D Discussion of Alternatives

The two sections within a draft EIS that generally contain the most extensive documentation are the section on **alternatives** (including the proposed action) and the section on **environmental consequences**. Two statutory provisions require consideration of alternatives. In the CEQ regulations, section 102(2)(C)(iii) simply includes "alternatives to the proposed action" among the requirements for the EIS. Section 102(2)(E) requires 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."

In the alternatives section, the regulations require agencies to "rigorously explore and objectively evaluate all reasonable alternatives," including the "no action" alternative and "reasonable alternatives that are

not within the jurisdiction of the lead agency." In fact, CEQ regards the discussion of alternatives as the ''heart'' of the statement.[17] Yet requiring agencies to consider alternatives that are outside their jurisdiction is ambitious, and not all agencies can be expected to devote resources to the task. If a tribe recognizes that there are reasonable alternatives outside the lead agency's jurisdiction that warrant serious consideration, tribal representatives may want to help formulate such alternatives during scoping and then to advocate their inclusion in the EIS.

Tips for Evaluating the Proposed Alternatives

When evaluating the alternatives presented in a draft EIS, there are several questions a reviewer might want to consider.[18] These include:

- Are all reasonable alternatives rigorously explored and objectively evaluated? Reasonable alternatives should include those that are viable or feasible from a technical and economic standpoint, rather than only those desirable from the standpoint of the project sponsor.

- Have the alternatives been screened to reduce their number, allowing a reasonable number of viable alternatives to be evaluated in ***detail***?

- For those alternatives eliminated from study, does there appear to have been an objective screening? Is there a clear and reasoned explanation for eliminating them? Has it been documented?

- Are all the selected alternatives treated with equal, objective detail and given equal, objective treatment in presentation such as displays and maps?

- Does the draft EIS clearly identify the preferred alternative and document the selection criteria by which that alternative came to be preferred?

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[17] 40 CFR §1502.14

[18] Adapted from *Alternatives Analysis in the EIS Process* (EA Training Book).

4.3E Environmental Consequences

The other major section of an EIS is the one devoted to the environmental consequences of the proposed action. The regulations provide some specific guidance for the content of this section of the EIS, such as a discussion of possible conflicts between the proposed action and the objectives of land-use plans and policies for the affected area. This ‘‘affected area’’ may, of course, include tribal lands and/or land-use plans. Where a reservation is affected, the discussion within the EIS must examine the "energy requirements and conservation potential"[19] of the alternatives; the use of and conservation potential for natural resources (renewable and depletable); and the impact to historic and cultural resources.

The discussion of alternatives and environmental consequences in an EIS is to be presented in a comparative format, so that the decision maker and the public can logically choose among the options. An EIS may include a "cost-benefit" analysis, but one is not required. The regulations do require, however, that if an agency prepares a cost-benefit analysis that is relevant to the choice between environmentally different alternatives, the EIS must "discuss the relationship between that analysis and an analysis of unquantified environmental impacts, values, and amenities."[20]

Furthermore, the regulations state that "when there are important qualitative considerations," the EIS *should not* present "the weighing of the merits and drawbacks of the various alternatives ... in a monetary cost-benefit analysis."[21]

4.3F Mitigation Measures

In most situations, those who would be adversely affected by an action prefer the route of ‘‘avoidance,’’ either by no action being taken, or by use of an alternative action. Often an agency may not be able or willing to seriously consider the route of action that ‘‘avoids’’ impacts. When ‘‘avoidance’’ is not possible, mitigation becomes the preferred or required course of action.

Although the concept of mitigation is not formally discussed in NEPA, it is defined by CEQ in Section 1508.2 of the regulations.

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[19] 40 CFR §1502.16
[20] 40 CFR §1502.23
[21] 40 CFR §1502.23

Agencies are directed to either avoid, minimize, rectify, reduce, or eliminate the impact over time, through preservation/maintenance, or by compensation through replacement or substitution. Most commonly, mitigation measures include:

- Minimizing impacts by limiting the action.
- Rectifying impacts through restoration of the affected environment.
- Reducing impacts over time through maintenance operations.
- Compensating for impacts by providing substitute resources.

Enforcing Mitigation Measures

Because so many NEPA actions require mitigation, and because so many tribal interests are affected by these mitigation measures, the issue of enforcement takes on singular importance in the overall scheme of NEPA. If, for example, an agency develops a detailed and comprehensive mitigation plan, but fails to execute the plan in a thorough or timely fashion, what recourse do impacted parties have? What can tribes do to ensure enforcement of mitigation measures?

Section 1505.3 of the CEQ regulations states that a monitoring and enforcement program shall be adopted and summarized in the Record of Decision where applicable for any mitigation. Section 1505.3 also indicates that the lead agency shall make funding of action dependent on mitigation. Furthermore, **the lead agency must, upon request, inform cooperating or commenting agencies about progress in carrying out mitigation measures which were adopted by the agency making the decision.**[22] Similarly, the lead agency shall, upon request, make available to the public the results of relevant monitoring.

Tribes concerned about enforcement might also want to review the mitigation plan from the standpoint of feasibility. Does the mitigation plan in the EIS[23] include, for example:

- A level of detail linked appropriately to the project detail?
- An implementation plan that is feasible in terms of the agency's authority, jurisdiction, and cost?
- A measure of evaluating effectiveness (e.g., proven vs. experimental)?

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[22] 40 CFR §1505.3(c)

[23] Duke University and CEQ, 1992.

- An implementation schedule (e.g., short or long term)?
- A list of parties responsible for implementation, monitoring, and maintenance?

4.3G Tips for Evaluating a Draft EIS

Though agencies are required to solicit comments on their draft EISs, they do not have to be specific about the types of issues that they wish the reviewers to focus on. Public comments may thus be too broad or vague, and may not generate specific attention from the lead agency in the final EIS. A helpful list of criteria has been developed that should aid reviewers in evaluating a draft EIS[24]. It includes:

- The **appropriateness of the study area**: Were the potentially affected areas included in the analyses (particularly wherever tribal usual and accustomed areas may be involved)?

- The **significant issues** addressed in the draft EIS: Were they adequately identified, analyzed, and understood?

- The range of **alternatives**: Was there an appropriate array of alternatives to the proposed action? Were they presented and evaluated adequately?

- The **data used** in the analyses: Were the conclusions in the analyses supported by appropriate and accurate data?

- The **methodology:** Were the methodologies and approaches in the analyses appropriate for the technical issues addressed in the draft EIS?

In addition to reviewing what *is* included in an EIS, it is helpful to consider what might *not* have been included in an EIS. Has the EIS adequately incorporated tribally generated data? Has the EIS fully examined the study area to include areas of special tribal significance? Has the EIS given adequate attention and analysis to cultural impacts? These are the types of questions tribes may want to consider when reviewing a draft EIS, ensuring that an agency's final decision is based on *complete information.*

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[24] Kreske, 1996.

The issue of complete information in an EIS was addressed by the CEQ in 1985, through an amendment to its regulations. This amendment required all federal agencies to ''disclose the fact of incomplete or unavailable information when evaluating reasonably foreseeable significant adverse impacts on the human environment in an EIS, and to obtain that information if the overall costs of doing so are not exorbitant.''[25]

The amendment further states,

> If the agency is unable to obtain the information because overall costs are exorbitant or because the means to obtain it are not known, the agency must (1) affirmatively disclose the fact that such information is unavailable; (2) explain the relevance of the unavailable information; (3) summarize the existing credible scientific evidence which is relevant to the agency's evaluation of significant adverse impacts on the human environment; and (4) evaluate the impacts based upon theoretical approaches or research methods generally accepted in the scientific community.[26]''

4.4 Commenting

The lead agency is required by the CEQ regulations to file a copy of the draft EIS with the Environmental Protection Agency (EPA), and to distribute copies to and seek comments from a variety of governmental entities and private organizations. Sometimes a *preliminary* draft EIS is distributed to federal and state agencies, and presumably would be distributed to tribes acting as cooperating agencies, but such distribution is not required by the regulations.

4.4A Minimum Time Periods for Comment

The lead agency must allow at least 45 days for comments on a draft EIS, though agencies frequently allow even more time. For example, the Department of Interior's minimum review period for draft EISs is 60 days from the date of transmittal to EPA. An agency may not make a decision on a proposed action until after at least 90 days have passed

[25] 51 FR 15616 (April 25, 1986)
[26] *Ibid.*

from the date the draft EIS is available to the public. This time period begins to run on the date that the draft EIS is listed in the weekly *Federal Register* notice published by EPA.

4.4B The Source and Substance of Comments

When soliciting comments, agencies usually send a draft EIS to all interested or potentially impacted parties. Agencies are legally required, however, to give copies of the draft document to certain parties, including:

- Federal agencies with jurisdiction by law or special expertise.
- State and local agencies that are authorized to develop and enforce environmental standards.
- Indian tribes ("when the effects may be on a reservation").
- Any agency that has asked to receive EISs for the kind of action proposed.

When a commenting party reviews an EIS, the comments most often are about the completeness, adequacy, or merit of the document. Comments frequently received about an EIS include:

- Too much *extraneous* information is included.
- Information is not germane, is unavailable, or is inconsistent.
- Document is selective or self-serving.
- Information is scientifically unreliable.
- Data is inaccessible.

Although most federal agencies that propose actions near Indian reservations routinely include tribes in their distribution of the EIS, some agencies may be less cooperative. A more important problem for most tribes is what to do with the many EISs that they receive from various federal agencies. Although EISs now use a standard format and are generally better focused than in previous years, EISs are still detailed and interdisciplinary documents. Environmental professionals who are experienced in reviewing EISs and drafting comments typically need much time to conduct a thorough review. Many tribes have professional staff to whom such review responsibilities could be assigned, but the staff typically has many other responsibilities.

When tribes do comment on a draft EIS, and when they identify specific problems with the adequacy of the EIS, what kind of response

can they expect from the agency? In CEQ's "Forty Most-Asked Questions," this very issue is raised:

> **Question**: What response must an agency provide to a comment on a draft EIS which states that the EIS's methodology is inadequate or inadequately explained? For example, what level of detail must an agency include in its response to a simple postcard comment making such an allegation?
>
> **Response**: Normally the responses should result in changes in the text of the EIS, not simply a separate answer at the back of the document. But, in addition, the agency must state what its response was, and if the agency decides that no substantive response to a comment is necessary, it must explain briefly why. An agency is not under an obligation to issue a lengthy reiteration of its methodology for any portion of an EIS if the only comment addressing the methodology is a simple complaint that the EIS methodology is inadequate. But agencies must respond to comments, however brief, which are specific in their criticism of agency methodology.
>
> If a number of comments are identical or very similar, agencies may group the comments and prepare a single answer for each group. Comments may be summarized if they are especially voluminous. The comments or summaries must be attached to the EIS regardless of whether the agency believes they merit individual discussion in the body of the final EIS.

4.4C The Commenting Responsibilities of the BIA and EPA

Agencies with jurisdiction by law or, or who have special expertise about a proposed project, are required to provide comments. CEQ considers the BIA to have special expertise about all environmental impacts on Indian lands and to have jurisdiction by law over certain kinds of impacts. A tribe that lacks the resources to review and comment on EISs for proposed actions that may affect its interests may want to stress the BIA's duty to comment on a particular EIS.

Sometimes the BIA's comments have been helpful in protecting tribal interests, particularly when tribes have insisted that the BIA play a role. Tribes know, however, the limitations of BIA's staff resources. Although cooperation between tribes and the BIA in reviewing EISs may be mutually beneficial, tribes should not rely on the BIA to protect tribal

interests. Some tribes might try using regional intertribal organizations to provide an EIS monitoring service for member tribes.

The commenting responsibilities of EPA are much broader and more formally defined than those of most federal agencies, because they have specifically delegated NEPA responsibilities through the Clean Air Act. Each year, EPA receives approximately 250 draft EISs, from 25 different agencies, on more than forty fundamentally different types of projects. This makes it challenging for the agency to comment on and characterize the adequacy of each draft EIS they review. Types of issues they frequently encounter when commenting on draft EISs include:

- The proposed project's **inconsistency with other environmental protection codes** (e.g., air (SIP) standards, water standards, RCRA/CERCLA requirements, endangered species, anti-degradation policy, nonpoint source control plans).

- The **adequacy of the impact prediction methods** used by the lead agency (e.g., direct, indirect, and cumulative impacts; media-specific impacts; cross media/ecological impacts; socioeconomic impacts; model selection/use; and need/benefit projections).

- The **adequacy of mitigation measures** proposed by the lead agency, including emphasis on: avoidance/minimization of impacts (alternatives); reduction of impact level of selected alternative**;** ability to implement; effectiveness; and cost.

- The **adequacy of alternatives** proposed by the lead agency, including emphasis on structural, nonstructural, need satisfaction, and outside agency jurisdiction.[27]

4.5 Final EIS

After the close of the comment period, the final EIS is prepared.[28] The lead agency must respond to the comments that have been filed by:

[27] "EPA Summarizes the Adequacy of the Federal EIS," in Duke University and CEQ, 1992.

- Modifying one or more of the alternatives.
- Developing new alternatives.
- Revising the analyses.
- Making factual corrections.
- Explaining why the comments do not warrant further response.

All substantive comments are to be included in or attached to the final EIS whether or not the agency considered the comments worthy of response. The final EIS, like the draft EIS, must be filed with the EPA, which lists all final EISs received during the preceding week in its weekly notice in the *Federal Register*. Agencies must then wait a minimum of 30 days from publication of the notice before they can select the preferred alternative.

4.5A Record of Decision (ROD)

The decision that an agency makes based on its EIS must be documented in a concise public record of decision (sometimes referred to as a ROD). There is no prescribed format for a record of decision, and the decision can be incorporated into any other record prepared by the agency. The record must state the following:

- What the decision was.
- All alternatives that were considered.
- Which alternatives were considered to be environmentally preferable.
- If any nonenvironmental factors were taken into account by the agency in making its decision.
- Whether the agency has adopted "all practicable means to avoid or minimize environmental harm" associated with the selected alternative.
- If such practicable mitigation measures have not been adopted, an explanation of why not.

In CEQ's ''Forty Most Asked Questions,'' CEQ addresses two issues with regard to RODs: their availability to the public, and their enforceability:

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[28] However, for an EIS of a legislative proposal, both a draft and a final EIS are required only in certain, limited instances.

Must Records of Decision (RODs) be made public? How should they be made available?

Under the regulations, agencies must prepare a "concise public record of decision," which contains the elements specified in Section 1505.2. This public record may be integrated into any other decision record prepared by the agency, or it may be separate if decision documents are not normally made public. The Record of Decision is intended by the Council to be an environmental document (even though it is not explicitly mentioned in the definition of "environmental document" in Section 1508.10). Therefore, it must be made available to the public through appropriate public notice as required by Section 1506.6(b). However, there is no specific requirement for publication of the ROD itself, either in the Federal Register or elsewhere.

What is the **enforceability of a Record of Decision?**

Pursuant to generally recognized principles of federal administrative law, agencies will be held accountable for preparing Records of Decision that conform to the decisions actually made and for carrying out the actions set forth in the Records of Decision. This is based on the principle that an agency must comply with its own decisions and regulations once they are adopted. Thus, the terms of a Record of Decision are enforceable by agencies and private parties. A Record of Decision can be used to compel compliance with or execution of the mitigation measures identified therein.

4.5B Mitigation Measures

According to CEQ, mitigation measures considered in an EIS must cover the range of impacts for a proposed project. The measures must include, "such things as design alternatives that would decrease pollution emissions, construction impacts, esthetic intrusion, as well as relocation assistance, possible land use controls that could be enacted, and other possible efforts."[29] Moreover, "**Mitigation measures must be**

[29] CEQ Memorandum: Forty Most-Asked Questions,1981.

considered even for impacts that by themselves would not be considered significant."

Once mitigation measures have been adopted, the lead agency is responsible for implementing these measures (unless another agency has agreed to carry out the mitigation program). These measures include placing appropriate conditions on both agency approvals and funding actions. If the mitigation measures were proposed by a cooperating or commenting agency, that agency may ask the lead agency to keep it informed on its progress in carrying out the mitigation measures. When such a request is made, the lead agency must comply. If tribes propose mitigation measures that are incorporated into the lead agency's decision, they may find this provision of the regulations, which requires reporting by the lead agency, to be of great value.

"If tribes propose mitigation measures that are incorporated into the lead agency's decision, **they may find this provision of the regulations, which requires reporting by the lead agency, to be of great value."**

Question 19b, of CEQ's "Forty Most-Asked Questions," raises two important issues with regard to mitigation.

> **Should an EIS treat the subject of available mitigation measures that are (1) outside the jurisdiction of the lead or cooperating agencies, or (2) unlikely to be adopted or enforced by the responsible agency?**
>
> All relevant, reasonable mitigation measures that could improve the project are to be identified, even if they are outside the jurisdiction of the lead agency or the cooperating agencies, and thus would not be committed as part of the RODs of these agencies. Sections 1502.16(h), 1505.2(c). This will serve to [46 FR 18032] alert agencies or officials who can implement these extra measures and will encourage them to do so. Because the EIS is the most comprehensive environmental document, it is an

ideal vehicle in which to lay out not only the full range of environmental impacts but also the full spectrum of appropriate mitigation.

However, to ensure that environmental effects of a proposed action are fairly assessed, the probability of the mitigation measures being implemented must also be discussed. Thus the EIS and the Record of Decision should indicate the likelihood that such measures will be adopted or enforced by the responsible agencies. Sections 1502.16(h), 1505.2. If there is a history of non-enforcement or opposition to such measures, the EIS and Record of Decision should acknowledge such opposition or non-enforcement. If the necessary mitigation measures will not be ready for a long period of time, this fact, of course, should also be recognized.

4.6 Predecision Referral to CEQ

The genesis of the referral process is Section 309 of the Clean Air Act, which gives EPA's administrator broad authority to refer matters to CEQ that are "unsatisfactory from the standpoint of public health or welfare or environmental quality.'' Executive Order 11991, which follows suit, expands the referral process to address conflicts between federal agencies.[30] This order does not recognize tribes as federal agencies, however, and tribes therefore cannot make referrals.

Chapter 6 looks at the issue of challenging an agency decision or action in detail.

If a federal agency disagrees on environmental grounds with the action that a lead agency plans to take, it has 25 days[31] from the date of the final EIS publication to make a ''referral.'' After the lead agency is given the opportunity to respond to the points raised by the referring agency, the CEQ may take any of a range of actions, including referring the matter to the President. Though CEQ rarely refers such disputes to the President, it does often publish its findings and recommendations. The recommendations are not binding on agencies, although they are usually accepted.

[30] Executive Order 11991, Sec.3(h).
[31] 40 CFR §1504.3(b).

4.7 Supplemental EIS

Sometimes it may be appropriate for an agency to prepare a supplement to an EIS, either after the EIS has been distributed as a draft for public review and comments, or after the EIS has been released in final form. The regulations direct that agencies shall prepare a supplemental EIS if the agency "makes substantial changes in the proposed action that are relevant to environmental concerns" or if there "are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts."[32]

A supplemental EIS may also be required if a substantial period of time has elapsed between the preparation of a draft and a final EIS or between the preparation of a final EIS and an agency decision. If a supplemental EIS is prepared, the regulations provide that it is to be circulated and filed in the same way as a draft and final EIS, except that scoping is not required.

[32] 40 CFR §1502.9(c).

THE ESSENTIALS OF TRIBAL NEPA PARTICIPATION

Chapter 1:
Know NEPA's History, Performance, and Framework

Chapter 2:
Know How and When NEPA is Triggered

Chapter 3:
Know the Environmental Assessment Process: Its Function, Form, and Limitations

Chapter 4:
Know How the EIS is Developed

Chapter 5:
Know Your Options for Involvement

Chapter 6:
Know How to Invoke Tribal Rights and Resources

Chapter 7:
Know How to Challenge a NEPA Determination

Chapter 8:
Know What a Tribal Environmental Policy Act Can Do For You

Chapter 9:
Know How to Write a Tribal Environmental Policy Act

Chapter 10:
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5: Your Options for Involvement: Roles and Responsibilities of the NEPA Participant

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This chapter takes a brief but in-depth look at the specific roles and responsibilities of all those involved with the process. This includes lead agencies, cooperating agencies, commenting parties, and the special roles of the BIA and EPA. Most importantly, we look at how tribes *can* be involved – and how some tribes *are* involved. For tribes trying to decide which role they might assume, we discuss some of the basic costs, benefits, and considerations for each role. In this chapter, we aim to help the reader:

- Become familiar with the regulatory basis for tribal involvement in NEPA (e.g., the CEQ regulations that specifically identify tribes).
- Be aware of how other tribes throughout the country have participated in NEPA, and what their experiences have been.
- Understand how Lead, Co-Lead, and Cooperating Agencies are chosen, and what their responsibilities are.
- Understand the special roles and responsibilities of EPA and the BIA.

5.1 Basic Roles and Responsibilities as Defined by CEQ Regulation

5.1A The Lead Agency for an EIS

How the Lead Agency is Chosen

The lead agency in the preparation of an EIS is that federal agency which has the authority to permit, license, approve, fund, or carry out a "major federal action." The action itself may be initiated by an agency, an organization, or an individual, and is defined as

> 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.

By definition, the agency responsible for the major federal action becomes the **lead** agency. The lead agency is then responsible for preparing the EIS and for making the final determination on the proposed action, whether it is the project proponent or not.

If More Than One Agency Is Involved

If more than one agency is involved in the same action, the CEQ regulations provide guidance on how to select the lead agency. The regulations encourage the agencies involved to resolve the question among themselves, and provide criteria for determining lead agency status. Most important from the tribal perspective is the provision that allows other federal, state, or local agencies to act as joint leads in the NEPA process.[1] **Some federal agencies have included specific language in their NEPA guidelines that enables Indian tribes to act as "Co-lead." Where such language does not exist, a tribe wishing to act as Co-lead will need to negotiate with the lead federal agency to secure such a role.**

[1] 40 CFR §1501.5(b)

If there is a conflict over lead agency status, the CEQ regulations allow "any of the agencies or persons concerned" to ask CEQ to determine which federal agency shall be the lead. Filed with both CEQ and the potential lead agencies, the request must include a detailed statement of why each potential lead agency should or should not be the lead. CEQ is required to make the lead agency determination no later than 20 days after the request is filed.[2]

Roles and Responsibilities of the Lead Agency

Once the lead agency is determined, that agency is then responsible for executing all phases of the NEPA process. The basic framework that the lead agency must follow is laid down by the CEQ regulations, in which minimum requirements are established for each phase of the NEPA process, including:

- Scoping
- Timing and time limits of each phase
- Page limitations on the EIS
- Evaluation of alternatives
- Circulation of EIS for comments
- Environmental review and consultation requirements
- Inviting and responding to public comment
- Record of decision in cases involving an EIS

Though agencies are responsible for complying with these guidelines, they have considerable license in determining exactly how they will conduct each of these activities. In fact, NEPA procedures can vary tremendously from agency to agency. Interested parties, such as tribes, will want to become very familiar with the lead agencies' guidelines.

How Agency Guidelines Differ

All federal agencies, regardless of how much they come into contact with NEPA, must adopt their own, agency-specific NEPA procedures. These procedures help agencies decide, among other things, which of their actions trigger NEPA and at what level of analysis. Understanding these agency procedures may be important to tribes as they seek to establish their role and position in the process.

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[2] 40 CFR §1501.5(e)(f)

Some agencies, for example, will share "lead agency" status with a tribe if the issue directly involves tribal resources. Other agencies may invite tribal involvement in the form of "cooperating agency" status. Some agencies can adopt tribal documents to satisfy their own EIS requirements, and some agencies can veto a proposal if the impacts are significant and cannot be adequately mitigated.

When Lead Agencies use Contractors

Lead agencies often hire a contractor to write the EIS. Ideally, no such assistance would be needed; yet some agencies have neither the expertise nor the in-house resources to write an EIS on their own, and contractors can prove essential. In particular, if a lead agency does not have an archeologist or historian on staff, a consultant prepares the analysis for the EIS. Whenever contractors are involved, tribes and other interested parties should scrutinize how the document is developed. Specific factors to consider when evaluating the contractor's work include: the objectivity of the contractors, their accessibility, their availability and qualifications, and the quality of their work as seen in previous projects.

Further, no matter who writes the EIS, it is still, ultimately, the responsibility of the lead agency. Thus the methods of analysis, format, opinions, content, and conclusions found in the EIS must be attributed to the lead agency, not to the contractor.[3] The CEQ regulations state that, "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 a project."[4]

5.1B Joint or Co-Lead Agencies

If at least one federal agency is involved, then other federal, state, local agencies, or tribes may act as "Joint" or Co-lead agencies to prepare an EIS. The CEQ regulations strongly encourage the joint lead agencies to cooperate in conducting research and studies, in planning activities, and in any public hearing that may be held. If the joint state, local, or tribal government has its own environmental review requirements, then CEQ encourages the preparation of joint EISs. In practice, one document can be created to satisfy both NEPA and the state or tribal "mini-NEPA" requirements.

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[3] Kreske, 1996.

[4] 40 CFR §1506.5(c)

Because there can be great "differences in perspective," as well as conflicts, between federal, state, local, and tribal goals for resource management, CEQ encourages participating agencies to

> adopt a flexible, cooperative approach. The joint EIS should reflect all of their interests and missions, clearly identified as such. The final document would then indicate how state and local interests have been accommodated, or would identify conflicts in goals (e.g., how a hydroelectric project, which might induce second home development, would require new land use controls). The EIS must contain a complete discussion of scope and purpose of the proposal, alternatives, and impacts so that the discussion is adequate to meet the needs of local, state and federal decisionmakers.[5]

In practice, however, most EISs do not contain such a discussion. In order to have its interests and missions expressly stated in an EIS, a tribe would probably need to make a pointed request to the lead agency. Making such a request might also help ensure that the final EIS includes a discussion of how tribal interests have been accommodated.

5.2 Cooperating Agencies

One of NEPA's principle aims is to produce better, more informed decision making by federal agencies. The drafters of NEPA recognized that one way to accomplish this task would be to create a "systematic, interdisciplinary" review process. By formally establishing the role of "cooperating agencies" in their regulations, CEQ directly encouraged lead federal agencies to routinely incorporate the perspective, opinions, and expertise of governmental entities other than the lead agency.

5.2A How Cooperating Agencies are Selected

Once the lead agency has been designated, that agency is then responsible for soliciting cooperation from any other federal agencies that either: (a) have jurisdiction by law or (b) have special expertise on any environmental issue that should be addressed in the EIS being prepared.

[5] CEQ. Forty Most-Asked Questions, 1981.

The cooperation of state or local agencies, and **Indian tribes**, should also be sought if they possess similar qualifications. If the proposed action may affect an Indian reservation, the lead agency should consult with the Indian tribe. Moreover, if the effects of the proposed action are on a reservation, the tribe may, by agreement with the lead agency, become a cooperating agency[6]. In fact, new cooperating agency guidance was issued by CEQ in July of 1999, urging federal agencies to more actively involve tribes as cooperating agencies.[7] Key elements of this guidance include:

If the effects of the proposed action are on a reservation, the tribe may, by agreement with the lead agency, become a cooperating agency.

- As "soon as practicable," lead agencies are urged to routinely solicit the participation of state, tribal, and local governments as cooperating agencies.
- When agencies choose not to become cooperators in the NEPA process, the lead agency should identify them as an internal party on their distribution list.
- If possible, the lead agency should fund (or include in its budget requests funding for) major activities or analyses that it requests from cooperating agencies.[8]

The effects that proposed actions might have on a reservation are not always obvious to the lead or cooperating agencies. Environmental impacts outside reservation boundaries may affect places or resources that are important in tribal cultural practices, and would thus cause cultural and socioeconomic impacts on tribal members. For example, damaging an off-reservation treaty fishing site could deprive tribal members of both food and income. A tribe may have to be assertive in exercising its right to be a cooperating agency based on such impacts.

5.2B Cooperating Agency Responsibilities

After the lead agency has consulted with other "candidate" agencies, the cooperating agencies are determined. Responsibilities of the cooperating agency typically include preparation of information and/or the

[6] 40 CFR §1508.5
[7] CEQ. Memorandum for Heads of Federal Agencies, 1999.
[8] 40 CFR §1501.6(b)(5)

development of environmental analyses. If a cooperating agency is "satisfied that its views are adequately reflected in the environmental impact statement,"[9] it can simply comment accordingly. In contrast, if the cooperating agency determines that the draft EIS is incomplete, inadequate, or inaccurate, or it has other comments, it can make such comments as well, according to the requirements of specificity in section 1503.3.[10]

New cooperating agency guidance was issued by CEQ in July of 1999, **urging federal agencies to involve tribes as cooperating agencies**.

When an agency accepts the role of cooperating agency, a letter or a Memorandum of Agreement is usually signed that clarifies the agencies' specific responsibilities in the process. Section 1501.6(b)(3) of the CEQ directs cooperating agencies to

> 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.[11]

Cooperating agencies may also simply play an advisory role, by participating, for example, on a steering committee. Moreover, if an extensive role is not required, the invited agency (federal, state, local, or tribal) may decline to participate as a cooperating agency.

Tribes as Cooperating Agencies

The option of becoming a cooperating agency offers tribes much involvement in the NEPA process, but without the extensive responsibilities of acting as Co-lead. One of the most important benefits of cooperating is the opportunity for direct involvement in key decisions, such as the scope of the EIS, and the nature and degree of public involvement. This may be particularly beneficial for tribes who have sought to participate in NEPA, only to find that the lead agency is either unaware of or insensitive to their unique issues and rights. In this situation, becoming a cooperating agency gives tribes a chance not only

[9] 40 CFR §1503.2
[10] CEQ. Forty Most-Asked Questions, 1981.
[11] *Ibid*.

to shape the NEPA process, but also to educate that agency at the same time.

There are, of course, responsibilities as well as benefits in becoming a cooperating agency, and if a tribe considers the responsibilities too burdensome, an alternative would be to persuade the BIA to become a cooperating agency in order to ensure adequate consideration of the tribe's interests. Another arrangement would be for the BIA to provide the tribe with funding through a contract, pursuant to the Indian Self-Determination Act. If there is enough lead time, a tribe might also be able to get funding through its tribal priority allocation (TPA). This would enable the tribe to assume the responsibilities of a cooperating agency, without drawing resources from other programs. Either way, tribes seeking to decide how involved to become should consider several factors, including:

- The costs and benefits of committing tribal resources to the process, relative to other tribal environmental protection priorities.
- The presence of any tribal resources or expertise (e.g., site-specific data, policy expertise, modeling/GIS information) that could substantially alter the formation and selection of alternatives developed during scoping.
- The potential for support from other entities who may have the resources to be directly involved and who support the tribe's position (e.g., other tribes, local governments, environmental group, citizen groups).
- The ability of the tribe to marshal its resources for a long time if the process becomes lengthy (e.g., two or three years), if the federal agency needs to be "monitored," or if the project itself, once complete, involves monitoring or mitigation.

Resolving Disputes between Lead and Cooperating Agencies

Generally speaking, disputes between lead and cooperating agencies are resolved by the agencies themselves. Although required to consider the information provided by cooperating agencies, lead agencies are still ultimately responsible for the content of the EIS.[12] **If, however, the lead**

[12] 40 CFR §1501.6(a)(2)

agency omits information or neglects to consider the advice or expertise of a cooperating agency, then the EIS may be later found to be inadequate. Tribes who have submitted environmental analyses or recommendations, and who later find this information to be absent from the EIS, may want to raise this issue with the lead agency **and** with CEQ.

5.3 Commenting Parties

As mentioned in Chapter 4, certain agencies with jurisdiction by law or special expertise with respect to a proposed project are required to provide comments on an EIS. Those discussed here include the Bureau of Indian Affairs (BIA) and the Environmental Protection Agency (EPA).

5.3A The Bureau of Indian Affairs

CEQ considers the BIA to have special expertise about all environmental impacts on Indian lands, and to have jurisdiction by law over certain kinds of impacts. Therefore, when an EIS is prepared for a proposal with impacts on Indian lands, the BIA has special commenting responsibilities. At the same time, the BIA must comply with programs over which tribes have jurisdiction. This includes supporting and cooperating with any tribal environmental laws and programs that exist. This dual role puts BIA in a unique position, particularly with regard to NEPA. NEPA responsibilities of the various BIA offices, divisions and staff are outlined in the following table.[13]

BIA's NEPA Responsibilities by Office/Division	
Assistant Secretary - Indian Affairs	Responsible for the NEPA compliance of Bureau of Indian Affairs (BIA) activities and programs.

[13] Dept. of Interior, NEPA Procedures, 516 DM6, at App.4, Section 4.1.

BIA's NEPA Responsibilities by Office/Division	
Deputy to the Assistant Secretary - Indian Affairs (Trust and Economic Development)	Responsible for oversight of the BIA program for achieving compliance with NEPA; determines adequacy of all EISs which come before the Assistant Secretary before making decisions for implementing proposed actions.
The Environmental Services Staff (Washington), in the Office of Trust and Economic Development	The focal point for overall NEPA guidance within BIA; responsible for advising and assisting Area Offices, Agency Superintendents, and other field support personnel in their environmental activities, providing training and acting as the Central Office's liaison with Indian tribal governments on environmental and NEPA compliance matters. Information about BIA NEPA documents of the NEPA process can be obtained by contacting the Environmental Services Staff.
Other Central Office Directors and Division Chiefs	Responsible for ensuring that the programs and activities within their jurisdiction comply with NEPA.
Area Directors and Project Officers	Responsible for conducting all activities under their jurisdiction in compliance with NEPA and providing advice and assistance to Agency Superintendents and consulting with the Indian tribes on environmental matters related to NEPA; and assigning sufficient trained staff to ensure that these responsibilities are carried out.
Agency Superintendents and Field Unit Supervisors	Responsible, as directed and delegated by the Area Directors, for implementation and enforcement of BIA environmental policy at the Agency and field unit level, including field inspection and preparation of environmental documents, which should be reviewed if possible for procedural adequacy by the Environmental Coordinator of the Area Office before release to the public.

5.3B The Environmental Protection Agency

The United States Environmental Protection Agency (EPA) has commenting responsibilities that are much broader and more formally defined than those of most federal agencies. Under Section 309 of the Clean Air Act, EPA is recognized as *the* federal agency whose primary mission is environmental protection, and which is therefore delegated special responsibilities for reviewing NEPA documentation. Section 309 specifically directs EPA to:

- Comment in writing and to make its comment available for public review; and
- Refer 'any such legislation, action, or regulation' to CEQ if it is found to be 'unsatisfactory from the standpoint of public health or welfare or environmental quality'.

To fulfill these responsibilities, both Headquarters and the regional offices have NEPA responsibilities. Typically, projects of a national scope, or projects that could have multi-region impacts, are reviewed by Headquarters. The regional offices, in turn, are responsible for reviewing NEPA documents that affect their region. In the regional offices, a regional Environmental Review Coordinator is designated and assigned overall management responsibility for the Environmental Review Process in that region. Additionally, both Headquarters and regional offices receive technical assistance and policy guidance from EPA's various Program Offices. These offices will assist by reviewing actions directly related to their areas of responsibility.

In addition to its review responsibilities, EPA may also, upon request, serve as Cooperating Agency. Under 40 CFR §1501.6, the lead agency may request any other federal agency to serve as a cooperating agency if it has jurisdiction or special expertise (statutory responsibility, agency mission, or related program experience) regarding any environmental issue that should be addressed in the statement. Hence EPA may ask the lead agency to designate it as a cooperating agency.

The following excerpts, taken from a joint CEQ/EPA training course on NEPA,[14] describe EPA's responsibilities in greater detail.

[14] CEQ. NEPA Training Course, 1993.

EPA's Comment Process

It is EPA's policy to review and comment in writing on all draft EISs officially filed with EPA, to provide a rating of the draft EIS which summarizes EPA's level of concern, and to meet with the lead agency to resolve significant issues. **The EPA review will be primarily concerned with identifying and recommending corrective action for the significant environmental impacts associated with the proposal**. Review of the adequacy of the information and analysis contained in the documentation will be done as needed to support this objective.

In general, EPA's comments will focus on the proposal but will, if necessary, review the complete range of alternatives, identifying those that are environmentally unacceptable to EPA and identifying EPA's preferred alternative.

EPA's comment letter will reflect all of EPA's environmental responsibilities that may bear on the action. The review will include EPA's assessment of the expected environmental impacts of the action and, if substantive impacts are identified, an evaluation of the adequacy of the supporting information presented with the documentation with suggestions for additional information that is needed.

Once EPA has received copies of the EIS, a primary reviewer is assigned. The primary reviewer may be either at headquarters or in a regional office. The primary reviewer is a person designated to coordinate the review of the action and to prepare the EPA comment letter on the proposed federal action. The primary reviewer is responsible for ensuring that the views of other EPA offices are adequately represented consistent with agency policy and reflects all applicable EPA environmental responsibilities.

If the action is a federal project to be located in or on a specific site (rather than legislation or proposed regulations), the appropriate EPA regional office has the jurisdiction and delegated responsibility for carrying out the 309 review and working with the proposed federal agency to resolve any problems. If the action by the proposing federal agency is a national level action or is a legislative or regulatory action, generally the 309 review is conducted at the EPA HQ level.

EPA's Rating System

The purpose of the rating system is to summarize the level of EPA's overall concern with the proposal and to define the associated follow-up that will be conducted with the lead agency. It is an alphanumeric system that rates both the environmental acceptability of the proposed action and the adequacy of the NEPA documentation. The alphabetical categories LO, EC, EO, and EU signify EPA's evaluation of the environmental impacts of the proposal. Numerical categories 1, 2, and 3 signify an evaluation of the adequacy of the draft EIS.

In general, the rating will be based on the lead agency's preferred alternative. If, however, a preferred alternative is not identified, or if the preferred alternative has significant environmental problems that could be avoided by selection of another alternative, or if there is reason to believe that the preferred alternative may be changed at a later stage, the reviewer should rate individual alternatives.

EPA's Rating Criteria

To rate the environmental impact of an action, EPA uses the following system:

(1) **LO (Lack of Objections)**. The review has not identified any potential environmental impacts requiring substantive changes to the preferred alternative. The review may have disclosed opportunities for application of mitigation measures that could be accomplished with no more than minor changes to the proposed action.

(2) **EC (Environmental Concerns).** The review has identified environmental impacts that should be avoided in order to fully protect the environment. Corrective measures may require changes to the preferred alternative or application of mitigation measures that can reduce the environmental impact.

(3) **EO (Environmental Objections).** The review has identified significant environmental impacts that should be avoided in order to adequately protect the environment. Protective measures may require substantial changes to the preferred

alternative or consideration of some other project alternative (including the no action alternative or a new alternative). The basis for environmental objections can include situations:

a. Where an action might violate or be inconsistent with achievement or maintenance of a national environmental standard;

b. Where the federal agency violates its own substantive environmental requirements that relate to EPA's areas of jurisdiction or expertise;

c. Where there is a violation of an EPA policy declaration;

d. Where there are no applicable standards or where applicable standards will not be violated but there is potential for significant environmental degradation that could be corrected by project modification or other feasible alternatives; or

e. Where proceeding with the proposed action would set a precedent for future actions that collectively could result in significant environmental impacts.

(4) **EU (Environmentally Unsatisfactory).** The review has identified adverse environmental impacts that are of sufficient magnitude that EPA believes the proposed action must not proceed as proposed. The basis for an environmentally unsatisfactory determination consists of identification of environmentally objectionable impacts as defined above and one or more of the following conditions:

a. The potential violation of or inconsistency with a national environmental standard is substantive and/or will occur on a long-term basis;

b. There are no applicable standards but the severity, duration, or geographical scope of the impacts associated with the proposed action warrant special attention; or

c. The potential environmental impacts resulting from the proposed action are of national importance because of the threat to national environmental resources or to environmental policies.

Adequacy of the Impact Statement

(1) **"1" (Adequate).** The draft EIS adequately sets forth the environmental impact(s) of the preferred alternative and those of the alternatives reasonably available to the project or action. No further analysis or data collection is necessary, but the reviewer may suggest the addition of clarifying language or information.

(2) "**2**" (**Insufficient Information**). The draft EIS does not contain sufficient information to fully assess environmental impacts that should be avoided in order to fully protect the environment, or the reviewer has identified new, reasonably available alternatives that are within the spectrum of alternatives analyzed in the draft EIS, which could reduce the environmental impacts of the proposal. The identified additional information, data, analyses, or discussion should be included in the final EIS.

(3) "**3**" (**Inadequate**). The draft EIS does not adequately assess the potentially significant environmental impacts of the proposal, or the reviewer has identified new, reasonably available alternatives that are outside of the spectrum of alternatives analyzed in the draft EIS, which should be analyzed in order to reduce the potentially significant environmental impacts. The identified additional information, data, analyses, or discussions are of such a magnitude that they should have full public review at a draft stage. This rating indicates EPA's belief that the draft EIS does not meet the purposes of NEPA and/or the section 309 review, and thus should be formally revised and made available for public comment in a supplemental or revised draft EIS.

The rating of a draft EIS will consist of one of the category combinations shown below, which also indicates the level of follow-up that EPA should take based on the level of concern.

Category	**Follow-up**
LO	None

EC-1, EC-2	Phone Call
EO-1, EO-2	Meeting
EO-3, EU-1, EU-2, EU-3	Meeting*

** Plus, if needed, referral to the Council on Environmental Quality for resolution.*

Before transmitting a comment letter containing a rating that would make the action a candidate for referral to CEQ, EPA prefers to meet with the lead agency. The purposes of such meetings are:

- To describe the specific EPA concerns and discuss ways to resolve those concerns;
- To ensure that the EPA review has correctly interpreted the proposal and supporting information; and,
- To become aware of any ongoing lead agency actions that might resolve the EPA concerns.

However, the EPA comment letter itself and the assigned rating are not subject to negotiation and will not be changed on the basis of the meeting unless errors are discovered in EPA's understanding of the issues. EPA may add in the letter an acknowledgement of any relevant new lead agency activities that could resolve the EPA concerns.

Filing of EISs with EPA

In 1978 CEQ transferred to EPA the operational duties associated with the administrative aspects of the EIS filing process. The Office of Federal Activities has been designated the official recipient in EPA of all EISs. It should be noted that the operational duties associated with the administrative aspects of the EIS filing process are totally separate from substantive EPA reviews performed pursuant to both NEPA and section 309 of the Clear Air Act.

The EIS filing system was created to provide an official log and public announcement of EISs received by EPA and to guarantee that the requirements of NEPA and the CEQ regulations are satisfied.

EPA's duties do not include responsibility for the distribution of EISs or for providing additional copies of already

distributed EISs. These are the obligation of the lead agency preparing an EIS. Nevertheless, EPA will assist the public and other federal agencies by providing agency contacts on, and information about, EISs.

5.4 Tribal Roles: In Regulations and In Practice

In the CEQ regulations, it is fairly clear how lead, co-lead, and cooperating agencies are chosen, and what their rights for involvement are. Yet because there are so few references to Indian tribes in the regulations, it is less clear when and how tribes can be involved. Beyond the handful of specific references to tribes, the general rule of thumb is that wherever the CEQ regulations invite "state and local" entities, or "interested parties" to participate, Indian tribes are invited too.

The following section lists all the references to Indian tribes that are found in the CEQ regulations. Although these may be much-needed reminders for some federal agencies, they must not be the only avenue that tribes use to "level the playing field" in the NEPA process. There are, in fact, a multitude of federal policies, statutes, and executive orders that help accomplish this task, either because they recognize tribal sovereignty or because they recognize trust responsibility and the protection of tribal resources. By calling upon these policy resources, and by bringing them to the attention of federal agencies, tribes can transcend the frustration of being simply "notified" of a NEPA action, and can become part of the actual decision making.

> The issue of tribal involvement – and the legal, regulatory, and policy drivers that mandate greater tribal involvement, is addressed in Chapter 6.

5.4A Formal Tribal Roles as Defined in CEQ's Regulations

As with many other federal environmental laws, NEPA is generally silent on the subject of Indian tribes. In the CEQ regulations, however, there are multiple references specific to Indian tribes. Table 5.1 lists each of the specific references and its general intent:

Table 5.1. Tribal References in the CEQ Regulations

Reference:	Description:
40 CFR §1501.2(d)(2)	Apply NEPA early in the process – If a federal agency realizes that it will be involved in an action planned by a private applicant or other non-Federal entity, it must **consult early with any interested Indian tribe**.
40 CFR §1501.7(a)(1)	Scoping – As part of the Scoping process, **the lead agency shall invite the participation of any affected Indian tribe.**
40 CFR §1502.16(c)	Environmental consequences – This section of the EIS must **discuss possible conflicts between the proposed action and affected Indian tribes' land-use plans, policies, and controls** for a reservation.
40 CFR §1503.1(a)(2)(ii)	Inviting comments on a draft EIS – The lead federal agency must **request the comments of Indian tribes**, when the effects may be on a reservation.
40 CFR §1506.6(b)(3)(ii)	Public involvement – Notice of preparation of NEPA document for an action with effects primarily of local concern would **include notice to Indian tribes when effects may occur on reservations.**
40 CFR §1508.5	Cooperating agency – when the effects of a proposed federal action are on a reservation, **an Indian tribe may, by agreement with the lead agency, become a cooperating agency** for an EIS.
40 CFR §1508.12	"Federal agency" – An **Indian tribe assumes NEPA responsibilities under federal law if it is an applicant for assistance under section 104(h)** of the Housing and Community Development Act of 1974.

5.4B Informal Tribal Roles as Observed in Case Studies

In conducting the research for this Guidance, we surveyed many tribes throughout the country, to learn from, record, and share their experiences with NEPA. In 1993, one of the first nationwide tribal NEPA surveys was conducted, through which much of the information for this project emerged. In that survey, sponsored by CEQ and the Tulalip Tribes, the primary goal was to collect information from tribes about NEPA's performance. In essence, it was a "diagnosis" of the problems tribes encountered with federal agencies during the NEPA process. In contrast, the surveys conducted during 1997 and 1998, in preparation for this Guidance, were aimed at finding "solutions" to some of those problems.

Summarized below are some of the different approaches we found tribes using in the NEPA process. We would like to thank these tribes, again, for their time and effort in survey participation. The information they shared with us was extremely valuable in determining the outline and focus for this guidance. We would like to note, however, that because these surveys were conducted in 1997, the practices of participating tribes may have since changed.

Miccosukee: The tribe conducts the majority of EAs for the BIA. The tribe also uses the BIA process for an internal in-house review as well. Most of the developments on the reservation are independent lessees. When a more involved and expensive EIS is required, the developer will pay a consultant to do the EIS.

When the tribe conducts the EA, the typical review process is that the EA is approved by the tribe, then by the National Park Service (because their reservation is located within Everglades National Park), and then by the BIA.

The tribe uses the BIA handbook to conduct the process, which seems to be working well. Currently the tribe is not being reimbursed by the developers to conduct the EA, which is a matter they would like to address.

San Juan Pueblo: The tribe does not have the resources to conduct NEPA reviews, but they often request money from the BIA area office to hire a contractor to conduct the process when they would like to expedite it. The tribe uses an RFP process and selects the best quality proposal for the money. Because there are changing information needs, the tribe does not see using a single contractor as beneficial.

Once a contractor is chosen, the Office of Environment makes a recommendation to a committee of the tribal council on whether or not the EA is final. The EA then goes to the full tribal council for approval, and is then passed along to the BIA for final approval.

The tribe also conducts reviews for DOE's Los Alamos site.

Eastern Band of Cherokee: The Eastern Cherokee do not have their own environmental review code, but do use the BIA checklist for new developments. For the most part, developers hire their own contractors to conduct environmental assessments and reviews. The BIA primarily conducts the NEPA process for the larger projects on the reservation.

There are 400 businesses on the reservation, owned independently by tribal members. Other than the checklist and the NEPA process for BIA-funded projects such as roads, no other environmental assessment mechanism is in place.

Confederated Tribes of the Umatilla: The tribe does not have many NEPA processes for developments on the reservation. However, they have acted as a cooperating agency with the Bureau of Reclamation on a NEPA review for water spreading/irrigating that directly affects the tribe's water rights. They have found that the Bureau of Reclamation's NEPA handbook is excellent on interaction with tribes, defining what "consultation" with tribes truly means. They noted that working as a cooperating agency gives the tribe more leverage in a NEPA process, but that a tribe must have its own Natural Resources department in order to work in this way.

Sac and Fox Nation: The tribal environmental office prepares all NEPA documents for tribal and realty developments, including leases and rights of way. They receive EAs and EISs for external activities on ancestral lands and make comments if appropriate, but usually they find no issues with these external reviews.

Isleta Pueblo: The pueblo does an environmental review as a part of their planning process because they receive federal funding and because they view it as good business. The pueblo sometimes conducts NEPA reviews for the BIA, but pueblo officials regarded this as an unfunded mandate.

They have used the NEPA process as leverage against outside entities, such as DOE at the Los Alamos site. For example, they used NEPA to require DOE to conduct a site-wide EIS of the lab site.

Salish/Kootenai: The Salish/Kootenai act as the lead in NEPA reviews for the BIA, using CEQ guidelines and the BIA Manual. One of the issues they have run into in conducting NEPA reviews is the definition of "public" and how participation by nonmembers of the tribe should be addressed.

The tribe has a Cultural Committee that participates in the review as well, and their participation in the NEPA process is helpful. They noted that, generally, this system of taking the lead in conducting the NEPA process is working well.

Normally, the tribe's environmental staff conducts the review, but an EA must be approved by the tribal council prior to being submitted. On tribal lands for tribal actions, the council can request an environmental assessment, but there is currently no law in place to require such a review.

The tribe also notes that:

- The BIA Flathead Agency lacks the resources to adequately perform NEPA analyses.
- The Tribes, in contrast, have the knowledge and technical capabilities.
- The Tribes are committed to using an interdisciplinary approach to planning.
- The Tribes are committed to protecting resources while allowing for sustainable development.
- EISs are used for large, reservation-wide projects (e.g., the Flathead Reservation Forest Management Plan).
- EAs are used extensively (e.g., timber sales, road construction, dam reconstruction, weed management, wildlife management).
- Categorical exclusions – use is limited by applicability (e.g., ROWs, mineral exploration, forestry, land conveyance).

Penobscot: The Forest Management Plan process is the primary NEPA review they have conducted so far. They used the NEPA alternatives process to provide an opportunity for the tribe to express its management goals and cultural issues. They have primarily used Natural Resource Damage Assessments (NRDA) under CERCLA to assess environmental and cultural damages, but acknowledged that this is a different from a proactive NEPA or TEPA-type review.

Sisseton-Wahpeton: The Sisseton-Wahpeton have a tribal environmental protection code, overseen by the tribe's Environmental

Protection Committee. The code requires all developments on the reservation to obtain an environmental permit. The process is modeled after the NEPA process, where thus far, most projects have received categorical exclusions. One distinct difference, however, is that the development must follow the alternative chosen by the Committee. Where NEPA is required, the two processes try to be complementary.

The Committee uses an escalating enforcement process to resolve disputes. The process includes a notice of violation and hearing, a cessation order, impoundment of construction equipment, a request for BIA cancellation of leases, a stiff fine, use of provisions in the ICRA, and, finally, a hearing in tribal court and possibly the Northern Plains Inter-Tribal Court of Appeals. For enforcement on non-tribal lands, the applicants can go to state court; this has not yet been tested, but probably will be soon because the tribe's boundaries were disestablished.

In this case, the tribe has waived its sovereign immunity, agreeing to abide by the Committee's decisions. However, future tribal councils may challenge this provision.

THE ESSENTIALS OF TRIBAL NEPA PARTICIPATION

Chapter 1:
Know NEPA's History, Performance, and Framework

Chapter 2:
Know How and When NEPA is Triggered

Chapter 3:
Know the Environmental Assessment Process: Its Function, Form, and Limitations

Chapter 4:
Know How the EIS is Developed

Chapter 5:
Know Your Options for Involvement

Chapter 6:
Know How to Invoke Tribal Rights and Resources

Chapter 7:
Know How to Challenge a NEPA Determination

Chapter 8:
Know What a Tribal Environmental Policy Act Can Do For You

Chapter 9:
Know How to Write a Tribal Environmental Policy Act

Chapter 10:
A Model Code

Chapter 11:
Alaska Supplemental Guidance

6. Invoking Tribal Rights and Resources: Leveling the Playing Field

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Though a tribe may be familiar with the basic requirements of NEPA and well acquainted with its options for involvement, when an actual NEPA process begins, it may yet encounter its most significant challenges. It may find, for example, that vast amounts of data are being collected and generated, but that little of it is given careful consideration. It may find that the methodologies used to evaluate its data are inappropriate or are applied incorrectly. A tribe may find that the information it provides is not put on an equal footing with information from other sources. Such issues are common to NEPA; so tribes must equip themselves with whatever tools exist.

This chapter therefore provides tribes with as many concrete tools as possible, any of which might fortify their involvement in NEPA

and help produce a better outcome. We have divided these tools into two categories: Policy and Analytical.

Policy tools are those laws, rules and policies that govern federal agency behavior, and that can and should be integrated into the NEPA process.

Analytical tools are concerned with the process by which information in the NEPA process is weighed, analyzed, and applied, whether it be ecological, economic, social, cultural, or otherwise. In the field of environmental impact assessment, much time and energy is devoted to this issue; later, we will discuss some of the more prominent and promising methodologies used on occasion in NEPA.

The need for both policy and analytical tools in the NEPA process is evidenced quite clearly in the observations of Ray Clark, former CEQ Associate Director and recognized NEPA expert. He remarks,

> Another general issue is *the extent to which the EIA process mandated by NEPA can or should be used to integrate other federal laws, rules, or policies*. For example, in February 1994, President Clinton issued an executive order on environmental justice, directing all federal agencies to evaluate the effects of their proposed actions on low-income and minority communities and to take steps to assure that such communities do not experience disproportionate health and environmental effects from federal actions.
>
> The White House called the attention of agencies to the NEPA process as a powerful tool available to decision makers to better understand these consequences. Some agencies' approach to EIA, however, excludes examination of social impacts in EAs, thus *stripping the decision makers of the value of integrating social, economic, and environmental considerations into one analysis*."[1]

To goal of this chapter is to help the reader understand:

- Why certain types and sources of information must receive special consideration in the NEPA process (e.g., Federal policies and legal requirements that apply to NEPA); and

[1] Clark, 1997.

- How information is evaluated in the NEPA process – and how it can be used – to produce better, more informed decisions.

6.1 Policy Tools: Federal Policies, Statutes, and Legal Requirements that Tribes May Invoke in a NEPA Process

A common concern among those who strive to improve NEPA is the need to have other federal laws, rules, and policies integrated into the impact assessment process. Although this may be an academic issue for some, it is a pivotal issue for tribes and can be a major determinant of a tribe's success with NEPA. It can influence how tribes are able to participate, how tribal comments are solicited, and to what extent tribal issues are adequately weighed or elevated in the decision-making process.

Because there are hundreds, if not thousands, of federal laws, rules, and policies that may pertain to NEPA, it is beyond the scope of this document to include them all. Instead, in this section, we identify some of the *key* laws, rules, and policies, while encouraging tribes to be aware of and to pursue related information on their own. Included here are those most likely to ensure that a federal agency fulfills its trust responsibility. These include:

- Federal Trust Doctrine.
- Treaties between the United States and American Indian tribes.
- Federal laws protecting cultural and historical resources (e.g., NAGPRA, AIRFA, NEPA, and NHPA).
- Federal laws protecting the environment.
- Other federal policies (e.g., Executive Order on Environmental Justice; Presidential Memorandum on "Indian Sacred Sites").

We begin the following section by discussing one of the most important policy determinants of tribal/federal relations in the NEPA process: the trust relationship.

6.1A The Federal Government's Trust Responsibility and Its Relationship to NEPA

The federal government's trust responsibility is the source of a long-standing debate between tribes and federal agencies. Despite years of litigation, federal agencies are still seeking to define and implement their trust responsibilities, at the continued behest of tribes. Yet there are some tenets of "trust responsibility" that are undebatable, most notably, the fact that Indian lands are held in trust for tribes and individuals. As such, it is the responsibility of the federal government to administer Indian lands in a manner that specifically helps Indian beneficiaries, rather than the public as a whole.

For NEPA, this is a significant departure point. If federal agencies routinely applied this paradigm in making their NEPA determinations, the outcome of many NEPA actions might be very different. Yet many federal agencies are either not aware of or are unwilling to recognize this basic precept of Native American law. Instead, they are more inclined to make "judgment calls" about whose interests are adversely affected and may, based on their agency's situation, seek a balance of political interests.

In a landmark case, Pyramid Lake Paiute Tribe v. Morton[2], the court ruled that such judgement calls were "impermissible." The court's ruling was based on its recognition that "The nature of the federal fiduciary responsibility toward the Indian tribes differs markedly from its usual governmental authority."

In Pyramid Lake Paiute Tribe v. Morton, the Secretary of the Interior faced a conflict between the needs of the Indians and non-Indian ranchers served by a project of an Interior subagency, the Bureau of Reclamation. The Secretary had adopted regulations for operation of certain dams that diverted water away from the Pyramid Lake Indian Reservation so that ranchers could use it. The tourism and fishing of Pyramid Lake were economically vital for the Paiutes, yet the lake was drying up. The Secretary argued that existing statutes and regulations gave him the authority to make a "judgment call" between the interests of the Paiutes and the ranchers. The court, however, ruled that a "judgment call" was impermissible.

Given the court's ruling in this case, it is clear that tribal interests can and should receive more consideration than they normally receive in a NEPA review. Tribes seeking to strengthen their position in a NEPA

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[2] Pyramid Lake Paiute Tribe of Indians v. Morton, 360 F. Supp. 669, 672 (DC 1973)

review should be prepared to raise this issue of trust responsibility, highlighting similar cases as a reminder of agencies' court-mandated fiduciary responsibility.

6.1B Executive Orders

Another source of policy comes from Executive Orders, which are less commonly recognized but can be significant. Executive Orders are used most frequently by the White House, on matters of national policy. They represent an alternative to the traditional route of establishing national policy through the legislative arena.

When issued, Executive Orders typically apply to all federal agencies and, most often, act as an overlay to existing federal code. As such, their enforceability should be relatively straightforward. Yet Executive Orders tend to be broadly worded, with goal statements that allow some degree of interpretation. Some Orders require federal agencies to establish agency-specific procedures, describing how the agency will incorporate and uphold the Order. Yet because they are non-legislated and non-regulatory, Executive Orders do not create as much accountability and may therefore be more challenging to enforce. Nonetheless, policies advanced through Executive Orders are often of singular importance, based on recognition of a vital national policy issue. In this section, we focus on one such Order, that pertaining to environmental justice.

Although many Executive Orders have been issued, some bearing on NEPA, few have rivaled the significance in recent years of **Executive Order 12898 on Environmental Justice**. In the following section, we provide some information about EO 12898, but we encourage tribes to seek more information. For example, all federal agencies are required to identify how their procedures will reflect and address environmental justice concerns, and a copy of these agency-specific procedures can be obtained by contacting the agency.

Following the section on EO12898, we have included a summary of **EO 11593 on Pollution Prevention.** This Order also merits attention, and may provide tribes with yet another tool in their interactions with federal agencies.

6.1C Executive Order 12898: Environmental Justice

On February 11, 1994, President Clinton issued Executive Order 12898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations." This Executive Order is designed to *focus the attention of federal agencies on the human health and environmental conditions in minority and low-income communities*. It requires all federal agencies to adopt strategies that will address environmental justice concerns within the context of agency procedures. In an accompanying Presidential memorandum, the President emphasizes how existing laws, including how the National Environmental Policy Act (NEPA), should provide opportunities for federal agencies to address environmental hazards in minority communities and low-income communities.

The NEPA Provisions of EO 12898

The memorandum requires each Federal agency to, "analyze the environmental effects, including human health, economic, and social effects, of Federal actions, including effects on minority communities and low-income communities, when such analysis is required by [NEPA]." This particular emphasis on NEPA includes several key components, including:

- **The development of agency-specific environmental justice strategies.** Agencies should develop and periodically revise their strategies for providing guidance about the types of programs, policies, and activities that may raise, or historically have raised, environmental justice concerns at the particular agency.

- **The importance of research, data collection, and analysis, particularly about multiple and cumulative exposures to environmental hazards for low-income populations, minority populations, and Indian tribes.** Data on these exposure issues should be incorporated into NEPA analyses as appropriate.

- The requirement for agencies to **collect, maintain, and analyze information on patterns of subsistence consumption of fish, vegetation, or wildlife.** Where an agency action may affect fish, vegetation, or wildlife, that

agency action may also affect subsistence patterns of consumption and indicate that there could be disproportionately high and adverse human health or environmental effects on low-income populations, minority populations, and Indian tribes.

- The requirement that agencies work to ensure effective public participation and access to information. Within its NEPA process, and through other appropriate mechanisms, each Federal agency shall, "wherever practicable and appropriate, translate crucial public documents, notices and hearings, relating to human health or the environment for limited English-speaking populations." In addition, each agency should work to "ensure that public documents, notices, and hearings relating to human health or the environment are concise, understandable, and readily accessible to the public."3

CEQ's Guidance on EO 12898

When EO 12898 was written, CEQ was given special oversight responsibilities, supporting the federal government's compliance with Executive Order 12898 and NEPA. Working with EPA and other federal agencies, CEQ developed special guidance to assist federal agencies with their NEPA procedures, to ensure that environmental justice concerns are effectively identified and addressed. Within legal limits, agencies may supplement this guidance with more specific procedures that are tailored to their particular programs or activities. The following six principles are taken directly from CEQ's Guidance4.

1. Agencies should **consider the composition of the affected area**, to determine whether minority populations, low-income populations, or Indian tribes are present in the area affected by the proposed action, and if so whether there may be disproportionately high and adverse human health or environmental effects on minority populations, low-income populations, or Indian tribes.

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[3] Executive Order 12898. Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations

[4] CEQ. *Environmental Justice.* 1997.

2. Agencies should consider relevant public health data and industry data concerning the potential for multiple or cumulative exposure to human health or environmental hazards in the affected population and historical patterns of exposure to environmental hazards, to the extent such information is reasonably available. For example, data may suggest there are disproportionately high and adverse human health or environmental effects on a minority population, low-income population, or Indian tribe from the agency action. Agencies should consider these multiple, or cumulative effects, even if certain effects are not within the control or subject to the discretion of the agency proposing the action.

3. Agencies should recognize the interrelated cultural, social, occupational, historical, or economic factors that may amplify the natural and physical environmental effects of the proposed agency action. These factors should include the physical sensitivity of the community or population to particular impacts; the effect of any disruption on the community structure associated with the proposed action; and the nature and degree of impact on the physical and social structure of the community.

4. Agencies should develop effective public participation strategies. Agencies should, as appropriate, acknowledge and seek to overcome linguistic, cultural, institutional, geographic, and other barriers to meaningful participation, and should incorporate active outreach to affected groups.

5. Agencies should assure meaningful community representation in the process. Agencies should be aware of the diverse constituencies within any particular community when they seek community representation and should endeavor to have complete representation of the community as a whole. Agencies also should be aware that community participation must occur as early as possible if it is to be meaningful.

6. Agencies should seek tribal representation in the process in a manner that is consistent with the government-to-government relationship between the United States and tribal governments, the federal government's trust responsibility to federally recognized tribes, and any treaty rights.

CEQ also notes that,

> Under NEPA, the identification of a disproportionately high and adverse human health or environmental effect on a low-income population, minority population, or Indian tribe **does not preclude a proposed agency action from going forward**, nor does it necessarily compel a conclusion that a proposed action is environmentally unsatisfactory. Rather, the identification of such an effect should heighten agency attention to alternatives (including alternative sites), mitigation strategies, monitoring needs, and preferences expressed by the affected community or population.5

Considering Environmental Justice in Specific Phases of the NEPA Process

Neither the Executive Order nor CEQ's Guidance prescribes any specific format for examining environmental justice issues. There is no requirement to develop a specific chapter or section in an EA or EIS on environmental justice issues. Yet agencies are strongly encouraged to integrate environmental justice issues in a way that ensures clear, concise discussion.

CEQ's Guidance does include, however, suggested opportunities and strategies that are useful at particular stages of the NEPA process. These include:

1. Scoping: During the scoping process, an agency should first find out whether an area that might be affected by a proposed agency action may include low-income populations, minority populations, or Indian tribes, and seek input accordingly.

2. Determining the Affected Environment: Where environments of Indian tribes may be affected, agencies must consider pertinent treaty, statutory, or executive order rights and consult with tribal governments in a manner consistent with the government-to-government relationship.

3. Analysis: When agencies have identified a disproportionately high and adverse human health or environmental effect on a low-income population, minority population, or Indian tribe,

[5] *Ibid*.

they should analyze how environmental and health effects are distributed within the affected community.

4. Alternatives: When an agency has identified a disproportionately high and adverse human health or environmental effect on low-income populations, minority populations, or Indian tribes from either the proposed action or alternatives, both the distribution and the magnitude of the disproportionate impacts in these communities should be factors in choosing the environmentally preferable alternative. In weighing this choice, the agency should consider the views it has received from the affected communities, and the magnitude of environmental impacts associated with alternatives that have a less disproportionate and adverse effect on low-income populations, minority populations, or Indian tribes.

Where no EIS or EA is Prepared

In developing its Guidance, CEQ recognized that,

> There are certain circumstances in which the policies of NEPA apply, and a disproportionately high and adverse human health or environmental impact on low-income populations, minority populations, or Indian tribes may exist, but where the specific statutory requirement to prepare an EIS or EA does not apply. These circumstances may arise because of an exemption from the requirement, a categorical exclusion of specific activities by regulation, or a claim by an agency that another environmental statute establishes the 'functional equivalent' of an EIS or EA.6
>
> Under these circumstances, in which an EIS or EA will not be prepared and a disproportionately high and adverse human health or environmental impact on low-income populations, minority populations, or Indian tribes may exist, **agencies should augment their procedures as appropriate to ensure that the otherwise applicable process or procedure for a federal action addresses environmental justice concerns. Agencies should ensure that the goals for public participation outlined in this guidance are satisfied to the fullest extent possible**. Agencies also should fully develop and consider alternatives to

[6] U.S. EPA, 1998.

the proposed action whenever possible, as would be required by NEPA.[7]

EPA's Environmental Justice Strategy

In April of 1998, EPA adopted the "Final Guidance for Incorporating Environmental Justice Concerns in EPA's NEPA Compliance Analyses."[8] The document provides specific guidelines for the agency on how to incorporate environmental justice goals into their NEPA analysis and documentation. It is, however, intended only for EPA's conduct in actions where EPA must comply with NEPA and/or where EPA has jurisdiction and is therefore a cooperating agency. It is not intended to include EPA's Section 309 review responsibilities,[9] and would therefore not be applicable to EPA's review of other federal agencies' EISs.

Several key excerpts from EPA's Guidance are included below, to give tribes a sense of how EPA seeks to address environmental justice issues. Tribes should obtain a complete copy of the guidance by contacting one of the Tribal Program Coordinators in their regional EPA office. The Guidance is also available through the EPA's Office of Federal Activities Web Site, at www.epa.gov/oeca/ofa.

EPA's Environmental Justice NEPA Guidance Principles

In their EJ NEPA Guidance, EPA establishes several principles for the agency, some of particular relevance for tribes. They include:

- "EPA **officials should be vigilant in identifying where EPA actions may have disproportionately high and adverse human health or environmental effects** on minority and/or low-income populations."

- "Where proposed actions may affect tribal lands or resources (e.g., treaty-protected resources, cultural resources and/or sacred sites) **EPA will request that the affected Indian Tribe seek to participate as a cooperating agency** .[10]"

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[7] *Ibid.*
[8] *Ibid.*
[9] U.S. EPA, 1999.
[10] 40 CFR §1508.5.

- "Where differences occur regarding the preferred alternative or mitigation measures that will affect tribal lands or resources, the affected Indian Tribe may request that a **dispute resolution process be initiated** to resolve the conflict between the tribe and the Agency."

Cumulative and Indirect Effects

Section 2.2.2 of the Guidance states that EPA must consider the cumulative and indirect effects of a proposed action.

- "EPA NEPA analyses must consider the cumulative effects on a community by addressing the full range of consequences of a proposed action as well as other environmental stresses which may be affecting the community. …In addition, minority populations and low-income populations are often located in areas or environments that may already suffer from prior degradation."

- "EPA analysts need to place special emphasis on other sources of environmental stress within the region, including those that have historically existed, those that currently exist, and those that are projected for the future."

- "With respect to natural resources, analysts should look to the community's dependence on natural resources for its economic base (e.g., tourism and cash crops) as well as the cultural values that the community and/or Indian Tribe may place on a natural resource at risk. Further, it is essential for the EPA NEPA analyst to consider the cumulative impacts from the perspective of these specific resources or ecosystems which are vital to the communities of interest."

Environmental Justice Screening Analysis

- Section 3.2.1 of the Guidance states: "In preparing for any proposed action, one of the first actions is a preliminary delineation of potential impacts and of the potentially affected area. A screening for environmental justice concerns should be incorporated into this initial NEPA screening analysis."

Environmental Justice and the Determination of Significance

- Section 3.2.2 of the Guidance directly cites CEQ's EJ Guidance… the "Executive Order does not change the prevailing legal thresholds and statutory interpretations under NEPA and existing case law. For example, for an EIS to be required, there must be a sufficient impact on the environment to be 'significant' within the meaning of NEPA. Agency consideration of impacts on low-income populations, minority populations or Indian tribes may lead to the identification of disproportionately high and adverse human health or environmental effects that are significant and that otherwise would be overlooked."[11] EPA notes also that, "CEQ requires that significance be evaluated in terms of 'intensity' or 'severity of impact.' Here too, the narrowed focus could affect the determination. Several factors that affect the evaluation of intensity are relevant to situations involving environmental justice issues. These include the degree of scientific controversy, uncertainty (since distributional analysis is relatively new in the NEPA context and this introduces an element of uncertainty in impact assessment), and cumulative significance of related actions."

- "Environmental justice concerns should sensitize EPA NEPA analysts to the need to focus analyses on relevant contexts. Focusing the analysis may show that potential impacts, which are not significant in the NEPA context, are particularly disproportionate or particularly severe on minority and/or low-income communities. As mentioned previously, disproportionately high and adverse effects should trigger the serious consideration of alternatives and mitigation actions in coordination with extensive community outreach efforts."

Scoping and Planning

- Section 3.2.3 of the Guidance states: "Indian tribe representation in the process should be sought in a manner that is consistent with the government-to-government relationship between the United States and tribal

[11] Council on Environmental Quality. Environmental Justice: Guidance Under the National Environmental Policy Act, 10 December 1997.

governments, the federal government's trust responsibility to federally-recognized tribes, and treaty rights. This will help to ensure that the NEPA process is fully utilized to address concerns identified by tribes and to enhance protection of tribal environments and resources. As defined by treaties, statutes, and executive orders, the federal trust responsibility may include the protection of tribal sovereignty, properties, natural and cultural resources, and tribal cultural practices."

Incorporating Environmental Justice Concerns into EA Development

- Section 3.2.3.1 of the Guidance states: "If the initial screening analysis identifies an affected community that is minority and/or low-income or identifies a disproportionately high and adverse effect upon a minority community, and/or on tribal resources, or on a low-income community, then a smaller scale scoping analysis (than that undertaken for an EIS) should be conducted and some level of public participation should be designed and implemented to solicit community involvement and input, and to develop alternatives and mitigation measures. Mitigation measures should be developed and alternatives should be crafted so as to allow an evaluation of the relative disproportionality of impacts across reasonable alternatives."

- "The **EA also should include a comparative socioeconomic analysis** that is scaled and tailored to evaluate the potential effects to the minority and/or low-income community (i.e., in the case of environmental justice concerns, the EA should include socioeconomic analyses scaled according to the severity of the impacts)."

Incorporating Environmental Justice Concerns in EIS Scoping

- Section 3.2.3.2 of the Guidance states: **"**Consulting with officials in tribal, state and/or local government agencies over the environmental and human health concerns within the region and who may be familiar with the demographics of the affected populations. *Where environments of Indian tribes may be affected***, *agencies must consider pertinent treaty, statutory or executive order rights*** and consult with tribal

governments in a manner consistent with the government-to-government relationship.**"**

Identification of Affected Resources

- Section 3.2.4 of the Guidance states: "The EPA NEPA analyst should use all means available to identify particular natural resources that, if affected by the proposed action, could have a disproportionately high and adverse effect on minority and/or low-income communities. In particular, **natural resources that support subsistence living (e.g., hunting, fishing, gathering) should be identified**. In addition**, Indian Tribes may have treaty-protected resources on or off reservation lands and may hold some natural resources sacred due to religious beliefs and/or social/ceremonial ties**."

Mitigation Measures

- Section 3.2.7 of the Guidance states: "When identifying and developing potential mitigation measures to address environmental justice concerns, **members of the affected communities should be consulted**."

- "If mitigation measures are determined to be necessary to reduce disproportionately high and adverse effects on minority and/or low-income communities, and/or tribal resources, then **the measures should be committed to in the FONSI or ROD**. This provides an additional avenue for public notice and involvement. Other steps that can be considered to ensure that mitigation measures are effective and are implemented include the following:

  - Establishing the mitigation measure as a requirement in the permit or authorizing document.
  - Requiring financing at the outset of the project for both implementing the measure and monitoring its effectiveness.
  - Requiring monitoring reporting, which should be made available to the public.

- Identifying clear consequences and penalties for failure to implement effective mitigation measures."

Decisions

- Section 3.2.8 of the Guidance states: "In cases where effects to tribal lands or resources have been identified and the Indian Tribe and EPA disagree as to the preferred alternative or mitigation measures, **the Indian Tribe may request that the EPA initiate a dispute resolution process** to resolve this conflict."

6.1D Executive Order 11593: Pollution Prevention

In 1990, Congress adopted the Pollution Prevention Act, declaring it to be the national policy of the United States that "pollution should be prevented or reduced at the source whenever feasible; pollution that cannot be prevented should be recycled in an environmentally safe manner, whenever feasible; pollution that cannot be prevented or recycled should be treated in an environmentally safe manner whenever feasible; and disposal or other release into the environment should be employed only as a last resort and should be conducted in an environmentally safe manner."[12]

Principal provisions of the Act include:

(1) establishing national goals and policy related to pollution prevention (P2),
(2) establishing universal definitions,
(3) assigning EPA with certain P2 responsibilities,
(4) creating a grant program for states to establish technical assistance programs,
(5) creating a Source Reduction Clearinghouse, and
(6) initiating data collection on Source Reduction and Recycling.

Shortly after Congress adopted the P2 Act, the Council on Environmental Quality issued a memorandum to the heads of all federal agencies. The purpose of the memorandum was to raise agency awareness about the purpose and function of P2. In the memo, CEQ explained how P2 should be incorporated at each stage of the NEPA process, in scoping, mitigation, monitoring, and enforcement, and how

[12] 42 USC §13101.

P2 should be integrated into all phases of a project, including siting, design, construction, and operation. After all, as CEQ well knew, a fundamental goal of NEPA is to identify any techniques that will ultimately minimize environmental impacts…*"NEPA's very purpose is to 'promote efforts which will **prevent** or eliminate damage to the environment.*"[13] Finally, the memo encouraged all federal agencies and departments to evaluate and report on pollution prevention (P2) in their NEPA documents. CEQ itself began summarizing the P2 efforts of various agencies in its annual reports.

Key excerpts from the Memorandum are given below.[14]

EXECUTIVE OFFICE OF THE PRESIDENT

AGENCY: Council on Environmental Quality, Executive Office of the President

ACTION: Information only--Memorandum to Heads of Federal Departments and Agencies Regarding Pollution Prevention and the National Environmental Policy Act

SUMMARY: This memorandum provides guidance to the federal agencies on incorporating pollution prevention principles, techniques, and mechanisms into their planning and decisionmaking processes and evaluating and reporting those efforts in documents prepared pursuant to the National Environmental Policy Act.

MEMORANDUM
TO: Heads of Federal Departments and Agencies
FROM: Michael R. Deland
SUBJECT: Pollution Prevention and the Nat'l. Environmental Policy Act
DATE: January 12, 1993

Introduction

Pollution prevention techniques seek to reduce the amount and/or toxicity of pollutants being generated. In addition, such techniques promote increased efficiency in the use of raw materials and in conservation of natural resources and can be a

[13] 42 USC §4321.

[14] A complete version of the 1993 Memorandum can be obtained by contacting the Council on Environmental Quality, at (202)456-6224, or by downloading an electronic version of the document from CEQ's website, at: www.whitehouse.gov/CEQ/ or through CEQ's "NEPAnet" site at: http://ceq.eh.doe.gov/nepa/nepanet.htm.

more cost-effective means of controlling pollution than does direct regulation.

This memorandum seeks to encourage all federal departments and agencies, in furtherance of their responsibilities under the National Environmental Policy Act (NEPA), to incorporate pollution prevention principles, techniques, and mechanisms into their planning and decisionmaking processes and to evaluate and report those efforts, as appropriate, in documents prepared pursuant to NEPA.

Background

NEPA provides a longstanding umbrella for a renewed emphasis on pollution prevention in all federal activities. Indeed, NEPA's very purpose is "to promote efforts which will prevent or eliminate damage to the environment."[15]

The very premise of NEPA's policy goals, and the thrust for implementation of those goals in the federal government through the EIS process, is to avoid, minimize, or compensate for adverse environmental impacts before an action is taken. Virtually the entire structure of NEPA compliance has been designed by CEQ with the goal of preventing, eliminating, or minimizing environmental degradation.

Defining Pollution Prevention

"Pollution prevention" as used in this guidance includes, and is not limited to, reducing or eliminating hazardous or other polluting inputs, which can contribute to both point and non-point source pollution; modifying manufacturing, maintenance, or other industrial practices; modifying product designs; recycling (especially in-process, closed loop recycling); preventing the disposal and transfer of pollution from one media to another; and increasing energy efficiency and conservation.

Pollution prevention can be implemented at any stage--input, use or generation, and treatment--and may involve any technique--process modification, waste stream segregation,

[15] 42 USC § 4321.

inventory control, good housekeeping or best management practices, employee training, recycling, and substitution."

Federal Agency Responsibilities

Pursuant to the policy goals found in NEPA Section 101 and the procedural requirements found in NEPA Section 102 and in the CEQ regulations, the federal departments and agencies *should take every opportunity* to include pollution prevention considerations in the early planning and decisionmaking processes for their actions, and, where appropriate, should document those considerations in any EISs or environmental assessments (EA) prepared for those actions.

Federal Approvals

In addition to initiating their own policies and projects, federal agencies provide funding in the form of loans, contracts, and grants and/or issue licenses, permits, and other approvals for projects initiated by private parties and state and local government agencies. As with their own projects and consistent with their statutory authorities, federal agencies could *urge private applicants to include pollution prevention considerations* into the siting, design, construction, and operation of privately owned and operated projects.

These considerations could then be ***included in the NEPA documentation*** *prepared for the federally funded or federally approved project, and any pollution prevention commitments made by the applicant would be monitored and enforced by the agency.* Thus, using their existing regulatory authority, federal agencies can effectively promote pollution prevention throughout the private sector.

Incorporating Pollution Prevention into NEPA Documents

NEPA and the CEQ regulations establish a mechanism for building environmental considerations into federal decisionmaking. Specifically, the regulations require federal agencies to "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."[16] *This mechanism can be used to incorporate pollution prevention in the early planning stages of a proposal*.

In addition, prior to preparation of an EIS, the federal agency proposing the action is required to conduct a scoping process during which the public and other federal agencies are able to participate in discussions concerning the scope of issues to be addressed in the EIS.[17] *Including pollution prevention as an issue in the scoping process* would encourage those outside the federal agency to provide insights into pollution prevention technologies which might be available for use in connection with the proposal or its possible alternatives.

Pollution prevention should also be an important component of mitigation of the adverse impacts of a federal action. To the extent practicable, pollution prevention considerations should be included in the proposed action and in the reasonable alternatives to the proposal, and should be addressed in the environmental consequences section of the EIS.[18]

Finally, when an agency reaches a decision on an action for which an EIS was completed, a public record of decision must be prepared which provides information on the alternatives considered and the factors weighed in the decisionmaking process. Specifically, the agency must state whether all practicable means to avoid or minimize environmental harm were adopted, and if not, why they were not. A monitoring and enforcement program must be adopted if appropriate for mitigation.[19] *These requirements for the record of decision and for monitoring and enforcement could be an effective means to inform the public of the extent to which pollution prevention is included in a decision* and to outline how pollution prevention measures will be implemented.

A discussion of pollution prevention may also be appropriate in an EA. While an EA is designed to be a brief discussion of the

[16] 40 CFR § 1501.2
[17] 40 CFR § 1501.7.
[18] See 40 CFR §§ 1502.14(f), 1502.16(h), and 1508.20.
[19] 40 CFR § 1505.2(c).

> environmental impacts of a particular proposal, the preparer could also include suitable pollution prevention techniques as a means to lessen any adverse impacts identified.[20] Pollution prevention measures which contribute to an agency's finding of no significant impact must be carried out by the agency or made part of a permit or funding determination.

6.1E Executive Order on Indian Sacred Sites

On May 24, 1996, the White House issued an Executive Order on Indian Sacred Sites. The first of four sections in this Executive Order directs federal agencies to:

> (1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and (2) avoid adversely affecting the physical integrity of such sacred sites. Where appropriate, agencies shall maintain the confidentiality of sacred sites.

Section two directs each executive branch agency with statutory or administrative responsibility for the management of federal lands to implement procedures for the purposes of carrying out the provisions of section 1:

> In all actions, agencies shall comply with the Executive memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments."

6.1F Federal Memoranda: Government-to-Government Relations

In addition to Executive Orders, the White House periodically uses memoranda to communicate or clarify its position on an issue. The policies and principles discussed in these memoranda are often targeted at a specific audience, though many are of broad application. For tribes involved with NEPA, they provide yet another avenue for clarification and advancement of tribes' rights.

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[20] 40 CFR § 1508.9.

One memorandum in particular, issued in 1994, involves Native American tribes directly. Because of its policy implications, the memorandum could and should affect the way a lead federal agency interacts with tribes.

White House: April 29, 1994 - Memorandum for the Heads of Executive Departments and Agencies

Subject: Government-to-Government Relations with Native American Tribal Governments

Outlines principles that executive departments and agencies, including their respective component bureaus and offices, are to follow in their interactions with tribal governments. "The purpose of these principles is to clarify our responsibility to ensure that the Federal Government operates within a government-to-government relationship with federally recognized Native American tribes."

6.1G Special Federal Agency Procedures

Federal agencies comply not only with federal statutes and policies, but also with internal procedures, regulations, and policies. Those we are most familiar with are the individual agency NEPA procedures discussed earlier in this Guidance. Some agencies also have procedures that govern their interaction with Native American tribes. Where such policies and procedures exist, tribes may find themselves reminding regional offices and staff of their own agencies' procedures. In this section we have identified and summarized some of these agency procedures that would be of interest to tribes.

Since many of the departments and agencies discussed below are housed with the Department of Interior, we suggest that readers might also refer to **Interior's web site** for additional information, at: **www.doi.gov**

A good example of special federal agency NEPA procedures is the Bureau of Reclamation's Indian Trust Assets (ITA) policy. ITAs are defined in this policy as "legal interests in property held in trust by the United States for Indian tribes or individuals, or property that the United States is otherwise charged by law to protect. Examples of resources that could be ITAs are lands, minerals, hunting and fishing rights, water rights, and instream flows."

Adopted by Reclamation in 1993, the policy states that Reclamation will "carry out its activities in a manner which protects ITAs and avoids adverse impacts when possible." Moreover, it adds that, "When Reclamation cannot avoid adverse impacts, it will provide appropriate mitigation or compensation."

What is most noteworthy about Reclamation's ITA policy, is that it: (a) acknowledges the agency's trust responsibility, (b) clearly defines "Indian Trust Assets", and (c) identifies the specific stages of the NEPA process in which ITAs should receive special consideration, as seen in the following excerpt:

> **ITA-2 Applying NEPA Early – Identifying ITAs**
> The NEPA process should consider potential impacts on ITAs at the earliest reasonable time in the decisionmaking process. The initial step will be to identify ITAs in or near the affected area. ITA identification should involve consultation with: (i) potentially affected tribes, Indian organizations or individuals, and (ii) the Bureau of Indian Affairs, the Office of American Indian Trust, the Solicitor's Office, Reclamation's Native American Affairs Office, or the Regional Native American Affairs Coordinator, all of which are in the Department of the Interior.

The policy goes on to note specific stages within the NEPA process where ITAs should be considered. It identifies how ITAs should be determined (e.g., working with the entities listed in ITA-2), and how any potential impacts to those ITAs should be mitigated. Tribes engaged in a NEPA action in which Reclamation is responsible and/or involved should obtain a complete copy of the policy and be sure that the regional office with which they are working is fully aware of, and accountable to, the policy requirements.

Secretarial Order: American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act

This order was issued in 1997 by the Secretary of the Interior and the Secretary of Commerce, pursuant to the Endangered Species Act of 1973, the federal-trust relationship, and other federal laws. It serves to "clarify the responsibilities of the component agencies, bureaus, and offices of the Department of the Interior and the Department of Commerce, when actions taken under authority of the Act and associated implementing regulations affect, or may affect, Indian lands, tribal trust

resources, or the exercise of American Indian tribal rights, as defined in this Order."

The order also acknowledges the trust responsibility and treaty obligations of the United States toward Indian tribes and tribal members and its government-to-government relationship in dealing with tribes. Principles established in the order include:

1. The Departments shall work directly with Indian tribes on a government-to-government basis to promote healthy ecosystems.
2. The Departments shall recognize that Indian lands are not subject to the same controls as federal public lands.
3. The Departments shall assist Indian tribes in developing and expanding tribal programs so that healthy ecosystems are promoted and conservation restrictions are unnecessary.
4. The Departments shall be sensitive to Indian culture, religion, and spirituality.
5. The Departments shall make available to Indian tribes information related to tribal trust resources and Indian lands, and, to facilitate the mutual exchange of information, shall strive to protect sensitive tribal information from disclosure.

Department of Interior: Environmental Justice Policy

In 1994, Secretary of Interior Bruce Babbitt established an environmental justice policy. The policy requires the department to consider the impacts of its actions on minority and low-income populations and communities, as well as the equity of the distribution of benefits and risks of those actions. The policy also provides that these considerations should be specifically included in any NEPA documents generated by Interior bureaus and offices, stating that:

> Therefore, henceforth, all environmental documents should specifically analyze and evaluate the impacts of any proposed projects, action, or decisions on minority and low-income populations and communities, as well as the equity of the distribution of the benefits and risks of those decisions.

As with other EJ Guidance documents, Interior's policy encourages staff to "use the scoping and/or planning process to identify

and evaluate any anticipated effects, direct or indirect, from the proposed project, action or decision on minority and low-income populations and communities." It adds that, "if significant impacts are identified during scoping/planning, then the environmental document should clearly evaluate and state the environmental consequences of the proposed project, action or decision." If insignificant or no impacts are identified, the environmental documents should still state that impacts to minority populations and low-income populations were considered and that no impact, direct or indirect, was identified.

Department of Interior Order: Departmental Responsibilities for Indian Trust Resources

A Department of Interior Order, issued in 1993, clarified the responsibilities of the component bureaus and offices to ensure that "The trust resources of federally recognized Indian tribes and their members, that may be affected by the activities of those bureaus and offices are identified, conserved, and protected."

The order calls upon the heads of bureaus and offices to be aware of the impact of their plans, projects, programs, or activities on Indian trust resources. Whenever bureaus or offices are engaged in the planning of a proposed project or action, they must ensure that any anticipated effects on Indian trust resources are explicitly addressed in the planning, decision, and operational documents (e.g., EISs).

The Order also requires bureaus and offices to consult with the recognized tribal government that has jurisdiction over the trust property that the proposal may affect, the appropriate office of the Bureau of Indian Affairs, and the Office of the Solicitor (for legal assistance) if their evaluation reveals any impacts on Indian trust resources.

Departmental Responsibilities for Indian Trust Resources and Indian Sacred Sites on Federal Lands

This memorandum of May 1997 provides guidance to Departmental bureaus and offices on the implementation of and compliance with 512 DM Chapter 2, Departmental Responsibility for Indian Trust Resources, and Executive Order No. 13007 – Indian Sacred Sites.

Department of Interior's Responsibilities for Indian Trust Resources and Indian Sacred Sites on Federal Lands

In 1995, the Department of Interior issued a "Secretarial Order" that provided guidance to bureaus and offices concerning the Department's responsibilities for Indian trust resources. The order required all bureaus and offices to explicitly address any potential impacts to Indian trust resources in their environmental documents and, in doing so, added a new element to their NEPA review procedures.

The Order specifically refers to the preparation of EAs and EISs, requiring that they identify and evaluate any anticipated effects, direct or indirect, on Indian trust resources. If there are impacts, the Departmental bureau or office should "consult with the affected tribe(s) on a **government-to-government basis** with respect to the impact from the proposed project or action on the Indian trust resources."[21]

The order does not appear to define "government-to-government" nor does it define any penalties that would be imposed were a bureau or office to fail to comply with the Order. Nonetheless, tribes seeking compliance with a Departmental bureau or office should be able to invoke this order if its trust resources are threatened by an action for which a NEPA document is prepared. Although such a tactic may not prevent the proposed action, it could result in substantive mitigation and minimize the impact to tribal resources.

Housing and Urban Development's Delegated NEPA Procedures

The NEPA procedures of the Department of Housing and Urban Development (HUD) are unique, in that certain conditions allow the Department to transfer its environmental review responsibilities to "responsible entities." Under 24 CFR part 58, certain HUD programs are authorized for delegation, *including* Indian housing programs (e.g,.Native American Housing Assistance and Self-Determination Act – NAHASDA). The rules adopted by HUD in part 58 specify the environmental review procedures that must be followed by entities that have assumed HUD environmental responsibilities.

In the rules, a "responsible entity" is defined as any of the recipients or grantees that are listed in part 58.1(b). Those listed can then assume the responsibility for "environmental review, decision-making, and action that would otherwise apply to HUD under NEPA and other provisions of law that further the purposes of NEPA, as specified in part 58.5."[22] If a tribe chooses to assume full responsibility for conducting the

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[21] Department of Interior Environmental Compliance Memorandum No. ECM95-2.

[22] 24 CFR Part 58.4 *Assumption Authority.*

environmental review, it must submit a certification to HUD stating that it has fully carried out such responsibilities. Such a certification must include a waiver of sovereign immunity, allowing a suit to be filed against the tribal official in federal court to enforce the duties of the certifying officer as a federal official under the NEPA.[23] (Note: a waiver is not required if a tribe is acting only as a *cooperating* agency.)

The NAHASDA regulations provide that if a tribe does not choose to assume full responsibility and certify compliance, then the environmental review will be conducted under part 50.[24] In the remaining sections of 24 CFR Part 58, HUD further defines these specific NEPA-related responsibilities and requirements of delegated entities. For the most part, the HUD rules contained in this section are similar to other federal agency NEPA rules, but anyone who might assume such responsibilities should obtain a copy and be sure that their role is clearly defined.

Environmental Assessments

Most NAHASDA-funded activities for which NEPA documents are required will require an environmental assessment (EA) and not an environmental impact statement (EIS), unless the EA does not support a finding of no significant impact (FONSI).[25] The lists of actions that are categorical exclusions can be found in parts 50 and 58,[26] along with the lists of actions that normally require an EIS.[27] Activities that do not fit within these lists and that are not otherwise exempt[28] normally require an EA. If the EA supports a FONSI, an EIS is not required. The final NAHASDA rules provide that the approval of an Indian Housing Plan by HUD is exempt from the NEPA review requirement, but otherwise no additions were made in the categorical exclusion lists in parts 50 and 58. If tribes believe that certain kinds of NAHASDA-funded activities ought to be treated as categorical exclusions, then revisions in parts 50 and 58 may be warranted.

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[23] 25 USC §4115(c); 25 CFR §1000.18-.24 (Consensus on draft final rule September 26, 1997).

[24] 24 CFR §1000.20 (Workgroup 7 Reviewed Draft, Oct. 21, 1997).

[25] For an overview of the NEPA screening process, see Chapter 2 of this Guidance.

[26] 24 CFR Part 50.19, 50.20, 58.34.

[27] 24 CFR Part 50.42, 58.37.

[28] 24 CFR Part 58.34.

In the public comment period, several tribes suggested a middle ground.[29] HUD could treat NEPA review for NAHASDA projects the same way that other federal agencies treat NEPA compliance, at least for projects that only require an EA and not an EIS, and could require the tribe, as the nonfederal applicant, to prepare the EA, but HUD would retain responsibility for the scope and content of the EA.[30] This option would allow a tribe to do most of the work associated with NEPA reviews without having to waive sovereign immunity. The negotiated rulemaking committee consented to this middle ground, at least when an EA is the appropriate level of NEPA document.[31] The costs of environmental review are eligible for NAHASDA funding.[32]

Environmental Impact Statements

What if an environmental impact statement (EIS) is required for NEPA compliance? Should the regulations also provide middle ground for that situation? Under the regulations issued by the Council on Environmental Quality (CEQ)[33] implementing NEPA, the middle ground for an EIS would have to be somewhat different, because, as a general rule, an agency must be directly involved in the preparation of an EIS (although consultants can be used if they have no direct financial interest in the decision for which the EIS be prepared).[34] The lead agency for the preparation of an EIS must be a federal agency.[35] For tribes that do not want to assume complete responsibility, but still want significant involvement, the middle ground is for an Indian tribe to become a "cooperating agency."[36]

As a cooperating agency, a tribe can assume responsibility for developing information and preparing environmental analyses, including portions of the EIS.[37] The NAHASDA regulations do not preclude a tribe from using this option, although tribes might have done so more often if the NAHASDA regulations had provided express authorization

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[29] Both the Metlakatla Indian Community and the Seminole Tribe of Florida made this suggestion. Their comment letters are on file with the authors.

[30] 40 CFR §1506.5(b). Also see BIA *NEPA Handbook*, 30 BIAM Supp. 1, Section 4.2B.

[31] 25 CFR §1000.20(c) (Consensus draft, final rule, September 26, 1997).

[32] 24 CFR §1000.22 (Consensus draft, final rule, September 26, 1997).

[33] 40 CFR §§1500 to 1508.

[34] 40 CFR §1506.5(c).

[35] 40 CFR §1501.5.

[36] 40 CFR §1508.5, 1501.5. A tribe might ask to be a "joint lead agency."

[37] 40 CFR §1501.6(b).

for using this option in dealing with the relevant sections of the CEQ NEPA regulations.

6.1H Federal Statutes

One of NEPA's chief strengths is that it was designed to ensure consistency with and among *other* federal environmental regulations. The CEQ regulations *require* lead agencies to consider the requirements posed by other statutes and regulations when reviewing the impacts of their proposed action.[38] Granted, a mere evaluation of applicable environmental regulations is not compliance with those laws. Still, the consultation requirements imposed by NEPA establishes an important "hammer" that tribes could wield to ensure agency compliance with other environmental laws.

Although we are not providing information about the statutes themselves, we have provided in Table 6.1 a list of those federal laws that are commonly involved in a NEPA review. They include environmental, cultural, and historical preservation laws.

Table 6.1: Federal Statutes.[39]

STATUTE	CONCERN
CULTURAL AND HISTORICAL RESOURCE CODES	
National Historic Preservation Act of 1966[40]	Preservation of prehistoric and historic sites/structures.
Archaeological Resources Protection Act of 1979[41]	Prehistoric artifacts including skeletal remains

[38] Though not explicitly stated, this clause can also be construed to include tribal laws and regulations as well.

[39] Kreske, 1996; U.S. Environmental Protection Agency.

[40] 16 USC §470-470t, 110.

[41] 16 USC §470aa-mm.

NATIVE AMERICAN STATUTES	
Indian Self-Determination and Education Assistance Act[42]	Self-determination for tribal governments
American Indian Religious Freedom Act of 1973[43]	Right to practice religious beliefs.
RESOURCE PROTECTION AND LAND USE STATUTES	
Marine Protection, Research, and Sanctuaries Act of 1972[44]	Marine sanctuaries
Marine Mammal Protection Act of 1972[45]	Marine mammal protection
Endangered Species Act[46]	Protection of endangered/threatened plant and animal species
Outer Continental Shelf Lands Act of 1953[47]	Offshore oil development
Coastal Zone Management Act of 1973[48]	Control of projects in coastal zone
Farmlands Protection Policy Act of 1981[49]	Conversion of farmlands
National Forest Management Act of 1976[50]	Directs forest planning
Wilderness Act of 1964[51]	Management of wilderness areas

[42] P.L. 93-638.
[43] 42 USC §1996 and §1996a.
[44] 33 USC §§1401-1445.
[45] 16 USC §§1361-1407.
[46] 16 USC §§1531-1543.
[47] 43 USC §1332.
[48] 16 USC §1451.
[49] 7 USC §42 *et seq*.
[50] 16 USC §1600.
[51] 16 USC §§1131-1136.

ENVIRONMENTAL PROTECTION STATUTES	
Clean Water Act[52]	Water pollution and wetland filing
Clear Air Act Amendments of 1970[53]	Air pollution
Noise Control Act of 1972	Noise pollution
Emergency Planning & Community Right-To-Know Act of 1986 [54]	Community Right-to-Know policies
Federal Insecticide, Fungicide and Rodenticide Act of 1947[55]	Pesticide pollution
Pollution Prevention Act of 1990 [56]	Pollution prevention
Resource Conservation and Recovery Act of 1976[57]	Hazardous and nonhazardous waste management
Safe Drinking Water Act[58]	Drinking water protection
Toxic Substances Control Act[59]	Chemical substances control
Rivers and Harbors Act of 1899[60]	Deposition of refuse in navigable waters

[52] 33 USC §121 *et seq*.
[53] 42 USC §7401 *et seq*.
[54] 42 USC §11011 *et seq*.
[55] 7 USC §135 *et seq*.
[56] 42 USC §13101 *et seq*.
[57] 42 USC §321 *et seq*.
[58] 42 USC §300f *et seq*.
[59] 15 USC §2601 *et seq*.
[60] 33 USC §403

ENVIRONMENTAL PROTECTION STATUTES, Cont.	
Comprehensive Environmental Response, Compensation and Liability Act of 1980[61]	Contain and clean up releases of hazardous substances
Superfund Amendments and Reauthorization Act of 1986[62]	Cleanup of contamination from past hazardous waste disposal

6.2 Analytical Tools: Methodologies used in the NEPA Process

6.2A Methodologies Commonly Used in NEPA: A Discussion of Their Use and Application

Tribes participating in NEPA may encounter a variety of roadblocks. Some of these problems stem from institutionalized agency behaviors that, inadvertently or otherwise, diminish tribal rights. Other problems arise when the action subject to NEPA review is politically charged and mired in intergovernmental legal wrangling. Still, many of the problems that tribes encounter may have less to do with the tribe or the proposed action than with the *methods* that are used – or not used – to assess environmental impacts. By *methods*, we mean a host of techniques used to predict the physical, biological, cultural, and socioeconomic impacts of a project. Each method poses different analytical challenges, and most require their own set of data. Yet the net result of using these methodologies is to more accurately capture the range of potential project impacts, and to minimize the potential for *subjective* decisions about the significance of those impacts.

Using impact prediction methodologies, federal agencies should, in theory, be better able to make informed decisions. Since agencies differ in their expertise, resources, and degree of cooperation, tribes may need to be persistent, consistently reminding lead agencies that they

[61] 42 USC §9601 *et seq.*
[62] *Ibid.*

should use – and use correctly – these various methodologies. In the following section, several different methodologies are summarized, including cumulative impact assessment, social impact assessment, biodiversity conservation, and cultural impact assessment.

6.2B Cumulative Impact Assessment

One of the most frequent complaints about NEPA is that there is not enough analysis of cumulative impacts. Critics of the process point out that the *impacts* of a project often last much longer than the project itself, often compounding and aggravating existing impacts to a project's zone of influence. For example, cumulative impacts may include[63]:

- Marginal environmental impacts of new development in an area with prior impacts.
- Total aggregate environmental impacts of multiple developments in a defined area.
- Overall impacts of many similar concurrent developments in a defined area.
- Interactive impacts from nearby developments of different types.
- Interactions between impacts from diffuse and point sources.
- Increases in impacts over time, from growth in existing activities.
- Joint net impacts of multiple developments on particular environmental parameters, such as air or water quality.
- Joint effects of multiple stresses on plant and animal populations; e.g., through habitat clearance, crowding, noise, air and water pollution, or pathogens.

Many of these scenarios are found on Indian reservations, where a permanent land base is involved, and where habitats and resources of ecological significance face multiple threats. Tribal surveys have in fact indicated that this is an issue of concern, in that tribal resources do not receive adequate protection unless cumulative impact assessments are done. A similar concern involves projects conducted *outside* the reservation boundaries, where tribes have less direct control over the

[63] Buckley, 1998.

content of the EIS and, by extension, over the use of cumulative impact assessment.

This section provides an overview of the basic purpose, methodology, and outcomes of cumulative impact assessment. It does not go into detail on how this particular impact prediction technique is applied. The intent is rather to introduce this methodology to tribes and to demonstrate its usefulness in the NEPA process.

The basic purpose of cumulative impact assessment is to ensure that the past, present, and future impacts of a project are *all* taken into consideration. The CEQ regulations sought to encourage this broader type of analysis, by requiring agencies to examine the impacts of "past, present, and reasonably foreseeable future actions."[64] Although the CEQ regulations do not prescribe a specific scientific method for analyzing such impacts, they do direct agencies to employ scientifically valid procedures. Section 1502.24 of the regulations states that

> All agencies of the Federal Government shall…identify and develop methods and procedures, in consultation with the Council on Environmental Quality, which will ensure that presently unquantified environmental amenities and values may be given appropriate consideration in decision-making along with economic and technical considerations.

To meet this requirement, agencies use a wide range of impact prediction and assessment techniques. The type of method they employ depends on such factors as the characteristics of the proposed project, the availability of relevant data, and the resources and expertise of the agency. Sometimes agencies will employ several methods for a project, ranging from the simplest techniques, such as inventories, to elaborate quantitative models. Examples of models include[65]:

- **Simple techniques**
  - Analogs (case studies of similar actions)
  - Inventory of resources in study area
  - Checklists (simple, questionnaire, descriptive)
  - Matrices or networks
- **Indices and experimental methods**

[64] 40 CFR §1508.7.
[65] Canter, 1997.

- Environmental media indices (air, surface and/or groundwater quality of vulnerability, land or soil quality, noise)
- Habitat indices (Habitat Evaluation Procedures, Habitat Evaluation Systems, Biological Diversity Indices)
- Other indices (visual, quality of life)
- Experimental methods (laboratory, field, physical models)

♦ **Mathematical models**

- Air quality dispersion
- Hydrologic processes
- Surface and groundwater quality and quantity
- Noise propagation
- Biological impact (Habitat Evaluation Procedures, Habitat Evaluation Systems, Wetland Evaluation Technique, population, nutrients, chemical cycling, energy system diagrams)
- Archaeological (predictive)
- Visual impact
- Socioeconomic (population, econometric, multiplier factors, health)

Some of these models lend themselves more readily than others to the assessment of cumulative impacts, and there is often disagreement over which models have the fewest assumptions, limitations, and uncertainties. Tribes seeking to ensure the use of cumulative impact assessment should work closely with the lead agency, or with the contractor responsible for writing the EIS, to monitor the use of models. Although there are weaknesses in almost all models, tribes should pay particular attention to those models that:

♦ cannot quantify effects, especially at the ecosystem level;
♦ cannot deal with multiple media or stresses; or
♦ lack interactive or coupled models.[66]

In addition to scrutinizing the technical and scientific validity of the chosen impact assessment model, tribes should be prepared to follow the lead agency's use of cumulative impact assessment throughout the

[66] Hunsaker, 1998.

duration of a NEPA review. As one NEPA expert notes, "Aside from the fact that cumulative impacts are very hard to assess within usual time, dollar, and data constraints, an EIS usually does not have a long-term plan or vision to guide or give context to the single proposed project."[67] Staying involved throughout the duration of the EIS, tribes can help ensure that cumulative impact assessment is employed.

There are, in fact, key stages during the process in which policy decisions are made – decisions that have a direct bearing on the nature, depth, and direction of technical analysis. From the standpoint of cumulative impact assessment, these critical stages include:

1. **The threshold determination stage**: If an EA is developed without adequate consideration of cumulative impacts, then an EIS might not be triggered. Full environmental impact assessment is thus avoided, when in fact the consequences of the proposed action might extend far beyond the project itself.
2. **The EIS development stage**: Cumulative effects analysis must be integrated from the very beginning of EIS development – ideally during scoping. This allows lead agency staff and team members to solicit and research the particular and unique data sets that may be needed for a cumulative impact assessment.
3. **The decision-making stage**: Though lead agencies are not required to disapprove a project on the basis of an EIS, projects that do go forward inevitably include some redesign, modification, and mitigation based on the EIS. Cumulative effects analysis, done properly, will ensure that the mitigation efforts are appropriate to the situation.

In a report on cumulative effects analysis, CEQ recommends several procedures for agencies to follow to ensure use of cumulative impact assessment throughout a NEPA review.[68] They recommend that agencies:

1. Use scoping (based on purpose and need and related actions and activities) to determine the study goals and avoid assessing the universe.

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[67] Hunsaker, p. 103

[68] CEQ. January 1997.

2. Define impact factors after identifying affected resources.
3. Determine *spatial or geographic* and temporal boundaries.
4. Establish environmental baselines (historical, contemporary, future).
5. Identify thresholds (e.g., carrying capacity).
6. Analyze impacts of alternatives by comparing consequences with baselines.
7. Recommend mitigation and monitoring.

6.2C Biodiversity Conservation: Assessments at the Ecosystem Level

The assessment of cumulative effects has become more mainstream in recent years, and although not always done well, it is performed at least more often. Yet some NEPA practitioners recognize the need to take EIA even further. They point out that the traditional "scope" of analysis used in an EIS is based on an "ad-hoc selection of issues and is inadequate for considering cumulative effects and biodiversity." Instead, they argue, assessments must be made at the *ecosystem* level in order to adequately protect biodiversity.

Under this approach, the carrying capacity of the impacted ecosystem would be used as the benchmark for thresholds. The impacts of a project would be measured against these thresholds, beyond which additional incremental effects would be considered to have a significant adverse impact. Because the definition of carrying capacity is unique to each ecosystem, and because there is not always enough data to establish this capacity, a starting point in a NEPA review would be to use ecosystem protection principles and indicators of ecosystem health (e.g., Watershed Analysis, Index of Biological Integrity).

In 1993, CEQ produced a report entitled "Incorporating Biodiversity Considerations Into Environmental Impact Analysis Under the National Environmental Policy Act." The report establishes eleven general principles for ecosystem protection (e.g., biodiversity conservation) that lead agencies should address in developing an EIS. They include:

1. Take a "big picture" or ecosystem view.
2. Protect communities and ecosystems.

3. Minimize fragmentation. Promote the natural pattern and connectivity of habitats.
4. Promote native species. Avoid introducing non-native species.
5. Protect rare and ecologically important species.
6. Protect unique or sensitive environments.
7. Maintain or mimic naturally ecosystem processes.
8. Maintain or mimic naturally occurring structural diversity.
9. Protect genetic diversity.
10. Restore ecosystems, communities, and species.
11. Monitor for biodiversity impacts. Acknowledge uncertainty. Be flexible.

Whether or not federal agencies can consistently apply these principles is debatable. Some agencies may make more of an effort, yet NEPA does not contain any procedures to force them to do so. NEPA does, however, indirectly promote biodiversity conservation by requiring consultation with other environmental statutes, chief among them being the Federal Endangered Species Act (ESA). Among the many environmental statutes that address biodiversity (e.g., Wilderness Act, Marine Mammal Act, Clean Water Act), the ESA is still considered "the most powerful, and therefore, has become a focal point in NEPA analyses for consideration of biodiversity. Used as a surrogate for broader habitat issues and an 'umbrella' covering less protected species, the presence of a threatened or endangered species within a project's zone of impact offers the potentially most enforceable opportunity (exception Section 404) to include in a NEPA analysis discussion of biodiversity, minimally at a species/population level and preferably at a habitat or even ecosystem level."[69]

6.2D Social Impact Assessment

This section will provide the reader with information about the history, concepts, and practice of Social Impact Assessment (SIA hereafter). Because many of the impacts that result from the implementation of a policy, activity, or project are social or cultural rather than environmental in nature, it is important that tribal planning agencies incorporate SIA or CIA into their processes. This discussion will give the user a general understanding of:

[69] Dennis, 1997.

- the need for a robust SIA in the development and planning process,
- the importance of public involvement and participation to SIAs,
- how to apply SIA methods, and
- where to find additional information on SIA.

A Brief History of Social Impact Assessment

After NEPA passed in 1970, most of the initial environmental assessments that were done ignored the social and cultural changes that could result from project or policy development, even though NEPA specifically requires that all EAs address social and cultural change. The leaders of some of the communities affected by development demanded that these social and cultural impacts be studied as rigorously as the environmental impacts of projects, and this caught the attention of law makers and practitioners. Social Impact Assessment methods were developed and used as tools to predict impacts from development that are likely to affect people, communities, regions, and nations. An SIA should be started as early in the NEPA process as possible, in order to insure adequate evaluation of the data throughout the EA process. SIA helps people to understand how tribal communities and cultures will be changed by a development project before that project is permitted.

The term "social impact assessment" was first used by an Inuit chief to describe the impacts of an Alaskan oil development project on the Inuit people and culture. The first example of rigorous social impact assessment was conducted by a British Columbia Supreme Court Justice, T.R. Berger, involving a proposed pipeline that would impact the First Nations people. During this inquiry, Justice Berger provided funding for First Nation communities to gather and present their views during hearings. The hearings were conducted in native communities, in local dialects. The resulting SIA and EA were informed and complete, and the project was deemed too socially and environmentally costly and was therefore not permitted. Most important, it was recognized that the proposed project would have forever altered the culture of the Inuit population of what is now the Yukon and Northwest territories.

These early applications of SIA happened at a time when academics and NEPA practitioners were seeking to advance the study of social impacts (Burdge, 1998). They recognized that, because most development activities will alter social structures and infringe on

indigenous culture, SIA methods are needed to predict and thereby avoid many negative social impacts.

Definitions

The following terms are defined to avoid misinterpretation or confusion.

Social impact is a consequence or apparent result of development that affects people in the ways that they live, consume goods, travel, interact with others, work and subsist, govern themselves, provide and receive services and goods, and recreate. Social impacts frequently reflect an individual's or community's values. A social impact can vary in intensity, duration, and locus.

Social Impact Assessment is an analytical process used to identify, quantify, and mitigate possible outcomes of a proposed project or policy on proximate populations. The impacts examined can affect daily activities like employment and travel patterns, as well as the ongoing cultural and social relations of a tribal community. Public involvement is a crucial part of SIA, and can be incorporated into a community's planning process to help individuals, communities, and government organizations anticipate possible social consequences of policies or projects.

Social impact variables (1) are operative when a community may be altered by project development and policy change; (2) will indicate a specific consequence of the proposed action; (3) have value that can be measured, collected, and interpreted within the context of a specific social impact setting; (4) are based on information that can be collected in the planning and decision stage of development; (5) can be generated or suggested by community members; and (6) are not descriptive sociological labels, such as economic class or ethnicity, that do not describe changes that take place in communities.

Social Impact Assessment Concepts

There are different ways to assess social impacts. In this section, the comparative method is discussed, which involves comparing two or more studies to predict the impacts of a project. This method predicts the outcomes of a project by comparing the proposed action with a past action to determine significance of impacts. There are four stages of a project in which an assessment is involved: (1) planning or policy

development, (2) construction or implementation, (3) operation or maintenance, and (4) decommissioning or abandonment.

The **planning or policy development stage** refers to "all activity that takes place from the time a project or policy is conceived to the point of construction activity or policy implementation."[70] Individuals and communities are impacted from the moment a policy, action, or project is suggested. For example, during the project design phase, information about the project might start circulating, and the introduction of this new information can impact the community. For example, when a runway expansion was proposed, it caused property values in potentially affected areas to drop overnight.

The **construction or implementation stage** begins when a law is enacted, permits are issued, or a decision to proceed with an action is made. This phase typically involves the introduction of new agencies or programs, new policies or procedures, road building, displacement and relocation of people, utility development, and in or out migration of residents. A community may have to rapidly increase the provision of school, health, social, and housing services. An example of this might be the construction of a new arterial through a reservation, causing an influx of workers and increased activity for a specific period of time.

The **operation or maintenance stage** follows completion of construction of a project or implementation of a policy. This is one of the most consistent and long-term stages, typified by economic development, stabilization of population and infrastructure, and adaptation to rapid changes that occurred in previous stages. An example of this could be the employment opportunities made available by a new commercial or manufacturing business.

The **abandonment or decommissioning stage** begins when a proposal is made to cease activities, operations, or regulation of a project or policy. This stage begins when the intent to cease activities is made known, as when a military base closure is proposed by Congress.

Using Social Impact Assessment: Procedures and Processes

SIA processes are very similar to those used to evaluate environmental impacts. The most important aspect of any impact assessment is the incorporation of tribal member involvement in all aspects of the process. Participation by tribal members is both empowering and informative for the tribe and its members, and can significantly reduce negative impacts of development. By using tribal members' knowledge about resources,

[70] Burdge, 1995, p. 24.

usage patterns, and levels of abundance, tribal planning agencies can best represent the tribe's interests early and thoroughly in the NEPA process.

Scoping. The scoping process is the initial data-gathering step in a SIA, and is probably the most important step in the SIA process. The assessor should carefully gather information about those social impact variables that are likely to change because of the development activity, for if variables are omitted, the opportunity to mitigate negative impacts is lost. Data can be from obtained from many sources, the most critical source being the community or tribe itself. Other sources of data that are used during the scoping process include the project proposal itself, and any environmental documentation generated by tribal, local, state, or federal entities.

When proposals are made public, stakeholders or interest groups often will issue a statement or alternative proposal that describes or supports values that group members share. These statements and/or proposals might be provided during a public hearing or in newspaper articles or notices. In fact, most development proposals receive some press coverage; so newspapers can be good sources of information about the proponents, the history of the activity, and the social and environmental context. To develop a clear historical overview of the project, it is important to gather as many perspectives as possible in order to present as accurate a description as possible.

A list of stakeholders and interested parties should be maintained as the scoping activities are done. This list could include tribal members and other individuals and communities, the proponent(s), local governments, permitting agencies (such as the Army Corps of Engineers and state regulatory agencies), special interest groups (the Sierra Club, community organizations, religious groups, etc.), the EPA, and others.

The identification of potential impacts or variables is the culminating step of the scoping process, and arguably the most critical part of the SIA process for those determining the course of development for a tribal community. Once one has collected data about the groups and areas that are likely to be impacted, it is important to understand what those impacts might be. Some common impacts include population impacts, community and institutional impacts, conflicts between local residents and newcomers, individual and family level impacts, and community infrastructure impacts. In order to identify all potential impacts, it is important to make social impact variable identification a community-wide process that emphasizes public involvement. Community hearings, open forums, informational workshops, field trips to the development site or legislature, and ongoing discussion facilitate

community understanding and the development of opinions about the proposed activity.

Table 6.2 demonstrates the types of variables that might be evaluated in an SIA process.

Table 6.2 Social Impact Assessment Variables[71]

Population Impacts	Population change (seasonal, temporary, permanent) Relocation of individuals or families Change in religious, ethnic, racial, age, social class, or gender composition
Community Impacts	Formation of attitudes toward activity (interest groups, media attention) Presence of an outside agency or stakeholder Disruption of religious or cultural practices Effects on known cultural, historical and archaeological resources
Individual and Family Level Impacts	Disruption of daily living and movement patterns and leisure activities Alteration or disruption of family structure or social network Change in perception of public health and safety
Institutional and Economic Impacts	Change in size and structure of local government Change in economic status and opportunities (employment equity, industrial focus) Disruption of treaty rights Change in the economic focus of a community Change in community infrastructure and land use

Data-gathering **methods and measurement** strategies should be developed and described. For each identified social impact assessment variable, detailed data should be gathered about changes occurring from or expected because of the proposed activity. While gathering or measuring data, researchers may identify new variables that should be incorporated into the process. Significant impacts should be identified and analyzed, and these findings should be presented in a detailed **analysis**. Impact analysis should be used to identify mitigation or enhancement opportunities and procedures. Detailed **monitoring procedures** for ongoing assessment of **mitigation** and enhancement

[71] Adapted from Burdge, 1998.

efforts should be documented. All measured variables should be regularly reevaluated to understand the efficacy of the SIA process used to assess the project. The continued collection of data will help to provide guidance for future SIA efforts. During monitoring and reassessment, latent impacts can be detected and sometimes mitigated.

As noted above, a carefully planned and executed scoping process is crucial to a successful SIA. Scoping can encompass many kinds of activities and data-gathering techniques. A comprehensive approach to impact assessment will provide relevant information to decision makers, and will become a base of social information that can be used in future assessment activities.

6.2E Additional Forms of Assessment

There are many other methodologies and types of assessment in addition to those discussed above. Those listed here are merely an indicator of what exists in the universe of NEPA. Some of these methods may be familiar to tribes, because they have been used outside the NEPA process as well, for other analytic purposes. The classic "Risk Assessment" is one example that tribes may have employed. Others include:

- Cost-benefit analysis/economic valuation
- Human health risk assessment
- Comparative risk assessment
- Life cycle assessment
- Environmental justice analysis

6.2F Cultural Impact Assessment

The Tulalip Tribes, in the Puget Sound region of Washington State, recently conducted a pilot project in which they sought to collect and document information on tribally significant natural resources. Some of this information, upon special tribal review *and* approval, will be used to help ensure that environmental impact assessments include an evaluation of cultural impacts.

For their pilot project, the Tulalip Tribes used a specific methodology for collecting information on indigenous uses of natural resources. The "Cultural Stories" methodology is based on three important premises:

(1) gathering and interpretation of the information is by the indigenous community themselves,

(2) information collected on past and present uses and values of natural resources guides the communities' future environmental management goals, encouraging the continuance or revival of cultural practices identified as important to the community, and

(3) the indigenous population shares this information as *it* deems appropriate and advantageous with external organizations or industry, to enable safeguarding of indigenous populations' resource needs and values.

As part of this pilot project, tribal members conducted personal interviews with other tribal members. Interviews were designed to solicit information on the cultural and traditional uses and importance of natural resources on the Tulalip Indian Reservation and outside its borders, on surrounding non-tribal lands. Those interviewed were asked what resources they used, how those resources and the environment had changed over their lifetime, what resources are important to them today, and what resource issues they would like to see addressed by tribal resource managers. A database was developed that will become accessible to other indigenous groups via a protected website. The tapes and transcripts have become part of the Tribes' oral history collection and will be used for additional research, analysis, and teaching. With approval from the Tribes' Board of Directors, elements of this information may periodically be used for environmental impact assessment.

THE ESSENTIALS OF TRIBAL NEPA PARTICIPATION

Chapter 1:
Know NEPA's History, Performance, and Framework

Chapter 2:
Know How and When NEPA is Triggered

Chapter 3:
Know the Environmental Assessment Process: Its Function, Form, and Limitations

Chapter 4:
Know How the EIS is Developed

Chapter 5:
Know Your Options for Involvement

Chapter 6:
Know How to Invoke Tribal Rights and Resources

Chapter 7:
Know How to Challenge a NEPA Determination

Chapter 8:
Know What a Tribal Environmental Policy Act Can Do For You

Chapter 9:
Know How to Write a Tribal Environmental Policy Act

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7. Challenging a NEPA Decision or Action: Litigation and Appeals

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7.1 Introduction

This chapter briefly discusses the opportunities to appeal a federal agency's decision making. It is divided into three main sections: administrative appeals of BIA NEPA actions; threshold issues relating to judicial review of federal agency NEPA actions; and the resolution of NEPA cases when courts agree to hear these cases.

7.2 Administrative Appeals from BIA Actions in Which NEPA Compliance Is an Issue

The BIA's NEPA implementing procedures do not provide specific guidance on how to file an administrative appeal from an action by a BIA official when NEPA compliance is an issue. Some cases have reached the federal courts, and other cases have been decided by the Interior Board of Indian Appeals (IBIA), an administrative appeals board in the Department of the Interior's Office of Hearings and Appeals. A review of these relatively few cases provides some guidance on how the administrative appeals should work, as well as some evidence that the appeals process has not been carried out with perfect consistency by the different field units of the BIA. It would be helpful for the BIA to review this topic and provide clear and reliable guidance for the affected public. In the meantime, this chapter describes the process as it currently exists.

The BIA administrative appeal process is governed by two separate sets of regulations: 25 CFR part 2, which governs appeals from administrative actions by BIA officials; and 43 CFR part 4, which governs hearings and appeals in the Department's Office of Hearings and Appeals, including the IBIA. To explain how these two sets of regulations fit together, it may be helpful to note that in the various field units of the BIA, officials make decisions pursuant to authority that has been delegated to them from the Assistant Secretary – Indian Affairs, who in turn exercises authority delegated from the Secretary, who has been vested with authority by Congress. For any decision made by a BIA official under the authority of an Area Director (now known as a Regional Director), the Area Director decides the matter on appeal pursuant to 25 CFR part 2.[1] For any decision by an Area (or Regional)

[1] 25 CFR §2.4(a). Decisions involving Indian education programs follow lines of delegated authority that are separate from the generally applicable lines of authority in the BIA. Accordingly, the BIA administrative appeals regulations provide for separate lines of appeal for decisions made by Indian education officials. 25 CFR §2.4(b), (e). Since education service programs are treated as categorical exclusions for

Director, the IBIA decides the appeal,[2] unless the Assistant Secretary – Indian Affairs chooses to take over the appeal process.[3] The Assistant Secretary may choose to make the decision on appeal, or may assign that duty to a Deputy Assistant Secretary. If the Assistant Secretary makes the decision, then the decision is final for the Department and constitutes final agency for purposes of judicial review under the Administrative Procedure Act.[4] If the Assistant Secretary takes an appeal that has been filed with the IBIA and assigns a Deputy Assistant Secretary the responsibility for making a decision, that decision may be appealed back to the IBIA.[5]

7.2A Which Decisions Can Be Appealed?

Any written decision by a BIA official can be appealed, and the rules in 25 CFR part 2 apply to all such appeals unless another federal regulation or a federal statute provides for a different appeal procedure for a specific type of decision.[6] An appeal can also be filed if a BIA official fails to take action on a request for a decision.[7]

The IBIA has ruled that the decision by a BIA official to sign a finding of no significant impact (FONSI) is subject to appeal under part 2.[8] The decision in that case relied in part on the fact that the FONSI itself, which was published, specified that it could be appealed to the IBIA. After the IBIA issued this decision, the BIA issued an internal memorandum stating that all future NEPA decisions must include the following statement:

> *APPEALS FROM NEPA DECISIONS:*
>
> Any party adversely affected by this decision may request an appeal from administrative actions in accordance with 25 CFR Part 2 – APPEALS FROM ADMINSTRATIVE ACTIONS, SECTIONS 2.1 THROUGH 2.21. The Notice of Appeal, including all supporting documentation, shall be filed with the Department of the Interior Board of Indian Appeals. A copy of

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NEPA purposes, 516 DM 6, App. 4, §4.4, these separate appeal procedures will not be discussed in this chapter.

[2] 25 CFR §2.4(e).

[3] 25 CFR §§2.4(c), 2.20.

[4] 25 CFR §2.6(c).

[5] 25 C.F.R. § 2.20(c)(2).

[6] 25 CFR §2.3.

[7] 25 CFR §2.8.

[8] Friends of the Wild Swan v. Portland Area Director, Bureau of Indian Affairs, 27 IBIA 8, at 15-23 (1994).

> the Notice shall also be filed with the Chief, Environmental Services Staff, BIA, 1849 C Street NW, Washington, D.C. 20240-0001. The Notice of Appeal must be filed in the office of the official whose decision is being appealed within 30 days of the notice of administrative action.[9]

The BIA has not always included such a notice in its FONSIs and at least once took the position that a FONSI is not subject to administrative appeals.[10]

A different appeal board within the DOI Office of Hearings and Appeals, the Interior Board of Land Appeals (IBLA), which hears appeals from decisions by officials of the Bureau of Land Management (BLM), has issued at least one decision that would offer support for such a position IF the IBLA had jurisdiction over appeals from BIA decisions. In that case, the IBLA ruled that a FONSI is not in itself subject to an administrative appeal; instead, the appeal must challenge the decision for which the EA and FONSI were prepared, that is, the agency action based on the EA and FONSI.

7.2B Who Can Appeal?

The rules governing appeals to the Area (Regional) Directors do not explicitly specify the class of persons who may file an appeal of an administrative action. Reading several provisions of the rules together, however, leads to the conclusion that any person who claims that his or her interests would be adversely affected by an action or inaction of a BIA official can file an appeal.[11] If an appeal is filed, any other interested party can file an answer.[12] The rules governing appeals to the IBIA provide that ''[a]ny interested party affected by a final

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[9] Memorandum from Deputy Commissioner of Indian Affairs to All Area Directors and All Central Office Directors, Subject: Appeals of National Environmental Policy Act Decisions (Aug. 14, 1995).

[10] Rosebud Sioux Tribe v. Gover, CIV. 99-3003 (D. South Dakota, Feb. 3, 2000). In this case, environmental organizations including individual tribal members attempted to file an appeal of the FONSI, which, as published in the local newspapers, did not include the statement required by the Deputy Commissioner's 1995 memorandum. In response to the attempted appeal, by letter dated September 17, 1998, the Acting Area Director stated the position that a FONSI ''does not qualify for appeal under 25 CFR, Chapter 1, Part 2.'' Letter from Acting Area Director to Nancy Hilding, Prairie Hills Audobon Society (Sept. 17, 1998)

[11] 25 CFR §2.2 (definitions of ''appeal,'' ''appellant,'' and ''interested party''); §2.7 (requiring notice of a decision to be given to all interested parties known to the decisionmaker).

[12] 25 CFR §2.11.

administrative action or decision'' by an official of the BIA may appeal. It may be an open question whether the effects on a person must be adverse for that person to have the right to appeal. The rules in 43 CFR part 4 do not explicitly require the effects on an interested party to be adverse, and these rules do not define ''interested party,'' although the rules in 25 CFR part 2 do require the effects to be adverse.

7.2C How to File an Appeal to the Area (Regional) Director

The administrative appeal process begins with filing a Notice of Appeal in the office of the official whose decision is being appealed, with a copy to the official who will decide the appeal (generally the Area/Regional Director) and a copy to all known interested parties. [13] The notice of appeal must be filed within 30 days of the date that notice of the decision was given.[14] The official who made the decision is required to give notice to all known interested parties by personal delivery or by mail.[15] If the decision maker fails to give notice to a known interested person, the 30-day period does not begin to run for that person until notice is given, but such a failure does not affect the validity of the decision or prevent it from taking effect.[16]

A Notice of Appeal must be supported by a Statement of Reasons, which can be filed as part of the Notice of Appeal.[17] If filed separately, the Statement of Reasons must be filed within 30 days after the filing of the Notice of Appeal. Filing a Notice of Appeal after the 30-day period has run will result in summary dismissal; failing to file a Statement of Reasons may result in summary dismissal.[18]

7.2D How an Appeal to the Area (Regional) Director Is Processed

After a Notice of Appeal and within 30 days after the Statement of Reasons is filed, any interested party wishing to participate in the appeal can file a written answer responding to the points raised by the appellant, identifying the party's interest that would be affected by the appeal, stating the interested party's position, and providing supporting documents.[19] The rules in 25 CFR part 2 do not provide for a hearing in

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[13] 25 CFR §2.9(a).
[14] *Ibid.*
[15] 25 CFR §2.7(a).
[16] 25 CFR §2.7(b), (c).
[17] 25 CFR §2.10.
[18] 25 CFR §2.17.
[19] 25 CFR §2.11.

which the parties can present their positions orally to the official who will decide the appeal. Rather, the decision on appeal is rendered based on the documents that are filed.[20] Within 60 days after the time for filing pleadings has expired, the decision maker (generally the Area/Regional Director) must issue a written decision, which must include a statement explaining how the decision can be appealed further, generally to the IBIA within 30 days.[21]

7.2E Assistance for Tribes and Individual Indians Not Represented by Legal Counsel

Two provisions in the 25 CFR part 2 rules provide that the official who made the decision that is the subject of the appeal will provide assistance to an appellant that is an Indian tribe or Indian individual not represented by legal counsel. Such assistance is supposed to be provided in the preparation of the notice of appeal and in serving appeal documents on other parties.[22]

7.2F When Does a Decision Take Effect?

A decision that can be appealed under 25 CFR part 2 does not become effective and is not considered ''final agency action'' for purposes of judicial review [23] until the 30-day period for filing an appeal has expired and no appeal has been filed.[24] Thus, filing an appeal generally has the effect of staying a BIA decision, as long as it is filed within 30 days after the decision. A BIA decision maker, however, can make a decision effective immediately based on a determination that public safety, protection of trust resources, or other public exigency so requires.[25] An appeal is allowed after 30 days if the appellant did not receive notice of the decision, if the decision maker had knowledge of the appellant's interest in the decision, and the failure to give such notice keeps the 30

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[20] 25 CFR §2.19. The decision maker can consider documents that are not part of the record on appeal, but in any such case all parties must be given at least ten days to comment on any such documents. 25 CFR §2.21(b).

[21] 25 CFR §2.19(a).

[22] 25 CFR §§2.9(b), 2.12(c).

[23] Judicial review under the Administrative Procedure Act is generally available only for final agency action. 5 USC §704.

[24] 25 CFR §2.6. In Friends of the Wild Swan v. Portland Area Director, Bureau of Indian Affairs, the IBIA considered the issue of whether the provisions in the BIA NEPA Handbook relating to when a decision becomes effective supercede the provisions in 25 C.F.R. part 2 and held that they do not. 27 IBIA 8, at 19-22 (1994).

[25] 25 CFR §2.6(a).

day period for filing an appeal from beginning to run until the required notice is given, in effect staying the BIA decision.[26]

7.2G Appeal Bonds

Any person who ''believes that he/she may suffer a measurable and substantial financial loss as a direct result of the delay caused by an appeal'' may ask the BIA official before whom the appeal is pending to require that the appellant post an appeal bond.[27] In addition, if the BIA official before whom the appeal is pending determines that a bond is ''necessary to protect the financial interests of an Indian or Indian tribe,'' the official can require an appeal bond on his/her own initiative.[28] The decision to require an appeal bond or to deny a request for a bond is a separate decision that can be appealed to the IBIA. The IBIA has sustained a decision by an Area Director to require an appeal bond in a case in which NEPA issues were raised.[29]

7.2H How to File an Appeal to the IBIA

Appeals to the IBIA are governed by general provisions of 43 CFR governing the DOI Office of Hearings and Appeals[30] and specific provisions governing the IBIA.[31] An appellant commences an appeal by filing a Notice of Appeal with the IBIA within 30 days after receipt of the decision from which the appeal is taken.[32] The Notice of Appeal must include a statement of reasons and the names and addresses of all additional interested parties having rights or privileges that may be affected by a change in the decision, including Indian tribes and tribal corporations. A copy of the notice must be filed simultaneously with the Assistant Secretary – Indian Affairs. If the appellant is an Indian or tribe

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[26] 25 C.F.R. § 2.7. The failure to give notice does not affect the validity of the underlying decision. Thus, it is possible for the BIA to proceed to carry out an action on the assumption that the 30 day period has run and that the decision has become final agency action because no appeal was filed.

[27] 25 CFR §2.5.

[28] 25 CFR §2.6(c).

[29] Friends of the Wild Swan v. Portland Area Director, Bureau of Indian Affairs, 27 IBIA 8, 10-14 (1994).

[30] 43 CFR §§4.1-4.31.

[31] 43 CFR §§4.200, 4.330-4.340. Most of the provisions in subpart D apply to IBIA decisions involving the determination of heirs. Some of the headings in 43 CFR subpart D are confusing, suggesting that §§4.310-4.318 may be generally applicable to IBIA decisions. The text of §4.200, however, clarifies that §§4.310-4.323 apply only to probate matters and that §§4.330-4.340 govern appeals from administrative decisions and actions by the BIA.

[32] 43 CFR §4.322.

not represented by legal counsel, the BIA official who issued the decision being appealed is supposed to provide help in preparing the appeal and serving notice of the appeal.[33]

7.2I How an Appeal to the IBIA Is Processed

The IBIA assigns a docket number 20 days after receiving the Notice of Appeal, unless the Assistant Secretary – Indian Affairs has decided to assume jurisdiction over the appeal within that time.[34] The IBIA then issues a Notice of Docketing, which specifies the times for filing briefs. The IBIA may then decide the appeal based on the written record, or may decide that further inquiry is needed to determine a genuine issue of material fact. In such a case, it will assign the matter to an administrative law judge in the Office of Hearings and Appeals to conduct a hearing.[35] If such a hearing is held, the administrative law judge will prepare recommended findings of fact and conclusions of law and submit these to the IBIA.[36] All the parties will then have the chance to file comments with the IBIA before it renders a decision.[37] Whether or not the IBIA assigns the matter to an administrative law judge to conduct a hearing, the IBIA may, in its discretion, allow oral argument before the IBIA.[38]

7.2J Seeking a Stay Pending the Decision on Appeal

The sections of 43 CFR part 4 that specifically apply to the IBIA do not state whether a decision that is the subject of an appeal is stayed pending the outcome of the appeal. This issue is addressed in the general rules relating to practice before the various boards of the Office of Hearings and Appeals. Briefly, an appellant must file not only a Notice of Appeal, but also a timely Petition for a Stay together with the Notice of Appeal.[39] The appellant requesting a stay bears the burden of proof to demonstrate that a stay should be granted, in accordance with standards set out in the rules. The Appeals Board to which the appeal is taken (the IBIA for BIA decisions) can grant or deny the request for a stay, and may also issue a ruling that a decision being appealed shall be made effective immediately ''when the public interest requires.''[40] If a stay is granted and the decision is not otherwise made immediately effective, then the

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[33] 43 CFR §§4.332(c), 4.333(a).
[34] 43 CFR §4.336.
[35] 43 CFR §4.337.
[36] 43 CFR §4.338.
[37] 43 CFR §§4.338(b), 4.339.
[38] 43 CFR §4.337.
[39] 43 CFR §4.21.
[40] 43 CFR §4.21(a)(1), (a)(3), (b)(4).

decision is not effective and is not final agency action for purposes of judicial review until the Appeals Board issues a decision. If a petition for a stay is denied, however, and the decision has been made immediately effective pending appeal, the decision is considered final agency action for purposes of judicial review under the Administrative Procedure Act.[41]

7.3 Seeking Judicial Review in Federal Court

This section discusses how a person, organization or tribe that objects to a federal action can seek review by a federal court on grounds that the agency failed to fulfill its responsibilities under NEPA. This section deals with what might be described as "threshold" issues, that is, issues relating to getting a federal court to consider the case. The next section discusses what happens if a court does agree to hear the case.[42]

7.3A The Basis for Judicial Review

NEPA does not include a statutory provision authorizing private parties to file lawsuits in federal court against federal agencies for failure to comply with the statute. Not long after NEPA was enacted, however, federal courts ruled that judicial review is authorized.[43] Such court decisions found a basis for jurisdiction in the judicial review provisions of the Administrative Procedure Act (APA),[44] which include a waiver of the federal government's sovereign immunity so that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."[45] The APA authorizes federal courts to issue declaratory judgments and/or injunctive relief,[46] but not money damages.

7.3B Final Agency Action

In order for a NEPA claim to be possible, the federal agency must have taken a "final agency action for which there is no other adequate remedy

[41] 43 CFR §4.21(c).

[42] The discussion of judicial review in this Chapter is an overview. Attorneys involved in NEPA litigation should refer to other sources, such as Mandelker, and Sheldon and Squillace.

[43] E.g., Calvert Cliffs Coordinating Comm. V. U.S. Atomic Energy Comm'n, 449 F.2d 1109 (D.C. Cir. 1971).

[44] 5 USC §§701-706 (1994).

[45] *Ibid.* at §702.

[46] *Ibid.* at §703.

in a court."[47] The CEQ regulations state that judicial review should not be available until one of three kinds of events has occurred: (1) the agency has made a final FONSI; (2) the agency has filed a final EIS; or (3) the agency "takes action that will result in irreparable injury."[48] For federal agencies that provide for an administrative appeal process, such as the BIA, the final administrative appeal decision is considered the final agency action.[49]

7.3C Standing in NEPA Litigation

As a threshold requirement for pursuing judicial remedies in a NEPA claim against a federal agency, a plaintiff must make a showing of ''standing.'' Standing is a Constitutional requirement that stems from Article III of the Constitution, which limits the federal courts' power to hear "cases or controversies."[50] If a federal agency challenges a plaintiff's claim of standing, the issue is usually decided in the context of a motion to dismiss or a motion for summary judgment . If the plaintiff does not prevail on this issue, then the plaintiff's claim does not go to trial.

In order to establish standing, a plaintiff has the burden of demonstrating that it: (1) has suffered, or is threatened by, an injury in fact, (2) which can be "fairly traced to the challenged action," and (3) "is likely to be redressed by a favorable decision."[51] These three requirements are based on the Constitution. In addition, certain ''prudential'' principles are applied by federal courts in their discretion: (1) a plaintiff must assert its own legal interests; (2) the interests asserted must be more than generalized grievances that are pervasively shared; and (3) the plaintiff's complaint must fall within the zone of interests protected or regulated by the statute.[52]

As a general rule, getting past the standing threshold has not been difficult for plaintiffs in NEPA litigation, although in some cases one of the constitutional or prudential factors has resulted in dismissal or summary judgment for the federal defendants. Environmental organizations have been held to have standing on behalf of their members if the individual members would have standing, if the interests at issue are germane to the organization's purpose, and if the case does

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[47] 5 USC §704.

[48] 40 CFR §1500.3.

[49] See 25 CFR §2.6.

[50] U.S. Constitution, Article III §2, cl. 1.

[51] Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 472 (1982); see also Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992).

[52] See generally Mandelker, at §4.06; Sheldon and Squillace at 195-98.

not require participation by the individual members. State and local governments have been held to have standing based on claimed injuries to environmental resources under their jurisdiction or ownership. Similarly, tribal governments can generally show standing when an environmental injury would occur on a tribe's reservation or would affect resources beyond reservation boundaries that are protected by treaty or statute. If a proposed federal action would affect lands in the vicinity of the Indian resources, it is not automatic that a tribe as plaintiff will have standing. In order to demonstrate "actual injury" to the court, the tribe should not simply make a general allegation of harm because the proposed action is near the Indian resource, but, rather, should provide proof to the court (often in the form of affidavits) that the proposed action will actually affect the Indian resource in question.[53] Also, to be within NEPA's ''zone of interest,'' a plaintiff must show physical injury to the environment; financial or socioeconomic injury alone will not suffice.

Because NEPA is a procedural statute, one way to establish standing as a NEPA plaintiff is to demonstrate to the court that the agency's failure to comply with the procedural requirements of NEPA has deprived the plaintiff of a procedural right.[54] In such cases, courts have relaxed the normal standards in determining whether an injury is sufficiently imminent to be an ''injury in fact'' and whether it can be redressed by a favorable court order. For example, a county has been held to have standing because it had a procedural right to comment on an environmental impact statement and it owned land adjacent to the area that would be affected by the proposed federal action.[55] Since the CEQ regulations establish procedural rights for tribes throughout the EIS process, such court decisions should also be applicable in showing that tribes have standing to seek judicial recognition of their procedural rights.

7.3D Exhaustion of Administrative Remedies

Even though a plaintiff in a NEPA case can make the required showing of standing, a court may find other reasons not to decide the case on its merits. One such reason is the doctrine requiring the exhaustion of administrative remedies, such as use of an agency's administrative appeal process. This exhaustion doctrine has two basic purposes: (1) it allows the agency to complete its process and correct any errors in its decision

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[53] Lujan v. National Wildlife Federation, 497 U.S. 871 (1990).

[54] Lujan v. Defenders of Wildlife, 504 U.S. 555, 572 n.7 (1992).

[55] Douglas County v. Babbitt, 48 F.3d 1495 (9th Cir. 1995), *cert. denied*, 516 U.S. 1042 (1996).

making; and (2) it prevent courts from interfering in the agency decision-making process.[56] Therefore, a NEPA plaintiff must first be aware of any administrative processes/remedies that are potentially available, and must first exhaust those remedies; otherwise a reviewing court may dismiss the claim if the United States raises the equitable defense of exhaustion.

Exhaustion is not an absolute doctrine. Courts are supposed to balance the integrity of the administrative process against the harm that a plaintiff would suffer by denying judicial review, but this balancing test sometimes leads to inconsistent results.[57] Courts also apply exceptions to the exhaustion requirement, e.g., if no administrative remedy is available, if the plaintiff did not receive notice that an administrative hearing was available, or where exhaustion would be futile. In one recent case, a court relied on exhaustion in declining to consider a NEPA claim.[58] In another recent case involving the BIA (a case not arising under NEPA but rather under the Endangered Species Act), the court did not require exhaustion, holding that it would have been futile.[59]

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[56] Bowen v. City of New York, 476 U.S. 467, 484 (1986), quoting Weinberger v. Salfi, 422 U.S. 749, 765 (1975).

[57] Mandelker, at §4.08[1].

[58] Shenandoah v. U.S. Department of the Interior, 159 F.3d 708, 711-713 (2d Cir. 1998).

[59] Silver v. Babbitt, 924 F.Supp. 976, 987-88 (D. Arizona 1995). The court also said that exhaustion is not required if the agency has indicated that it does not desire to conduct an administrative review, citing Natural Resources Defense Council v. Train, 510 F.2d 692 (D.C. Cir. 1974), or if the issue being reviewed in purely legal, citing McGee v. U.S., 402 U.S. 479, 485-86 (1971).

7.3E Statute of Limitations, Laches, and Mootness

The statute of limitations for bringing a NEPA claim is the general six-year statute of limitations for bringing a claim against the United States.[60] Because NEPA litigation also often involves other substantive law (i.e., other environmental laws) that may provide for a shorter period of time in which to bring a claim, a potential NEPA plaintiff should not assume that the time period for bringing a claim is six years. The statute begins to run whenever the agency action becomes final (see discussion above regarding final agency action).

Even though a NEPA claim is filed within the statute of limitations, it may be barred by the equitable doctrine of laches, a defense in which a defendant argues that it would be unfair to let the plaintiff's claim be ruled on by a court because of an unexcused delay in filing the claim. The defense of laches is not favored in environmental cases,[61] but it has been the basis for dismissal in some cases in which construction was nearly complete by the time the complaint was filed.[62] More often, rather than dismissing the complaint altogether, a court relies on the laches defense in denying a preliminary injunction,[63] in effect allowing a project to go forward before the court makes a decision on the merits.

Mootness is a related defense, based on the case and controversy requirement of Article III of the Constitution, and as such is related to standing. The basic idea is that if a court cannot order relief because of events that have occurred during litigation, then there is no longer any justiciable controversy. One example with NEPA occurs when an agency is sued for failure to prepare an EIS, and then decides to prepare one. Another example would be when the plaintiff fails to obtain a preliminary injunction and the project that is the subject of the litigation is completed before the court makes a decision on the merits. Some courts have said that the apparent completion of a project does not render a complaint moot if the court can still order meaningful relief.[64] In addition, there is an exception to mootness for cases involving agency

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[60] 28 USC §2401(a).

[61] See, e.g., Quince Orchard Valley Citizens Ass'n, Inc. v. Hodel, 872 F.2d 75, 79 (4th cir. 1989); Portland Audubon Society v. Lujan, 884 F.2d 1233, 1241 (9th Cir. 1989).

[62] Save Our Wetlands, Inc. v. U.S. Army Corps of Engineers, 549 F.2d 1021, 1026-29 (5th Cir. 1977), *cert. denied*, 434 U.S. 836 (1977).

[63] Quince Orchard Valley Citizens Ass'n, Inc., 872 F.2d at 80.

[64] E.g., Van Abbema v. Fornell, 807 F.2d 633 (7th Cir. 1986) (court could order dismantling of facility or change in operation); Columbia Basin Land Protection Ass'n v. Schlesinger, 643 F.2d 585 (9th Cir. 1981) (court could order removal of power transmission lines).

action that may be repeated and yet evade judicial review, but this exception is not often applied in NEPA cases.[65]

7.3F When a Tribe Is a Necessary Party

In some NEPA cases in which actions by a federal agency such as the BIA or Indian Health Service (IHS) are challenged, the interests of a tribe may be at issue. Federal courts operate under the Federal Rules of Civil Procedure, and Rule 19 governs the joinder of parties.[66] Under this Rule, a court engages in a two-step analysis to determine whether, "in equity and good conscience," an action can proceed without the participation of a non party. The first step is to determine whether the absent party is "necessary" to the resolution of a case. Whether a party is necessary involves an evaluation under Rule 19(a) of whether complete relief is possible without the participation of the absent party and whether the absent party has a legally protected interest in the outcome. Generally, if a party is found to be necessary, a federal court will order it to be joined as a party to the case. Indian tribes have sovereign immunity,[67] however, and so a tribe cannot be joined as a party to litigation without its consent, unless a valid waiver of tribal sovereign immunity applies.

If a tribe has been determined to be necessary and does not waive sovereign immunity, then the court moves on to the second step of the analysis, a determination under Rule 19(b) of whether the tribe is an "indispensable" party. This determination requires the balancing of four factors: (1) prejudice to any party or to the absent party; (2) whether relief can be shaped to lessen the prejudice; (3) whether an adequate remedy, even if not complete, can be awarded without the absent party; and (4) whether an alternative forum exists.

These issues were raised in an early Indian country NEPA case, Manygoats v. Kleppe.[68] In this case, members of the Navajo Tribe challenged the adequacy of the EIS prepared by the BIA prior to the approval of a lease between the Navajo Tribe and Exxon Corporation for the right to explore for, and mine, uranium on tribal lands. The Tenth Circuit Court of Appeals ruled that the Tribe was a necessary party because the interests and responsibilities of the Secretary of the Interior

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[65] Mandelker, at §4.08[4].

[66] F.R.Civ.P. 19.

[67] Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc. 523 U.S. 751 (1998).

[68] Manygoats v. Kleppe, 558 F.2d 556 (10th Cir. 1977).

under NEPA may conflict with the interests of the Tribe.[69] The court then considered whether the Tribe was an indispensable party and ruled that it was not. In reaching this holding, the court noted that the relief sought by the plaintiffs did not call for any action by the Tribe, but rather sought an order directing the BIA to prepare a revised EIS. The Court said that to dismiss that action for nonjoinder of the Tribe would have an anomalous result: a tribe would be the only party that could challenge an EIS relating to leases or other agreements for development on Indian land.[70]

In at least one recent case, a federal court has dismissed a NEPA complaint on the ground that the Tribe was an indispensable party.[71] Members of the Hopi Tribe sought an order halting construction of a water and sewer system until an EIS was completed, in essence challenging the decision of the IHS to provide funding for the project based on an EA and FONSI. The court considered the four-factor test, found the first three to weigh in favor of finding the Hopi Tribe an indispensable party, and found that these factors were not outweighed by the possibility that there might not be an alternative forum to hear the claims. The court assigned substantial weight to the facts that construction on the project was 99 percent complete and that the Tribe could complete the project with its own funds even if the federal defendants were enjoined.

In another recent case, a federal district court declined to issue an injunction to halt construction of an amphitheater, because the construction was being carried out by the Muckleshoot Tribe, which could not be joined without its consent. However, the court did order the BIA to prepare an EIS on the project.[72] The case involved a claim based

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[69] *Ibid.* at 558.

[70] *Ibid.* at 559. The Court distinguished, at 558, an earlier decision, Tewa Tesuque v. Morton, 498 F.2d 240 (10th Cir. 1974), *cert. denied*, 420 U.S. 962, in which Indian plaintiffs sought the cancellation of a lease for the lack of an EIS. The court ruled that the NEPA claim had been rendered moot by the earlier decision in Davis v. Morton, 469 F.2d 593 (10th Cir. 1972), and affirmed the district court's dismissal of the action on the ground that the Tribe was an indispensable party.

[71] Village of Hotvela Traditional Elders v. Indian Health Service, 1 F.Supp.2d 1022 (D. Ariz. 1997).

[72] United States ex rel Citizens for Safety & Environment v. Bill Graham Enterprises, Inc., No. C97-1775C (D.C. Western D. Wash., April 17, 1998). In this case, the BIA had issued a FONSI based on an EA prepared by the Tribe, apparently in anticipation of a request by the Tribe to accept title to the land in trust or a request for approval of the management contract for the project. After issuing the FONSI, Citizens for Safety & Environment appealed that decision to the Interior Board of Indian Appeals (IBIA). The BIA then withdrew the FONSI, on the basis that contract did not implicate a statute or regulation that required environmental review, and the IBIA dismissed the appeal. Slip Op. At 2-3.

on NEPA and a claim based on the federal statute requiring BIA approval of contracts with tribes, 25 USC §81, although no formal request to approve the contract had been submitted to the BIA. The court ruled that the Tribe was an indispensable party for purposes of the Section 81 claim but not for purposes of the NEPA claim.

7.4 Outcomes of Judicial Review

This section discusses some of the major issues that arise when a federal court agrees to hear a claim that a federal agency has not fulfilled its responsibilities under NEPA.[73]

7.4A Actions that May Be Subject to Judicial Review

As noted earlier, the CEQ regulations state that judicial review of agency action involving NEPA should not be available until one of three kinds of events has occurred: (1) the agency has made a final FONSI; (2) the agency has filed a final EIS; or (3) the agency "takes an action that will result in irreparable injury." In addition to these three categories, courts have heard claims based on the failure of an agency to prepare a supplemental EIS, failure to supplement an EA, the decision to use a categorical exclusion to avoid the preparation of an EA, and failure to begin the NEPA process at all.[74]

7.4B Standards of Review

The jurisdictional basis for federal courts to hear NEPA claims is the Administrative Procedure Act (APA), and so the standard of review is that found in the APA. The APA contains six different judicial review standards, two of which may apply in NEPA cases. Under the APA, a reviewing court shall "hold unlawful and set aside agency action, findings and conclusions found to be … arbitrary and capricious, an

[73] This section offers an overview of issues that arise in NEPA litigation. Attorneys involved in NEPA litigation should consult other sources, e.g., Mandelker, and Sheldon and Squillace.

[74] Cheever, pp. 132, 140-41, and cases cited therein. See also Cohen and Berlowe, p. 189.

abuse of discretion, or otherwise not in accordance with law; [or] … without observance of procedure required by law."[75]

Over the years federal courts have used a variety of terms and phrases to describe how they apply these statutory standards, giving rise to the appearance, at least, of some inconsistency among the courts in the different federal circuits. The Ninth Circuit in particular had used a "reasonableness" standard, but, in Marsh v. Oregon Natural Resources Council,[76] the Supreme Court declined to endorse this standard. In this case, which involved action based on an EA and FONSI, the Supreme Court ruled that the proper standard is "arbitrary and capricious," but the Court also noted that the difference between these two standards "is not of great pragmatic consequence."[77] The arbitrary and capricious standard requires a reviewing court to give deference to a federal agency's decision, but how much deference? Many of the cases describe the amount of deference by saying that courts must take a "hard look" at agency action, but must refrain from substituting their own judgment for that of the agency.

To some extent, how these standards are applied depends on the nature of the agency action that is the subject of the claim. In taking a "hard look" at agency decisions, reviewing courts often seem to give agencies less deference if the decision at issue is to take an action based on an EA and FONSI than when plaintiffs challenge the adequacy of an EIS.

If the challenged agency action involves issues that are legal rather than factual in nature, reviewing courts generally do not defer to agency decisions. Rather, courts make their own rulings on questions of law, although they do defer to an agency interpretation of a statute when the agency has been charged with carrying out the statute and the agency interpretation was developed through the rulemaking process.[78] In NEPA litigation, however, questions of law and questions of fact tend to be interrelated. In Marsh, for example, the Supreme Court rejected an argument that the determination of significance in that case was an issue of law, saying that the dispute "involves primarily issues of fact."[79] On the other hand, sometimes legal issues can be separated from the facts. In addition, the NEPA process often helps to determine when review and

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[75] 5 USC §706(2)(A), (B) (1994). For an explanation of why the other four APA judicial review standards do not apply in NEPA cases, *see* Mandelker, at §3.04[1].

[76] 490 U.S. 360, 377 (1989).

[77] 490 U.S. at 377

[78] Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984).

[79] Marsh, 490 U.S. at 376.

consultation requirements imposed by other laws apply to a proposed federal action. Although such legal issues are not NEPA claims, they can be effectively used by plaintiffs seeking to block a federal action, especially when such claims come before reviewing courts as issues of law rather than issues of fact.

7.4C Review of Environmental Impact Statements

The Supreme Court has ruled that the mandate of NEPA is essentially procedural. NEPA "does not mandate particular results, but simply prescribes the necessary process."[80] Consequently, when courts consider challenges to the adequacy of an EIS, they focus on procedures followed in preparing the EIS rather than its substantive content. The D.C. Circuit has said that a challenge to the adequacy of an EIS is in effect a claim that the agency's decision was "without observance of procedure required by law."[81] Other courts have adopted the arbitrary and capricious standard, and the Supreme Court has not yet ruled on which standard is correct.[82] (In the Marsh case, the plaintiffs challenged an action based on an EA and FONSI, not an EIS.)

Regardless of which APA standard a court cites, the nature of the inquiry conducted to apply the review standard tends to be similar. For example, the First Circuit, applying the arbitrary and capricious standard, says that "the reviewing court must determine that the decision 'makes sense.' Only by 'carefully reviewing the record and satisfying [itself] that the agency has made a reasoned decision' can the court 'ensure that agency decisions are founded on a reasoned evaluation of the relevant factors.'"[83] Similarly, the Ninth Circuit has said that an EIS must include a "reasonably thorough discussion of the significant aspects of the probable consequences" of a proposed action.[84] The circuit courts

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[80] Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 333 (1989). See also Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519 (1978); Strycker's Bay Neighborhood Council, Inc. v. Karlen, 44 U.S. 223 (1980).

[81] Natural Resources Defense Council v. Securities & Exchange Comm'n, 606 F.2d 1031, 1049 (D.C. Cir. 11979) (citing the Administrative Procedure Act, 5 USC §706(2)(D)).

[82] See Mandelker, at §10.05.

[83] Dubois v. U.S. Dep't of Agriculture, 102 F.3d 1273, 1285 (1st Cir. 1996), *cert. denied*, 117 S.Ct. 2510 (1997) (internal citations omitted).

[84] Oregon Natural Resources Council v. Lowe, 109 F.3d 521, 526 (9th Cir. 1997).

continue to say that judicial review is not a "rubber stamp"[85] of agency action and that courts must take a "hard look."[86]

As federal agencies have become more experienced in complying with NEPA and the CEQ regulations, the number of cases challenging the adequacy of an EIS has declined, and so has the frequency with which courts have ruled in favor of plaintiffs in such cases. When challenging a federal action based on an EIS, a plaintiff has a better likelihood of success if the agency has failed in some way to comply with the procedural requirements of the CEQ regulations. Although reviewing courts show great deference to agencies on issues of fact, courts make their own rulings on legal issues, that is, if a legal issue can be separated from the factual issues. For example, in one recent case, the Ninth Circuit set aside an action by the Forest Service based on an EIS for, among other reasons, failure to adequately consider cumulative impacts because of the procedural violation of tiering an EIS onto a forest management plan.[87] The court ruled that tiering is only proper when the earlier document was also an EIS.

7.4D Review of FONSIs

If an agency produces an EA and then issues a FONSI, that action may be challenged in federal court (so long as it is a final agency action). As the Supreme Court ruled in Marsh, reviewing courts will apply the arbitrary and capricious standard to judicial review of FONSIs (and actions based on FONSIs). Courts typically say that they take a ''hard look'' when applying this standard. When an agency issues a FONSI, it is foregoing the more stringent documentation and public participation requirements of an EIS. Thus, a potential NEPA claimant challenging an action based on a FONSI would most likely seek a court order that an EIS must be prepared, alleging that the agency was wrong in concluding that the impacts of a proposed action will not be significant.

The federal courts have decided many cases involving challenges to actions based on a FONSI. Decisions in these cases go both ways and tend to turn on the facts of the case.[88] Courts typically put the burden on the plaintiff to allege facts that the agency omitted from its consideration

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[85] Dubois v. U.S. Dep't of Agriculture, 102 F.3d 1273, 1285 (1st Cir. 1996); Sierra Club v. Marita, 46 F.3d 606 (7th Cir. 1995).

[86] All Indian Pueblo Council v. United States, 975 F.2d 1437 (10th Cir. 1992); Tongass Conservation Soc'y v. Cheney, 924 F.2d 1137 (D.C. Cir. 1991).

[87] Muckleshoot Indian Tribe v. U.S. Forest Service, 177 F.3d 800 (1999).

[88] Professor Mandelker says, ''The courts usually decide these cases on an ad hoc basis with no attempt to provide criteria under which the environmental significance can be measured.'' Mandelker, at §8.03[3].

which, if true, might have resulted in a conclusion that a FONSI was not warranted.[89] If an agency's EA is superficial or based on assumptions or conclusions,[90] a court is likely to take a harder look than in cases in which the EA contains meaningful analysis.

The key issue is whether the probable environmental impacts may be significant, and so the courts often focus on the definition of ''significantly'' in the CEQ regulations, which calls for consideration of both context and intensity.[91] Some courts have said that the existence of one intensity factor does not in and of itself render the impacts significant.[92] The D.C. Circuit has applied a four-part test to review agency decisions not to prepare an EIS, after having prepared an EA and issued a FONSI:

> First, the agency must have accurately identified the relevant environmental concern. Second, once the agency has identified the problem it must have taken a ''hard look'' at the problem in preparing the EA. Third, if a [FONSI] is made, the agency must be able to make a convincing case for its finding. Last, if the agency does find an impact of true significance, preparation of an EIS can be avoided only if the agency finds that changes or safeguards in the project sufficiently reduce the impact to a minimum.[93]

Although this test was formulated prior to the Supreme Court's decision in Marsh, it is not inconsistent with that decision, and this test continues to be cited and applied.

7.4E Mitigated FONSIs

Agencies, and applicants for agency action that prepare EAs, often add mitigation measures to a proposal in order to reduce the environmental impacts so that they do not meet the threshold for being "significant." The agency may then conclude that the EA with the added mitigation

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[89] E.g., Winnebago Tribe of Nebraska v. Ray, 621 F.2d 269 (8th Cir. 1980), *cert. denied*, 449 U.S. 836 (1980).

[90] Public Service Co. of Colorado v. Andrus, 825 F.Supp 1483 (D. Idaho 1993); Sierra Club v. Babbitt, 15 F.Supp. 2d 1274 (S.D. Ala. 1998).

[91] 40 CFR §1508.27.

[92] E.g., Presidio Golf Club v. National Park Serv., 155 F.3d 1153 (9th Cir. 1998); North Carolina v. Federal Aviation Admin., 957 F.2d 1125 (4th Cir. 1992); Friends of Fiery Grizzard v. Farmers Home Admin., 61 F.3d 501 (6th Cir. 1995).

[93] Sierra Club v. U.S. Dept. of Transportation, 753 F.2d 120, 127 (D.C. Cir. 1985).

measures supports a FONSI. This practice has become known as a "mitigated FONSI," and the courts have endorsed it as an acceptable practice.[94] In some cases, however, courts have found mitigation measures inadequate to avoid the preparation of an EIS.[95]

7.4F Alternatives Required by Section 102(2)(E) of NEPA

When an agency prepares an EA instead of an EIS, the consideration of alternatives is based on section 102(2)(E) of the act,[96] which requires 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 CEQ regulations expressly state that this requirement applies to environmental assessments.[97] This requirement has been interpreted by courts in only a few cases,[98] and so what it means is not entirely clear. It is clear, however, that this is a legal requirement, once the underlying fact has been established that a proposal "involves unresolved conflicts concerning alternative uses of available resources." If an EA considers only two alternatives – the proposed action and the no-action alternative – and the proposal does meet this underlying fact requirement, a court should review a FONSI as a legal issue, without deference to the agency's decision.

7.4G Review of Agency Decisions to Use a Categorical Exclusion

If an agency uses a categorical exclusion (CE), and that constitutes final agency action, then an aggrieved plaintiff would have the opportunity to appeal that decision. CEs are intended to apply to a limited scope of actions that are not likely to have a significant effect on the environment.[99] Although agencies have the authority to develop their own regulations listing the kinds of actions that they treat as CEs,

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[94] Cabinet Mountains Wilderness v. Peterson, 685 F.2d 678, 681-82 (D.C. Cir. 1982); Sierra Club v. Peterson, 717 F.2d 1409, 1413 (D.C. Cir. 1983).

[95] E.g., Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208 (9th Cir. 1998); Audubon Soc'y of Central Arkansas v. Dailey, 977 F.2d 428 (8th Cir. 1992); National Audubon Soc'y v. Hoffman, 132 F.3d 7 (2d Cir. 1997).

[96] 42 USC §4332(2)(E). This subsection is worded somewhat differently from the language in section 102(2)(c), which is the basis for consideration of alternatives in an EIS.

[97] 40 CFR §1508.9(b).

[98] See Mandelker, at §9.05[5].

[99] 40 CFR §1508.4.

agencies must also include procedures for identifying particular actions that may cause a significant environmental impact and for which an EA must be prepared (i.e., procedures for identifying ''exceptions'' to CEs).[100] Courts generally do not set aside an agency's use of a CE, and they also defer to an agency's interpretation of its own regulations identifying its CEs[101] unless the activity clearly does not fit within the CE.[102] Courts generally treat these issues as mixed questions of law and fact, and review the agency decisions under the "arbitrary and capricious" standard.[103] If the agency uses a CE that clearly does not fit the particular action, the question would be more law than fact, and a court would be more likely to set aside the agency action. There have, in fact, been reported cases in which an agency's use of a CE has been set aside.[104]

7.4H Remedies

Plaintiffs in NEPA cases usually seek injunctive relief, usually to order an agency not to go ahead with an action until the alleged failure to comply with NEPA is cured.[105] Obtaining a preliminary injunction may be critical to success on the merits because, without a preliminary injunction, the agency can proceed with the action, and the complaint may be moot by the time the case is heard on the merits.[106] Courts can also grant declaratory relief, which means a declaration of what the law is in the particular case. In appropriate cases, a court may also issue a mandamus order, which is an order compelling an agency to take a particular action.

Federal district courts have the power to issue preliminary injunctions. Granting or denying such relief is within the discretion of the court, subject to review by the courts of appeal. In deciding whether to issue a preliminary injunction, the courts generally apply a four-factor balancing test: (1) the plaintiff's likelihood of success on the merits; (2)

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[100] *Ibid.*

[101] Mandelker, at §7.04[2].

[102] See generally Sheldon and Squillace, 203.

[103] *Ibid.*

[104] E.g., Jones v. Gordon, 792 Fed. 2d 821 (9th Cir. 1986); Fund for Animals v. Espy, 814 F.Supp. 142 (D.D.C. 1993); State of Mississippi v. Marsh, 710 F.Supp. 1488 (D.Miss. 1989); Greenpeace, U.S.A. v. Evans, 688 F. Supp. 579 (D. Wash. 1987); Washington Trails Ass'n V. U.S. Forest Service, 935 F.Supp. 1117 (W.D. Wash. 1996).

[105] See generally Mandelker, at §4.10.

[106] In some cases, NEPA plaintiffs seek another form of injunctive relief, a temporary restraining order (TRO), which is an extraordinary type of order that requires a showing of immediate and irreparable injury and which expires in 10 days. See Mandelker, at §4.10[2][b] n.30.

irreparable harm to the plaintiff if an injunction is not issued; (3) the harm to the defendant agency if an injunction is issued; (4) the public interest.[107] There is a substantial body of case law on the various aspects of this balancing test, which will not be summarized here. If the district court declines to issue a preliminary injunction, a plaintiff may seek a stay pending appeal, in which the court applies a very similar four-part test.[108] After a court has decided a case on the merits, it may issue a permanent injunction. The factors considered at this stage differ slightly, in that the likelihood of success on the merits is no longer a factor, because the plaintiff has already won on the merits.

7.4l Other Issues

A variety of other issues arise in NEPA litigation. This chapter has offered an introductory treatment of some of the major issues. Lawyers who represent tribes or organizations in NEPA litigation should consult a variety of other sources.

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[107] Mandelker, at §4.10[2][b] (noting that the Second Circuit follows a different rule which requires a showing of irreparable harm to the plaintiff and either probable success on the merits or sufficiently serious questions on the merits coupled with the balance of hardships weigh in favor of the plaintiff).

[108] Mandelker, at §4.10[6]. An application for a stay pending appeal is filed with the district court. Fed. R. Civ. P. 62(c). In certain circumstances, an application may be filed with the court of appeals. Fed. R. App. P. 8.

PART II:
DEVELOPING A TRIBAL ENVIRONMENTAL POLICY ACT

Part II of this Guidance focuses on the use of tribal sovereignty to establish a comprehensive environmental review process for proposals and projects that would affect the environment of Native American lands. In the context of actions proposed by federal agencies, the process established under NEPA has become the basic model for comprehensive environmental review. NEPA requires the responsible federal agency to consider environmental consequences before taking any ''major Federal action significantly affecting the quality of the human environment.''[1]

Many states have established review procedures similar to the federal NEPA process under state laws that are commonly known as "little NEPAs" or "SEPAs." At the same time, some tribes have created their own version of NEPA, implementing a tribal environmental review process that suits their unique governmental needs and circumstances. Many of these tribes recognized that the enactment and implementation of a *Tribal* Environmental Policy Act (TEPA) could yield various benefits for their tribe, as well as for the people who live and do business on Indian lands and territories.

In the following three chapters, we examine issues related to the development and implementation of a TEPA. With more than 500 federally recognized Indian tribes (including Alaska Native villages), one model surely cannot serve the needs of all. Moreover, many tribes already have established some kind of environmental review process. The goal of this discussion is not necessarily to create an environmental review process that will suit each and every tribe, but to raise the visibility of the basic concept of using tribal law to establish a NEPA-like review processes. As well, we wish to highlight some of the key issues that should be considered by tribal officials and attorneys who are considering the enactment of such a law.

[1] 42 USC §4332(2)(C).

THE ESSENTIALS OF TRIBAL NEPA PARTICIPATION

Chapter 1:
Know NEPA's History, Performance, and Framework

Chapter 2:
Know How and When NEPA is Triggered

Chapter 3:
Know the Environmental Assessment Process: Its Function, Form, and Limitations

Chapter 4:
Know How the EIS is Developed

Chapter 5:
Know Your Options for Involvement

Chapter 6:
Know How to Invoke Tribal Rights and Resources

Chapter 7:
Know How to Challenge a NEPA Determination

Chapter 8:
Know What a Tribal Environmental Policy Act Can Do For You

Chapter 9:
Know How to Write a Tribal Environmental Policy Act

Chapter 10:
A Model Code

Chapter 11:
Alaska Supplemental Guidance

8. Reasons for Adopting a Tribal Environmental Review Process

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- 8.1A A Brief Look at the Alternatives to a TEPA 184
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This chapter is intended to help the reader:

- Understand the reasons a tribe would consider adopting a TEPA.
- Recognize the circumstances under which a TEPA would be appropriate for their tribe.
- Understand how a TEPA would fit with other tribal governance goals and responsibilities, including economic development and environmental protection.
- Be aware of the requirements and responsibilities associated with adopting a TEPA.
- Discern which components of a TEPA would be appropriate for their tribe.

8.1 Introduction

8.1A A Brief Look at the Alternatives to a TEPA

When it comes to managing growth, and protecting their reservation environment, tribes use a variety of strategies. Although these strategies are as diverse as the tribes themselves, there are several that appear consistently among tribal programs. The first of these is the strategy often referred to as "command-and-control." Using laws and regulation, this approach seeks to define, permit, and enforce an allowable level of "pollution" or degradation. This approach does not question the need for, location, or design of a proposed project. Rather, it presumes that certain emissions or impacts are inevitable and then seeks to minimize the damage. This widely employed approach forms the basis of most state and federal environmental protection programs, and because of changes in federal codes, is seen increasingly among tribal governments as well. This strategy is often essential, as it provides the only legally enforceable and effective means to minimize a project's impact.

Another common strategy is that of ***collaboration***. Tribes employing this strategy often find that, in order to minimize adverse impacts to their reservation environment, they must work closely – and collaboratively – with local and state permitting agencies. Sometimes this approach is voluntary; at other times it is taken because recalcitrant local governments fail to recognize a tribe's sovereignty. When such agencies and permitting authorities make autonomous decisions, without tribal approval, a tribe's only recourse is to provide vigorous review and comment throughout the process. This approach is seen most often on fee lands, where non-Indian projects are proposed and where the applicant elects not to seek tribal approval.

A third strategy, the one discussed in this chapter, is that of *environmental impact assessment* (hereafter "EIA"). Although still not widespread, this strategy is being adopted more and more frequently by tribal governments, in various forms and fashions. In stark contrast to the command-and-control or "regulatory" approach, EIA is based on the notion of *prevention*. Fundamentally, EIA is about the examination of alternatives, the avoidance of impacts, and the mitigation of damage. In its ideal form, an analysis performed using EIA finds out not only what the allowable emissions or impacts of a project are, but what *other* forms of production or development would generate *fewer or no impacts or emissions*.

Those familiar with the federal version of EIA (i.e., NEPA) are aware that the theory of EIA does not always hold up in practice. Throughout Chapters 1-7 of this Guidance, the reader can find examples of how NEPA falls short, or more accurately, how NEPA's *practitioners* fail to uphold the statute's goals and objectives. Still, in its absence, there are few genuinely effective strategies for managing the impacts of growth and development. The myriad of other environmental protection programs have done little to prevent the loss or endangerment of tribally significant species, such as salmon, elk, buffalo, or native berries. In the wake of these programs, and as tribes increasingly return to self-governance, it seems logical to give EIA due consideration.

We have assembled this Guidance not only for tribes considering EIA, but also for tribes who have already embarked upon the process and for tribes considering modification of a process already in place. We recognize that tribes are at many different stages in developing their environmental protection programs, and that, without question, there is no one approach, no matter how ideal, that will work for all tribes. The model Tribal Environmental Policy Act (TEPA) that is proposed here is not so much a single concept as it is a combination of approaches that center around EIA. How a tribe chooses to conduct an EIA process, and which components it chooses to focus on, is something we expect to differ from tribe to tribe. Hence we have attempted to write the Guidance in a way that allows "selective adaptation." Tribes developing their own TEPA or EIA process should be able to take all or part of this Guidance in designing their own approach, and yet still be able to anticipate the legal, administrative, and procedural issues that their unique approach will produce.

8.1B Frequently Asked Questions about a TEPA

There are certain questions that tribes frequently ask about TEPA. Within these questions and the issues they encompass lie many of the concerns and misconceptions about TEPA. We have briefly summarized and answered them here to give readers a general introduction to TEPA. Later, throughout the following two chapters, these issues will be explored in greater detail.

Why use "environmental impact assessment" to review projects?

Because virtually every proposed project, regardless of its nature or size, will have some measure of environmental impact. Unlike almost all other forms of environmental protection, EIA is designed to address these impacts *before* they occur. In other words, it puts you in the driver's seat and keeps you from having to chase after violators, seek mitigation, monitor and assess damages, etc. It is substantially easier to implement than a host of environmental codes, as well as more protective of the environment.

Why formalize a process instead of just informally reviewing each project as it comes along?

Because every potential developer/project proponent will want to be assured that he or she is receiving the same treatment. Also, because the development community will tell you themselves that predictability is a critical, though often absent, factor. Local governments and state permitting authorities will be more able to acknowledge and work within your process if they know how it functions.

Why adopt a separate TEPA instead of just modifying an existing code, such as a zoning code, to include similar language?

Because zoning codes often do not provide enough information about how, when, and why the environmental review process is invoked. This lack of information and absence of formal procedure may render a tribe vulnerable if someone challenges a land-use decision.

Will adoption of a TEPA result in more restrictions or limitations on what tribal members can do with their land?

No, not necessarily. Environmental review is a *process* only and makes no judgment about what is good or bad, right or wrong for a given situation. It simply requires that a project's environmental impacts be reviewed and is entirely silent on the issue of how these impacts should be avoided or mitigated. This decision is at the discretion of tribal staff and officials, and generally relies upon use of best available science and sound professional judgment.

To whom will the TEPA apply?

Anyone seeking a permit for the activities covered by TEPA would be *potentially* subject to review. Permit applicants may include tribal members, tribal entities, non-Indians, local, state, or federal agencies, private developers, etc. A TEPA is not applicable to all projects or activities, however, depending on how a tribe has written the code.

Will the TEPA process slow or inhibit development on the reservation?

Only if tribal leadership wishes it to do so. The process can be streamlined so that only nominal time and resource commitments are involved. In contrast, if the tribes feel that an outside proposal could have significant adverse impacts (environmental, social, cultural or otherwise), the tribes can use this process to ensure a thorough examination of potential impacts.

Will the tribal process take the place of NEPA?

No. Local, state, and federal agencies may still, in certain cases, invoke a state environmental policy act or NEPA. Where NEPA is involved, however, TEPA documents may be used by the federal agencies, provided they are "functionally equivalent."

8.2 Reasons for Enacting a Tribal Mini-NEPA

Tribal governments adopt environmental protection codes for a variety of reasons, and a TEPA is no exception. Some tribes have adopted a TEPA in order to establish a uniform "permitting" mechanism for all on-reservation activities. Others have adopted a TEPA just to address the impacts of a particularly onerous, on-going activity on their reservations, such as non-Indian housing developments that continually draw down on the reservation's aquifers. Still others adopt TEPA as part of a long-term strategy to build tribal governance capacity, anticipating and preparing for future situations in which a TEPA will become necessary.

Regardless, it is helpful if tribal officials establish a clear understanding of what they hope to accomplish through a TEPA, identifying which legislative purposes are most important and which are

secondary. By doing so, their choice of legislative purposes can be used to help inform their choice of options for a TEPA. In the following section, we identify and discuss some of the most common, useful, and effective uses of a TEPA, which can be thought of as a tribal mini-NEPA.

8.2A Proactively Controlling Development within Reservation Boundaries

By establishing an environmental review process, a tribal government could assert control over a broad range of ''development'' activities that may cause adverse environmental and cultural impacts within its reservation or to other lands under its jurisdiction. This includes not just the garden variety of residential and commercial developments, but also industrial and resource extraction activities, transportation projects, hydropower projects, military activities, etc. In essence, any activity that might change or impact current land use is considered ''development.''

Using an environmental review procedure, tribal governments can become proactive, rather than reactive, in trying to control the environmental, socioeconomic, and cultural damage that a project might cause. Unlike almost all other forms of environmental protection, the environmental review approach addresses impacts *before* they occur. This minimizes the need, later on, to chase after violators, seek mitigation, monitor and assess damages, etc. Hence it can be substantially easier and less expensive to implement than a host of environmental codes, as well as being more protective of the environment.

Another facet of being proactive is that an opportunity is created, through the review process, to explore and evaluate all reasonable alternatives for meeting the objectives of a development proposal. Moreover, it establishes an opportunity for the project proponent to work in a non-regulatory, cooperative setting with the tribal government. Often, this type of dialogue produces creative solutions and new information about a project that would otherwise receive a simple ''yes'' or ''no'' from the permitting agency – be it tribal, municipal, state, or federal.

8.2B Expressing and Exercising Tribal Regulatory Authority

The most common exercise of tribal regulatory authority over development within the reservation boundaries is through zoning. Though contentious, and used only by some, this form of controlling land uses can be an effective way for tribal governments to protect and maintain the character and resources of their reservation environment. Other types of controls, through which tribes seek to regulate land use, include tribal and/or federal environmental codes. Such controls differ from tribe to tribe, and usually reflect the tribe's cultural values and practices. An environmental review process, especially one tied to approval of a permit, is another mechanism through which tribes might express and exercise their regulatory authority.

A key factor in determining a tribe's choice of ''controls'' is the extent to which a tribe has managed to retain (or regain) ownership of its lands. In light of recent U.S. Supreme Court decisions, a tribe's environmental regulatory authority is most firmly grounded when it seeks to regulate activities on lands that are owned either by the tribe or by tribal members in trust (or subject to a federal restraint on alienation). For tribes that retain all or most of their reservation lands in tribal trust status, a formal process may not be needed to control "development," but an environmental review process nevertheless may be useful, particularly where the functions of tribal government are carried out by many different subdivisions, where tribal enterprises operate with relative autonomy, or where tribal members are regarded as being subject to few limits under tribal law in developing their possessory land holdings.

Tribal authority over the activities of nonmembers on lands within reservation boundaries but owned in fee by nonmembers is most firmly grounded in contexts in which Congress has delegated authority to tribes[2] or has recognized that retained inherent tribal sovereignty covers the kind of conduct to be regulated.[3] In the absence of delegation or affirmative recognition, tribal authority may exist under either of the two prongs of the so-called Montana test: (1) where nonmembers "enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements"; and

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[2] E.g., United States v. Mazurie, 419 U.S. 544 (1975) (upholding delegation of authority from Congress to a tribe to control sale of alcoholic beverages on fee lands within reservation boundaries).

[3] E.g., 25 USC §1301(2), (3), and (4) (recognizing and affirming tribal criminal jurisdiction over all Native Americans, reversing Duro v. Reina, 495 U.S. 676 (1990)); see Newton, 1992.

(2) where "the conduct of non-Indians on fee lands ... threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe."[4] In this section, we do not devote much attention to Montana and subsequent cases, which have been addressed in a substantial body of literature.[5] Rather, we simply note that the exercise of tribal authority over non-Indians on fee lands must be informed by an awareness of this body of law.

8.2C Establishing Consistency and Coordination of Tribal Environmental Efforts

By adopting a TEPA, tribes establish both an organizational *structure* and a *process* for reviewing most types of development proposals. Though different tribes will apply different degrees of formality to the process they create, some tribes could benefit from putting in place a consistent and distinct mechanism for coordination. The tribal membership and the regulated public benefit from the consistency and coordination, as development requirements are identified early and compliance (or avoidance through alternatives) is factored into the schedule. Other benefits that stem from this coordination include:

- **Coordinating departmental review:** By making a single tribal agency, department, or individual responsible for coordinating the environmental review process, tribes minimize confusion, encourage interdepartmental communication, and provide consistency for other tribal staff, local governments, project applicants, etc.
- **Coordinating permits:** Project applicants and the regulated public benefit from what might be called "one-stop shopping" for permits and other clearances. Although this may be an elusive objective for a complex project subject to the regulatory authority of different agencies, a TEPA can, at a minimum, achieve coordination. An equally viable alternative is to establish one general permit that is issued under TEPA and that includes all types of review and approval needed for a given project (e.g., clearing and grading, building occupancy, solid waste disposal, air emissions, wastewater discharge, shoreline permits).
- **Coordinating regulations:** For tribes that have more than one permit, or who have multiple environmental codes that

[4] Montana v. U.S., 450 U.S. 544, 565-66 (1981).
[5] E.g., Singer, 1991; West, 1992; Duthu, 1994.

require compliance, a TEPA can function as an ''umbrella'' for coordination of these regulations. NEPA requires consultation with all applicable federal environmental regulations, at least when an EIS is prepared. TEPA could make this a requirement for all development proposals, not just those for which an EIS is prepared. An efficient use of the TEPA checklist is to cross-reference specific codes within each checklist question and category.

- **Promoting compliance:** Having an established procedure means that regulated entities are less tempted to try to get away with noncompliance.
- **Promoting public confidence:** Public perception tends to be more favorable when they see that a tribal regulatory agency is doing an effective job, leading to a broader base of public support for the tribe.

8.2D Triggering Federal Environmental Review and Consultation Requirements

NEPA is but one federal environmental review requirement. There are numerous other federal environmental review and consultation requirements that are concerned with specific resources. If an EIS is prepared for a proposed federal action, the CEQ regulations mandate that the EIS also should address compliance with any other federal environmental laws that apply to the proposed action.[6] Similarly, if an EA is required, the EA should at least identify any other federal requirements that would apply. Thus, if a federal action is required as part of an on-reservation development, the NEPA process can be used to identify any other federal laws, as well as tribal and state laws, that apply. How well NEPA works in achieving coordination depends on many things, including which federal agencies are involved and how effectively they carry out their NEPA responsibilities

8.2E Optimizing a Tribal Role in NEPA

Occasionally, on-reservation development proposals trigger NEPA. Whenever the funding, decision, or permit of a federal agency is involved, and almost universally when a BIA action is required, NEPA is triggered. Though CEQ regulations governing EIS preparation mandate early tribal involvement, such as by requiring lead agencies to invite

[6] 40 CFR §1502.25(a).

tribal participation, tribes are still – even on their own reservations – often relegated to the level of an "interested party." In Part I of this Guidance, where NEPA is examined in detail, we provide numerous examples of how tribes can better engage federal agencies during a NEPA review, whether the proposed action be on or off reservation. For on-reservation activities, however, we can identify no better "hook" for tribes than the one created by the formal adoption of a TEPA, because of what this means from the standpoint of CEQ's regulations.

Section 1506.2 of the CEQ regulations directs federal agencies to eliminate duplication in their NEPA documents by coordinating with state and local agencies. To the fullest extent possible, such coordination must include joint planning, joint environmental research and studies, joint public hearings, and the development of joint environmental assessments and impact statements. Yet perhaps the most significant and powerful element of this requirement is in the section that states

> 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*.[7]

It is not possible to overstate the potential significance of this requirement. Not only does it dictate the development of one, shared document when both NEPA and TEPA are involved, but this document must then comply with whatever requirements a tribe has built into its TEPA. Such requirements can include, for example, a "standard" for analysis of cumulative, cultural and socio-economic impacts. Another requirement could be the need for tribal approval of all mitigation plans, as well as an established procedure for tribal notification throughout the post-project monitoring phase.

A more legally contentious, yet possibly viable requirement would be to include language in a TEPA that mandates tribal approval of the federal agencies' final determination. In the absence of approval, the TEPA would require alternative dispute resolution to resolve differences. Although this type of requirement may be difficult to enforce, it would clearly establish what the tribe regards as an essential component of government-to-government relations. Depending on the agency and project involved, some federal agencies might voluntarily comply with this approach.

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[7] 40 CFR §1506.2(c).

A final word on the term "state and local agencies." Although CEQ regulations do not define "local agency," the term is generally construed to include tribal governments whenever they can demonstrate jurisdiction. Moreover, in 1984, EPA adopted a ''Policy for the Administration of Environmental Programs on Indian Reservations,''[8] in which it recognized tribal governments as sovereign entities, which are ''the primary parties for setting standards, making environmental policy decisions and managing programs for reservations, consistent with Agency standards and regulations.''[9] Beginning in 1996, Congress has amended many of the federal laws in ways that are generally consistent with the EPA's 1984 policy, in essence ratifying the EPA's policy. These laws now provide that tribes, if they choose, may assume roles similar to the roles performed by states.[10] In response to the mandates of these amended statutes, the EPA has issued amendments to its regulations to establish procedures for tribes to be treated as states for many purposes.

8.2F Building Capacity and Demonstrating Tribal Sovereignty

Many tribes enjoy an increasingly strong and respected capacity for self-governance, having worked diligently to strengthen their administrative, organizational, and legal expertise. State and federal agencies, and district and circuit courts, have all, in recent years, increasingly recognized tribal capacity to self-govern. On the other hand, some recent court decisions have not been favorable to the exercise of tribal sovereign powers. Moreover, a tribe's most recalcitrant audience is usually their local government neighbors (or the citizen groups therein). This puts tribes in the position of having to be careful about their every move, and expecting that their every move may be watched carefully.

Advancing publicly in the arena of self-governance, by adopting a TEPA or similar code, may thus be a better strategy for some tribes than for others. When and if tribes find that the political circumstances,

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[8] EPA, *Administration of Environmental Programs on Indian Reservations* (Nov. 8, 1984).

[9] *Ibid.*

[10] Safe Drinking Water Act (SDWA), 42 USC §300j–11(a)(1) (treating tribes as states for certain purposes); Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA, also known as ''Superfund''), 42 USC §9626 (treating tribes substantially the same as states for certain purposes); Clean Water Act (CWA), 33 USC §1377 (treating tribes as states for certain purposes); Clean Air Act (CAA), 42 USC §7601(d) (treating tribes as states for certain purposes). See generally Coursen, 1993.

timing, and outcomes are favorable for a TEPA, they may also find a more favorable public reception to their proclamations of sovereignty. Such confidence and positive response come when the public sees the following procedures become part of tribal governance, in whole or part, because of TEPA:

- A formal mechanism that the tribe uses to implement a tribal land use and development policy.
- A designated and accountable tribal office or department, under the authority of the tribal council, which acts as the primary authority for planning and development.
- A tribal review commission, acting under the authority and direction of the tribal council, which assists the responsible tribal office in reviewing proposed actions, policies, and plans.
- A system that promotes prompt resolution of disputes involving land use and development decisions.
- A fair and consistent means of enforcing tribal land-use actions and environmental permits.
- A system for documenting land-use and development decisions to ensure that such rules and decisions will be implemented in an efficient and consistent manner.
- A mechanism for coordinating tribal environmental review with federal or state environmental review procedures.

8.2G Empowering the Affected Public

Another function of a TEPA is to empower the reservation populace, both Indian and non-Indian, by providing a structure through which interested individuals and groups can become involved in tribal decision making. A TEPA can empower the regulated public – the people who seek to carry out development activities that the tribal government seeks to control – simply by setting up a consistent process. This would include, for example:

- Clearly prescribed procedures and standards for decision making.
- A "transparent" set of rules to let persons in the regulated public know what they must do to get to a governmental decision point.
- A reasonable basis upon which applicants can predict the outcome of such decisions.

In these ways, the environmental review process can be more than just an assertion of tribal governmental authority; it can be a mechanism for making tribal government more accessible to the public. The concept of sovereignty embodies not only power but also responsibility. For tribal governments, this means not only responsibility toward past, present, and future generations of tribal members, but also toward nonmembers, both Indian and non-Indian, who reside within reservation boundaries. Some tribes may choose to appoint non-Indian residents of their reservation to sit on their planning commissions or review boards. This creates an opportunity for non-Indians to participate in governmental decision making and therefore helps ensure that due-process provisions are met. Tribes that include non-Indians or non-member Indians on such commissions may, or course, choose to ensure that the majority of the people appointed are tribal members.

8.2H Optimizing a Tribal Role in Federal Environmental Law

Tribal governments that adopt a TEPA can gain valuable experience through their implementation of what is tantamount to a major federal environmental program -- NEPA. Such experience should be useful in helping tribes decide whether their interests would be better served by taking over certain delegable programs, such as Clean Water Act Section

402 (National Pollutant Discharge Elimination System Permits). Tribes may find that, given their particular expertise and resources, a certain federal program would be better managed by the tribal government. Or they may prefer to let federal agencies continue to run the programs or to enter into cooperative agreements with state agencies.

8.2I Implementing Tribal Environmental Policies

Tribal governments use multiple avenues to articulate their goals and policies for protection of the reservation environment. Policies are often articulated by inclusion in tribal documents and laws, such as comprehensive plans, or in a Tribal Environmental Policy Act. By definition, such policy statements present far-reaching, broadly defined goals. Although these policies may prioritize the protection of specific natural resources, they are often unenforceable. Tribal laws are usually enforceable only if they include provisions such as a permit requirement or penalties for violations. Yet it is highly impractical for most tribes, given their size and resources, to develop a massive regulatory infrastructure that can definitively implement every policy statement ever made.

A good example, seen in some comprehensive plans, is the goal of protecting groundwater resources from depletion and contamination, thereby ensuring a long-term supply of drinking water for the tribal population. Yet without a Drinking Water Protection Act, or a Wellhead Protection Ordinance, a tribe would have no legal mechanism for ensuring that non-Indian developments do not deplete the reservation's aquifers. In contrast, an EA or EIS, conducted as part of a TEPA review, may be able to determine if a proposed project would impact the reservation aquifers, and in turn, may then define this project as having a "significant" impact.

8.2J Creating a Mechanism to Evaluate the Impacts of Development on Tribal Culture and Biodiversity

Most tribes have some type of procedure, be it formal or informal, for assessing the impacts of proposed land-use actions. Often, however, resources allow only a cursory assessment of impacts, e.g., a brief examination to ensure that sensitive areas, such as streams and wetlands, are not under obvious threat. Few tribes have been able to expand their impact assessment process, let alone study emerging impact assessment methodologies. Yet many tribes would acknowledge that, given their

current level of review and their sporadic ability to regulate proposed actions, many genuine threats to biodiversity and tribal culture seem to be beyond their control.

By adopting a TEPA, tribes may not be able to automatically jump into cultural impact assessment or cumulative impact assessment, or tie land-use planning to conservation of biodiversity. But adopting a TEPA makes a statement that such issues are critical and warrant further attention. It sends a signal to project proponents that, although not all reviews will entail such detail, a project could be modified, altered, or denied because of its potential impacts on tribal culture or biodiversity.

Under this approach, the carrying capacity of the impacted ecosystem would be used as the benchmark for thresholds. The impacts of a project would be measured against these thresholds, beyond which additional incremental effects would be considered to have a significant adverse impact. Because the definition of carrying capacity is unique to each ecosystem, and because there is not always sufficient data to establish this capacity, a starting point in a TEPA review could be to use ecosystem protection principles and indicators of ecosystem health, such as Watershed Analysis or the Index of Biological Integrity.

THE ESSENTIALS OF TRIBAL NEPA PARTICIPATION

Chapter 1:
Know NEPA's History, Performance, and Framework

Chapter 2:
Know How and When NEPA is Triggered

Chapter 3:
Know the Environmental Assessment Process: Its Function, Form, and Limitations

Chapter 4:
Know How the EIS is Developed

Chapter 5:
Know Your Options for Involvement

Chapter 6:
Know How to Invoke Tribal Rights and Resources

Chapter 7:
Know How to Challenge a NEPA Determination

Chapter 8:
Know What a Tribal Environmental Policy Act Can Do For You

Chapter 9:
Know How to Write a Tribal Environmental Policy Act

Chapter 10:
A Model Code

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9. Writing a Tribal Environmental Policy Act

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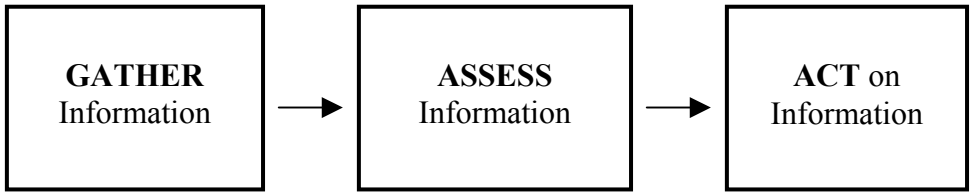
Once tribal officials and legal staff have decided to establish an environmental review process, several different approaches can be taken. In fact, there are myriad different ways to design and implement a TEPA, and it would be difficult to find two tribes who have developed identical processes. Surveys and conferences held throughout the country made clear that tribes needed not just a single "model code," but suggestions and assistance with developing a process, one that would be appropriate for their unique needs and circumstances.

This chapter examines the different types of approaches to environmental review, outlining the issues, pros, and cons associated with each. In subsequent sections, the discussion becomes narrower, focusing on specific administrative, legislative, and judicial issues to be considered in designing a process. Then, in Chapter 10, tribes can review actual sections and language from the model code provided.

9.1 Options for Developing a Review Process

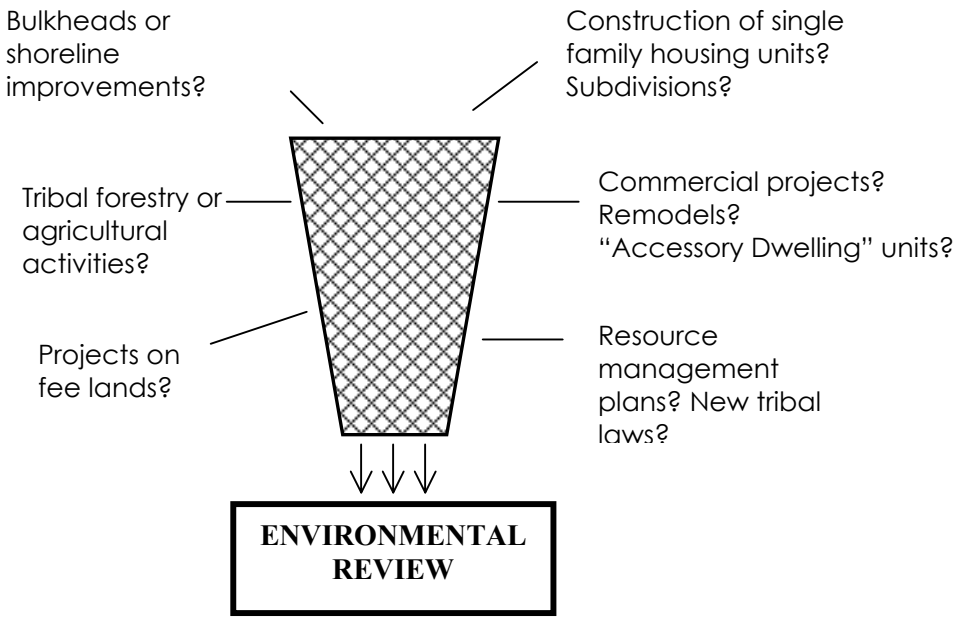
Despite the differences among environmental review procedures, be they federal, state, or tribal, most approaches share three core elements. These elements, which form the underpinning of environmental review, involve *Gathering* information, *Assessing* information, and *Acting* on information.

As demonstrated in the diagram below, each of these three actions is a prerequisite to the next, taking information from proposed projects through a *defined, consistent* process.



Virtually all approaches to environmental review involve these steps, usually in this same order. Differences stem from ***how*** a tribe, state, or federal agency gathers information; ***when***, ***how,*** and by ***whom*** the information is analyzed; and ***how*** and by ***whom*** it is acted upon. Yet before any of these information-processing and decision-making activities take place on a given project, in designing the process, the responsible entity must decide which types of projects, policies, and plans this process will apply to.

Deciding on the type, size, and category of activities to be filtered through this process is quite important. With a smaller filter, fewer projects and activities will require review, and, hence, fewer tribal resources will be needed. In contrast, a "large" filter (where a wide range and number of projects trigger review) can require substantial staff time and resources. Either way, choosing the size of this filter is one of the first purposeful decisions a governing body makes when designing an environmental review process.



Later on, the issue of establishing a "filter" will be examined in detail, along with other implementation issues. The point we wish to highlight here is that no matter what type of process a tribe adopts, it can be rendered as basic and straightforward or as involved as the tribe wishes, largely by the size of filter that is chosen. Although many other factors of a TEPA help determine its complexity, the filter is one of the most important of these factors.

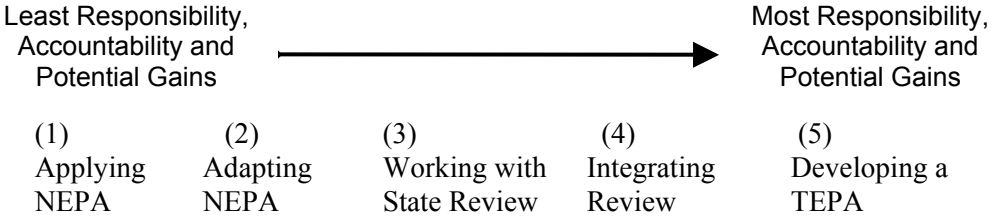
In the following section, we outline various options for tribes to consider in developing an environmental review process. Although Chapter 10 provides a "model" code for a traditional Environmental Policy Act, research for this project indicated that only a small percentage of tribes would employ this approach. Most requested, instead, "options," different ways that they could approach the concept of environmental review. In response, what we have included here represents the broadest possible range, from the most minimally involved to the most comprehensive and formal of approaches. The five options include:

(1) Making the federal NEPA process serve tribal purposes.

(2) Adapting the federal NEPA process into a Tribal Environmental Review Process.

(3) Coordinating Tribal Review with State Environmental Policy Acts.
(4) Building an Environmental Review Process into an Existing Tribal Program.
(5) Developing a Tribal Environmental Policy Act (TEPA).

There are many differences between the options, including the degree of administrative burden and staff resources required to implement the process, and the associated degree of accountability a tribe takes on. Another important difference is the relative gains a tribe might enjoy in achieving compliance and enforcement. One way to look at the options is along a continuum (see below), with responsibility, accountability, and potential gain increasing as you move from Option 1 to Option 5.



Each of the five options is described below, along with a discussion of the associated (a) implementation issues, (b) pros and cons, (c) examples, and (d) suggestions for further research. There is only a short, introductory discussion of Option 5 in this section, because the following two sections (9.2 and 9.3) are dedicated exclusively to TEPA implementation issues. Because the primary purpose of this Guidance is, in fact, to assist tribes who are planning to adopt a TEPA, and because this option is the most intensive from a governance standpoint, we have focused much of the analysis on this approach.

9.1A Making the Federal NEPA Process Serve Tribal Purposes

Many of the activities on reservations that have environmental impacts involve some kind of federal agency action. If this federal action involves permitting, funding, or approval, then the responsible federal agency must comply with the review process triggered by NEPA. Thus one approach to establishing a tribal environmental review process is to make the existing federal NEPA process work to serve tribal interests. In

this approach, tribes address major projects not through their own process, but by becoming actively involved in, and asserting control over, the federal NEPA process within their reservations.

1. Implementation Issues

There are two key methods of ensuring tribal involvement through this approach. One way is to have tribal staff prepare and review NEPA documents for the responsible federal agency. Another is for tribal officials to wait for NEPA documents to be prepared and reviewed by the responsible federal agency before making decisions on proposed actions. This minimizes the amount of tribal resources involved in conducting the review and assessment, but provides important information – through the NEPA documents produced – about the impacts of a project. Tribal decision makers can then focus their energies and resources on other administrative aspects of the project.

Another key step is to enact tribal laws that expressly require the preparation of an Environmental Assessment (EA) whenever a federal agency is considering a proposed action that would affect tribal interests. For agencies within the Department of the Interior, including the BIA, the regulations *expressly require preparation of an EA prior to any proposed federal action that would violate a tribal law*.[1] Thus, it should be quite simple to make Interior agencies, including the BIA, prepare EAs before they take or approve actions that may adversely affect important tribal interests. Despite enacting a tribal law requiring an EA for certain kinds of actions, tribes may sometimes find litigation to be necessary to force federal agencies to comply.

Actually, tribal governments have *substantial* authority for environmental protection within their reservations as an aspect of their retained tribal sovereignty. This tribal governmental authority is distinct from the responsibilities and authority of the BIA pursuant to NEPA, other federal environmental laws, and the trust responsibility. Thus, activities that affect the environment of Native American reservations often require the approval of both the BIA and the appropriate tribal government. Because of this dual authority, the Bureau's NEPA process and tribal decision-making processes should be coordinated. Such coordination will help achieve the policies and purposes of the CEQ regulations, especially reducing paperwork and delay, integrating environmental considerations into the early stages of planning and decision making, and making the NEPA process more useful to decision

[1] 516 DM [Departmental Manual] 2, app. 2, §2.10.

makers. This section explains certain ways in which tribal governments can make the Bureau's NEPA process more useful in tribal decision making and more responsive to tribal concerns.

(a) *Waiting for completion of environmental documents*. One way in which tribal governments can make the NEPA process more useful is to wait for the completion of environmental documents required by NEPA before making decisions that affect the environment. If withholding tribal approval is not practicable, a variation of this approach would be to specify that tribal approval is subject to terms and conditions which may be established during the NEPA process.

(b) *Involvement in preparation of environmental documents*. EAs and EISs will generally be more useful for tribal decision making if tribal governments are directly involved in the preparation and review of these documents. When an EIS is required for a proposed action, tribal involvement can best be achieved by the tribe becoming a cooperating agency.[2] Tribal involvement in the preparation and review of EAs can be achieved in a variety of ways.[3]

(c) *Tribal environmental laws*. If a tribal government has enacted any environmental law(s) which apply to a proposed Bureau action, and the preparation of either an EA or EIS is required, compliance with any such law should be addressed in the EA or EIS. If the proposed Bureau action is categorically excluded, but taking the action would threaten to violate a tribal environmental law, an EA must be prepared.[4]

(d) *Excluding insignificant actions*. To focus the NEPA process on actions that could have significant environmental impacts and to avoid devoting time and resources to actions that do not pose a threat, the CEQ regulations allow agencies to identify actions as categorical exclusions. The Bureau's list of categorical exclusions[5] may be expanded if appropriate actions have been omitted, and the tribes may bring such

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[2] See Chap.6 of the BIA *NEPA Handbook*, 30 BIAM Supp.1.
[3] See Chap.4 of the BIA *NEPA Handbook.*
[4] 516 DM Section 2.4A(3)(i).
[5] 516 DM 6, Appendix 4.4.

omissions to the attention of the Central Office environmental staff. Note: tribal actions that do not require Bureau or other federal agency action are not subject to the NEPA process.[6]

2. Pros and Cons

- Allows tribe to focus on other important elements of a project, such as timing, location, financing, employment, operations, inter-governmental coordination, etc.
- Ensures that resources will always be available to produce NEPA-compliant documents, where federal agency retains this responsibility.
- Establishing tribal law to trigger EAs ensures that most projects involving some federal role will be reviewed at some length.
- Where tribes produce the NEPA documents, ensures that the assessment will adequately address specific and/or sensitive tribal resources.

- Where tribes produce the NEPA documents, requires commitment of tribal staff and resources.
- Where federal agencies retain responsibility for producing NEPA documents, minimizes ability of tribe to influence scope and breadth of issues reviewed.

3. Examples

The Salish-Kootenai Tribe, on the Flathead Indian Reservation, has been preparing NEPA documents for the BIA for many years. Although their arrangement is informal, the BIA officer in their region generally accepts both the documents – and the recommendations – that the tribe makes about the proposed activity.

9.1B Adapting the Federal NEPA Process for Tribal Environmental Review Purposes

Using the federal NEPA process, as described above, works well for some tribes, though for some it is used more out of necessity than out of

[6] 516 DM 6, Appendix 4.2A(2)(b).

choice. A similar yet modified approach is for tribes to borrow from, or build upon, selected elements of the federal NEPA process. This may mean using language from CEQ's NEPA regulations or can entail adapting sections from the NEPA requirements of a specific agency (e.g. the BIA).

1. Implementation Issues

If a tribe is going to prepare NEPA-style documents, it should ensure that its staff members are well acquainted with elements of the federal approach. (NEPA training opportunities are provided by CEQ and other organizations, on a regular basis.) For example, NEPA requires the preparation of an environmental impact statement (EIS) for any federal action that significantly affects the quality of the human environment.

The CEQ regulations require the preparation of a less detailed document known as an environmental assessment (EA) for certain categories of actions, in order to determine whether an EIS is required for a particular proposed action. If an EA leads the federal decision maker to conclude that the action will not cause significant impacts, that official signs a finding of no significant impact (FONSI), which completes the NEPA process. The CEQ regulations refer to these three kinds of documents – EISs, EAs, and FONSIs – as "environmental documents."[7] These terms, and the concepts they represent, have become so widely used in environmental review processes in the United States that they set the standard. A tribal mini-NEPA might try to improve on this standard, but we recommend building on these concepts rather than trying to fashion something completely different.

Environmental Impacts Statements

For many kinds of proposed actions within Native American reservations, some kind of federal action is required, such as BIA approval of a transaction relating to trust or restricted land. Such an action is subject to NEPA and, if it may cause significant impacts, will require an EIS. The subset of actions that may cause significant impacts but that *do not* require a federal action may be relatively small, though tribes may want to establish an environmental review process for such activities. If this subset is likely to be small, there may be little point in reinventing the EIS process.

[7] 40 CFR §1508.10. As defined in this section, the term "environmental document" also includes a Notice of Intent to prepare an environmental impact statement.

For actions that require EISs, the principal benefit of a TEPA might be to clarify the kinds of actions that require EISs and to expedite the decision-making process. The BIA has established a pattern of not requiring EISs unless there is substantial pressure from other agencies or members of Congress, and tribes generally do not push for EISs to be done on proposals that they want to go forward. Like other kinds of actors, tribes often resist having EISs prepared (unless they object to a project and want to delay or stop it). In such cases, an EA may go through several revisions because of efforts to make it support a FONSI and, in the process, take about as much time as would have been required to prepare an EIS. In part this is because some tribal leaders are not comfortable with public participation in their decision-making processes. Attorneys helping tribes develop a TEPA might devote some attention to helping tribal officials understand how public participation can serve tribal interests, rather than regarding the preparation of an EIS as something to be avoided.

Environmental Assessments

The preparation of EAs has become a common practice under NEPA and under the state little NEPAs, and a TEPA should make use of this level of environmental documentation. In the CEQ regulations, EAs serve to determine whether or not an EIS is required. Although the regulations also encourage EAs to be prepared to aid in planning and decision making, most agencies do not prepare (or require applicants to prepare) them unless required, i.e., unless an action does not fit within a categorical exclusion.

The development of detailed mitigation plans in EAs in order to avoid significant environmental impacts has become an accepted practice. Even where the driving force behind such mitigation plans is to avoid the public scrutiny involved in the EIS process, the avoidance of significant environmental impacts serves the purposes of NEPA. In such cases an EA is more than a procedural exercise.

The Model Tribal Environmental Review Code (Chapter 10) makes the preparation of an EA the standard practice for applicants seeking development permits. The basic idea is that tribal officials should routinely ask to see the EA before taking a position on a proposed development that will affect the environment. If tribal staff and external applicants know that EAs will be used in decision-making, the EAs that are prepared are more likely to be written as planning and decision-making tools.

The Model Code provides two kinds of exceptions to the EA requirement. First, it authorizes an Environmental Review Commission

(ERC) to develop a list of categorical exclusions through rulemaking.[8] This is the same basic concept used in the federal NEPA process to sweep categories of actions out of NEPA review if they generally do not cause significant impacts. Such actions would still require permits. Second, it allows the ERC to develop a list of activities that are considered "low-impact" or "minor," which are subject to a simplified review process involving decisions by the ERC Chairman rather than the full Commission, and which do not require the preparation of an EA.[9]

2. Pros and Cons

- 👍 Allows tribe to use a limited review process for most projects, minimizing the commitment of tribal staff and resources.
- 👍 Ensures that major projects and/or those with federal involvement will be subject to a comprehensive review and will, at the same time, meet federal requirements for public notice, scoping, document content, etc.
- 👍 Establishes a consistent approach for major projects that local, state, and federal agencies, as well as project applicants, are familiar with.

- 👎 Preparing NEPA-style documents under CEQ regulations does not preclude other federal agencies, who may have some involvement in the project, from developing their own documents. CEQ encourages preparation of joint documents, but this policy may be difficult to enforce.
- 👎 Preparing NEPA-style documents in conjunction with federal agencies does not transfer the decision-making authority to the tribe. In other words, tribes can write an EIS, and a federal agency can adopt it, but that agency is not obligated to make a decision favorable to the tribe.
- 👎 Tribe may face greater liability, because this approach involves greater discretion and therefore could lead to less consistency and more variability.
- 👎 No statement of sovereignty is made through this approach.

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[8] Model Tribal Code, §5.05(d).
[9] Model Tribal Code, §§2.01(c), 5.02.

3. Examples

A good example comes from the Tulalip Tribes, in Washington State, who developed a Tribal Environmental Policy Act in 1996. Tulalip wanted a simple, straightforward review process that would apply to certain types of projects, but also needed to ensure that complicated and/or major development projects would receive consistent, in-depth, and defensible review. Their brief code (under four pages) contains no detailed provisions for projects where a full-scale review (e.g., Environmental Impact Statement) is needed. Nor are there any requirements established for public involvement, scoping, length of documentation, etc. Instead, Tulalip's code states that when a project has the potential for "significant" environmental impacts, that the Tribe will employ CEQ's regulations[10] for execution of the assessment. In other words, they have adopted the federal NEPA process by reference, automatically instituting a legally defensible process in cases where such an extensive review is needed.

9.1C Coordinating Tribal Review with State Environmental Policy Acts

Fifteen states and the District of Columbia have enacted environmental policy acts modeled on NEPA. Such state statutes are often called "little NEPAs" or "mini-NEPAs." These statutes vary somewhat from state to state, but generally requires state agencies, and sometimes local government agencies as well, to prepare or oversee the preparation of environmental impact statements on proposed actions that may significantly affect the environment. State little NEPAs exist in a context of state environmental and land-use laws, *and* in a context of governmental institutions that have been created through the state's sovereignty. Much of this context may not be very relevant for tribal governments. On the other hand, if a tribe's reservation is located in a state that has a mini-NEPA, if the tribe and reservation residents do business with environmental consultants and architectural-engineering firms that are familiar with the process created by the state's statute, and if there is a general sense that the state's process works pretty well, using the state statute as a model may be the best approach.

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[10] 40 CFR Parts 1500-1508.

1. Implementation Issues

Using the state model may be most appropriate where the tribe's main legislative purpose is to simplify and coordinate environmental review requirements, and where many of the people who will be covered by the tribe's system are already familiar with the state's system. Not only does this help establish consistency and credibility, but it may even encourage voluntary compliance by non-Native American applicants or for projects on non-tribal, fee lands.

If, however, the state model has cumbersome application, notice, and review requirements, as some do, tribes should probably modify the process. A streamlined application process and/or a modified checklist will ensure that tribal applicants are not deterred and that tribal projects are not unduly delayed. If tribes do modify the checklist, they may want to include questions not found in the state forms, such as whether or not there are culturally significant species that would be impacted by the proposed project, or whether or not the site is of spiritual significance for the tribe. Although applicants may not have this information, staff reviewing the checklist will be reminded to examine the site/project from this standpoint.

2. Pros and Cons

- 👍 Enhances opportunities for joint project review between tribe and regulating authority.
- 👍 Encourages project applicants to view tribal government as also having authority/jurisdiction over activities on fee lands.
- 👍 State process is already in place; tribes only need to modify or adapt the procedures as needed to meet their circumstance.
- 👍 Regulated public is already familiar with the state process – promoting consistency and credibility.

- 👎 Tribe's use of the state process does not ensure compliance, in any way, with the decisions they make as a result of environmental review.
- 👎 Tribe may be perceived as being equivalent to a "local government," rather than a sovereign nation.

3. Examples

Projects on fee lands are usually regulated by local or state agencies (though some tribes have been able to retain this authority). Where the permitting authority is a local or state agency, and where the state uses a mini-NEPA, project proponents must complete a *checklist*, or go through an equivalent type of information-screening process. Through this process, the regulating authority determines the potential environmental impact of the project and the subsequent degree of environmental review needed for the project. Some tribes encourage applicants to work with them as well by using this same checklist. The tribe requests that applicants for fee-land projects complete the checklist, thereby meeting the initial requirements of both the tribe and the regulating entity. Once this preliminary review has been done jointly, the tribe has a better chance to work with both the applicant and the regulating entity to assess and condition the project.

9.1D Building an Environmental Review Process into an Existing Tribal Program

For a variety of reasons, tribal officials may not want to establish a comprehensive environmental review process. A tribe may not have enough funding or staff to administer a comprehensive program. Moreover, tribal officials may be concerned about creating more, potentially burdensome bureaucracy, especially when some may believe that environmental review would restrict tribal member activities. For such reasons, a tribal legislature might consider creating a review process that is either (a) built into an existing tribal program or (b) of limited scope. Either way, the function of TEPA is to act as an overlay over existing processes and permit requirements.

Under the first scenario, tribes would identify an existing policy, statute, or regulation that could be amended to include an environmental review requirement. Tribes that regulate land use, through zoning legislation, might find that environmental review is best attached to this particular tribal function. Development proposals subject to other types of review (e.g., clearing and grading, occupancy) would now become subject to environmental review as well.

Many tribes, whether or not they have zoning legislation, have enacted some form of environmental legislation. There are general codes, such as tribal Environmental Protection Acts, as well as the myriad of more resource or site-specific codes for sensitive areas,

shorelines, wetlands, cultural resources, drinking water, surface water, air quality, etc. For some tribes, it may make more sense to amend one of these codes to include environmental review, rather than to create an entirely new process. The more specific the code (e.g., wetlands or drinking water) is, the less likely it is that the environmental review approach will capture the range of development projects and proposals. Still, this may be all a tribe wants or needs, given their situation.

Where appropriate or relevant tribal legislation does not exist, tribes can take an informal approach by simply including environmental review into an existing tribal process or departmental procedure. For example, many tribal planning departments have a single staff person who is responsible for meeting with all project applicants. Even if no tribal permit is issued, some discussion and negotiation usually occurs, aimed at persuading the project applicant to concur with any tribal requests about the proposed activity. Asking applicants to complete a basic checklist would not add significant burden and would allow the tribe to obtain more information than they might have otherwise. The tribe could then circulate this checklist to key staff and departments, to address any environmental or cultural concerns that the tribe might have. Even though this process is neither legislated nor enforceable, it may be an ideal first step for some tribes.

Whether environmental review is incorporated into existing legislation, or simply made part of informal staff procedures, the challenge lies in ensuring that such processes complement, and do not conflict with, each other.

1. Implementation Issues

Example: Incorporating TEPA with a Tribal Land-Use Plan

In conjunction with general criteria, or as an alternative, a TEPA might require proposed projects to be consistent with an approved tribal land-use and development plan. Rather than establish a new permitting process, TEPA would require an environmental review for all applicants for a land-use or zoning-code permit. The level of environmental review and degree of scrutiny would depend on the characteristics of the project and the proposed site.

After conducting the environmental review, or determining that a review is not warranted, the responsible tribal official would then proceed with and approve other tribal requirements for permit issuance. A ‘‘consistency determination’’ might be made, allowing the tribal governing body to maintain direct authority over the underlying policy decisions regarding the kinds of development that would be appropriate

for the reservation, although the permit decisions on specific proposals would be insulated from political pressures. In this way the independence of the permitting agency could be maintained, but the permitting agency's decisions nevertheless would reflect the tribal governing body's policy decisions.

2. Pros and Cons

- 👍 Encourages consideration of environmental values and features in the tribal planning and decision-making process.
- 👍 Allows tribe to integrate environmental review requirements into existing tribal programs and procedures – minimizing the administrative and human resource requirements of creating a "new" program.

- 👎 If the environmental review process does not include its own permit requirement, or if the outcome of the environmental review is not directly reflected in the approval or denial of a permit, the process may be perceived as being inconsequential, particularly by non-tribal applicants who are developing on fee land.

9.1E Adopting a Tribal Environmental Policy Act

1. Implementation Issues

Adopting a tribal code specifically to establish an environmental review process is another approach that tribes might consider. This legislative-based approach is more formal, in some respects, than the others, and can be more comprehensive as well. Yet it is clear, from the many different tribal versions of TEPA that exist, that tribes can and do fashion as narrow or as broad a process as they wish.

As varied as the codes themselves are, tribes often have similar reasons for pursuing this more formal approach. Among the most common reasons for adopting a TEPA are:

- ♦ The need to *create a regulatory framework*, or "umbrella," under which the tribe can establish a

permitting mechanism and/or tie future codes and regulations.

- The desire to *standardize and coordinate the existing project review procedures* of various tribal departments, and to institutionalize the process by creating a formalized process.
- The desire to *incorporate public participation and due process* into tribal decision-making procedures.

Other reasons for adopting a TEPA include the desire to control a particular type of onerous development or activity, the need to better protect tribal cultural resources, or the desire to encourage broader, more holistic analysis of proposed tribal projects and plans. However, the reasons why a tribe ultimately adopts a TEPA may also be related to the specific governance needs of that tribe.

When and if a tribe decides that there are compelling reasons to adopt a TEPA, it then confronts a new set of decisions about how to structure its process. It will need to decide what the core elements, features, and requirements will be, as well as the associated responsibilities and demands upon tribal resources. Examples of questions to be addressed include which institutions of the tribal government will be assigned TEPA responsibilities, how much and what type of authority they will have, how and when TEPA will be triggered, and how the environmental documents will be prepared.

The purpose of this and subsequent sections is to shed some light on these issues, enabling tribes to dedicate more time toward code development rather than to research and analysis. Likewise, the purpose of the next chapter is to provide tribes with actual code language and a model TEPA, which they can directly borrow from, modify, or build upon in writing their own code.

2. Pros and Cons

- 👍 Enables a tribe to establish a regulatory "umbrella" under which all future tribal permitting activities may be organized.
- 👍 Enables a tribe to institute an environmental permitting mechanism, and to require a permit for all major on-reservation actions significantly affecting the quality of the environment.

- Creates a review process by which any actions that might cause significant environmental harm can be avoided, redesigned, or mitigated.
- Encourages the use of interdisciplinary, long-term, and holistic analysis in tribal planning and permitting.
- Language can be included in TEPA stating that no federal activities may be conducted on the reservation unless an Environmental Assessment is first conducted or unless the proposed action fits within a categorical exclusion established by tribal law.
- Encourages local, state, and federal agencies to conduct their own environmental review procedures in accordance with tribal law.
- May also encourage those agencies to develop joint documents with the tribe, avoiding duplication and promoting government-to-government involvement.
- Creates a venue for non-Native Americans to participate in tribal decision-making, thereby promoting due process.
- The existence of a model code and support materials, such as those provided by this guidance, enable a tribe to develop a comprehensive and robust code without undue commitment of tribal resources.

- Applicability of TEPA may be limited, depending on the situation, to actions on tribal lands only. Activities on nontribal lands, for which no permit is required by other tribal laws, would not trigger TEPA.
- Administrative burden may become an issue, if TEPA does not produce the "benefits" that the tribes had anticipated.

9.2 Basic Components of a Tribal Environmental Policy Act

This section is designed to give tribes a general sense of how a Tribal Environmental Policy Act (TEPA) is constructed. Despite the differences

in how tribes write and implement their environmental review codes, certain elements are common among most acts. These basic components provide both a framework and a starting point from which tribes can begin to construct their own process.

Table 9.1 lists each of the basic elements of a TEPA. The following section then describes, for each element, the function it serves, provisions it may include, sample language, and key issues related to that component.

These components are neither required nor optional, but lie somewhere in the middle, depending on the approach a tribe wishes to take. For example, a section on Applicability, defining which actions, under which circumstances, are subject to the requirements of the Act, is not essential. A "responsible official" can simply be authorized in the Act to make judgments, case by case, on whether or not a proposed action warrants environmental review. The latter approach affords a great deal of flexibility to the tribe, but leaves project applicants, tribal and nontribal, with little predictability in the project planning process.

Generally speaking, the more descriptive and detailed the wording of the Act, the less guesswork there is for tribal staff, project applicants, and legal counsel. And though a prescriptive, carefully worded Act does require more attention and awareness from tribal staff, the Act need not be restrictive on tribal member activities or cumbersome for staff to administer. Moreover, if a tribal Act is silent on certain subjects or omits certain provisions, that does not automatically mean that the tribe has jeopardized itself legally. It does, however, place a greater burden on the tribe to be consistent from project to project and to ensure that due process is afforded any potentially affected party.

With all this in mind, we encourage tribes considering a TEPA to evaluate not only the administrative issues associated with a TEPA, such as governance capacity, but also the political ramifications. Likely, both the tribal leadership and the membership will have discussed tribal regulation, and staff may have a very good sense of how environmental review will be received. Still, in our experience, many people mistrust environmental review, and tribal members may not support their elected officials if they are not well informed about how the Act might affect their livelihood.

Table 9.1. Components of a TEPA

Section Title	Description
1.0 Purpose or Policy Statement	Includes statement or declaration of tribal policy.
2.0 Definitions	Defines key terms used throughout the Act.
3.0 Applicability/ Permits Required	Specifies which projects and activities, under which circumstances, are subject to the requirements of the Act, and under what circumstances permits are required.

Section Title	Description
4.0 Application Procedures	Outlines the specific procedures and requirements associated with the review and/or permit application process, such as completion of a checklist or notification of tribal officials.
5.0 Environmental Review Procedures	Specifies procedures for environmental review, including how the review will be conducted, at what level, by whom, with what public involvement, and within what time frame. If tribe creates an Environmental Review Commission for project review, their organization and authority may be included here as well.
6.0 Permit Limitations, Conditions, and Mitigation	Outlines the terms, conditions, and authority under which a tribal permit is granted, denied, or mitigated.
7.0 Enforcement and Judicial Review	Designates and authorizes tribal officials to enforce provisions of the Act by issuing notices (e.g., cease and desist, notice of violation, abatement and mitigation orders) and may outline the conditions under which civil and/or criminal penalties are issued. Establishes the conditions under which an applicant may appeal the decision of the tribe; to whom an appeal is submitted; how the hearing and decision will be made, etc.

Section Title	Description
8.0 Coordination with Federal Environmental Laws/NEPA	Establishes the opportunity for tribal environmental review documents to be conducted consistent with other federal environmental laws, such as NEPA. Whenever a federal agency is involved in the proposed action, and where the tribe is a cooperating agency, allows for development of a joint document.
9.0 Severability	Legal provision that prevents the entire Act from being invalidated if any one section is deemed invalid.
10.0 Sovereign Immunity	If a tribe decides to enact a partial waiver of its sovereign immunity for purposes of the Act, or if a tribe chooses not to, the legislative intent should be clear.

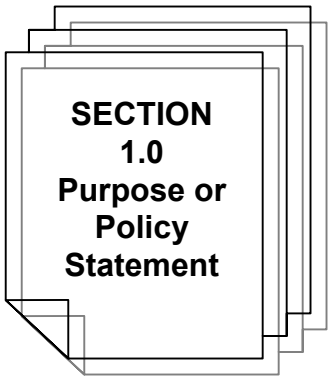
Next, we will discuss in detail the purpose and function of each of these sections. In building a TEPA, understanding these elements is essential. It is equally valuable, however, to have a clear understanding of how and why a TEPA would be put to use, and what role it would serve in tribal policy.

The following questions are designed to help initiate an exploration and discussion of these important policy issues:

- What is the TEPA really for? Are you trying to flag major projects only, or do you want more extensive review of all development activities? How broadly will it apply?
- How much information do you want and how much process are you willing to take on?
- How much are you willing to require of project applicants, in terms of time, money, and compromise?

- How much detail will you require in an environmental review process? Are you willing to "phase" or "screen" project reviews, so that only certain projects are subject to in-depth environmental review?
- Do you want to create a permit requirement, so that the tribe has some ability to review, mitigate, or deny development activities on the basis of environmental impacts?
- Do you want to create a process that will be compatible with any existing local or state review requirements? Are you willing to modify their forms and/or procedures in order to create this compatibility, or do you prefer to create a tribal-specific approach and address differences as they arise?

Next, each of the TEPA components from Table 9.1 are discussed in detail.



DESCRIPTION:

The first section of a TEPA is usually dedicated to tribal declarations, policy statements, and legislative findings. Whether included in one section or spread out among two or three distinct sections, these introductory statements establish the purpose, goals, and justification for tribal enactment of an environmental policy act.

Under the title of "Legislative Findings," "Statement of Findings," or "Tribal Council Findings," a tribe communicates to the public why the reservation's natural resources are of significance, the potential or imminent threats to those resources, the ecological and cultural value of certain resources, and the sovereign authority of the tribe to protect those resources.

Under the title "Declaration of Policy" or "Purpose," a tribe formally states its intent to adopt and implement an environmental

review procedure as part of its governmental activities. The language in this section also establishes that it is the tribe's *policy* to protect, preserve, restore, and improve the environment and homeland of their people. Such a statement helps establish a tribe's basis for asserting regulatory authority over a specific environmental media or resource, such as groundwater or wetlands.

TO CONSIDER:

- "Purpose" statement may be in a separate section from the "Policy Findings" or "Legislative Findings" statements.
- Tribes can use specific statements (e.g., "Reservation groundwaters are of critical importance to the tribe's treaty fishery") as justification for further, more detailed legislative/regulatory action related to that resource.
- Tribes can identify specific sites (e.g., an ecologically sensitive wetland or an important spiritual site) as requiring particular protection under the review process.

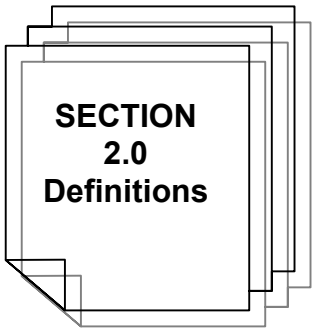
SAMPLE LANGUAGE:

"The _____ Reservation was established for the exclusive and permanent use of the _____ tribe/nation. Through its governing body, the _____ tribal council has the jurisdiction and the duty to protect the quality of the environment within the boundaries of the _____ Reservation, according to Article ____ of the _____ tribe/nation constitution."

"The ____ Tribal Council finds that development activities may have long-term and irreversible impacts on the reservation's ecological, cultural, and spiritual resources. Such activities may have a direct effect on and may threaten the political integrity, the economic security, the health, welfare, and safety of the tribe and its members."

"Because of the adverse effects from unmonitored development, there is a critical and continuing need to monitor growth and development through an environmental review permit process."

"The _____ tribal council declares that it is the tribe's policy to protect and preserve the _____ Reservation environment, and to provide a safe and habitable homeland for the tribal population's present and future generations."



DESCRIPTION:

Defines key terms used throughout the Act. Some of the more commonly defined terms in this section include: "Responsible Official," "Action," "Significant Impact," "Development," "Board," "Applicant," "EA," and "EIS."

TO CONSIDER:

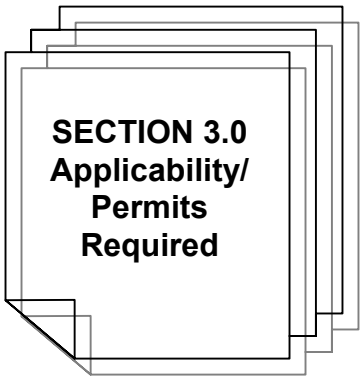
- Helpful to define those particular terms, such as "significant" or "impact," that are subject to interpretation or dispute.
- Tribes may also wish to define broad or sensitive terms, such as "cultural resource," without necessarily naming the specific site, practice, object, or species.
- Terms such as "Wetland, "Waterway," and "Sensitive Area" may need to be defined in this section if other tribal regulations do not speak to these resources.

SAMPLE LANGUAGE:

"For the purposes of this Act, the following terms shall have the meanings set forth below and are exclusive to this Act."

"The term 'Action' or 'Actions' shall mean new and continuing activities and projects."

"'Impacts' shall mean the effects of consequences of actions and shall include direct and indirect effects, as well as the cumulative effects of the action and other existing, proposed, or probable actions."



DESCRIPTION:

In this section, a tribe establishes which types of land-use activities the Act applies to, and describes the required procedures for environmental review and/or permitting. The amount of information included in this section is dependent on two factors, both of which are core to how a tribe designs its TEPA process. The first factor is whether a tribe chooses to define **"**applicability**"** within the Act itself, or opts instead to adopt regulations to make this definition. The second factor is whether or not a tribe chooses to tie the environmental review process to a *permit requirement*, and whether or not this permit is new (e.g., a creation of TEPA), or existing (e.g., required by some other tribal code).

Defining Applicability

There are two distinct approaches to defining "applicability" in this section. One approach is to include a comprehensive list, in the Act itself, of all activities, or categories thereof, that require review and/or permitting. A similar list might also identify all activities that are exempt from the Act, such as construction of a single-family house or tribal cultural activities. The other approach is to simply state how and when tribal staff shall handle an environmental review or permit application.

Rather than define specific activities that must comply with the Act, this latter approach uses the concept of a blanket review or permit process to which *all* development activities are subject. Under this scenario, tribal staff reviews each development project or activity as it comes to their attention, and decides whether or not, based on the nature of the project, a detailed environmental review is needed and whether or not a permit is required. An individual, a department, or a tribal "review commission" can be charged with making the decision about whether a proposed activity could have "significant" adverse impacts. Some tribes may leave the language in TEPA broad, and instead develop a separate list, or adopt a regulation, which itemizes the specific land-use and

development activities subject to the Act. Whether activities are listed in the Act or separately, the tribe should usually distinguish which ones are (a) categorically excluded, (b) possibly harmful, or (c) probably harmful and in need of an impact assessment before being approved. Creating such a list, as federal agencies do to comply with NEPA, helps applicants determine how much environmental review will be required during the application process. In turn, this helps them calculate, with some predictability, their anticipated timelines, budgets, and permit compliance requirements.

Establishing a Permit Requirement

One of the more significant questions a tribe will face is whether or not to establish a permit requirement as part of its environmental review process. Some tribes already have a permitting mechanism in place, in a tribal land-use, zoning, or environmental code, and therefore may choose not to establish another permit requirement in their TEPA. They may, however, construct their TEPA to ensure that all tribally issued permits be subject to environmental review.

Tribes that do *not* have a permit mechanism in other tribal codes may elect to establish one as part of their TEPA. The various reasons why a tribe would establish a permitting requirement, and how they would structure the permit, are discussed in Section 6.0. If a tribe does include a permit requirement in its Act, then it will need to dedicate this and possibly subsequent sections to defining the conditions under which a permit will be issued or denied.

TO CONSIDER:

- Applicability: Section may include "safety-net" language, giving the tribe authority to apply the requirements of the Act to "any other action that may have a significant adverse impact," based on the discretion of a designated department/individual.
- Applicability: Section may include a blanket provision that applies the requirements of the Act to any actions for which "a permit is required by any other provision of tribal (or other) law."
- Applicability: Section may list specific types of activities, such as construction or road repair, or may be organized by category, such as, " any activity within 75 feet of a water

body; or any activity located within a flood plain; or any activity located within a sensitive area".

- Applicability: A provision can be included to ensure that the applicant also complies with any other tribal or Federal laws that apply to the proposed activity.
- Permit: Tribes that do establish a permit requirement within TEPA need not require a permit of every type of development. Some tribes require permits only for those projects that could have significant environmental impacts. For example, if an initial environmental review (e.g., a checklist) is completed, and a project is deemed to have little or no harmful environmental impacts, it may proceed without further review and/or permitting. In contrast, projects that could have significant environmental impacts would require further study, and would not be able to proceed without a tribal environmental permit.
- Permit: Some tribes not only establish a permit requirement within TEPA, but also require all development projects, regardless of their size, nature, or impact, to apply for a tribal environmental permit. Once a permit application has been submitted, and once an initial environmental review has been conducted, tribal staff then exercises its discretion in deciding whether or not to issue a permit. Projects deemed to have a "low impact" are awarded permits and are not subject to in-depth study. Where the impacts of a project are unknown, the tribe may choose to have an interdepartmental or multidisciplinary review before issuing the permit.
- Permit: Tribes that do require permits may include, in this section, a list of all activities and projects that are exempt from the permit requirement. For example, many tribes (and local governments) exempt such projects as residential home improvements, construction of garages or sheds, home business operations, or placement of firework stands. If, however, any of the exempted activities take place within a tribally designated "sensitive area" (e.g., within 50 feet of a stream), they may no longer be considered "exempt" and must meet the requirements of the Act.

- This section may provide detailed information to project applicants on how to ascertain the applicability of the Act to their project.

SAMPLE LANGUAGE:

"All persons, entities, or agencies conducting any of the following activities within the exterior boundaries of the _____ Reservation shall be required to obtain an Environmental Permit from the _____ Tribe:

a. Construction, placement, or expansion of any structure to be used for industrial, commercial, or residential purposes;
b. Construction, placement, or expansion of any public or private road or bridge, transportation facility, or public facilities of any nature;"

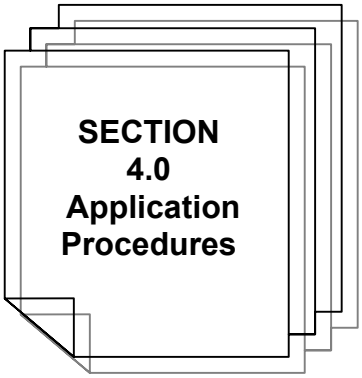
"The _____ Tribe prohibits development within its jurisdiction unless the _____ tribal department issues an Environmental Review Permit for the development."

"The __(authorized tribal department/individual/team)__shall review an Environmental Review Permit application and:

(1) issue a permit when it determines that the development is low impact, subject to conditions that it or the designated tribal departments may impose under tribal or federal law;
(2) issue the permit where all designated tribal departments sign off, subject to conditions that it or the designated tribal departments may impose under tribal or federal law; or
(3) deny the permit where a designated tribal department withholds sign off, due to:_____".

"All persons conducting any of the following activities within the boundaries of the _____ Reservation shall be required to obtain a permit from the _____ Tribe:

(1) Preparation of a site for the construction of a building or area for purposes of human habitation, business use, or public area;
(2) The construction of any structure and construction which alters the exterior of any existing structure;
(3) Conduct of a business operation;
(4) Road construction or repair and right of way maintenance;"



DESCRIPTION:

This section outlines the specific procedures that applicants must follow in order to meet environmental and/or permit requirements. Some tribes include this language in the previous section, where they discuss applicability and permit requirements, whereas others create a separate section. Although either approach works, creating a specific section that focuses on the application requirements may help applicants work their way through the process. Moreover, it may help delineate and clarify the specific responsibilities of each tribal department that is to be involved.

TO CONSIDER:

This section can serve to inform the applicant of procedure, as well as clarify and establish interdepartmental procedures for the tribe itself. Detailed information may be included on which offices/departments will be involved, how and when they will participate in review, etc. Such information may include:

- Which tribal department(s) or staff members are the appropriate contacts for applicants.
- Which tribal department(s) or staff members are responsible for reviewing and processing applications and in what time frame (e.g., ten working days; 30 days from submittal of complete application, etc.) they will respond.
- Any fees that may be charged for the review process (e.g., requiring applicant to pay for the direct and indirect costs of environmental review) and any fees that may be required for permit application (e.g., $50 to $100.00 permit "processing" fee). (Note: tribes usually waive such expenses if the applicant is a tribal member or entity.)

- Information that applicants will be expected to provide as part of their application, such as:
  - A brief description of the proposed project.
  - A legal description of the proposed site.
  - Copies of any other permits, leases, easements, or licenses that the applicant is required to obtain.
  - Baseline information about the project site, such as geology, topography, soil type, proximity to sensitive areas, or cultural or spiritual significance of the site.
- Some tribes also include a set of questions for staff to review in determining whether or not an application is deemed "complete". These include, for example:
  - Is there sufficient information in the Application?
  - Have the goals and purposes of the TEPA been met?
  - Have the environmental review criteria been met?
  - Have other permit and consultation requirements been met?

SAMPLE LANGUAGE:

"All applicants shall submit an application to the _____ tribal office."

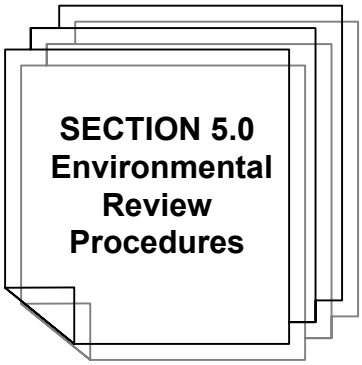
"Any person requiring a permit under Section _____ of this Act shall obtain a permit application and an environmental checklist form from the _____ tribal office."

"The completed environmental permit application and environmental assessment/checklist shall be filed with the _____ tribal department. The application shall be accompanied by _____ processing fee which may be waived on demonstration of hardship."

"The proponent of an action as defined in Section _____ of this Act shall submit an application for environmental review to the _____, together with such information as is needed for environmental review, and, except in the case of tribal actions, an application fee in an amount determined by the Executive Director to be sufficient to pay for the direct and indirect costs of environmental review, including costs of necessary studies, consultants, and preparation of any required environmental impact statements."

"If the action is a tribal activity or project, any required application for environmental review shall also be completed by the tribal department, agency, or official proposing the action. The tribe shall

fund the cost of any environmental review of tribal actions or legislative proposals required by this Act."



DESCRIPTION:

This section describes the requirements and procedures associated with the actual environmental review. It may include such information as who will conduct the review, the criteria they will use for evaluating impacts, the time frames involved, and how the reviewer(s) will make their final determination about the proposed activity. The amount of detail in this section depends on how a tribe has structured its review process, and largely on whether they will use a screening process such as that described below.

Some tribes set up their review procedures to parallel NEPA, in which there are two different *levels* of review. The first level of review, known as "Environmental Assessment" (EA), involves a basic but fairly comprehensive review of a project's potential environmental impacts. The EA does not involve extensive data collection or analysis, but should provide decision makers with enough information to determine a project's potential for "significant" environmental impacts. In essence, an EA acts as a "screen" through which tribal staff members apply a filter to projects, often focusing their energies on the most serious and potentially harmful activities. The second level of review, known as "Environmental Impact Statement" (EIS), is most often triggered when an EA concludes that a project will indeed have significant impacts and that further study is warranted.

Though the EIS is widely recognized, ironically, it is used far less frequently than the EA. Many federal agencies conduct their environmental reviews in a way that avoids preparation of an EIS and the subsequent in-depth, often exhaustive study of a project's potential impacts. (Usually an EIS involves a substantial commitment of resources for data collection, sampling, modeling, and analysis.) It is intended to

produce a scientifically defensible, holistic assessment of a project's impacts, along with parallel information about the alternatives to the proposed project.

In Chapter 4 of this Guidance, the EIS is discussed in great length. Tribes who plan on employing an EIS-type review as part of their TEPA should review this chapter at length. If a tribe does use a phased concept of review (i.e., an EA, and then, if required, an EIS), it will want to structure this section accordingly. In the box below, we have provided an example of how a tribe might structure this section and each level of review:

5.0 ENVIRONMENTAL REVIEW

5.1 ENVIRONMENTAL ASSESSMENT/CHECKLIST

Often, to streamline the process, tribes will use a checklist to satisfy their EA requirements. In this section, tribes state how they will review the applicant's checklist (e.g., to ensure completeness), and may include a time frame for completion of the initial review.

5.2 THRESHOLD DETERMINATION

After reviewing the checklist/EA, tribal staff makes a "threshold determination" about a project's potential for significant impacts. Typically, a project is given one of three designations, though tribes may want to depart from the standard NEPA format and develop their own designations.[11] The designations are as follows:

5.2.1 Finding of No Significant Impact (FONSI): "In the event the threshold determination indicates that the proposed action does not have a probable significant adverse environmental impact, the tribe shall issue a 'Finding of No Significant Impact,' and the action may proceed without environmental review. An environmental permit (will/will not) thus be required."
Note: Some tribes require an environmental permit for all projects, but others require permits only for those projects that require an EIS. This section should clearly state whether or not a project

[11] For example, a tribe wishing to evaluate proposals more holistically might emphasize cultural (versus environmental) impacts. A "Determination of Cultural Significance", or "Determination of Non-Cultural Significance" would thus be issued.

given a FONSI determination still requires an environmental permit.

5.2.2 Mitigated FONSI: "The proponent of a matter subject to environmental review under this Act may agree to conditions and mitigation requirements. If the tribe determines that such conditions and mitigation will cause the action to not have a probable significant adverse impact, the tribes may issue a mitigated FONSI and an environmental permit. If the proponent agrees to and accepts such permit, conditions, and mitigation, by written agreement in form satisfactory to the tribe, the preparation of an environmental impact statement shall be excused."

5.3 ENVIRONMENTAL IMPACT STATEMENT

All those projects that receive neither a FONSI nor a mitigated FONSI determination require preparation of an environmental impact statement. In this section, tribes describe the required content, format, and analysis to be included in the EIS. These requirements may be general, or highly detailed, depending on how prescriptive the tribe wishes to be. It may include procedures for tribal review, public involvement, and time frames for review and approval as well.

Examples of *general* ***content*** requirements:

- the environmental impacts of the proposed action;
- any adverse environmental effects which cannot be avoided should the project be implemented;
- alternatives to the proposed action; and
- environmental impacts of the proposed alternatives.

Examples of *format* requirements:

- cover sheet
- summary page
- purpose and need statement
- description of the proposed activity and alternatives
- description of the affected environment
- environmental consequences
- list of preparers
- appendix

Examples of *analysis* requirements:

- use of a systematic, interdisciplinary approach that insures the use of natural and social sciences;
- application of best available science to the proposed activity and alternatives;
- examination of the relationship between local, short-term uses of the environment and the maintenance and enhancement of long-term productivity;
- any irreversible and irretrievable commitments of resources which would be involved if the proposed action were to occur;
- the analysis of cumulative impacts;
- the analysis of social, cultural, and economic impacts; and
- any beneficial impacts the project may produce.

Examples of *tribal review procedure* requirements:

- tribal staff designated to conduct the review;
- response time of tribal staff upon receipt of initial application;
- procedures for internal review and comment of draft EIS;
- distribution list for draft EIS;
- any required or suggested cooperation with affected or interested agencies;
- public notice requirements;
- time frame for public comment/scoping period;
- time frame and minimum requirements for public hearings;
- tribal staff designated to make final determination;
- criteria for determining sufficiency of the EIS;
- criteria for decision to approve, deny, or condition final permit; and
- administrative procedures for final determination (e.g., posting a Record of Decision).

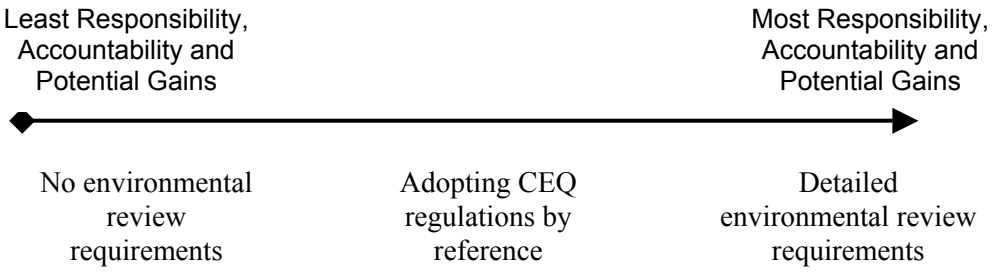
TO CONSIDER:

- Although this section may include the level of detail described above, it is not essential. Tribes may elect, instead, to provide this information in a separate document, such as in council-approved tribal regulations.
- Tribes who prepare EISs infrequently, or who do not wish to commit significant resources to designing their review procedures, may consider adopting the EIS requirements of NEPA (in CEQ's regulations) or those of their state's mini-NEPA.
- Tribes may find it useful to include language allowing them to adopt other documents (e.g. local, state, or federal EISs), which will satisfy tribal requirements for an EIS.
- Tribes may wish to establish a specific body to oversee and execute the environmental review process. A Tribal Environmental Review Commission (TERC) created by the Act would be responsible, for example, for reviewing and regulating all development activities subject to TEPA review. By assigning TEPA duties to an independent body such as a TERC, tribes help ensure that their review procedures will be conducted consistently and impartially – two chief factors in establishing credibility. Issues that tribes will need to address in organizing a TERC include:
  - How many members will be appointed, how they will be appointed (e.g., by tribal council), how long they will serve (e.g., 1, 2, or 3 year terms), and what proportion of the membership, at any given time, may consist of non-tribal members (e.g. no more than 30 percent or 50 percent).
  - What authorities the TERC will be assigned, such as promulgating TEPA regulations, enforcing the provisions of TEPA, issuing or denying TEPA permits, assessing and collecting permit fees, conducting public hearings, etc.
  - How the TERC will work with the tribal council (e.g. whether or not TERC rules must be approved by council,

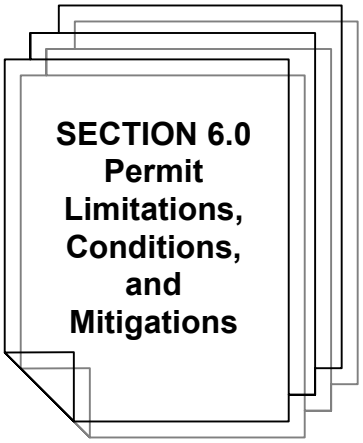
or if council may overturn administrative decisions made by TERC).

- How the TERC will coordinate with other tribal agencies, departments, and staff, in executing the reviews, issuing permits, and enforcing provisions of the Act.

♦ As tribes decide what to leave in and what to leave out in this section, they should consider how and where this places them on the scale below. Generally, as tribes move toward greater specificity and detail in their environmental review requirements, they acquire more administrative responsibility and legal accountability. At the same time, however, the potential gains are greater, because the environmental impacts of a proposed activity have probably received greater study and evaluation.



SAMPLE LANGUAGE: See above.



DESCRIPTION:

This section outlines the conditions and authority under which a permit is granted, denied, or mitigated. It authorizes the tribe to include terms and conditions in a permit that will prevent or mitigate significant environmental impact.

TO CONSIDER:

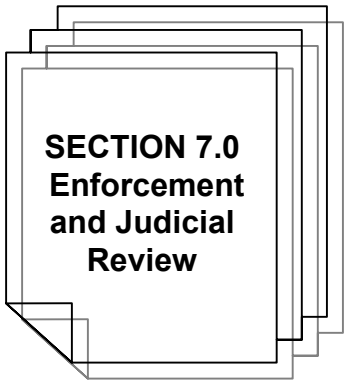
- May provide for/require monetary compensation to the tribe, where there are unavoidable, adverse impacts to the reservation environment.
- May also require replacement or restoration of impacted resources.
- May include a "re-opener" clause through which the tribe can reopen and further review a permitted activity when given new information indicating unmitigated adverse impacts of the permitted activity. "A reopened permit shall be evaluated as if it were a new permit application and may be granted, conditioned, or denied in accordance with the provisions of this ordinance."

SAMPLE LANGUAGE:

"The _____ Tribal Council shall decide whether to grant or deny the issuance of a the permit or to issue a conditional permit. The Tribal Council shall give notice of its decision to the applicant within 30 days of the public hearing unless an additional hearing is scheduled, in which case notice of the decision shall be given to the applicant within 30 days

of the final public hearing. The Tribal Council shall post a notice to the _____ tribal community of its decision to approve, deny, or condition a permit, on the same day notice is given to the applicant."

"In issuing an environmental permit, the Executive Director may include conditions and mitigation requirements to reduce, prevent, or mitigate significant adverse impacts and to protect the reservation environment from degradation. Mitigation may include monetary compensation to the tribe or others for adverse impacts to the reservation environment and natural resources, and may also include requirements of replacement or restoration of impacted resources."



DESCRIPTION:

In this section, tribes outline the circumstances and conditions under which they will allow project proponents (or impacted parties) to challenge their TEPA-related decisions and actions. Tribes also use this and possibly subsequent sections to describe the measures they will use to enforce TEPA-related decisions and actions. Although procedures for judicial review and enforcement differ from tribe to tribe, several core elements are usually included:

Judicial Review (Appeal) Procedures

Although tribal legislative bodies generally should seek the advice of legal counsel throughout the development of a TEPA, such advice is particularly important for the provisions of a TEPA relating to administrative appeals and judicial review. Tribal staff may be able to reduce the amount of time needed for legal review by addressing several core issues:

1. What *type*s of tribal determinations are eligible for appeal?

Tribes can purposefully narrow or broaden the scope of their judicial review by choosing which types of tribal decisions are eligible for appeal, such as:

- A tribe's decision (threshold determination) that a proposed action has probable significant adverse impacts and that preparation of an EIS is thus required.
- A tribe's decision (threshold determination) that a proposed action does not have probable significant adverse impacts and that preparation of an EIS is therefore not required.
- A tribe's decision to deny an environmental permit, or to impose permit conditions and mitigation requirements.
- A tribe's decision to approve and issue an environmental permit.
- A tribe's enforcement action, such as the assessment of civil penalties.

2. *Who* may appeal these tribal determinations?

The most common approach is to allow appeals by any person who is "aggrieved" or "adversely affected" by a TEPA-related decision or action. Tribes may elect, however, either to limit appeals to the project proponent only, or to provide some definition of the term "aggrieved," to limit the number of parties who can enter the appeal process and thus exhaust tribal resources.

3. Within what time frame must appeals be submitted?

Tribes can, though they need not, establish a time frame for the filing of appeals. A time limit of 10, 15, or 30 calendar days, from the time the tribal decision is made, is not uncommon.[12] If it is the project applicant filing the appeal, then the clock is usually started from the date the applicant received notice of the tribe's decision. If it is an aggrieved party, then the clock usually starts from the date that the tribal decision was posted in a public venue (e.g., a tribal newspaper).

4. Which tribal body will hear the appeal?

[12] Federal agencies generally make the deadline for filing an appeal a "jurisdictional" requirement, which means that the court or other review tribunal will not consider the appeal if it is not filed within the deadline.

Tribes can authorize one or more specific bodies to hear, review, and act upon appeals, such as a Hearing Examiner, an Appeals Committee, the Tribal Council, the Tribal Court, an Administrative Hearing Office, or a tribal executive. In deciding which body is most appropriate for TEPA judicial functions, tribes may want to consider:

- Using any existing judicial institutions (and procedures) already in place, routing all TEPA matters through this same body and process. This eliminates the need to create new procedures and institutions, but it may add to the case load of existing institutions and impose other kinds of burdens on them.
- Creating an administrative appeal process, in which applicants and affected persons must exhaust administrative remedies before going to tribal court. Administrative appeals processes can take many forms. An executive branch official, who may have authority to appoint a hearing officer, may hear appeals. Other options include an appeals board or an administrative law judge. This general approach can minimize the workload of tribal courts that might result from the enactment of a TEPA by reducing the number of appeals that go to tribal courts and by limiting the scope of judicial review to the administrative record.

5. What standards of review will be applied to an appeal?

A TEPA can specify the standards to be applied by the tribal court or an administrative appeals board (or hearing officer). Such standards might be borrowed from those used in federal law, e.g., those used in the Administrative Procedures Act for judicial review of federal agencies. In the absence of standards in a TEPA, a tribal court could determine the appropriate standards on a case-by-case basis. A TEPA might provide that an administrative hearing officer or tribal court could set aside the decisions of a tribal agency depending on:

- Whether or not the tribal agency's decision was "arbitrary and capricious," or contrary to tribal law.
- Whether or not the tribal agency's decision was supported by substantial evidence.

- Whether or not the party bringing the appeal was able to meet the appropriate burden of proof.
- Whether the tribal agency's decision violates a right proclaimed in the tribe's constitution and/or the Indian Civil Rights Act.

Enforcement Procedures

Few laws enforce themselves. Just because a tribal government has enacted a TEPA, people will not immediately and voluntarily comply with the tribal law. Even if a tribe does not anticipate applying TEPA to nontribal lands, it can still expect to encounter some challenges to its authority. And if a tribe has not defined the basis for and provisions of its enforcement authority, then these challenges may be successful. However, the extent to which a tribe chooses to *apply* its enforcement provisions is important here. Many tribes considering adoption of a TEPA are understandably concerned about how enforcement will work in practice.. If a tribal member built an addition to his or her home, for example, and unknowingly violated a provision of TEPA, would the tribe exercise its full enforcement authority? Would the tribal member be required to pay fines for this violation? Often tribes will apply an informal "warning-first" or "education" policy in such situations, giving the tribal community the opportunity to gradually become aware of TEPA requirements.

Tribal officials should be aware that federal agencies such as EPA, as well as state agencies, typically do not pursue enforcement against all violations. Rather, enforcement always involves choices in allocating resources. No agency has the resources to go after every violator, and in many ways it is more efficient to help violators come into compliance than to impose penalties. Sometimes, however, agencies must enforce the law against violators, and to be able to do this they must have their enforcement mechanisms in place.

In establishing its enforcement provisions, a tribe may use administrative measures, judicial measures, or both. The lines between administrative and judicial enforcement can be drawn in a variety of ways, and some enforcement mechanisms are part administrative and part judicial. **Administrative enforcement measures** are employed in the majority of enforcement situations, and commonly include:

- Written Warnings, which staff issue to warn a person that the activity is not in compliance with tribal code.

- Notice of Violation Orders (NOVs), which staff issue and which can include any or all of the following:
  - A description of the specific violation;
  - Any monetary penalty that may be involved;
  - A cease and desist Order; and,
  - A requirement for corrective action.
- Emergency Orders, which a tribal Board or Council might issue if an activity in noncompliance with TEPA presents an imminent and substantial threat to the public health, welfare, or environment.
- Civil Penalties, which may be issued after any of the above administrative enforcement orders, and which are usually based on a predetermined rate or schedule.
- Civil Forfeiture, which means seizing items of personal property being used to violate a tribal law, such as heavy equipment being used for unauthorized grading.

Judicial measures, involving a tribal court, attorney, attorney general, or equivalent, can be used to enforce administrative actions taken, such as issuance of cease and desist orders, NOVs, and civil penalties. The court, or other designated body, is authorized to enforce provisions of the Act, which may include:

- Recovering civil penalties imposed in accordance with the Act.
- Ordering temporary and/or permanent injunctive relief that prohibits continuation of any action in violation of the Act.
- Recovering damages resulting from harm to the reservation environment and resources that has been caused by actions conducted in violation of the Act.
- Recovering direct and indirect costs and expenses of enforcement of the Act, and for litigation expenses and reasonable attorney fees.
- Providing a forum in which tribal officials can complete the process of civil forfeiture, allowing persons whose property has been seized an opportunity to challenge the forfeiture.

As was noted above, the lines between administrative and judicial enforcement can be drawn in a variety of ways, and some enforcement mechanisms are mixed. For example, one tribal law might authorize the head of a tribal environmental protection agency to issue Notices of

Violation and/or Cease and Desist Orders, but another tribal law may require the tribal agency to go to tribal court to get such orders, since violators may be more likely to stop if they are served with a court order. As a general rule, there is no one right way to decide the extent to which enforcement should be administrative or judicial.

TO CONSIDER:

- **Determining the most appropriate tribal agency for enforcement.** In developing their enforcement procedures, tribes should consider designating a specific tribal agency, or individual, with the authority to take administrative enforcement actions. An Executive Director, a Hearing Examiner, the tribal Board or Council, or an Environmental Review Commission (ERC) would, among other things, be responsible for holding adjudicatory hearings, issuing civil penalties, and requiring corrective actions of the violator. All of these functions require a commitment of funds and people. Certain bodies, however, such as the tribal Board, may have less availability and would therefore be more "costly" to employ for these purposes.

  Hiring a Hearing Examiner, on a case-by-case basis, is an option some tribes consider. It allows the tribe to expend resources only as needed, and ensures that the tribe will have someone with objectivity and experience. Some tribes hire law-school professors to serve as judges for tribal courts of appeal. A similar practice could be adopted for administrative appeals, by using law-school professors as administrative law judges or hearing officers.

- **Citizen Suit Provisions**. Most federal environmental laws authorize private citizens to file actions in federal court against alleged violators, including federal agencies. Although NEPA does not include such a "citizen suit" provision, federal courts have consistently ruled that private citizens can sue federal agencies for alleged failure to comply with NEPA. Tribal officials should consider including provisions in a TEPA to expressly authorize suits in tribal court against tribal government agencies for injunctive relief to enforce compliance with the procedural requirements of a TEPA.

Such authorization would require a limited waiver of sovereign immunity, which could be limited to injunctive relief – an order to comply with the law – thus precluding citizens from collecting monetary damages. Although tribal officials are understandably hesitant to waive sovereign immunity, limited waivers to allow people to go into tribal court to force tribal agencies to comply with tribal law can be seen as an exercise of tribal sovereignty – a way of empowering tribal members to hold tribal agencies accountable for compliance with tribal law.

- **Alternative Dispute Resolution.** In environmental disputes, there are usually more than two sides; so the use of nonadversarial dispute resolution techniques (often called "alternative dispute resolution" or ADR) may be productive. In the design of TEPA, there are many ways in which ADR could be worked in, at both the administrative adjudication stage and the judicial review stage. ADR techniques can be a way of fashioning "win-win" solutions, and so of holding down the governmental agency's enforcement costs. Dispute resolution techniques that the larger American society might label ADR are well grounded in many tribal cultures.[13] Where a tribal culture has a tradition of nonadversarial dispute resolution, it may be particularly effective to incorporate such a tradition into a tribe's TEPA.

SAMPLE LANGUAGE:

Administrative Review: "The Executive Director may issue an administrative enforcement notice to any responsible party or parties requiring them to cease and/or abate and remediate the adverse environmental effects of any action conducted or performed in violation of, or without compliance with, any provision of this Act."

Administrative Review – Civil Penalties: "The civil penalty for failure to conform to the terms of a permit or for proceeding with an activity without a permit, as required under this Act, is a fine not to exceed five thousand dollars for each violation. Each permit violation or each day of continued activity without a required permit shall constitute a separate violation."

[13] See, e.g., Zion, 1983.

Judicial Review – General Language: "Any person who is aggrieved by the issuance or denial of a development permit, without respect to whether that person, corporation, or other entity is a party to such permit application, or who is the subject of an Enforcement Order, may file an appeal in the Tribal Court of Appeals, in accordance with the rules of the Court. The Court is authorized to hear such appeals."

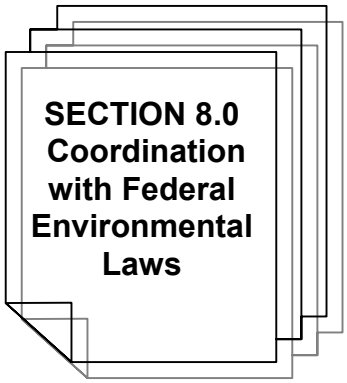
Judicial Review – General Language: "The tribe may enforce its notice to cease and desist and its assessment of a penalty in the tribal court. The tribe may request the court to enter an injunction against the continued activity and to order payment of the fine. Failure of any person to abide by the lawful order of the tribal court is punishable by civil and criminal contempt of court proceedings."

FROM THE HUALAPAI CULTURAL HERITAGE RESOURCE ORDINANCE:

"**Civil Forfeitures – Seizure and Forfeiture of Personal Property**. In the event that a Tribal Law Enforcement Officer is present at the scene of any violation of this Ordinance, whether or not in the process of serving a Notice of Violation and/or Cease and Desist Order, the Officer is authorized to seize all items of personal property that apparently have been involved in the violation. Title to such property shall be deemed to vest in the _____ Tribe at the time of the commission of the unlawful activity, provided that the Director (of the Cultural Resources Department) brings an action in Tribal Court to perfect the Tribes' title and the Tribal Court issues a ruling in favor of the Department. If the former owner is present at the time of seizure, the Officer shall obtain the necessary information to provide such person information on the procedure to seek the return of such property; if not present at the time of seizure, a notice shall be posted and other reasonable steps taken to provide notice to the former owner."

FROM THE HUALAPAI CULTURAL HERITAGE RESOURCE ORDINANCE:

"**Citizen Suits and Limited Waiver of Sovereign Immunity – Private Right of Action in Tribal Court**. In any case which a person or governmental agency subject to this Ordinance, including an agency or instrumentality of the Tribe, has carried out an undertaking without first obtaining clearance from the Director pursuant to Section 3.03, and the Director has not initiated enforcement by issuing a Notice of Violation or by petitioning the Tribal Court for a Cease and Desist Order, any person who is directly and adversely affected by the violation of the Section 3.03 clearance requirement may file an action in Tribal Court seeking an Order to enjoin the undertaking and compel the alleged violator to apply for and obtain clearance from the Director prior to resuming the undertaking. In any such case, the person filing the action shall have the burden of showing, by a preponderance of the evidence, that a violation of Section 3.03 has occurred. If the Tribal Court determines that injunctive relief is warranted in such a case, and issues an appropriate Order, action taken by the Director on an application for clearance after the issuance of such an Order by the Tribal Court shall be subject to hearing and judicial review in the same manner as other determinations by the Director."



DESCRIPTION:

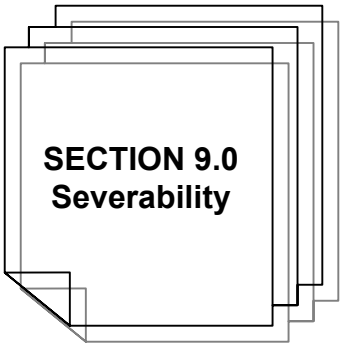
Including this provision creates the opportunity to ensure that environmental review documents prepared for TEPA will be consistent with other federal environmental laws, such as NEPA. Whenever a federal agency is involved in the proposed action, and where the tribe is a cooperating agency, such a provision allows for development of a joint document. Also, if earlier sections of the TEPA do not provide detailed

information on preparation of an EIS, this section allows the tribe to adopt the CEQ regulations by reference.

SAMPLE LANGUAGE:

"The preparation of environmental documents under this Act *may* occur in a manner sufficient to conform and comply with NEPA and NEPA regulations."

"When an EIS is required, the tribe shall employ the federal procedures specified in the Council on Environmental Quality's regulations, in 40 CFR Parts 1500-1508."



SECTION 9.0 Severability

DESCRIPTION:

"Severability" is a legal provision that prevents the entire Act from being invalidated if any one section is deemed invalid.

SAMPLE LANGUAGE:

"If any portion or provision of this Act, or application thereof, is determined to be invalid, in whole or in part, the remainder of this Act shall continue in full force and effect."

DESCRIPTION:

If a tribe does *not* wish to waive its sovereign immunity (in whole or part) for purposes of this Act, a brief statement to this effect may be included in this section.

SAMPLE LANGUAGE:

"The sovereign immunity of the _____ Tribe is in no manner waived by this Act."

FROM THE HUALAPAI CULTURAL HERITAGE RESOURCE ORDINANCE:

"**Waiver of Sovereign Immunity**. This section of the Ordinance constitutes a limited waiver of sovereign immunity for actions in Tribal Court against agencies and officers of the Tribe, provides that any such actions shall be limited to injunctive relief. This section shall not be construed to authorize an action against the Tribe or its officers contrary to Article XVI, Section 2, of the Constitution of the Hualapai Indian Tribe."

9.3 Implementation Issues to Consider

In the following section, we address some of the central issues that tribes must address in the implementation of a TEPA. These include whether or not to create a permit requirement, which institutions of tribal government to employ, whether or not to enforce TEPA on nontribal lands, and what to address in TEPA regulations.

9.3A Whether or not to Create a Permit Requirement

If a tribal agency is charged with carrying out an environmental review process for development activities, a permit process is one kind of mechanism for performing such duties. NEPA itself does not establish a permit requirement but instead applies to any federal action that may significantly affect the human environment, so NEPA does not provide a model for a permit mechanism. Yet many tribes do require a permit in their TEPA for any kind of activity that falls within the statutory definition of ''development.''

A major advantage of a permit requirement is that tribal staff can easily know if a project is in compliance with the tribal law: either it has been issued a permit or it has not. A permit process is not needed for a tribe to exercise control over development on tribally owned land, but making such a requirement apply to tribal administrative agencies and business enterprises could facilitate environmental review by tribal officials. For development on individual Native American lands or on fee lands, a permit requirement could function as a critical mechanism, allowing a tribe to assert the full measure of its sovereign authority to protect important tribal interests, including public health and safety, and respect for tribal environmental and cultural values.

A Comprehensive or "Blanket" Permit

If the main legislative objective for enacting a TEPA is to control development on the reservation, then a permit requirement that applies to all kinds of development activities, or at least all above a certain threshold level, may be the most appropriate way to achieve this objective. The more comprehensive the coverage of a permit requirement, the bigger the blanket, and the better tribes can control development. In addition, a blanket permit requirement can be particularly useful for coordinating environmental review between various tribal agencies and departments.

Permitting under the Model Tribal Code. This approach involves a development permit based on the ALI Model Code, which would be issued by a tribal Environmental Review Commission (ERC). Permit decisions are made by the ERC using an informal adjudicatory process. In the Model Tribal Code, the term “development” is broadly defined in the statutory language to include any building operation, any material change in a structure, or any material change in the use or

appearance of land.[14] The permit requirement expressly applies to development activities proposed by tribal administrative agencies.[15] A tribe using this Model might expressly exclude certain kinds of development activities that usually have minimal adverse environmental impacts. This Model also provides that the tribal ERC would have authority to issue rules to define a category of "low-impact" development for which the permit process would be largely *pro forma*. It may also work well to use a timetable for the permit requirement, with bigger projects subject to compliance sooner than smaller projects. This would enable the tribal ERC and tribal staff to focus their efforts on projects that really matter while they are learning how to run a permit program

Criteria for Permit Decisions

If a tribal agency or department is vested with the authority to issue permits, TEPA should also provide standards to use in making these permit decisions. Three ways of doing this are: (1) setting out general policy criteria in the Act itself; (2) requiring the permitting agency to determine whether or not the project would be consistent with an approved land-use plan; and (3) using a checklist to ensure that the project will comply with all applicable requirements established by other laws and regulations. Each of these approaches is described in greater detail below. A tribe might consider using a combination of these approaches to provide standards for the permitting agency.

1. General Policy Criteria. In many cases, decision makers must apply permit general policy criteria when reviewing a permit application. A good example comes from Vermont's Act 250, which takes a "holistic" approach to development. It combines pollution prevention with resource conservation rather than treating these as separate problems and looks at community stability and economic sustainability. It does not rely on "one size fits all" technical standards, or cookie cutter approaches, but takes a fresh look at each problem to find the most appropriate solution reflecting the latest thinking.

The Act establishes ten general criteria for permit issuance,[16] under which each permit applicant is required to show that the project:

(1) will not result in undue water or air pollution;

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[14] The definition of ''development'' is in Section 2.01 of the draft Model Tribal Code.

[15] Model Tribal Code, §5.01.

[16] Vermont Statutes Annotated, Title 10, Section 6086(a).

(2) has sufficient water for its reasonably foreseeable future needs;
(3) will not cause an unreasonable burden on existing water supply;
(4) will not cause unreasonable erosion or reduction in the ability of the land to hold water;
(5) will not cause unreasonable congestion or unsafe conditions on highways or other transportation facilities;
(6) will not cause an unreasonable burden on the ability of a municipality to provide education services;
(7) will not place an unreasonable burden on the ability of local government to provide governmental services;
(8) will not have an undue adverse effect on the scenic or natural beauty of the area, aesthetics, historic sites, or rare and irreplaceable natural area;
(9) is in conformance with statewide plans required by Act 250;
(10) is in conformance with any duly adopted local or regional plan or capital program.

These criteria are very general and subjective, and there is no statewide land-use plan against which to measure an individual project's compliance with the criteria or to give guidance on where development should and should not take place. Partly as a result of the general nature of these criteria, the permit-by-permit review process can be lengthy and contentious.

2. A Land-Use and Development Plan. In conjunction with general criteria, or as an alternative, a TEPA might require the permitting agency to find that a proposed project would be consistent with an approved tribal land-use and development plan. This would be one of the main functions of the ERC under the Model Tribal Environmental Review Code. Such a plan could be similar to a land-use plan adopted pursuant to a typical zoning code but might be more flexible. Rather than providing that certain kinds of development can take place only in certain areas, as zoning codes do, the plan might describe the kinds of development that the tribe wants to encourage and provide a set of standards for the ERC to use in determining whether development proposed in an application is consistent with the plan. The plan also might include areas of special tribal concern in which development proposals would be more strictly scrutinized. Recent case law should be taken into account in the development and approval of any such plan, to improve the likelihood that it will be sustained if subjected to legal challenge.

Under the Model Tribal Code, the plan would not be developed by the ERC but rather by tribal staff in an appropriate administrative agency of tribal government, such as a tribal planning or natural resources department. The ERC, however, would be directed to facilitate public involvement in reviewing the other agency's plan, including, for example, holding a hearing on the plan. The ERC would be directed to make recommendations to the tribal governing body regarding the plan. The formal adoption of the plan would be by action of the tribal governing body (in a tribe with separation of powers, the legislature with approval of the executive).

By separating the development of the plan from the consistency determination required for permit issuance, the tribal governing body would maintain direct authority over the underlying policy decisions about the kinds of development that would be appropriate for the reservation, but the permit decisions on specific proposals would be insulated from political pressures. In this way the independence of the permitting agency could be maintained, but the permitting agency's decisions nevertheless would reflect the tribal governing body's policy decisions. Under the Model Tribal Code tribal administrative agencies would be subject to the permit requirement, and, since administrative due process requires an unbiased decision maker, some degree of independence of the permitting agency is desirable for due process reasons. Under the Model Tribal Code, in any permit application by a tribal agency, the ERC must independently determine whether the proposed action would be consistent with the tribe's land use and development plan, whether the environmental assessment is adequate, and whether the project would result in significant environmental impacts.[17]

3. A Checklist of Other Review Requirements. A third way of providing standards for a permitting agency would be to require a determination that the proposed action would comply with the requirements of all applicable laws and regulations. (NEPA-style documents are supposed to discuss other environmental review and consultation requirements, but NEPA itself does not make compliance with such requirements a precondition of agency action.) Of course, making such a determination may not be easy, involving the interplay of complex legal issues and educated judgment about the likely impacts of proposed actions.[18] If a tribal permitting agency is required to do this, it must have staff that is adequate to the task, and the staff must be

[17] Model Tribal Code, §7.03.
[18] See O'Connell, 1995.

authorized to interact with the staff of other government agencies, not just tribal, but also federal, state, and local.

Permits for Specific Kinds of Resources

For a variety of reasons, a tribe may not want to establish a blanket permit requirement. For example, vesting a tribal government agency with permitting authority may run counter to a tribe's cultural values, or a tribe may lack the financial and human resources needed to administer and enforce a blanket permit requirement. If human and financial resource constraints are the main reasons for deciding against a blanket permit, a tribe might consider enacting a permit requirement of limited scope, focused on specific kinds of resources. Possible subjects for a limited scope permit include: discharges into surface waters and/or wetlands; stationary sources of air pollution; municipal solid waste landfills; archaeological resources; and the graves of ancestors.

Giving a tribal agency authority to administer a limited scope permit process could be a step toward a blanket permit process. As other subjects become priorities and as resources permit, the tribe could expand the permitting agency's mandate. An agency that issues permits for consumptive uses of water might be given authority to enforce water quality standards; an agency that issues permits for the excavation of archaeological resources might be given a mandate to review proposed actions that would affect historic properties. One drawback to this approach is that, if different agencies are given authority for different limited scope permits, it may be difficult to establish a truly comprehensive and coordinated permit process. As agencies become established in carrying out their particular assigned roles, the people who run these agencies may resist attempts to set up a different agency with authority over them.

9.3B Which Institutions of Tribal Government to Employ

For an environmental review process to be effective, one or more governmental agencies must be charged with responsibilities for carrying out the law. This may seem self-evident, but it is nevertheless a matter of critical importance. If a tribe wants to create a truly effective environmental review process, it must create a new governmental institution, add responsibilities to an existing governmental institution, or do both. Assuming that most tribes have real limits on their human and financial resources, how can a tribe do this? In this section we consider some of the options. We also discuss why a tribal legislative body should consider delegating to an agency of tribal government the

decision-making authority for environmental review of specific proposals.

Assigning Responsibilities

In enacting a TEPA, a tribal legislative body should consider how to assign responsibilities among its governmental subdivisions. At one end of the spectrum, a TEPA can make each governmental subdivision responsible for analyzing the environmental impacts of the actions that it takes. At the other end, a single agency can be charged with all of the responsibility.

Universal Responsibility: Under the federal NEPA, each federal agency has been charged with the responsibility to analyze the environmental impacts of its proposed actions and to use these analyses in making its decisions. (When agencies respond to externally initiated proposals, the applicants generally bear the cost of preparing the analyses, with the agencies being responsible for their content.) In giving every agency this mandate, Congress sought to make agencies develop the capacity to integrate environmental concerns into their planning and decision making; congressional sponsors hoped that this would push agencies toward making decisions that cause fewer adverse affects on the environment. In choosing to make all agencies responsible, Congress also chose not to set up any one agency with the power to second-guess or veto agencies' decisions (at least, not based on NEPA).[19] Congress has given EPA a mandate to comment on the EISs prepared by other federal agencies,[20] and the CEQ regulations provide that any agency with jurisdiction by law or special expertise can comment on EISs prepared by other agencies and can participate in the preparation of EISs as cooperating agencies.[21] No agency, however, has a mandate to force any other agency to fulfill its NEPA responsibilities. Rather, the principal mechanism for forcing an agency to fulfill its NEPA responsibilities has been for private parties, or nonfederal agencies, to file lawsuits in federal court. The state little NEPAs generally take a similar approach, making each state agency responsible for assessing the environmental impacts of its actions.[22]

Under universal responsibility, no one agency has supervisory authority, and this may cause compliance problems. In the Indian

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[19] The CEQ regulations do provide a rarely used process through which one agency can refer a decision that is pending before another agency and for which an EIS has been prepared to the office of the President for resolution. 40 CFR part 1504.

[20] Clean Air Act §309, 42 USC §7609.

[21] 40 CFR §§1501.6, 1503.2.

[22] Mandelker, at §12.01.

Country context, such problems might render the tribal code totally ineffective unless the tribal legislature expressly authorizes lawsuits against tribal agencies. Another drawback to the universal approach for some tribal governments, particularly smaller ones, is that it might be counterproductive to require all tribal government agencies to develop the capacity to produce environmental documents.

Centralized Responsibility. An alternative to universal responsibility is for a single agency to be charged with preparing (or overseeing contracts for the preparation of) environmental documents. If a tribal agency is given such responsibility without sufficient resources, however, its inability to produce environmental documents in a timely way may lead to a pattern of noncompliance. To avoid this problem, tribal legislation could assign responsibility to each tribal agency but also provide for the transfer of program funds to the tribal agency that can produce environmental documents (or provide for detailing of staff from the environmental agency to the program agency).

Oversight Authority. A TEPA could feature a combination of universal and centralized responsibility, in which each agency has responsibilities but one agency has oversight authority. The Model Tribal Environmental Review Code does this, by imposing responsibility on each tribal agency to prepare environmental assessments for its actions (or ensure that environmental documents are prepared for externally initiated proposals subject to its approval) and by setting up an Environmental Review Commission with authority to issue or deny permits after reviewing the environmental documents.[23]

Vermont's Act 250 is an example of universal responsibility with oversight authority. Although Vermont does not have a little NEPA, Act 250 makes a permit from the appropriate District Environmental Commission a requirement for any construction project proposed by a state agency or municipal government that involves more than ten acres.[24] Thus each such governmental subdivision must comply with the substantive and procedural requirements for obtaining a permit from a distinct governmental agency.

Different *Kinds of Agencies*

Most tribal governments conduct their business through an assortment of governmental institutions or agencies. For purposes of fashioning a TEPA, these agencies can be divided into two basic categories: **administrative agencies** and **independent regulatory agencies**. For

[23] Model Tribal Code, §§501, 5.03, 5.04, 5.05, 7.03.
[24] Vermont Statutes Annotated, Title 10, Section 6.021.

purposes of this Guidance, what distinguishes administrative agencies from independent regulatory agencies is that the head personnel of administrative agencies are more or less directly accountable to elected officials, whereas independent regulatory agencies are set up to ensure that their decisions are made free of political influence.

Administrative Agencies: Administrative agencies go by a variety of names, such as departments, divisions, and offices. In most tribal governments, as in the federal government and the states, administrative agencies are organized hierarchically, e.g., the head of a department exercises supervision over the heads of several divisions and offices. In the federal and state governments, administrative agencies are typically accountable to the executive branch of government, but in many tribes, executive and legislative functions are combined in a single governing body. A TEPA can assign responsibilities to administrative agencies using any of the three approaches outlined above: universal or centralized responsibility, or universal responsibility with one agency assigned oversight authority.

Independent Regulatory Agencies: The creation of an independent regulatory agency is a common way for a legislative body to vest an agency with decision-making authority that is protected from influence by elected officials. A legislative body might want to do this for reasons relating to fairness and due process. For example, issuing a permit for one proposal may mean denying a permit for another, and fairness suggests that the choice should not be based on factors such as which applicant has a stronger connection to elected officials. Moreover, American jurisprudence regards an unbiased decision maker to be an essential aspect of due process in adjudication by administrative agencies.[25] A tribal legislature might want to use this approach to provide neutrality for situations in which a tribal administrative agency is required to obtain a permit from another tribal agency.[26]

Typically, an independent regulatory agency consists of a board of commissioners who are appointed by the chief executive, sometimes subject to confirmation by the legislature. Commissioners are typically appointed for fixed terms of office, and the expiration dates are often staggered in order to avoid simultaneous turnover of a majority of the positions. Independent agencies are not, of course, completely free of

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[25] Davis and Pierce, 1994. Creating an independent agency is not the only way to ensure an unbiased decision maker. Another approach is for administrative agencies to use administrative law judges to render recommended decisions.

[26] EPA has expressed some concern over how to assure impartiality in such situations. E.g., 53 Fed. Reg. 37,401 (1988) (discussing regulatory independence in the context of the Safe Drinking Water Act); 56 Fed. Reg. 64,876 (1991) (discussing regulatory independence in enforcing water quality standards and permits under section 402 of the Clean Water Act).

political influence: legislative bodies can assert control by reducing their budgets or changing the laws they administer; executive branch agencies may decline to give them support in enforcing their decisions.

The Model Tribal Environmental Review Code features an independent regulatory agency, called an Environmental Review Commission (ERC), comprised of three commissioners.[27] Vermont's Act 250 features nine independent District Environmental Commissions, with Commissioners appointed by the Governor.[28] A Tribal ERC could be set up in a variety of ways. Commissioners might be appointed or elected. The heads of certain tribal departments and possibly certain elected officials might be called to serve on an ERC (although the independence of such a body might be compromised). There is no magic number of commissioners: three might be right for a small tribe, but more might be preferable for a larger tribe. If the ERC decides matters by majority vote, an odd number might be preferable, but an ERC might decide matters by consensus.

Service on the commission would entail reviewing documents and attending periodic meetings, perhaps monthly, depending on the workload. It may be possible to fund such a commission on a shoestring, if respected members of the community are willing to serve on a volunteer basis or for modest compensation. Tribal college faculty might be willing to serve. Tribal members who serve on university faculties or hold similar positions in off-reservation communities might be called. Sometimes it may be desirable to ask respected non-Native Americans to serve as commissioners or in some advisory capacity.

Layers of Responsibility and Oversight: A tribal legislature can use administrative agencies and independent regulatory agencies in a variety of combinations to create layers of responsibility and oversight authority. If the tribal legislation establishes an Environmental Review Commission (ERC) with authority to issue permits for development (as provided in the Model Tribal Environmental Review Code), any tribal administrative agency that proposes to carry out or approve a development activity would have to obtain a permit from the ERC. However, before issuing a permit, the ERC may be required to consult with various tribal agencies, and with federal and state agencies. Consultation might be required with such tribal entities as:

(a) tribal administrative agencies with expertise in natural resources, wildlife, and environmental matters;

[27] Model Tribal Code, §301.
[28] Vermont Statutes Annotated, Title 10, Section 6021.

(b) separate independent commissions that may have been given jurisdiction over matters such as cultural heritage resources and sacred places; or
(c) relevant committees of the tribal legislature.

For large reservations the ERC itself might have more than one level of review, such as by having local commissions decide most matters, with a right of appeal to a reservation- wide commission. The options are virtually limitless, and choices should be made based on a tribe's needs and priorities. If a tribal legislature chooses to assign review authority to a variety of entities, an ERC can make sure that all applicable consultations and clearances have been accomplished before a project can be carried out.

Delegating Authority

If a TEPA features an ERC, the tribal legislature must delegate enough authority to the ERC that it can carry out its responsibilities. Many tribal legislators are reluctant to delegate authority, but if a little NEPA is going to work, the tribal legislature cannot retain all authority, even if a TEPA uses administrative agencies rather than an independent regulatory agency.

Legislative Authority: Congress and the state legislatures typically delegate some of their legislative authority to administrative and independent agencies. These agencies carry out such delegations through the process known as rule-making, i.e., promulgating "rules" or "regulations" to implement statutes, adding details and clarifying ambiguities in the process. Federal agencies that engage in rule-making are subject to the Administrative Procedure Act[29] and the body of federal administrative law, and state agencies are subject to similar state laws.[30] The use of rule-making by tribal agencies is generally fairly recent and far from widespread. Some tribes have enacted their own administrative procedure acts, but such laws, where they do exist, are generally recent. Thus to use the concept of rule-making in a TEPA may require work on building the framework of tribal administrative law. This may include establishing procedures to provide for community and public involvement when a tribal agency conducts rulemaking.

Adjudicatory Authority. When agencies make decisions that affect the interests of individuals on specific grounds, they are said to engage in adjudication. To do this they must be vested with authority

[29] 5 USC §§551-570, 701-706.
[30] See generally Bonfield & Asimow, 1989.

that derives from the legislative body that created them. The term adjudication applies when an environmental agency such as an ERC issues or denies permits for development, and it also applies when such an agency considers appeals from its decisions. As with rule-making, the practice of delegating adjudicatory authority to tribal agencies is not yet widespread. As tribes become more engaged in administering environmental regulatory programs, this practice may become more widely accepted, since it offers a familiar means of providing due process for individuals whose property and liberty interests are affected by tribal government decisions.[31]

Administrative and Judicial Review

Administrative adjudication can be fair without being excessively formal.[32] One way to minimize the formality in permitting is to allow affected persons to file administrative appeals in which additional procedural protections are provided. For example, the initial permit decision may be made after the ERC has reviewed the application and has considered the application in a meeting in which tribal agency staff expressed any concerns they might have and the applicant has been able to respond. An administrative appeal might be reconsidered at a subsequent meeting after the chance to submit additional information. Another level of appeal might feature a hearing before the tribal equivalent of an administrative law judge.

9.3C Enforcing TEPA on Nontribal Lands

If a tribe elects to enforce provisions of the Act on fee land, it must be able to demonstrate the sources of its regulatory authority. In particular, if a tribe plans to impose a *permit* requirement on fee lands and hopes to withstand legal challenge, it should craft language that (a) protects tribal interests that have been recognized by Congress or (b) meets the second prong of the Montana test.[33] In writing these provisions, the tribe's board or council may want to focus on the specific tribal interests to be protected, hold hearings during the process, and otherwise create a

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[31] See Suagee and Lowndes, 1999.

[32] Davis and Pierce, at 67, suggest that courts "should acquiesce in any decision making procedure chosen by a legislature or by an agency as long as that procedure seems to represent a reasonable, good faith application of the Mathews cost-benefit test."

[33] Montana v. United States, 450 U.S. 544, 566 (1981). See sources cited in note 9, *supra*.

legislative history to support the tribe's exercise of regulatory power over fee lands.

As one tribal planner describes it, "If your tribal attorney, after close examination of the jurisdictional issues on your reservation, is still apprehensive about adopting a TEPA, consider this: *The adoption of a tribal code is not, by itself, something that will generate a lawsuit.* In many important ways, the tribe controls the keys to the court by choosing or not choosing to enforce the code. Your tribe may not want to pursue enforcement if the circumstances of the case are not favorable for the tribe, or if the tribe has no chance of winning the larger jurisdictional issue. Just because your code is not enforceable in every situation does not mean it is worthless or that your tribe should not adopt a code. Even a TEPA with little or no chance of being upheld in court can be used successfully to posture a legal position to attain concessions from developers."[34]

9.3D What to Address in TEPA Regulations

In earlier sections, we discussed the option tribes have of including detailed implementation procedures in the TEPA itself, or of developing companion regulations in a separate document. One advantage of developing companion regulations is that the TEPA can first be adopted as a relatively straightforward and uncomplicated policy statement, more readily accepted and less controversial than a complex statute. The regulations, developed later, are where the tribe conducts a more detailed analysis of tribal capacity and makes some of the more challenging decisions about how to implement TEPA.

Provisions or features that tribes may want to consider for inclusion in their TEPA regulations are listed below. Many of these provisions are discussed earlier in this Chapter, to the extent that some tribes include such provisions directly in the TEPA itself. They include:

(1) Provisions to establish that tribal permits may be conditioned or denied, or that mitigation may be required, based upon environmental impacts.

(2) Provisions authorizing the Executive Director (or equivalent) to promulgate implementing regulations designed to assure that tribal environmental documents generated under TEPA are sufficient for use or adoption by federal and state agencies with which the tribe deals.

[34] Schmanska, 1998.

(3) Provisions establishing any exceptions to TEPA that the tribe may desire.

(4) Provisions establishing that the tribe may require project proponents to bear the cost of necessary studies and preparation of necessary TEPA documents.

(5) Provisions specifying public notice and comment opportunity the tribe desires to make available.

(6) Provisions allowing the tribe to adopt, in whole or in part, existing federal or state environmental documentation otherwise sufficient to comply with the requirements of TEPA.

(7) Provisions establishing any tribal court review of tribal TEPA compliance that the tribe may desire.

THE ESSENTIALS OF TRIBAL NEPA PARTICIPATION

Chapter 1:
Know NEPA's History, Performance, and Framework

Chapter 2:
Know How and When NEPA is Triggered

Chapter 3:
Know the Environmental Assessment Process: Its Function, Form, and Limitations

Chapter 4:
Know How the EIS is Developed

Chapter 5:
Know Your Options for Involvement

Chapter 6:
Know How to Invoke Tribal Rights and Resources

Chapter 7:
Know How to Challenge a NEPA Determination

Chapter 8:
Know What a Tribal Environmental Policy Act Can Do For You

Chapter 9:
Know How to Write a Tribal Environmental Policy Act

Chapter 10:
A Model Code

Chapter 11:
Alaska Supplemental Guidance

10. MODEL TRIBAL ENVIRONMENTAL POLICY ACT

NOTE: This document is only a MODEL. Tribal legislation to regulate development and to protect the environment involves a variety of legal issues. Prior to the enactment of such legislation tribal officials should consider the issues in consultation with legal counsel. Some issues are discussed briefly in notes in this draft text; some issues are discussed in more detail in the paper that accompanies this draft text.

MODEL TRIBAL ENVIRONMENTAL POLICY ACT

SECTION 1.0 Policy and Purposes

§ 1.01 STATEMENT OF FINDINGS

The [Governing Body] of the [Name of Tribe] finds and declares that the environmental and cultural impacts of development activities within the Reservation [and other lands within the Tribe's jurisdiction] threaten the political integrity, the economic security, and the health and safety of the Tribe and its members.

> [Note: Specific findings should be included to reflect the particular situation of the Tribe. If there are fee lands within the reservation owned by non-Native Americans, the findings should expressly address this. Rather than simply stating that the tribal governing body is acting in accordance with the Montana standard, cite specific facts to show that the standard has been met.]

§ 1.02 POLICY

The [Governing Body] hereby declares that it is the policy of the [Name of Tribe] to protect the natural environment of the [reservation and region within which the reservation is located], to take affirmative action to restore and enhance environmental quality in areas that have been subject to degradation, and to ensure that no proposed development that

might cause significant environmental degradation will be permitted before the completion of a thorough environmental review in which alternatives and mitigation measures are fully considered.

> [Note: The tribal governing body might include specific language about the relationship between the tribe's culture and the natural environment of its reservation and the region in which its reservation is located. If the tribe was removed from its ancestral lands, this section might include some language expressing the tribe's continuing interests in those lands.]

§ 1.03 PURPOSES

It is the legislative purpose of the [Tribal Governing Body] to protect the land, air, water, natural resources, and environment of all lands within Reservation boundaries [and other lands over which the Tribe has jurisdiction], to encourage the economic use of Reservation lands in ways that are compatible with tribal cultural values, and to provide a mechanism through which the Tribe can establish and carry out a Tribal land-use and development policy, including:

(a) designation of the [designated Tribal planning agency] as the primary authority for planning development within all Tribal lands;

(b) designation of the Environmental Review Commission (ERC) as the primary authority for regulating land use and development in accordance with the system established in this Subtitle including the Land Use and Development Plan prepared by the [designated Tribal planning agency] and adopted by the [Tribal Governing Body];

(c) authorization of judicial review of ERC decisions to provide for prompt resolution of disputes;

(d) provision of a fair and effective means for enforcement of land-use and development regulations and orders;

(e) establishment of a system for recording land-use and development regulations and decisions so that Tribal policies established in or pursuant to this Subtitle can be carried out in an efficient and consistent manner;

(f) establishment of a system for ensuring that financial support for capital improvements, whether provided by federal agencies, private parties, the state of [_____], or the Tribe, will be used in ways that are consistent with the Tribe's land-use and development policies.

SECTION 2.0
DEFINITIONS

§ 2.01 DEFINITION OF "DEVELOPMENT"

(a) "**Development**" means the performance of any building operation, the making of any material change in the use or appearance of any structure, or the making of any material change in the use or appearance of land (including wetlands).

[Note: The tribal governing body may want to expressly exclude certain kinds of activities from the definition of "Development." For example, the building of traditional structures might be expressly excluded. The tribal governing body might also set a threshold land area, and provide that development which disturbs less than the threshold area of land will not be subject to the permit requirement established by the Code. Another issue to consider in this definition is whether it should expressly include certain kinds of actions that the Tribe is currently regulating or plans to regulate in the future, e.g., actions that cause discharges into waters, including wetlands. The definition above is probably broad enough to include such actions, but greater specificity may be desired.]

(b) "**General**" development**.** All development shall be treated as general development unless it is included within the definition of "low-impact" development below.

(c) "**Low-Impact**" development. The Commission may by rule (issued pursuant to Section 3.03 of this Subtitle) define as "low-impact" development a class of development activities which normally have little impact on the natural environment. Such definition must be adopted by unanimous vote of the Commissioners.

§ 2.02 OTHER DEFINITIONS

Many terms used in this Subtitle are defined elsewhere in this Code, and their meanings remain the same.

(a) "**Applicant**" means any person or entity that applies for a development permit pursuant to this Subtitle, including a subdivision of the Tribe or a corporation chartered by the Tribe.

(b) An **environmental assessment** (EA) is a brief document that is used by federal agencies to aid in their compliance with the National Environmental Policy Act (NEPA) (42 USC §§4321-4370a) and implementing regulations (40 CFR Parts 1500-1508) issued by the Council on Environmental Quality (CEQ). Because EAs have proven to be quite useful in federal-agency decision making and appear well-suited for the purposes of the [Tribe] set forth in Section 1.03 of this Title, the [Tribal Governing Body] has decided to use EAs in its development permitting process. NEPA requires every federal agency to consider the environmental concerns associated with its proposed actions before proceeding. In cases involving major federal actions significantly affecting the quality of the human environment, an environmental impact statement (EIS) must be prepared. An EA is typically 10 to 20 pages in length, whereas an EIS is typically 150 pages long and involves a formal process of public review and comment. The primary purpose of an EA is to determine whether a proposed action may result in significant environmental impacts; if so, an EIS is required. An additional purpose of an EA is to help in planning and making decisions. The preparation of an EA can also help achieve compliance with environmental review and consultation requirements established by federal laws other than NEPA. As defined in the CEQ regulations (40 CFR §1508.9), the content of an EA must include brief discussions of:

(1) the need for the proposed action;

(2) alternatives to the proposed action if it involves unresolved conflicts concerning alternative uses of available resources;

(3) the environmental impacts of the proposed action and alternatives; and

(4) agencies and persons consulted.

For purposes of this Title, an environmental assessment must also comply with any guidance provided by ERC for the use by applicants.

[Note: The above defined terms are just some of the key terms that require definition in the Code. Other terms should be included in the definitions as well.]

SECTION 3.0 ADMINISTRATION OF DEVELOPMENT REGULATION

§ 3.01 ESTABLISHMENT OF ENVIRONMENTAL REVIEW COMMISSION (ERC) AND GRANT OF POWER

(a) There is hereby established an Environmental Review Commission (ERC or Commission) to administer a review and permit procedure for all development activities that are proposed for any site within the Reservation [possibly including lands outside Reservation boundaries in which the Tribe has jurisdiction or recognized rights] in order to ensure that:

(1) no development activity will be carried out without a permit; and

(2) all development activities which are permitted will be carried out in accordance with all applicable Tribal and Federal environmental protection laws and regulations.

(b) The ERC shall be governed by a three-member Board of Commissioners, each of whom shall be appointed by the [Governing Body]. Each Commissioner shall serve a three-year term; however, when Commissioners are first appointed, one will be appointed to serve a three-year term, one a two-year term, and the other a one-year term. Thereafter, one Commissioner shall be appointed each year. Commissioners shall be eligible for reappointment without limitation. The Commissioners shall elect one member to serve as Chairperson.

[Note: This is only one option. Many alternatives could be imagined. For example, the commissioners might be elected. We picked the number three because we are trying to fashion a process that can be used by small tribes. For large tribes, a larger number of commissioners might be desirable. If there are many nonmember landowners within reservation boundaries, a tribe might want to consider including one or more nonmembers on the Commission or providing some other structured way for nonmembers to have input into the Commission.]

(c) The ERC shall work cooperatively with the Tribal [Tribal Governing Body] and all Tribal agencies and departments to enforce Tribal and Federal environmental laws. Until such time as ERC employs enough employees to carry out all of its responsibilities, the [designated tribal agency or department] shall provide staff support to ERC; *provided* that ERC shall conduct an independent review of all development applications in which the Tribe itself is an applicant.

(d) The ERC shall have the authority to hire employees, who shall be treated as Tribal employees and who shall be subject to Tribal Personnel Policies adopted by the [Tribal Governing Body], provided that employees of the ERC shall not be dismissed from employment except by the ERC.

(e) The ERC shall have the authority to issue rules to carry out its responsibilities under this Title of the Tribal Code [and in accordance with the Tribal Administrative Procedure Act].

§ 3.02 ORGANIZATION OF THE ERC

The Board of Commissioners of ERC is authorized to prescribe the internal organization of ERC. The Board of Commissioners shall prescribe its own decision-making processes, except to the extent that specific requirements are established in this Subtitle [and the Tribal Administrative Procedure Act]. The Board of Commissioners may establish that certain categories of decisions may be made by the Chairperson or by a single designated Commissioner and that other categories of decisions must be made by the entire Board. The Board may establish that certain categories of decisions shall require a unanimous vote of the entire Board. The Board shall provide written guidance on its decision-making processes, which shall be issued as rules pursuant to Section 3.03 of this Subtitle, in order to inform Tribal members and applicants for development permits.

§ 3.03 POWERS OF THE ERC

By the enactment of this Subtitle, the [Tribal Governing Body] delegates to the ERC all powers necessary to carry out its responsibilities under this Subtitle. These powers are derived from the powers of the [Tribal Governing Body] pursuant to [the Tribal Constitution].

[Note: The power of a tribe to enact a Code such as this is derived from inherent tribal sovereignty. The power of a tribal governing body to exercise this power on behalf of the tribe may be based on a tribal constitution. In the absence of a tribal constitution, it may be advisable to include in the Code some other explanation of the power of the tribal governing body.]

§ 3.04 RULES

The Board of Commissioners of ERC is authorized and directed to issue rules governing its procedures and supplementing the substantive law prescribed in this Subtitle. [The ERC's rules shall be developed and adopted in accordance with the Tribal Administrative Procedure Act.] At a minimum, the Board of Commissioners shall issue its rules in proposed form and request comments, and it shall hold a legislative-type hearing to assist it in developing rules. Any rules issued by the Board of Commissioners shall not take effect until 30 days after they have been provided to the [Tribal Governing Body], except that, if the Board of Commissioners finds that there is a substantial threat to public health, safety, or welfare, it may issue rules on an emergency basis which will take effect immediately. The [Tribal Governing Body/or a designated tribal department/ or the ERC staff] will make the rules available to applicants for development permits and interested persons.

[Note: If a tribe has not enacted an administrative procedure act, it should incorporate the minimal requirements specified in EPA regulations for "Rule-making by states" (including tribes treated as states). See 40 CFR Part 25.]

§ 3.05 HEARINGS

In carrying out its responsibilities, the Board of Commissioners is authorized to hold legislative hearings as part of the rule-making process, administrative hearings on permit applications, and adjudicatory hearings on alleged violations of this Subtitle. [All hearings shall be conducted in accordance with applicable provisions of the Tribal Administrative Procedure Act.] All hearings may be conducted in either the [tribal] language or the English language or both as warranted by the circumstances.

(a) **Rule-making hearings**. In developing rules, the Commission shall hold at least one hearing in which Tribal members and others who may be affected by rules issued by the Board are given the opportunity to

express their views. Notice of rule-making hearings shall be provided at least 45 days prior to the date of the hearing, and the text of the proposed rules, with explanatory materials, shall be made available to the public at least 30 days prior to the date of the hearing.

(b) **Administrative hearings**. The Commission is authorized to hold administrative hearings when it decides whether to approve an application for a development permit. In an administrative hearing, the burden is on the applicant to demonstrate to the Commission that the issuance of a permit would be consistent with the Tribe's Land Use and Development Plan. A written transcript shall not be required, but the applicant shall be entitled to a written decision. For administrative hearings, the Commission shall provide written notice to the [Tribal Governing Body] at least one week prior to the scheduled date of the hearing, which notice shall be posted in the Tribal Office and at such other places as may be specified in the Commission's rules.

(c) **Adjudicatory hearings**. The Commission shall by issuing rules establish procedures for adjudicatory hearings, as provided for in Section 8.03 of this Subtitle, to ensure that all persons whose rights and interests are adjudicated by the Commission are afforded due process of law.

[Note: If there is no tribal administrative procedure act, this section should provide more detail. The time frames specified for rule-making hearings are based on EPA regulations in 40 CFR part 25.]

§ 3.06 DEVELOPMENT ORDERS

(a) The decision of the Commission to issue a permit, to deny a permit, or to issue a permit subject to conditions shall be recorded in a brief document known as a "development order." Each development order will:

(1) briefly set forth the reason(s) in support of the Board's decision;

(2) advise the applicant of the procedure to be followed if the applicant chooses to appeal the decision;

(3) if the permit is issued subject to conditions, inform the applicant of what the conditions are;

(4) if the permit is denied, advise the applicant whether the Board would reconsider the application if certain changes were made; and

(5) advise the applicant that failure to comply with the order may be grounds for enforcement and penalties under Sections 8.02 and 8.03 of this Subtitle.

(b) A copy of each development order shall be provided to the [Tribal Governing Body]. The Commission shall take appropriate steps to inform Reservation communities regarding the orders that it issues.

§ 3.07 CONDITIONS OF PERMITS

The Commission is authorized to include in any permit issued any conditions that it considers to be appropriate to ensure that permitted development is consistent with the Tribe's Land Use and Development Plan. The Commission is also authorized to include conditions to ensure compliance with other tribal laws and with applicable federal laws and regulations.

SECTION 4.0 PERMIT REQUIREMENTS FOR DEVELOPMENT

§ 4.01 PERMITS REQUIRED FOR ALL DEVELOPMENT

No development on any lands within the jurisdiction of the Tribe shall be lawful unless the Commission has issued the developer a permit. This requirement for a permit applies to all Tribal members, all lessees and permittees of the Tribe, all lessees and permittees of Tribal members, the Tribe, or any agency thereof, and any other person who performs development activities on lands within the jurisdiction of the Tribe.

[Note: If a tribe has rights on lands outside of reservation boundaries, the code might include specific language to cover development by tribal members on such lands.]

§ 4.02 PROCEDURE FOR LOW-IMPACT DEVELOPMENT PERMITS

(a) Any person proposing to perform low-impact development activities shall submit an application to ERC using such forms as ERC

shall prescribe and shall include all supporting information required by ERC. The application shall include a signed statement that:

(1) the applicant believes that the proposed development is "low-impact" development as defined in ERC's regulations; and

(2) the applicant will comply with any conditions that ERC decides to include in a development permit.

(b) ERC shall issue written guidance for applicants, and ERC's staff and/or staff of [a designated tribal agency or department] may provide assistance to applicants.

(c) Applications for low-impact development permits will be acted upon by ERC as provided in Section 7.01 of this Subtitle. If ERC's staff determines that proposed development covered by an application for a low-impact development permit cannot be properly treated as low-impact development, the staff shall advise the applicant to file for a general development permit pursuant to Section 4.03 of this Subtitle.

§ 4.03 PROCEDURE FOR GENERAL DEVELOPMENT PERMITS

(a) Any person proposing to perform general development activities shall submit an application to ERC using such forms as the ERC shall prescribe in its regulations. The application shall include:

(1) a brief description of the proposed development;

(2) if the applicant is other than the [Tribal Governing Body] or a Tribal agency or department, and the proposed development would be located entirely or partially on Native American trust or restricted lands, a certification by the [designated tribal agency or Bureau of Indian Affairs] that the applicant either possesses or has applied for the requisite property interest in the trust or restricted land to proceed with the development should a permit be issued;

(3) a draft environmental assessment (EA) in accordance with Section 5.05 of this Subtitle unless a categorical exclusion applies; and

(4) all supporting information required by ERC.

(b) ERC shall issue written guidance for applicants, and ERC's staff and/or staff of [a designated tribal agency or department] may provide assistance to applicants.

(c) ERC's staff will screen each application to determine if it is complete enough to be accepted and processed. The staff may require the applicant to revise or supplement an application, or may accept a substantially complete application and perform whatever actions are necessary to complete it.

§ 4.04 PROCEDURE WHEN THE [TRIBAL GOVERNING BODY] OR A TRIBAL AGENCY OR DEPARTMENT IS THE APPLICANT

When the [Tribal Governing Body] or a Tribal agency or department is the applicant for a development permit (either low-impact or general), ERC's staff may cooperate with and assist other tribal staff and officials in preparing the necessary application; *provided* that, in order to ensure against improper political influence in decisions made by ERC on such tribal applications, the issuance of a permit by ERC must comply with the additional requirements provided in Section 7.03 of this Subtitle.

§ 4.05 ENVIRONMENTAL ASSESSMENTS (EAS)

(a) **EA normally required**. An environmental assessment (EA) is required for all applications for permits for proposed general development, except:

(1) An EA is not required if ERC staff determines that the environmental impacts of the proposed development are adequately addressed in an earlier EA or an environmental impact statement (EIS). In such cases, a copy of the earlier EA or EIS will be used by ERC in deciding whether or not to issue the permit.

(2) The proposed development is included within a category of development which has been excluded, through rules issued by ERC pursuant to paragraph (d) of this section, from the requirement to prepare an EA.

(b) **Responsibility for preparation of the EA**. The applicant is normally responsible for preparing the EA. If the applicant is the [Tribal

Governing Body] or a Tribal agency or department, and the proposed development involves a joint venture with any other party, responsibility for preparation of the EA may be decided by agreement between the joint venture partners.

(c) **Review by ERC**. ERC's staff will review each EA to determine its adequacy. The applicant may submit a draft EA for review before submitting the permit application or may submit a completed EA and permit application at the same time. The staff may require additional information or analyses or consultation with appropriate federal, tribal or state agencies. If an EA is almost adequate but lacking in some minor way, the staff may accept the EA without requiring revisions; *provided* that the staff shall advise the Chairperson of ERC in writing of the nature of any inadequacies in the EA.

(d) **Categorical exclusions**. ERC is authorized to exclude certain categories of development from the requirement for an EA if it is determined that such categories of development do not result in significant environmental impacts and are not subject to any environmental review and consultation requirements established by federal laws or regulations or by Tribal laws other than this Subtitle. Such "categorical exclusions" may be established by ERC only through rules issued pursuant to Section 3.03 of this Subtitle; *provided* that if any such categorical exclusions are so established, ERC shall establish a procedure for identifying any specific development included within such an exclusion that may nevertheless have a significant impact on the environment, and, in any such case, ERC will retain authority to order the applicant to prepare an EA.

§ 4.06 OTHER ENVIRONMENTAL REVIEW AND CONSULTATION REQUIREMENTS

The EA prepared for each permit application shall identify any environmental review and consultation requirements established by Tribal laws and regulations other than this Subtitle or by federal laws and regulations. If an EA discusses alternatives to the proposed development, the EA shall indicate whether an environmental review or consultation requirement applies to all alternatives considered or only to certain alternative(s). If any environmental review and/or consultation requirements apply to the proposed development, the EA shall document steps taken to achieve compliance. Normally, compliance should be achieved before the application for the development permit is submitted

under this Subtitle. If compliance has not been achieved at the time the development permit application is submitted, the application shall state a target date by which the applicant expects to have achieved compliance.

§ 4.07 REQUIREMENTS FOR AREAS OF SPECIAL TRIBAL CONCERN

If the applicant is proposing to conduct development activities within an Area of Special Tribal Concern designated pursuant to Section 4.07 of this Subtitle, the EA shall include a discussion of alternative locations or an explanation of why alternative locations are not practicable. In addition, a permit authorizing development within an Area of Special Tribal Concern may be issued only after compliance with the procedural requirements provided in Section 7.05 of this Subtitle.

§ 4.08 REVIEW OF PERMIT APPLICATIONS BY ERC STAFF

(a) ERC staff shall review each application for a development permit and shall prepare a staff report containing findings on the following:

(1) Whether the proposed development is consistent with the Tribe's Land Use and Development Plan.

(2) Whether the EA adequately discusses the environmental impacts of the proposed development and alternatives.

(3) Whether the EA identifies all applicable environmental review and consultation requirements established by Tribal laws and regulations other than this Subtitle and by Federal laws and regulations, and whether compliance with such requirements has been accomplished or is likely to be accomplished in the near future.

(4) Whether, in the judgment of the staff, the proposed development may or will result in significant environmental impacts. If the staff reaches such a conclusion, the staff report will indicate whether any of the alternatives considered in the EA would avoid such significant environmental impacts.

(5) Whether, if ERC issues a permit as requested, any conditions should be included in the permit in order to insure that the development will: (a) be consistent with

the Tribe's Land Use and Development Plan; (b) comply with any applicable other environmental review and consultation requirements; and (c) adequately mitigate any adverse environmental impacts that may result from the development. If the staff recommends that conditions be included in a permit, the staff report will include recommended conditions.

(b) The staff report shall be submitted to the Commission for action in accordance with part 7 of this Subtitle.

§ 4.09 Filing Fees and Service Charges

The Commission is authorized to charge applicants filing fees for the costs associated with processing their applications and to assess service charges for the costs of helping applicants to complete their applications, including their EAs. The Commission is also authorized to establish procedures through which filing fees and service charges may be waived. Prior to assessing any filing fees or service charges, the Commission shall establish a policy on fees, charges, and waivers through rules pursuant to Section 3.03 of this Subtitle.

SECTION 5.0 Coordination with Federal Environmental Laws

§ 5.01 Policy of Tribe regarding Treatment as a "State" by the U.S. Environmental Protection Agency

Certain federal environmental laws authorize the U.S. Environmental Protection Agency (EPA) to treat Native American tribes as "states" for certain purposes. The Commission is directed to submit a report to the [Tribal Governing Body] on an annual basis providing recommendations on whether the Tribe should seek treatment as a state under one or more federal statutes, and which purposes and programs under the federal statutes should be the Tribe's priorities.

§ 5.02 ERC to Issue Interim Guidance on Compliance with Federal Environmental Laws

Until the EPA designates the Tribe a "state" for purposes of federal environmental laws, ERC shall issue written guidance to assist applicants for Tribal development permits to identify and achieve compliance with

any requirements of federal environmental laws that may be applicable to proposed development. Such guidance need not be issued through the rule-making process.

PART 6.0 ISSUANCE OF PERMITS AND ORDERS BY ERC

§ 6.01 "LOW-IMPACT" DEVELOPMENT PERMITS

The Chairman of the Commissioners is authorized to issue permits for "low-impact" development. The Chairman may delegate this authority to either or both of the other Commissioners. No administrative hearing shall be required for action on such permits The Commission shall post notice of the issuance of any low-impact permit within one week after the date of issuance. Such notice shall be posted in the [Tribal Office] and at such other locations as the Commission shall specify in its rules.

§ 6.02 GENERAL DEVELOPMENT PERMITS

(a) **Administrative hearing normally required**. Applications for general development permits shall normally be reviewed by the Commission in an administrative hearing. This shall be an informal hearing in which the applicant will describe the proposed development, explain how it would be consistent with the Tribe's Land Use and Development Plan, describe actions taken to insure compliance with any other environmental review and consultation requirements established by Tribal or federal law, and respond to questions from the Commissioners. ERC's staff shall also make an oral presentation to the Board. The [Tribal Governing Body]'s staff may make an oral presentation, whether or not the [Tribal Governing Body] or any Tribal agency or department is an applicant or is associated with the applicant.

(b) **Exceptions to the hearing requirement**. The Commission may, through the issuance of rules, establish certain kinds of development permit applications on which the Commission may take action without first holding an administrative hearing. Such exceptions might include applications which are excluded from the requirement to prepare an EA, either by categorical exclusion or because the environmental impacts are sufficiently covered in an earlier EA or EIS. In any such case, if the Commission denies a permit without holding a

hearing, the applicant may request that a hearing be held and the Commission shall do so.

§ 6.03 ADDITIONAL REQUIREMENTS WHEN THE [TRIBAL GOVERNING BODY] OR A TRIBAL AGENCY OR DEPARTMENT IS THE APPLICANT

(a) When the [Tribal Governing Body] or a Tribal agency or department is the applicant, the Commission shall independently determine whether:

(1) the proposed development would be consistent with the Tribe's Land Use and Development Plan,

(2) the environmental assessment is adequate, and

(3) the proposed development may have significant environmental impacts.

(b) In order to help make such an independent determination, the Commissioners shall question ERC staff on these points, but this questioning need not take place during the administrative hearing.

(c) The development order issued in any such case will include a statement that the Commission has independently made the determinations listed in paragraph (a) of this Section.

§ 6.04 ADDITIONAL REQUIREMENT FOR AREAS OF SPECIAL TRIBAL CONCERN

Any application that proposes development within any Area of Special Tribal Concern must be presented to the [Governing Body] for ultimate resolution. In any such case, the [Tribal Governing Body] and the Commission shall both present their views on the proposed development in a meeting of the [Governing Body] called to consider such proposed development.

§ 6.05 ISSUANCE OF DEVELOPMENT ORDERS

The decision of the Commission on any application for development (low-impact as well as general) shall be recorded in a development order, as described in Section 3.05 of this Subtitle. In the case of an application for which an administrative hearing has been held, the development

order shall be issued no later than thirty days after the close of the hearing. A copy of the development order shall be provided to the applicant and to the [Tribal Governing Body].

§ 6.06 DETERMINATION THAT AN ENVIRONMENTAL IMPACT STATEMENT (EIS) WILL BE REQUIRED FOR PROPOSED DEVELOPMENT

In certain cases, the Commission may determine that the environmental assessment submitted with an application for development will not support a conclusion that the proposed development will not result in significant environmental impacts. In such a case, if an action by a federal agency (such as the Bureau of Indian Affairs) would be required for such proposed development to be permitted, an environmental impact statement (EIS) may be required. In any such case, the Commission shall suspend consideration of the permit application and inform the applicant that an EIS will be required for the proposed development. In any such case, the applicant may revise the proposed development to avoid significant environmental impacts or may resubmit the application after an EIS has been prepared in accordance with federal regulations.

> [Note: A tribe might consider establishing an intermediate level of environmental review – something between an environmental assessment and an environmental impact statement – to cover situations in which an EA leaves the Commission (or the Commission's staff) with unresolved concerns about a development proposal and/or situations in which community and public review would be desirable. If an EIS is required for a federal action, however, adding an intermediate level of review under tribal law might make the review process take longer. To avoid this, a tribal law might provide that the intermediate level could be skipped.]

§ 6.07 PROCEDURE WHEN AN EIS IS REQUIRED

When an EIS is required, the applicable procedure is specified in the federal regulations issued by Council on Environmental Quality (40 CFR Parts 1500-1508). If the [Tribal Governing Body] or a Tribal agency or department is the applicant, or is associated with the applicant, the [Tribal Governing Body] may direct an appropriate Tribal agency or department to participate in the preparation of the EIS as a cooperating agency.

PART 7.0 ENFORCEMENT AND JUDICIAL REVIEW

§ 7.01 INVESTIGATIONS

The Commission is authorized to investigate compliance with development orders that it has issued and to investigate activities that are being carried out without a permit in possible violation of this Subtitle. As part of an investigation, the Commission's staff may serve any person with a letter of inquiry, which shall inform the person to whom it is addressed that answers must be provided to the Commission within 60 days and that failure to respond may result in the imposition of civil penalties.

§ 7.02 NOTICE OF VIOLATION; CEASE AND DESIST ORDER

If the Commission's staff has reason to believe that a violation of this Subtitle has occurred or will probably occur in the near future, the staff shall so advise the Chairperson of the Commission. Given an apparent violation of this subtitle, the Chairperson is authorized to issue a Notice of Violation to the person(s) apparently responsible for the violation, and, if the apparent violation occurred on property owned by a person other than the alleged violator, a Notice of Violation shall also be issued to the landowner. If there is a continuing violation or a threatened violation, the Chairperson is authorized to issue a Cease and Desist Order to prevent the violation from continuing or occurring. Failure to comply with a Cease and Desist Order shall constitute a violation of this Subtitle. Both a Notice of Violation and a Cease and Desist Order may be issued for a single incident. A Notice of Violation will include a Summons to appear before the Commission at an enforcement hearing at a specified time and date, and shall advise the alleged violator that failure to appear may result in the imposition of civil penalties. If a Cease and Desist Order is issued without an accompanying Notice of Violation, the Order shall inform the recipient that failure to comply with the Order will constitute a violation of this Subtitle, which will result in the issuance of a Notice of Violation, and may result in the imposition of civil penalties.

§ 7.03 ENFORCEMENT HEARINGS

The Commission is authorized to conduct adjudicatory hearings to determine if a violation of this Subtitle has occurred. [Such hearings

shall be conducted in accordance with the Tribal Administrative Procedure Act/ or (if there is no tribal APA or if the tribal APA does not establish procedures for such hearings) in accordance with rules issued by the Commission pursuant to Section 3.04 of this Subtitle.] In such a hearing, the Tribal Attorney General [or other designated official or agency], in cooperation with the Commission's staff, shall present the case to the Commission to establish that the person(s) charged has (have) committed a violation of this Subtitle. Any person so charged shall be entitled, at his or her own expense, to represented by an attorney.

(a) **Burden of Proof**. The Tribal Attorney General [or other designated official or agency] shall have the burden of proving that a violation of this Subtitle has occurred and that a person charged was responsible for the violation. The Commission shall rule that a violation of this Subtitle has occurred if it finds that the charges are supported by substantial evidence and that preponderance of the credible evidence supports a finding that a violation has occurred.

(b) **Enforcement Orders**. Within thirty (30) days after the date of any enforcement hearing, the Commission shall issue a written decision. If the Commission determines that a violation has occurred and that the person(s) charged was (were) responsible for the violation, the Commission's decision shall include an Enforcement Order.

(c) **Civil Penalties and Corrective Action**. An Enforcement Order shall direct any person(s) found to have committed a violation of this Subtitle to take whatever corrective action the Commission deems appropriate under the circumstances. An Enforcement Order may impose civil penalties in accordance with a schedules of civil penalties prescribed in the Commission's rules. Alternatively, an Enforcement Order may impose civil penalties if a person found to have committed a violation does not take corrective action in accordance with the Order within a prescribed time frame. If a person who has been found to have committed a violation does not take corrective action within the prescribed time frame, an appropriate department or agency of the Tribal government may take the necessary corrective action, in which case, the amount of any civil penalty shall be increased by twice the amount of the cost incurred by the tribal department or agency in taking the corrective action.

> [Note: If there is no tribal administrative procedure act or if the tribal APA does not establish procedures for such hearings, this section, or another section of the Subtitle, should establish minimum requirements for the Commission's rules in order to

ensure that the Commission provides due process for all persons who are subject to its rulings.]

§ 7.04 SPECIAL PROVISIONS FOR TRIBAL DEPARTMENTS AND AGENCIES

In any case in which the [Tribal Governing Body] or any Tribal agency or department is alleged to have violated the terms and conditions of a development order, or to have conducted development activity without a permit, the Chairperson of the Commission shall bring the matter to the attention of the [Chief Executive Officer of the Tribal Governing Body], who shall consider taking action to ensure compliance with this Subtitle. If the matter cannot be resolved informally, the Commission shall conduct an enforcement hearing to make factual determinations and to issue a decision recommending a course of corrective action if necessary.

[Note: The tribal governing body should consider whether to make its agencies and departments subject to enforcement orders and civil penalties assessed by the Commission. The above draft language limits the Commission's authority to making factual determinations and recommendations.]

§ 7.05 JUDICIAL REVIEW

Any person who is aggrieved by the issuance or denial of a development permit, or who is the subject of an Enforcement Order, may file an appeal in Tribal Court, in accordance with the rules of the Court. The Court is authorized to hear such appeals but shall not set aside an order of the Commission unless the Court finds that the Commission's order: (a) is not supported by substantial evidence; (b) was issued without compliance with the requirements of this Subtitle or the Commission's rules; or (c) is arbitrary and capricious.

[Note: A tribal governing body may want to consider including a citizen-suit provision like that in most federal environmental statutes to authorize citizens to enforce the Code. The language above authorizes any "aggrieved" person to appeal the issuance or denial of a development permit. If the above language is used, the term "aggrieved" should be defined.]

OPTIONAL SECTIONS FOR INCLUSION:

SECTION 8.0 LAND USE AND DEVELOPMENT PLANNING

§ 8.01 LAND USE AND DEVELOPMENT PLAN

(a) The [Tribal Governing Body] shall cause to be prepared (or updated) a Tribal Land Use and Development Plan for all lands under the Tribe's jurisdiction. The [tribal agency or department] is charged with lead responsibility for the preparation of this plan. The staff of ERC shall assist the staff of the [designated tribal agency or department] in the preparation of this Plan, as well as in the preparation of any planning studies that may be conducted.

(b) The content of the Plan shall include:

(1) the Tribe's objectives, policies, and standards to guide Tribal and private development within Tribal Lands over the long term; and

(2) the Tribe's short-term program (one year to five years) of Tribal actions to achieve the long-term objectives of the Plan.

§ 8.02 ADOPTION OF LAND USE AND DEVELOPMENT PLAN

(a) The [Tribal Governing Body] shall direct the ERC to hold a legislative-type hearing on the Tribal Land Use and Development Plan, during which the Plan will be explained to Tribal members and their views shall be sought.

(b) Following the hearing, the [Tribal Governing Body] and the ERC shall jointly meet to consider the Plan in light of comments expressed by Tribal members and shall attempt to reach a consensus on the specific content of the Plan.

(c) If the [Tribal Governing Body] and the ERC succeed in reaching consensus, the Plan shall be formally adopted by resolution of the [Tribal Governing Body] pursuant to its powers under [the Tribal Constitution].

(d) If the [Tribal Governing Body] and the ERC fail to reach consensus, the [Tribal Governing Body] shall direct the [designated tribal agency or department] to prepare a final Tribal Land Use and Development Plan, in accordance with instructions of the [Tribal Governing Body]. The [designated tribal agency or department] shall present the Plan to the tribal membership and the concerned public at a special meeting of the [Tribal Governing Body] called for the purpose of reviewing and adopting a Land Use and Development Plan. The ERC is authorized but not required to present an alternative to the [designated tribal agency's] Plan. After providing opportunity for comment from the tribal membership and the public, the [Tribal Governing Body] shall have the sole authority to adopt a Tribal Land Use and Development Plan.

§ 8.03 ANNUAL LAND USE AND DEVELOPMENT REPORTS

(a) The Commission shall submit annual reports to the [Tribal Governing Body] regarding land use and development on lands within the Tribe's jurisdiction. These annual reports shall briefly summarize:

(1) Progress that has been made toward the accomplishment of the short-term program and long-term objectives;

(2) Major problems that have arisen or that remain unresolved;

(3) Any changes in the assumptions or information on which the Tribe's Land Use and Development Plan was based; and

(4) Any recommendations for changes in the Tribe's Land Use and Development Plan.

(b) The [Tribal Governing Body] will consider the Commission's Annual Report and take action as may be appropriate. Action by the [Tribal Governing Body] may include adopting, by resolution, changes in the Land Use and Development Plan or directing the Commission to hold a legislative-type hearing to seek the views of Tribal members and the public on any proposed changes.

§ 8.04 DESIGNATION OF AREAS OF SPECIAL TRIBAL CONCERN

The Land Use and Development Plan may include the designation of Areas of Special Tribal Concern in order to provide added protection for important tribal interests. The [Tribal Governing Body] may designate such areas for a variety of reasons, including their importance for religious or cultural practices, wildlife habitat, or sources of water supply. If there is a need to maintain confidentiality of the precise location of any such areas, their location need not be shown on maps that are incorporated into the Land Use and Development Plan, *provided* that the [Tribal Governing Body] and the Commission may establish some confidential means of recording the locational information. Any development that is proposed within an Area of Special Tribal Concern is subject to additional review requirements prescribed in section 704 of this Subtitle.

THE ESSENTIALS OF TRIBAL NEPA PARTICIPATION
Chapter 1: Know NEPA's History, Performance, and Framework
Chapter 2: Know How and When NEPA is Triggered
Chapter 3: Know the Environmental Assessment Process: Its Function, Form, and Limitations
Chapter 4: Know How the EIS is Developed
Chapter 5: Know Your Options for Involvement
Chapter 6: Know How to Invoke Tribal Rights and Resources
Chapter 7: Know How to Challenge a NEPA Determination
Chapter 8: Know What a Tribal Environmental Policy Act Can Do For You
Chapter 9: Know How to Write a Tribal Environmental Policy Act
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11. Alaska Supplemental Guidance

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"When undertaking developmental or other activities of any nature, planners and decision-makers must not simply view the Arctic as an exploitable frontier ... Northern development must refer to more than economic growth. It must allow for and facilitate spiritual, social, and cultural development."

Inuit Circumpolar Conference

11.1 Introduction

11.1A Why an Alaska Supplement?

This supplemental guidance focuses very directly on some of the key issues and unique circumstances facing Alaska Native peoples. Although each tribe throughout the country is a unique government, Alaska tribes share a distinctive ecological, social, and cultural landscape with major implications for their involvement in environmental assessment and decision making. For this reason, and because Alaska tribes comprise nearly half of all tribes nationally, we have chosen to highlight some of these differences, and some potential strategies to address them. Our goal is to ensure that this NEPA and TEPA guidance is both responsive and directly relevant to Alaska tribes. It is not intended to be used as a replacement for, but rather as an addition to, the main guidance document.

11.1B What Is At Stake for Alaska Tribes?

> I am very concerned about the long-term economic impact of oil and gas development upon our Arctic community. We are riding the crest of a high economic wave, and I fear about where it will deposit us, and how hard we will la
>
> - Ebe r of Barrow, 1976

Alaska is immensely rich in natural resources. The major commercial interest in Alaska's abundant renewable and non-renewable resources, especially in oil and gas and other mineral reserves, ensures a steady stream of development proposals in the state. Coupled with the very large federal land base (approximately 60 percent of all lands in the state) and associated federal activities and responsibilities, the National Environmental Policy Act (NEPA) is frequently triggered in Alaska. Most actions subject to NEPA occur in rural parts of the state. It would be difficult to conceive of a NEPA project in Alaska that would not affect at least one of the many tribes scattered across the state.

Although many projects are proposed for remote areas of the state, the debate over disposition of the lands often becomes of statewide and national interest. State government, federal military interests, national and multi-national industries, national conservation organizations, and other entities with a major stake in the use of public

lands become powerful and influential players in the NEPA landscape. To many rural tribes in the state, entering into the clamor of this national debate can be both intimidating and seemingly futile.

Still, many proposed activities that fall under NEPA could adversely affect Alaska Native communities, sometimes irreversibly. Since most of the development in Alaska is in rural areas, Alaska Natives are among the most direct recipients of its impacts. Indeed, given their dependence on hunting, fishing, and gathering for subsistence, Alaska tribes are likely to experience very real impacts from rural development on their culture and livelihood.

Although Alaska Native residents may be the most directly affected by NEPA outcomes, they may be the least able to influence the NEPA process.

Although Alaska Native residents may be the most directly affected by NEPA outcomes, they may be the least able to influence the NEPA process. Handicapped by lack of technical expertise and staff, funds, limits on jurisdiction, language barriers, and physical isolation from the process, effectively engaging in the NEPA process presents a tremendous challenge. The time and energy that is likely to be required on the part of tribes to become meaningfully involved in NEPA will be costly to tribes with limited staff and resources. The alternative of not becoming involved in environmental assessment, however, could come at a far greater cost to tribes whose culture and livelihood are at stake. In this supplement, we will explore the challenges faced specifically by Alaska tribes, as well as practical and legal avenues that may help tribes to overcome them.

11.1C How the Alaska Supplemental Guidance is Organized

During the past two years, we have interviewed many tribal leaders across Alaska, and reviewed several case studies in an effort to better understand the unique circumstances faced by Alaska tribes in the protection of their resources and environment. In this supplement, we will summarize these findings, and tailor our recommendations accordingly. The guidance is presented as follows:

- **Section 11.2: Characterization of Alaska Native Tribes' Participation in NEPA**

This section characterizes Alaska tribes' involvement in NEPA, and summarizes any obstacles to an effective tribal role in this federal environmental assessment process. This summary is based largely on the more than thirty interviews conducted with tribal leaders across Alaska during the spring of 1998.

- **Section 11.3: Overcoming NEPA's Obstacles**

  Based on the interviews and case studies, this section addresses the specific problems and obstacles cited by tribal leaders in Alaska, and suggests potential tools to help overcome them.

- **Section 11.4: A Tribal "mini-NEPA" and its potential application in Alaska**

  This section explores the potential use by Alaska tribes of a "Tribal Environmental Policy Act" or "TEPA." Although this type of tribal environmental code has already been demonstrated to be useful within the border of several reservations in the "lower 48" states, its use in a "conventional" way in Alaska may be more limited. The guidance suggests some of the ways a TEPA may be usefully applied in Alaska, in both a conventional and a nonconventional manner.

11.2 Alaska Native Villages Discuss NEPA's Challenges and Opportunities

11.2A Tribal Survey of NEPA in Alaska

During the spring of 1998, interviews with more than thirty individuals in Alaska were conducted. Because the focus of this national project is on "Tribes" and the tribal government unit, participants in the interviews were mostly representatives of tribal governments and tribal staff persons. However, in order to better understand the complexity and diversity of issues, representatives from Alaska Native interest groups, non-profits and corporations, environmental groups, and federal agencies conducting NEPA activities in Alaska were also included. All individuals who were interviewed volunteered to participate during a Bureau of Indian Affairs Service Provider's Conference in Anchorage in 1997, or were recommended by their peers as having some first-hand knowledge of and experience with NEPA. Hence, those interviewed were not a random sample of tribal representatives, but were deliberately

chosen because of their prior experience and interest in NEPA, enabling us to get the most information possible in a relatively short period of time.

Interviews were conducted by two Native American students of Harvard University's Native American Program, a partner in this national tribal project. Most interviews were conducted by telephone. A list of those interviewed and willing to disclose their names is found in Appendix E. The purpose of the interviews was to characterize participation by Alaska Tribes in the federal environmental review process under NEPA. A standardized set of questions was presented to all respondents to ensure completeness and consistency. During the course of the interviews, respondents were asked to describe their experiences with NEPA from both a practical and a policy perspective. A comprehensive analysis of the survey results can be obtained directly from the Harvard University Native American Program.[1]

First and foremost is the obstacle of tribal awareness of what NEPA is, how it works, and how and when to participate.

Because we spoke with individuals who, for the most part, had prior experience in the NEPA process, the issues raised are indicative of results of participation once a tribe has engaged in the process. However, we know that fundamental barriers to becoming engaged in NEPA, such as awareness of NEPA actions in an area of a tribe's interest, and need for a basic understanding of NEPA law and how to participate, may have prevented many tribes in Alaska from ever having been involved in the NEPA process. In presenting the observations below, we acknowledge that the first and foremost obstacle is lack of tribal awareness of what NEPA is, how it works, and how and when to participate.

Although there was a diversity of opinions expressed on many NEPA issues, our intent is to shed light on the common themes and predominant opinions raised by those interviewed. The following sections outline what those interviewed commonly expressed as opportunities or successes they have had as a result of NEPA, as well as the problems or obstacles that have impeded their involvement and effectiveness. These observations form the basis for the recommendations in Section 11.3, "Overcoming NEPA's Obstacles," – intended as tribal guidance for the NEPA process that addresses the specific issues faced by Alaska Native peoples.

[1] Barrow and Balkissoon, 1998.

11.2B Obstacles to Tribal Participation in NEPA

Tribes in Alaska as a whole did feel that NEPA offered certain benefits, although they spoke predominantly of their frustration with the law and the way in which it was being implemented by federal agencies. Highlighted below are the key obstacles cited by tribal representatives interviewed to their participation in the NEPA process. Quotes from survey participants are integrated to further describe the issue and context in the respondent's own words. Although these observations resembled the findings from a similar survey in the lower 48 states,[2] several issues emerged as uniquely "Alaskan."

#1: Tribes lack the technical expertise and time necessary to participate effectively in NEPA.

To participate in the NEPA process, tribes are required to make major resource commitments. Integral to successful participation is adequate staff time and technical expertise. The federal agencies, because of their larger budgets, are able to hire technical experts to conduct NEPA related activities. In response, the tribes often feel it necessary to use specialists mirroring those used by federal agencies. The wide range of proposed land uses that trigger NEPA require that tribes have access to a wide range of specialists.

Tribal staff are called upon to fill many roles. No specific employee is tasked with organizing, facilitating, and producing NEPA documents. Not many people in the community will actually read a 300-page EIS or EA. Interviewees referred often to the "technical jargon" contained in NEPA documents, and spoke to the need for an abbreviated version in "plain English." Community members may have input during initial fact-finding, but not many community members ever see or evaluate the results of these detailed studies and public scoping efforts.

- *"You want a NEPA lawyer if you deal with NEPA."*
- *"It is difficult to prioritize NEPA issues relative to all other information received by tribal leaders. The tribes must deal with many federal agencies at once."*
- *"The staff deals with so many different issues".*
- *"MMS wants oil and gas lease sales twelve miles off the coast. We don't have the technical people to fight."*

[2] Mittelstaedt *et al.,* 1997.

- *"The microwaves are blasted into the atmosphere at a satellite at a million watts. They bounce back to a source. They might be dangerous to animals and people…All the physicists want to do it. We don't have any astrophysicists so we can't sue. We have no legal grounds."(Discussing a proposed military satellite project in interior Alaska.)*
- *"It is difficult for Masters Degree people to read an EIS. Imagine how difficult it must be for people without these degrees. The EIS should be in plain English."*
- *"There is no clearinghouse to sort out important information and prioritize data."*
- *"NEPA is a good tool but you need to be an expert to get the most out of it."*
- *"I do not know but I suspect that most of the specialized requirements of an EA (endangered species, water quality, archaeology, etc.) are usually evaluated by specialized scientists and their input is probably given much more consideration than the more general concerns of village residents, which are frequently not couched in technical terminology."*
- *"Too much work and not enough people. Some tribes with money contract out the work. Small tribes with low budgets contract out to review EIS. Funding is difficult. To deal with lack of funds we meet with other tribes and try to share information. We try and specialize on specific issues."*

#2: Internal tension often exists within communities between village corporations, municipal governments, and the more traditional IRA tribal councils with competing missions and agendas.

Some 70 Alaska Native villages used the provisions of the Indian Reorganization Act (IRA) to reorganize their governments in the 1930s. These governments adopted constitutions and function much like many of the Indian Nations in the lower 48 states. Many of the villages are also incorporated under Alaska law as first- or second-class cities. Most of the city governments were incorporated to obtain state services and funds in the early 1970s. These governments often continue to share authority with the IRA councils, though the power distribution between them varies from village to village. In many cases, there is an overlap in both the membership and mandates of these two entities. The relationships can be very complex, and in some cases local government bodies are in

competition[3]. Add to this tension regional and village-level for-profit Native corporations, and the political landscape of a community becomes even more complex. In the context of NEPA and village participation, one or the other viewpoint is often overlooked or misrepresented in NEPA, and a stronger, more unified tribal or community position is less likely to emerge.

- *"There are two faces of the village communities. The village corporations focus on economic development and the other folks want to live by fishing and hunting and honor the ocean both physically and spiritually. Both honor traditional subsistence practices but the contradiction reflects the complexity."*
- *"There is no single native voice. There are many faces -- everyone has a right to it."*
- *"The Native Corporation focuses on the benefits of the shareholder and getting work."*
- *"Traditional tribal concerns are being overlooked by many of the tribal corporations. There is a distinct separation of agendas between the tribal governments and the recognized corporations."*
- *"It is difficult to balance between providing jobs, contracts and other economic benefits, including a tax-base, while protecting subsistence and cultural affairs."*

#3: Inconsistent or late notice to tribes of the NEPA process and confusion over the appropriate point of tribal contact.

NEPA notification was most often via public notice in the newspaper or by word of mouth. Many respondents received notification by mail. However, in some cases notification arrived too late. Confusion exists about who is the most appropriate political entity to contact, which diminishes the ability of tribes to participate early and effectively in the NEPA process. This problem is summarized below:

> The responsibilities, relationships, and powers of various governing groups in Native communities across the state vary greatly and, in some cases, shift dramatically over short periods of time. Information about such shifts is seldom given wide dissemination outside a community and is frequently not documented in state or regional publications. Consequently, nonresidents and outside agencies

[3] "Village Alaska," 1996.

wishing to have effective relationships with local governments in Native communities must maintain continuous contact and face-to-face communication to understand community functioning and the changes which occur in the community government structure.[4]

- *"Some [agencies] actively attempt to get input from affected communities. Others feel that if a community doesn't respond there is no concern."*
- *"Time is provided (for commenting) but agencies do not make an effort to inform tribes; usually tribes find out about the process too late."*
- *"The public hearing was not advertised. Ultimately, some individual letters were mailed to local tribal members but it listed the wrong location for the public hearing. At the last minute they were advised to have some local tribal members attend who could speak to direct impact ---- but most of these people are rural and were unable to make the meeting on short notice. The meeting was held during business hours which prevented a lot of people from coming also."*
- *"A meeting with minimal attendance does not indicate no interests or problems, it indicates the public meeting failed."*
- *"The agencies need to contact the tribes early. The agencies should contact the tribes in addition to contacting the City Council."*
- *"Realistically, it is the regional corporations that comment on NEPA issues; as noted, however, we (tribes) are, more often than not, ignored in that process."*
- *"A tribal ombudsman is needed – someone with the ability to report to the Council on Environmental Quality as an information funnel. Someone who can look at all actions and keep a chronology or booklet of all projects in the pipeline to give tribes a heads up so they won't have to watch the federal register."*

#4: Perception that oral comments are given less weight in influencing NEPA decision making, and that little effort was made to record and keep track of oral testimony for use in subsequent NEPA-proposed projects.

A majority of interview participants commented on the importance of accepting oral testimony rather than relying only on written communication. They stated that the Elders, who hold the most

[4] *Ibid..*

knowledge about traditional Alaska Native ways, pass on their knowledge orally. Since respondents generally felt that oral testimony did not carry the same weight as written comments, this was perceived to act as a major barrier to participation and exchange of relevant information. In several cases, participants talked about how they had to say the same thing over and over again, from one public meeting to the next, and from one NEPA project to the next. They never felt as if agencies were writing down the information, or keeping a record of it for use in the future.

- *"We were told a year earlier that they will do a Hovercraft Demonstration Program. There was a meeting at the Children's Home. Senator Stevens was there. The Elders indicated they were going to affect the subsistence way of life of the community. ...The Elders spoke against the demonstration project. They did not write letters. Most of our Elders only know the Yup'ik language."*
- *"Opinions should be considered which are given orally not just in written letters. Currently, a constraint in the process is that people don't write letters; they are intimidated about writing letters."*
- *"Redundancy in participation is a problem. People feel I already told them. Don't they remember?"*
- *"An elder, 75 years old, who is a retired state worker goes to public meetings and tells them to write it down again and again. It is a fight all the way. Instead of saying your piece once, you have to say it over and over again. As an elder she has most of the cultural and spiritual knowledge. It is difficult for her to keep saying it over and over again."*
- *"We can always give comment, but we have been saying the same thing for 25 years."*

#5: Lack of government-to-government relationship in the context of NEPA.

There is currently no formal policy, issued by the Council on Environmental Quality (CEQ) that requires federal agencies to work with tribes government to government. Instead, as was reported by tribes in the lower 48 states, Alaska tribes did not feel agencies were sensitive to the important distinctions between recognized tribal governments and the general public. As a result, they felt that their ability to influence NEPA decision-making was weakened. Several of those interviewed, however, singled out the Environmental Protection Agency as a federal agency that was making a sincere attempt to work on a government-to-

government basis with tribes. In general, though, tribes reported that they did not feel federal agencies were according them the status deserved by another government.

- *"A treaty was negotiated with Mollie Beattie, former Director of the U.S. Fish and Wildlife Service (USFWS). The treaty included language for USFWS office of Bird Management in Washington D.C. to negotiate directly with the tribes and with the Alaska Department of Fish and Game to develop spring hunting regulations. The regulations envisioned a direct contact and direct role for the tribes. There was nothing about a public advisory process or FACA. Nothing was said about NEPA. Recently, after Molly Beattie died, the USFWS is proposing to use the NEPA process and develop regulations on their own and send proposals out to the public with the tribes as one of the addresses."*

- *"I have always followed the NEPA process and have been an active participant. Here is a situation where NEPA deliberately made it different. The original intention was not to involve the sports fisherman. It is abhorrent because the late Mollie Beattie, the most important allies her lieutenants are twisting the whole thing. By proposing NEPA there is opposition. The native community people at the table are a minority. New players in the tribes who weren't around the table have the document."*

#6: "Indigenous knowledge" is not as well accepted as western scientific information in the NEPA process.

Survey respondents felt that federal agencies both represented and focused on a traditional "western" perspective of the environment, and were neither sensitive nor open to traditional Alaska Native perspectives and knowledge. This, respondents felt, greatly limited the effectiveness of Alaska Native participation and influence in the NEPA process. At least one respondent, however, felt uncomfortable and suspicious about the way in which federal agencies have been proposing to incorporate traditional knowledge, for fear that it may not turn out to substantively benefit the tribes in the NEPA process.

- *"Often, much knowledge conveyed at the village level is rejected by scientists as anecdotal or unsubstantiated. I really believe that this is a major impediment to good communication between federal or state agencies and tribes."*

- *"NEPA compliance is designed in a way that does not easily admit most of the substantive contributions offered by Native people."*

- *"It is easy to get caught in a trap to think we need a program of traditional knowledge. I prefer looking for their weakest spot and going for it."*

#7: Perception that their comments or testimonies don't matter.

In the end, many of those interviewed felt that the NEPA outcomes rarely reflected their concerns, and that projects moved forward despite their voiced or written concerns. This perception more than likely becomes a self-fulfilling prophecy, leading to increased apathy and less participation by Alaska tribes in NEPA.

- *"(A key obstacle is) overcoming the belief that community involvement cannot change the course of action. Tribes believe their input may be heard but will not change the process. This results in tribal members withdrawing from the process."*
- *"The Forest Service appeared to have its institutional mind made up before the public process even started." (*Discussing a proposed Northwest Baranof Timber Sale*)*
- *"The US Postal Service has pursued the use of hovercraft since 1995. They initially proposed large hovercraft in lieu of the traditional fixed-wing aircraft….The tribes oppose the project because they feel the noise and vibration will be detrimental to bird and animal life in the landing and flight pattern areas. This is particularly true of small fish in the ecological chain and bird-nesting habitat -- both of which are essential for subsistence… (The tribes participated) at all phases of the EA. A FONSI was issued anyway."*
- *"NEPA has no 'teeth.' Tribes feel powerless."*
- *"In some cases where intense political pressure is being put on a project agency, they merely do lip service to our concerns."*
- *"It (NEPA) should work to protect the natural and cultural environment. Of course, this only works when the local individuals can have input. I think the process tends to be very cumbersome and unwieldy, and is seen as an impediment to business by many agencies. Because of this, agencies like to deal with it as a 'check-off list' of hoops to jump through and just deal with compliance by making a laundry list of phone calls."*

- *"The process is political ….Agencies do not take tribes' interest into consideration. Political agendas. Conflict in pork-barrel deals…"*
- *"One part that is difficult and more difficult in Alaska where there are small communities --- administrative requirement of what is coming through your doors. Your mom doesn't have firewood. In smaller communities it is hard to sort out what is important and what is not…..Too much and too different from people's everyday lives."*
- *"We have a problem with a hovercraft demonstration project by the Post Office…. The demonstration project serves 7 villages. We are against it. We try to stop it but they go ahead and did it anyway. They aren't listening to us. They don't listen to our concerns. We don't write our concerns we go to the public meeting and speak our concerns. The EA person says at the public meeting that they will move forward regardless of what we say. The EA person is assessing the affects of the hovercraft. We are concerned that the hovercraft might affect the fish. AVCP is handling a lawsuit about the hovercraft. We are part of it. There is a pressure for the Congress to balance the budget. Air mail costs $200,000 for every quarter mile. So the Post Office wants to see hovercrafts move forward. There was no EA first and they continue to do damage to the environment. This is a bad sign for the species."*
- *"Our input was dismissed out of hand, which is why we brought suit."*

#8: Isolation, travel distance, and timing serve as an obstacle to participation in public meetings.

Vast distances, limited transportation options, and associated costs prevent agencies from being able to hold NEPA public meetings in all affected communities. Instead, they often hold meetings at regional centers or "hubs," where it is too costly for individuals from other communities in the region to reach. Several individuals also noted that when public meetings do occur in their community, they often coincide with critical subsistence harvesting activities that cannot be postponed.

- *"The agencies should go to all the communities because they want to participate in the process. However, the agencies only go to Barrow; they cannot afford to go to all the communities."*
- *"NEPA should be more tailored to fit the customary and traditional gathering cycles of the Alaska Native people. Consequently, the very people who would be able to provide the most relevant information are often out gathering, fishing, and hunting when the NEPA and ANILCA 810 hearings and information sessions are held."*

- *"It cost $2,000.00 just to fly to Anchorage. We can't afford to travel to meetings."*
- *"Sometimes our phones don't work."*
- *"Agencies can't really get the people's input ---- they can only come to one main village for public hearings due to us being so spread out."*

#9: Cumulative impacts of proposed development are not effectively considered.

Respondents also noted that federal agencies failed to conduct a comprehensive accounting of a project's impacts, to both the natural and the cultural environment. Many cited the many and pervasive oil and gas development projects on the North Slope as being an area of particular concern.

- *"Cumulative impacts are largely ignored and, from my perspective, the science of assessing cumulative impacts is in its infancy. Every agency simply views their action as affecting only the footprint of the project or project area."*
- *"The Air Force split four or five different EAs and three EISs around building a new air force in Alaska."*(Discussing a proposed military base relocation from Guam to Alaska)
- *"The cumulative impacts they do are the worst. This is a classic example. Steady progress of oil development from Prudhoe Bay eastward. The filling in with pipelines. Each project is evaluated in isolation. Without predicting the long-term impact. They are not willing to go outside of their jurisdiction. Each program keeps blundering on deliberately avoiding discussing cumulative impacts."*
- *"Without exception, not one EIS has been done which looks at the cumulative impacts of development."*
- *"There is not a lot of information sharing."*

#10: NEPA documents do a poor job of reflecting impacts to cultural and spiritual values.

Respondents generally felt that the NEPA process was not conducive to drawing out and describing the impacts on the culture and spirituality of Alaska Native peoples, even though these may be a project's most significant impacts. This problem arises partly because of the limitations inherent in the western-style approach to public meetings and writing of

the NEPA documents, but also because of the very sensitive nature of the types of critical information that Alaska Native peoples feel are relevant, but are reluctant to share, and the lack of a culturally sensitive mechanism to allow for better incorporation of these concerns.

- *"Although NEPA is primarily focused on conservation more focus is needed on cultural preservation issues. For example, roads and pipelines put pressures on rural subsistence hunters and their resources."*
- *"Nothing is written down about what we believe. We have our views of animals and how they relate to us. We hold these views strongly. We don't talk about this because we don't want to be ridiculed. People don't understand our views and make light of them. We keep this to ourselves and feel it is best not to talk about it."*
- *"They don't understand. There is a whole different belief system. Spirituality is different. Instead of going to church everything has a spirit way of life. Taking away habitat is taking away the spirit. Trees have spirits. It is a different way of looking at nature."*
- *"Bureaucrats sitting in ivory towers have no clue about subsistence and cultural issues. Things they are proposing don't impact them and they don't know how it relates to that lifestyle. We sent a letter to Bruce Babbit and the MMS. We told him that the EIS did not consider impacts on the cultural lifestyle and spiritual issues. They have no clue."*

#11: Cross-Cultural and Inter-Personal Barriers and Differences in Agency Attitudes

Elders, who are seen as "keepers of the knowledge," often have the most difficulty plugging into NEPA process, which to them may be akin to a foreign language. Not only are translators essential to many meetings, but cultural sensitivity is necessary on the part of agencies and their staff. Many of those interviewed spoke to the differences in their experience with NEPA in relation to the particular agency and/or staff person(s) assigned to the NEPA project.

- *"A barrier to participation exists in that the elders like her grandparents only went to 8th grade. They hunted, fished and trapped and logged."*
- *"They (agencies) have no concept of what values we hold."*

- *"Bring along interpreters so the Elders can understand. The Elders don't speak English."*
- *"When individuals come in, if they don't ask the right question, the people don't say."*
- *"(We) conducted our own tribal EIS because many tribal citizens did not feel comfortable going to meetings conducted by the Forest Service. . . they felt more comfortable sharing their information with the Tribe."*
- *"Attitude. It makes a difference who you are responding to. The biggest obstacle is racism and a strong anti-tribal bias."*
- *"Depends on the organization. The Forest Service is better. We have had more success over time. They have been near us and are now beginning to cooperate. FERC is very arrogant."*
- *"DOD has a guidance document for working with the tribes ----- The US Postal Service does not have a policy and disregards the rights of the tribes."*
- *"The agencies are only as good as the attitude of the managers."*
- *"I don't think there is a problem with NEPA. It works fine. We have a problem with the agencies and NEPA."*

#12: Lack of Monitoring and Enforcement of Project Mitigation Requirements

Though some tribes reported successes in affecting the mitigation measures required with project development, they also felt there was little follow-up by federal agencies in monitoring and enforcement. Even federal staff we spoke with admit this is a weak link in the NEPA process.

- *"I think enforcement of NEPA (mitigation measures) is very weak"*
- *"Agencies need to do more monitoring and follow-up efforts, but current staffing levels in field offices preclude that. In Alaska, monitoring is the forgotten component of projects."*
- *"The mitigation estimates are overly optimistic. That is in terms of fudging on the degree of impact and the length of time involved. The system underestimates. They like to do construction now and evaluate later."*
- *"EPA issues permits but the specific criteria for mitigation and conditions are not clear to the tribes."*

- *"Monitoring is very rare. Monitoring is fundamental. This is one place that the process breaks down."*

11.2C NEPA Opportunities and Successes Reported by Alaska Tribes

During the course of their involvement in NEPA, tribes *did* feel there were returns on their investments in the process. These are again described largely in the words of the respondents themselves.

#1: Invoking Requirements of NEPA to Ensure Tribal Views are Considered

Tribes noted that they were successful in using provisions of NEPA to require a more open process of decision making in projects that otherwise were proceeding without adequate public review. In the case described below, several tribes banded together to call for an opportunity to comment on and influence a decision about use of hovercraft for mail delivery to their communities.

- *"I participated in trying to stop the hovercraft project. I wrote letters and organized a grass-roots campaign. There was a genuine effort to address our concerns. However, the 'Debt of the Nation' was more important. It is cheaper and the people in positions of power support it. It was innovative for us to use the EIS process to stop hovercraft, but it didn't work."*

#2: Increased Cultural Sensitivity by Some Agencies and their Staff

Several tribal staff noted the increased sensitivity by some agencies or their staff persons in conducting public outreach during a NEPA review. As a result, these tribes felt that trust was able to begin to form, thereby increasing the effectiveness of their participation.

- *"The Forest Service uses NEPA and gives some cultural benefit to protect the cultural secrets. There is a secret memorandum of agreement (MOA) in which the Forest Service holds information that describes the sacredness of certain sites. The treaty is with the Nooksack Tribe (in state of Washington) and the Forest Service. The Federal Energy Regulatory Commission (FERC) demanded that the Forest Service give the documents over as part of a judicial review. The Forest Service refused. This developed a lot of good will. The information that*

the Forest Service has is a repository of cultural uses and a map that shows locations. FERC is culturally insensitive. The Forest Service is developing cultural sensitivity."

#3: Decision Making by Federal Agencies Is More Open and Accessible

The "pre-NEPA" era in Alaska is characterized by such disasters for Native peoples as "Project Chariot," a nuclear testing project near the Alaska Native village of Point Hope, and many other military and resource-extraction projects that left a toxic legacy throughout rural Alaska. In general, those interviewed believe that NEPA has led to a much more open process of decision making by federal agencies, a better "airing" of agency agendas, and a greater opportunity for Alaska Native peoples to participate in decisions affecting them.

- *"Rules of the game are better defined and NEPA is still a powerful tool for environmental interaction."*
- *"EISs do reveal agencies' agendas."*
- *"NEPA creates an administrative record of how well the project agency handles solicited and unsolicited information and opinions. NEPA also has become the legal basis for third-party enforceability, to correct any situations when an agency was 'arbitrary' or 'capricious' in its decision making."*
- *"If NEPA weren't there, the oil and gas companies would move in Carte Blanche. They could do what they want."*

#4: Protection of Areas of Special Concern to Tribes

Several tribes spoke about how NEPA was instrumental in protecting specific areas of concern to them. In each case, the areas they described were afforded protection under another form of federal law, such as the National Historic Preservation Act (NHPA), the Native American Graves Protection and Repatriation Act (NAGPRA), the Archaeological Resources Protection Act (ARPA), the Alaska Native Claims Settlement Act (ANCSA), or the Alaska National Interest Lands Conservation Act (ANILCA). Although tribes believed that these other laws ultimately provided the "teeth" that NEPA lacked, they nonetheless credited NEPA and its required open decision-making process for initially airing the problem, and providing for their participation in the selection of alternate courses of actions.

- *"NEPA protected native allotments and restricted townsite lots."*
- *"The Tlingit won where a project proposed by NOAA (National Oceanic and Atmospheric Association) involved the historical and culturally significant location of Indian Point. Although the NEPA process was used, it is unclear whether NEPA made any difference. More significant in altering the location of the project may be that the location was already a designated historical site. The Historic Preservation Act and NAGRPA may have assisted in the process by providing the teeth. Yes, we won. They moved the building. Yes, they did, since they listened and we did well…. NEPA helped us protect Indian Point."*

#5: Achieving Mitigation Measures to Address Tribal Concerns

Although many tribes were frustrated by their inability to influence a federal agency's decision or choice of alternatives for a proposed project, tribes *did* cite smaller victories in influencing the types of mitigation required of project sponsors. These mitigation measures usually stemmed from comments they had made regarding anticipated impacts to their communities and to important subsistence hunting, fishing, and gathering areas or resources.

- *"(Mitigation included) recognition of the seasonal migration of the whales. (They also) concluded seasonal drilling based on the migration of animals. They stopped drilling during the migration and began again after migration through NEPA."*
- *"The tribes said no at first to the military base relocation from Guam to Alaska. Then political reality set in – quickly 800 million dollars were spent in construction, much of which went to the tribes in employment opportunity during the construction. At the table with the Air Force we were successful at getting them to modify plans and to pull their planes up to 25,000 feet."*
- *"They altered routes to consider habitat used by salmon or waterfowl, or used a different season to consider birds coming in."*
- *"(Management Service) developed an advisory council with a couple of native representatives."*(Discussing proposed Cook Inlet Oil and Gas Lease Sale.)

#6: Pushing Government-to-Government Negotiations

Although tribes generally felt that agencies did a poor job in their government-to-government relations with Alaska tribes, they occasionally found that going directly to high-level agency representatives in Washington, D.C., proved effective. These contacts helped to elevate their concerns within Alaska, and prompted regional staff in Alaska to initiate better government-to-government consultation and negotiations.

- *"(It was an) Environmental Protection Agency NPDES* (National Pollutant Discharge and Emissions Standards) *permit we were involved in and took issue with. We were not getting much input. We took our issues directly to CEQ and Carol Browner (Director of EPA). The Alaska Office of EPA, including the Deputy Regional Administrator, NPDES Program, Tribal Program Coordinator, and the Alaska Operations Officers came and discussed the permit specifically for Upper Cook Inlet. They had a public comment process at the last minute – government to government. The government officials of EPA go directly to the Tribal Council. There was a three- million-dollar study done to look at contamination in the fish in Cook Inlet. They looked at 25 different types of contamination."*

- *"We have always implied government-to-government in a threatening fashion. Don't ask for something that you already have."*

#7: Litigating NEPA to Buy Time and Media Attention

Although none of the tribal representatives interviewed claimed outright victories in lawsuits under NEPA, they did report that their litigation attempts "bought them time." The additional time was used in gathering more information, organizing more opposition, or simply stalling a project that was on a "fast track" until there was a new political environment less sympathetic to the project.

- *"NEPA is just a procedural tool; (but) it is the most reliable tool to gum up the works."*

- *"When NEPA is most useful is defensively. NEPA is useful if trying to stop a project."*

- *"Though we lost the suit, it was successful in that it delayed and gave us media attention. It was part of a large campaign to have this area permanently protected from oil. NEPA (litigation) bought us time. We were the plaintiff with the Native American Rights Fund, who was our attorney. There was a parallel lawsuit with the Trustees for Alaska. .... We needed to be realistic about what we are trying to achieve. We tried*

to be real exact with what we wanted. We used these tools…NEPA has so far kept oil companies out of the Arctic Refuge although ultimately we lost the lawsuit." (Discussing proposed oil and gas exploration and drilling within the Arctic National Wildlife Refuge.)

11.3 Overcoming NEPA's Obstacles – Tools for Alaska Tribes

> *Land for the Native person is special. There is a special tie to the land. I see a landmark and I feel it even if I have never been there. The pull is so strong. The land is a part of me. Others describe it in a different way. You feel the pull real strong.*
> *- Respondent, Alaska NEPA Survey, 1998*

This section will provide Alaska Natives with specific tools to strengthen their involvement in the NEPA process. The tools were developed in response to the many obstacles cited by tribes in Alaska, and are organized into three general categories:

- **Section 11.3A. Understanding the Basics of NEPA.**

  This section addresses the need for tribes to have a basic understanding of the "nuts and bolts" of the NEPA process, including the specific stages in which tribal involvement is critical.

- **Section 11.3B. Being Aware of Proposed Actions.**

  This section emphasizes the importance of having early knowledge of proposed NEPA-related projects and their potential impacts. This information is critical in determining whether and how much of tribal resources to devote to the process.

- **Sections 11.3C-E. Effectively Engaging in the Process.**

  These sections demonstrate the importance of, and provide key examples for, providing critical tribal input into the NEPA process. The sections suggest several tools, both practical and legal, that

Alaska tribes may use to ensure their input is understood, respected, and, most importantly, used in agency decision making.

Note that throughout Section 11.3, we address the potential opportunities NEPA allows for tribes to have more voice in *federal* action proposals and decision making. We suggest, however, that readers look also to the main guidance document, Chapters 5, 8 and 9, which provide a more comprehensive discussion of Tribal/NEPA issues, including a discussion of NEPA and *tribally proposed* actions.

11.3A Understanding the Basics of NEPA

Preliminary to any effective involvement in NEPA is a basic understanding of the statute itself, as well as the process of environmental assessment that it requires. In particular, we recommend an understanding of NEPA's general intent, as well as specifics such as:

- How and when NEPA is triggered;
- Why certain projects and activities are exempt from NEPA compliance;
- Why certain projects and activities are only subjected to an initial, brief review, known as Environmental Assessment; and,
- Which stages and components of NEPA offer tribes the best opportunities for comment and participation.

We will not go into this in detail in the supplement, since a thorough discussion of these issues is found in the main guidance document, Chapters 2, 3, and 4. Chugachmiut, a tribal organization in south-central Alaska, is also producing a tribal guide for their members, outlining the "nuts and bolts" of the NEPA and the National Pollution Discharge and Emissions System (NPDES) process. The guide was completed in September 1999 and has relevance to all Alaska tribes. In addition, as part of the Arctic Environmental Protection Strategy (AEPS) adopted by eight arctic countries in 1991, including the United States, guidelines specific to conducting environmental assessment in the Arctic were published. These guidelines raise several issues that may be of interest and assistance to tribes in Alaska engaged in NEPA.

The Juneau Area Office of the Bureau of Indian Affairs (BIA) recently made a pledge to provide tribes with training on the basics of the NEPA process. Tribes may be able to request that regional training workshops be held in their area, as needed, to develop an understanding of the basic NEPA framework.

A Few Tips:

- Read Chapters 2, 3, and 4 of the Main Tribal Guidance Document.
- Request a copy of Chugachmiut's Tribal NEPA Guide (Contact: Chugachmiut Environmental Program @ 800-478-4155)
- Review "Guidelines for Environmental Impact Assessment in the Arctic," available through the Arctic Council, online at http://www.grida.no/aria/eiaguide.pdf
- Request regional NEPA training courses from the BIA, Juneau Area Office.

11.3B Becoming Aware of Proposed NEPA Actions

One of the fundamental obstacles to Alaska tribal participation in NEPA is knowing *when* a project or activity is being proposed, and its potential effects on a given tribal community. As noted earlier, tribes expressed concern over the lack of timely notification from federal agencies regarding their proposed actions, even though federal agencies are directed by CEQ to notify tribes early in the NEPA process (see below). Tribes speculated that, among other things, agency confusion over who constituted the most appropriate contact for a tribe often led to a federal agency's failure to notify affected tribes, or alternately, that notification arrived too late for tribes to effectively engage in NEPA review.

Reference:	Description:
40 CFR 1502.1(d)(2)	Apply NEPA early in the process – If a federal agency realizes that it will be involved in an action planned by a private applicant or other non-federal entity, it must **consult early with any interested Indian tribe**.
40 CFR 1501.7(a)(1)	Scoping – As part of the Scoping process, **the lead agency shall invite the participation of any affected Indian tribe.**

Although many Alaska tribes reported that they were notified late or not at all prior to an agency's preparation of an Environmental Impact Statement (EIS), tribal notification of agency preparation of Environmental Assessments (EAs) may be even more rare. EAs serve as a screening tool for agencies to determine if a full-blown EIS is needed. Agencies have considerably more discretion in how they conduct the EA process, and, among other things, whether or not they provide for adequate public review.

The impetus for learning about the types of actions being proposed by an agency, especially those subject to either a categorical exclusion or an EA, often needs to originate from the tribes themselves. It is up to tribes, as potentially affected parties, to request review of an EA or to challenge the appropriateness of a "categorical exclusion." Specific procedures for involvement in these processes are laid out within each agency's own NEPA policies, and are reviewed in Chapters 2 and 3 of the main guidance document.

Alaska tribes spoke in detail about their experiences with the "higher profile" EISs, although little mention was made of their precursor, the EA. Yet agencies complete thousands of them each year, with relatively few resulting in a decision to prepare an EIS. Special attention should be given to Chapter 3, the development of EAs under NEPA. Although these projects may be determined by agencies as "non-significant" (i.e., a "Finding of No Significant Impact" or "FONSI"), history shows that their impact to tribes may well warrant the additional scrutiny.

In Alaska, for example, many administrative or policy decisions rarely are elevated to the level of an EIS. Yet many of these decisions do have the potential to affect the culture and economy of Alaska Native peoples. For example, a U.S. Postal Service proposal to use hovercraft for mail delivery to communities in the Kuskokwim Delta area caused an EA to be completed. The eight predominantly Alaska Native communities affected repeatedly raised concerns over the associated noise and its potential threat to area fish and wildlife. Despite their opposition and repeated calls for an EIS, the EA resulted in a FONSI (Finding of No Significant Impact). However, community concern in this case *did* lead to a public comment period and to mitigation measures that otherwise may have been omitted as part of the EA process.

There are many federal agencies with ongoing activities throughout rural Alaska. What they have in common is a vast area in which they operate, and a very large number of tribes that are potentially affected by any of their proposed actions. Although in theory the large number of tribes in Alaska should not diminish a federal agency's trust

responsibility to each of the 226 federally recognized tribes in Alaska, the reality of the situation is quite different. Few agencies, it seems, have taken the time to develop a relationship with many of the individual tribes scattered across Alaska. From the Postal Service to the Forest Service, these agencies have different NEPA policies, different degrees of experience with Alaska tribes, and a predominantly "urban" NEPA staff that may have little understanding of rural, tribal cultures. In turn, most Alaska tribes, because of limited or no staff and funding for natural resource protection, cannot develop contacts with all potential federal agencies that may be affecting a tribes' way of life. Once again however, as the affected party, tribes must be proactive in learning about proposed federal actions in their area, and those subject to provisions of NEPA review.

Tapping into the NEPA "pipeline" by establishing a reliable network for receiving information on proposed federal actions is only a first step. *In order for a tribe to make its own "threshold" decision of whether to devote its limited staff resources to engage in the NEPA process, it must weigh the risks to the tribe of not being involved.* Many tribes in Alaska and elsewhere have reported their experience with NEPA to be occasionally worthwhile, but an arduous endeavor with hard-won results. Although tribes have a variety of options for different stages and levels of involvement in NEPA, this basic question of whether and how much to involve themselves remains a good one for all tribes to consider – and reconsider before getting too far down the road.

A few tips:

- Develop a relationship with the appropriate NEPA contacts for agencies operating in your region. Learn more about the agency's specific NEPA policies including how they conduct EAs and seek tribal comment, as well as the types of activities that are categorically excluded from NEPA. Let them know what area and issues your tribe is interested in, and ask them to keep you abreast of their proposed activities. Contact them periodically for updates.

- Formalize a request for government-to-government communication and cooperation in the NEPA process through a Memorandum of Agreement or Understanding (MOA, MOU) with a federal agency active in your area. Outline specific notification requirements, contacts, and processes for tribal involvement and sharing of tribal information in all

phases of NEPA assessment, beginning with the EA, and provisions for confidentiality of shared information, technical expertise, and funding. Examples of such memoranda, although not specific to NEPA, include those developed by tribes in the Prince William Sound and Lower Kachemak Bay area, through their regional tribal consortium, Chugachmiut.

- Form or use an existing regional tribal consortium to serve as a clearinghouse for proposed NEPA actions in your region. Work with the consortium to track and alert individual tribes in a timely fashion to proposed federal actions that may affect them.

- Consider adopting a tribal ordinance that requires consultation with your tribe for any proposed federal activity that may affect the health and welfare of your tribal members. Because NEPA requires compliance with tribal law, such an ordinance may assist tribes in ensuring that federal agencies work with them on a government-to-government basis in matters of critical importance to tribes. A tribe's dependence on subsistence resources, for example, and the potential for proposed federal actions to affect these resources may provide a very appropriate platform for the context of such a tribal ordinance. For more information, read Chapter 6, on developing this type of tribal ordinance.

- Collectively lobby the Council on Environmental Quality to outline a specific policy and procedures for federal agencies to follow for implementing the government-to-government relationship with tribes in the context of NEPA.

11.3C Engaging Effectively in the NEPA Process

> *Tribes exist in Alaska with authority to govern…. The Commission recognizes that Alaska Natives maintain a special relationship with the United States whereby the federal government enters into government-to-government discussions with tribally authorized representatives in matters affecting rights of Native self-determination and tribal self-governance…*
>
> - From: Vision & Guiding Principles, State of Alaska Commission on Rural Governance and Empowerment, Fall, 1998

Although NEPA lays out a structure for public participation, tribes in Alaska as well as those across the country have felt stymied by federal agency treatment of tribes under NEPA as another "public interest group." Becoming effectively involved in NEPA is difficult under any circumstances because of limited tribal resources, but even more difficult when tribes must contend with constant challenges to their sovereignty. Fortunately, although NEPA is "silent" on tribes, there are many federal statutes, treaties, executive orders, and agency policies that hold federal agencies responsible for approaching tribes on all matters in a government-to-government fashion (see Section 6.1 of the main guidance document for detailed discussion of these statutes and policies).

Tribes who have determined that it *is* in their best interest to engage in the NEPA *process* should be aware of these federal "drivers," as well as all other tools they have at their disposal to make the most of their involvement and commitment of resources. Our main recommendation to tribes is to become involved as early in the NEPA process as possible, and, as an affected tribal government, assert and establish a close association with the lead agency.

> *"Our main recommendation to tribes is to become involved as early in the process as possible, and, as an affected tribal government, assert and establish a close association with the lead agency involved."*

In this section, we focus on several such strategies for early and strong tribal involvement in Alaska, including suggestions for increasing tribal influence as governments in NEPA decision making, securing adequate technical *expertise*, and accessing funding for participation. Although Chapters 5 and 6 of the main guidance provide a comprehensive description of NEPA strategies, this discussion highlights those that are specific to Alaska, or that have been successfully used to date by Alaska tribes.

Again, although this discussion focuses on the *tribal unit of government* in Alaska, we recognize that other entities representative of Alaska Native interests become involved in the NEPA process, such as the regional Native *corporations* and non-profits, as well as borough and municipal governments. Many of the strategies listed in Table 11.1 below are expected to be relevant to these other entities as well.

Table 11.1: NEPA Strategies for Alaska Tribes	
Strategy #1	**Use the Federal Trust Responsibility for the Protection of Subsistence**
Strategy #2	**Employ principles stated in U.S.-supported Arctic and international policy.**
Strategy #3	**Ensure incorporation of traditional knowledge into NEPA documents when it is deemed desirable by a tribe**
Strategy #4	**Consider acting as a cooperating agency under NEPA.**
Strategy #5	**Use provisions of the Executive Memorandum 12898 - Environmental Justice.**
Strategy #6	**Ensure that consultation requirements are being met under federal cultural resource protection statutes.**
Strategy #7	**Use provisions of the federal Coastal Zone Management Act of 1972.**
Strategy #8	**Develop a tribal community environmental plan.**
Strategy #9	**Assert the Federal Responsibility for Trust Assets Allotments and Native Townsites.**
Strategy #10	**Elevate a tribal issue beyond the lead agency when warranted.**
Strategy #11	**Take a proactive role in project monitoring and oversight of required mitigation measures.**
Strategy #12	**Use appeals process as necessary and/or appropriate.**

Strategy # 1: Use the Federal Trust Responsibility for the Protection of Subsistence

Although the federal trust responsibility doctrine related to Alaska Native subsistence is still developing, it is emerging as a judicially recognized statutory responsibility arising out of a continuous history of Native subsistence exemptions found in various conservation treaties and statutes. Subsistence protections under these laws are roughly equivalent to the "off-reservation" hunting and fishing rights of tribes in the lower

48 states. Under more recent enactments of law, however, these rights are generally not exclusive to Alaska Natives, but are exercised in common with other similarly situated (i.e., rural) Alaska residents. One of the most comprehensive of the laws protecting subsistence use and culture is the Alaska National Interest Lands Conservation Act (ANILCA) of 1980.[5]

Of particular relevance to the NEPA process is Section 810 of ANILCA. Section 810 imposes restrictions on the future dispositions (i.e., leases, withdrawals, permits, etc.) of public lands in Alaska. Under this provision, federal agencies must take into account their effect on subsistence. Prior to making their decision, the federal agency managing the land *must* evaluate the effect of the disposition on subsistence and available alternatives to reduce or eliminate the need for the action. A Section 810 evaluation integrated into a NEPA document serves as a potentially superior model for the assessment of cultural impacts – as opposed to the rather awkward way in which many federal agencies attempt to evaluate cultural impacts through socioeconomic analyses.

Although the requirements of Section 810 are largely procedural, the law does spell out specific steps an agency must take before proceeding with any action that *may* have an adverse effect on subsistence. Subsection (b) of Section 810 provides specifically that

> "If the Secretary is required to prepare an environmental impact statement pursuant to section 4332(2) of Title 42 (NEPA), he shall provide the notice and hearing and include the findings required by subsection (a) of this section as part of such environmental impact statement."

If a federal agency with jurisdiction over public lands fails to address the requirements of ANILCA Section 810 in an EIS, such an omission may lead a federal court to find the EIS inadequate. In City of Tenakee Springs v. Clough, 915 F.2d 1308 (9th Cir. 1990), the Ninth Circuit ruled, among other points, that an EIS did not adequately consider cumulative impacts on subsistence. However, although ANILCA requires federal agencies to consider subsistence uses and comply with the procedural requirements of Section 810, they can consider a variety of other public interests in deciding whether to allow an action that would adversely affect subsistence.[6]

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[5] Case, 1984.

[6] See Amoco Production Co. v. Village of Gambell, 480 U.S. 531, 545-46 (1987), and Hoonah Indian Association v. Morrison, 170 f.3d 1223 (9th Cir. 1999).

For their part, Alaska tribes should ensure that ANILCA Section 810 evaluations are meaningfully tied into the NEPA process.

A few tips:

- At a minimum, tribes should ensure that an agency follows the requirements of ANILCA Section 810, and become as closely involved in the process as possible.

- In conducting a subsistence evaluation, federal agencies should consider the impact to all subsistence users of affected resources, whether they are in the project area or not. For example, the Bureau of Land Management (BLM) recently failed to consider the impacts of development of the NPR-A area of the North Slope on subsistence users of migratory waterfowl in other areas of the State. As a result, they were required to hold a special hearing in the Y-K Delta region..

- Most agencies automatically conduct a Section 810 evaluation as part of the development of an EIS. However, many agencies do not routinely conduct 810 evaluations in the development of EAs. This may be an issue worth questioning, particularly in light of new agency requirements under Executive Order 12898 on Environmental Justice (see Section 6.1C of the main guidance document).

- When a Section 810 evaluation is deemed relevant and necessary, a tribe may wish to perform the analysis themselves, since they are likely to know the most about such impacts. Having this "technical expertise" may also position the tribe well for serving as a "cooperating agency" in the development of an EIS (described in more detail below).

Strategy # 2: Employ Principles Stated in U.S.-Supported Arctic and International Policy that Reaffirms the United States' Commitment to Engaging Indigenous Peoples in Impact Assessment and Development in the North

> ***We recognize the special role of the indigenous peoples in environmental management and development in the Arctic, and of the significance of their knowledge and traditional practices, and will promote their effective participation in the achievement of sustainable development in the Arctic.***
>
> *- Nuuk Declaration on Environment and Development in the Arctic, Greenland, September 1993 (United States a Signatory)*

As part of the Arctic Environmental Protection Strategy (AEPS) developed by the eight Arctic countries, a policy on the involvement of indigenous peoples in development of the Arctic has emerged. This policy, to which the United States is a signatory, recognizes and commits to a strong role for indigenous peoples in environmental management in the Arctic. Specifically, it recognizes indigenous peoples' special expertise and knowledge of the environment, their traditional uses of natural resources, and their cultural and economic stake in Arctic development. Taken in conjunction with other international policies that speak to indigenous rights in environmental management and development (see Chapter 7 of the main guidance document), as well as the federal trust responsibility to tribes in the United States, Arctic policy makes a strong case for Alaska tribes to be integrally tied to NEPA decision making.

Referring to such policies may help tribes when they have not been given adequate opportunity to "weigh in" on issues and decisions of importance to them. For example, commitments made by the United States to indigenous peoples of the Arctic may help Alaska tribes to:

- Require that a federal agency improve their notification to an affected tribe regarding a federal action subject to NEPA;
- Overcome resistance by a federal agency to accept a tribes' request to serve as a cooperating agency;
- Ensure that a federal agency conduct an ANILCA Section 810 evaluation as part of all NEPA decision making;
- Ensure that NEPA documents integrate indigenous knowledge and utilize it in their decision making;
- Leverage funding or technical expertise from a federal agency for effective tribal participation in NEPA;

- Develop a more formal agreement (e.g., Memorandum of Understanding) for outlining the specific roles and responsibilities of federal agencies and tribes in the NEPA process;
- Elevate issues of concern to the Arctic Council, or enlist support of United States representative to the Arctic Council; and
- Appeal or litigate a NEPA decision.

Strategy # 3: Ensure Incorporation of Indigenous Knowledge into NEPA Documents When It Is Deemed Desirable by a Tribe

Indigenous knowledge, sometimes referred to as "Traditional Knowledge," is that cumulative body of information and wisdom which has evolved and been passed down by generations of people living in an area for many centuries. In this case, we are speaking primarily of such knowledge as it relates to the environment, from a people that have lived close to and are dependent on it for their survival. Often indigenous knowledge has been transferred to new generations orally, and is not documented in written form.

For many years, indigenous peoples felt that their knowledge of the environment was overlooked or not taken seriously by federal agencies conducting environmental assessment. Only recently have some federal agencies in Alaska shown a willingness to solicit and document such knowledge in NEPA documents. Some Alaska tribes expressed skepticism about the sincerity or usefulness of federal agency's attempts to integrate indigenous knowledge with the more conventionally used "western" science. Yet others felt that having their own perspective represented was critical to writing worthy NEPA documents. Ultimately, the test is whether such information included in NEPA documents truly influences the outcome of decision making, and whether tribes view their contribution of indigenous knowledge as worth the effort and potential compromises of their privacy.

The recently published Beaufort Sea Oil and Gas Development / Northstar Project Final EIS offers an opportunity to ascertain the potential advantages to tribes of including distinct report sections on indigenous knowledge. The lead agency in this case was the Army Corps of Engineers, joined by other cooperating entities, including the North Slope Borough. Although it remains uncertain as to whether the inclusion of indigenous knowledge influenced the specific alternative chosen, it did appear to result in the following:

- Several distinct sections on indigenous knowledge (labeled "Traditional Knowledge") throughout the Affected Environment and Environmental Consequences Sections of the report. Having these sections may assist in educating both the federal agencies and the general public in how Alaska Native people view the environment. Also, by integrating this information directly into the report text, it would seem more difficult to ignore the information as agencies proceed with weighing the effects of alternatives and choosing a course of action.
- A higher quality and more informed discussion of cultural values than is contained in many other EIS documents, where this discussion generally is limited to socioeconomics or archaeological/historical sections.
- Utilization and integration of many years of testimony given by Alaska Natives about other proposed NEPA projects in the region. Inupiaq residents of Beaufort Sea communities had long been frustrated by what they perceived as federal agencies taking the same testimony year after year, project after project, and never reporting on it in NEPA documents. This was an instance, and not an isolated one, where public participation opportunities under NEPA amounted to a significant burden on local communities. At the insistence of Native peoples, the Army Corps of Engineers captured some of this information in the traditional knowledge sections of the Northstar Project EIS.
- Greater overall involvement of indigenous peoples in the development of the EIS than what appears to be the "norm."
- Specific required mitigation measures in response to several of the concerns raised and discussed in the Traditional Knowledge Sections of the EIS, and the establishment of a "post project" council composed of local residents to monitor the implementation and success of these mitigation measures.

Although incorporation of specific sections on indigenous knowledge within NEPA documents does appear to offer some potential advantages to tribes, at least as based on the Northstar Project, it is not the panacea to cure all ills of the NEPA process. Alaska tribes may wish to gauge the time needed to contribute to these sections, and the sincerity of the federal agency involved to use the information effectively. Other issues

include the incompleteness of written sections, intellectual property rights or payment for information collected, and privacy of the information documented.

At a minimum, the Northstar Project sets a precedent for other agencies in Alaska developing NEPA documents to include traditional knowledge where affected Native communities feel this is desirable. Under Executive Order 12898 (Environmental Justice), Executive Memorandum 13084 (Government-to-Government Relations with Tribes), and pursuant to CEQ regulations and stated International and Arctic Policy, integrating indigenous knowledge into NEPA documents could be viewed as a requirement if tribes sought to set this agenda. Moreover, the inclusion of specific indigenous knowledge components in NEPA documents may serve to bring tribes closer to the NEPA decision-making process, and establish a need for tribes to serve as a cooperating agency under NEPA if they chose to. It may also present an opportunity for tribes to write such sections under contract to a lead agency or project applicant and secure funding, and to be tied directly to the specification and monitoring of mitigation measures required for project approval.

Strategy # 4: Consider Acting as a Cooperating Agency under NEPA

One of NEPA's objectives is to conduct a "systematic, interdisciplinary" review process. A means for accomplishing this is by using "cooperating agencies" to routinely incorporate the perspective, opinions, and expertise of other parties in the development of an EIS. Becoming a cooperating agency offers tribes an opportunity for direct and early involvement in key decisions, such as the scope of the EIS, the nature of alternatives considered, and the degree of public involvement. This may be particularly beneficial for tribes who have sought to participate in NEPA, only to find that the lead agency is either unaware of or insensitive to their unique issues and rights. In this situation, becoming a cooperating agency gives tribes a chance to not only shape the NEPA process, but also educate that agency.

Alaska tribal representatives who were interviewed frequently spoke of their frustration over what they viewed as a "token" effort on the part of federal agencies to include and address their concerns in the NEPA process. Many felt that agencies had preordained the outcome of a proposed project, and that their participation made little difference. One strategy for overcoming this obstacle may be to engage earlier in the process, and participate more directly with the key decision makers (i.e.,

lead agency, other cooperating agencies) throughout the process. This opportunity may be afforded the tribe who becomes a cooperating agency.

Although regional government units representative of Alaska Native interests, such as the North Slope Borough, have served as cooperating agencies under NEPA, we know of no instances to date where an individual tribe or tribal consortium has served in this capacity in Alaska. According to the definition under CEQ regulations (Sec. 1508.5; 1508.12), tribes in Alaska would qualify as cooperating agencies by virtue of their status as affected governments, with "special expertise" in regard to the proposed action and its environmental impacts (Sec. 1501.6).[7]

CEQ regulations now require cooperating agencies to assume responsibility for the development of information and the preparation of environmental analyses at the request of the lead agency. If a tribe were to serve as a cooperating agency, and had insufficient staff or funds to participate as prescribed by CEQ regulations, they can request that lead agencies provide funding for their participation (Sec. 1501.6 (B)(5)).

Why would a tribe want to serve as a cooperating agency?

- To play a more central and timely role in the framing of issues and alternatives
- Ensure adequate representation of tribal interests in NEPA decision-making
- Directly contribute to the EIS; provide a discussion of impacts to the natural and human environment from a tribal perspective
- Ensure that the timing and design of community scoping and hearings is culturally-appropriate
- Increase communication and understanding with participating federal agencies of tribal culture and values; develop valuable contacts with agency staff
- Demonstrate to federal agencies and the general public tribal concerns and capabilities
- Further the development of tribal expertise in the NEPA process, and in environmental assessment and research in general

Since tribes in Alaska have yet to set a precedent for serving in the role of "cooperating agency" under NEPA, it is not advised that they wait for federal agencies to contact them. Once again, tribes need to take a proactive role and request to serve in this capacity, and request funding if needed from the lead agency. Again, since this has not been common practice in Alaska, the idea may

[7] Personal Communication with Ann Norton Miller, Office of Federal Activities, Environmental Protection Agency, Washington D.C. November, 1997.

meet with some resistance by lead federal agencies. Whenever a tribe's overture to a federal agency fails, we suggest the tribe contact local and regional NEPA or Tribal offices of the EPA, and the Associate Director for NEPA at the CEQ (see "Elevating a Tribal Concern," Strategy #10 below).

There are responsibilities as well as benefits in becoming a cooperating agency. Tribes will need to weigh them according to their interest and stake in a particular federal proposal. If a tribe considers the responsibilities too burdensome, an alternative might be to persuade the BIA to become a cooperating agency for the purpose of ensuring adequate consideration of the tribe's interests. In Alaska, BIA is most likely to be persuaded if considerable "Trust Assets" (i.e. restricted Native allotments and Townsites) were potentially affected by the proposed federal action.

Strategy # 5: Use provisions of the Executive Memorandum 12898, Environmental Justice.

On February 11, 1994, President Clinton issued Executive Order 12898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations." This Executive Order is designed to focus the attention of federal agencies on the human health and environmental conditions in minority and low-income communities, including, specifically, Native American tribes. It requires all federal agencies to adopt strategies that will address environmental justice concerns within the context of agency procedures. In an accompanying Presidential memorandum, the President emphasizes existing laws, including how the National Environmental Policy Act (NEPA) should provide opportunities for federal agencies to address environmental hazards in minority and low-income communities.

This executive order may serve as a very useful tool to address some of the major limitations expressed by Alaska tribes interviewed, all of which revolve around the lack of a culturally appropriate NEPA process. Issues noted during the interviews, including poor timing of scoping meetings, insufficient access to NEPA scoping meetings or hearings by *all* affected communities, difficult to understand and lengthy NEPA documents, lack of adequate translation into Alaska Native languages, inadequate public process for a predominantly oral culture, and lack of recognition of tribes as governments, are all specifically addressed in the language of the Executive Order or the CEQ guidance.

The following six principles are taken directly from CEQ's Guidance to implementing the Environmental Justice Executive Order:

1. Agencies should **consider the composition of the affected area**, to determine whether minority populations, low-income populations, or Indian tribes are present in the area affected by the proposed action, and if so whether there may be disproportionately high and adverse human health or environmental effects on minority populations, low-income populations, or Indian tribes.

2. Agencies should **consider relevant public health data and industry data concerning the potential for multiple or cumulative exposure to human health or environmental hazards** in the affected population and historical patterns of exposure to environmental hazards, to the extent such information is reasonably available. For example, data may suggest there are disproportionately high and adverse human health or environmental effects on a minority population, low-income population, or Indian tribe from the agency action. Agencies should consider these multiple, or cumulative effects, even if certain effects are not within the control or subject to the discretion of the agency proposing the action.

3. Agencies should **recognize the interrelated cultural, social, occupational, historical, or economic factors** that may amplify the natural and physical environmental effects of the proposed agency action. These factors should include the physical sensitivity of the community or population to particular impacts; the effect of any disruption on the community structure associated with the proposed action; and the nature and degree of impact on the physical and social structure of the community.

4. Agencies should **develop effective public participation strategies**. Agencies should, as appropriate, acknowledge and seek to overcome linguistic, cultural, institutional, geographic, and other barriers to meaningful participation, and should incorporate active outreach to affected groups.

5. Agencies should **assure meaningful community representation** in the process. Agencies should be aware of the diverse constituencies within any particular community when they seek community representation and should endeavor to have complete representation of the community as a whole. Agencies also should be aware that community participation must occur as early as possible if it is to be meaningful.

6. Agencies should **seek tribal representation in the process in a manner that is consistent with the government-to-government relationship** between the United States and tribal governments, the federal government's trust responsibility to federally recognized tribes, and any treaty rights.

In addition to the CEQ guidance, individual agencies have developed additional supplemental guidance to address their own agency's actions. See Chapter 6 of the main guidance document, which contains a more comprehensive discussion of Executive Order 12898, specific provisions of the order, and individual agency guidelines for its implementation.

Strategy # 6: Ensure that consultation requirements are being met under federal cultural resource protection statutes.

Three federal statutes are of particular relevance to the protection of cultural resources: the National Historic Preservation Act of 1966 (NHPA); the Archaeological Resources Protection Act (ARPA); and the Native American Graves Protection and Repatriation Act (NAGPRA). These statutes outline a framework for avoiding damage to historically or culturally significant places as a result of development activities. Because all three statutes address requirements of federal agencies regarding their proposed actions, the explanation of how requirements are met under these laws are usually tied into the NEPA process and packaged with NEPA documents. The requirements under each of these statutes addresses, in part, tribal rights for involvement in assessment of impacts to cultural properties on federal lands. Taken together, these statutes and their implementing regulations provide opportunities for tribes to assert their rights for involvement whenever cultural properties, as defined under these laws, may be affected by a NEPA action.

The NHPA is a statute designed to protect properties with historic significance, and authorizes the creation of the National Register of Historic Places. Places that hold religious or cultural importance for Native American tribes are eligible for listing on the National Register. The NHPA also created an independent agency, the Advisory Council on Historic Preservation, and charges it with reviewing proposed federal "undertakings" that may affect properties listed, or eligible for listing on the National Register. The mandate for this review function is found in Section 106 of the NHPA, and is referred to as the "Section 106 consultation process." [8]

[8] Suagee, Dean. 1994.

Under NHPA as amended in 1992, a tribe has the right to receive notice and to be involved in any Section 106 consultation when a proposed federal activity might affect a place that has religious or cultural importance to the tribe, and is eligible for the National Register (NHPA Sec. 101 (d) (A-B)). This applies to all properties, even private lands, if there is a federal action involved.

Neither ARPA, which addresses archaeological sites, nor NAGPRA, which addresses gravesites, requires formal consultations with tribes unless on "**Indian** lands" subject to tribal jurisdiction. They do, however, require that notice be given to tribes before any issuance of a permit on federal lands that might affect a site of religious or cultural importance for a tribe. As such, the requirements of these laws are often met through a NEPA process, if NEPA has been triggered.

A few tips:

- Consider identifying areas that hold cultural or religious significance to your tribe on federal lands, and seeking to establish their eligibility for the National Register under NHPA. This will ensure a federal agency's obligation to a formal consultation with a tribe before a NEPA action is taken.

- Ensure that federal agencies meet their obligation to tribes under these statutes at the earliest possible stage in the NEPA process.

- Obtain information on NHPA's National Register and eligibility, the Section 106 consultation process, and local government certification programs, by contacting:

ALASKA STATE HISTORIC PRESERVATION OFFICE
Office of History and Archaeology
Alaska Division of Parks and Outdoor Recreation
3601 C Street, Suite 1278, Anchorage, Alaska 99503-5921
(907) 269-8721. FAX (907) 269-8908, e-mail: oha@alaska.net

Or,

NATIONAL REGISTER OF HISTORIC PLACES, NATIONAL PARK SERVICE,
U.S. Department of the Interior,
P.O. Box 37127, Washington, D.C. 20013-7127.
http://www.cr.nps.gov/nr/nrhome.html

See also *National Register Bulletin 15: How to Apply the National Register Criteria for Evaluation*

Strategy # 7: Use Provisions of the Federal Coastal Zone Management Act - The "Consistency Finding"

Under the Coastal Zone Management Act of 1972, "any Federal agency which shall undertake a development project in the coastal zone of a state shall insure that the project is, to the maximum extent practicable, consistent with the enforceable policies of approved state management programs."[9] Hence, NEPA requires an evaluation of a proposed action to determine whether the proposed action is "consistent" with the State coastal zone management program. This is termed a "consistency finding" and is done by the designated State government authority reviewing coastal zone management programs for the potentially affected area.

Several Alaska tribes interviewed from coastal areas of the State have worked in cooperation with regional governments (i.e., boroughs) to develop a regional coastal zone management program under the umbrella of the State of Alaska's Coastal Management Program (ACMP). Under the ACMP, there are specific provisions for identifying and protecting areas utilized for subsistence activities.[10] For example, as part of the Kenai Peninsula Coastal District's program, the coastal area surrounding the predominantly Alaska Native communities of Port Graham and Nanwalek is designated as an "Area Meriting Special Attention" or "AMSA" because subsistence was deemed a priority use there.

In a lawsuit brought by the villages of Port Graham and Nanwalek against the State of Alaska, the villages asserted that the State's Consistency Finding for the issuance of an NPDES permit for an oil and drilling facility in upper Cook Inlet was inadequate. They claimed that the State, in their review, failed to make specific findings in regards to habitat and subsistence protection measures as defined in the regional coastal zone program for the Kenai Peninsula Coastal District. The Alaska Superior Court agreed, which ultimately

> *"Since the Supreme Court ruled that Section 810 of ANLICA did not apply to the outer Continental Shelf (OCS), the subsistence provisions of the ACMP potentially serve as a useful alternative tool for Alaska Native communities in or dependent on the coastal zone for subsistence."*

[9] 16 USC 1451 *et seq*.
[10] 6AAC 80.120(a)-(d).

resulted in more safeguards to protect subsistence and habitat upon the subsequent issuance of the permit.

The subsistence provisions of the State's Coastal Zone Program have also proved valuable in litigation by Alaska tribes to stop or substantially alter a proposed federal action. Since the Supreme Court ruled in Amoco Production Company v. Village of Gambell, 107 S. Ct. 1396 (1987), that Section 810 of ANILCA did not apply to the outer Continental Shelf (OCS), the subsistence provisions of the ACMP potentially serve as a useful alternative tool for Alaska Native communities in or dependent on the coastal zone for subsistence.

A few tips (for coastal-dependent Alaska tribes):

- Be familiar with provisions of their regional coastal zone plan.
- Track and review the "consistency findings" under the CZMP for NEPA actions, provide comments to the State as allowed under State law, and challenge such findings if warranted.
- Look into options for becoming involved in the development or revision of a regional coastal zone plan, and potentially designating tribal subsistence use areas as an "Area Meriting Special Attention."

Strategy # 8: Develop a tribal community environmental plan

Tribes engaged in NEPA might want to consider the value of developing a community resource plan, such as a tribal comprehensive plan, a watershed plan, an integrated resource management plan, or subsistence use plan. For the purposes of NEPA involvement, the intent of such a plan would be to document, in written form, the traditional territory of the tribe and the natural and cultural resources of importance. The plan could also describe sensitive fish and wildlife habitat, the customary and traditional uses of the tribe within that area, and the future tribal goals for the area. Several Alaska tribes or tribal consortia have already developed such plans. Canadian tribal governments have also developed community plans such as these primarily for conducting or contributing to environmental assessment of proposed development projects.

WHAT PURPOSE WOULD A COMMUNITY PLAN SERVE?

1. Documents the relationship of tribe to a particular land area (i.e., the customary and traditional use area); could include Alaska Native place names to serve as further evidence of historical tie to those lands
2. Could identify areas based on their sensitivity to development, and desired protection level (i.e., lands of special cultural/religious significance to tribe, environmentally "sensitive" lands, etc.)
3. Serve as a statement of tribal stewardship over their customary and traditional use area
4. Documentation of a tribe's historical and contemporary subsistence uses of natural resources, including fish, wildlife and plant species used, access routes, campsites, cabins, traplines, etc.
5. Documents tribal expertise and vested interest in this area
6. If updated periodically, plan could serve as a ready and available source of information for a tribe to contribute to a NEPA document, and prevent unnecessary duplication of effort

Community plans help to demonstrate tribal connections to, expertise and stake in the disposition of lands in the area identified in the plan, and as such, should assist tribes who wish to become involved in NEPA.

Whether through commenting/consultation, serving as a cooperating agency, or contracting to do analysis for NEPA actions (i.e., impacts to subsistence/ANILCA Sec. 810 evaluations, wildlife/habitat impact assessment, socio-economic analyses, etc.), possessing a written document of the tribes uses, knowledge, and values of a land area should help position the tribe as having expertise. It may also streamline their role in contributing to the development of NEPA when an action arises that concerns land or resources within their area. For tribes who become involved in litigation pursuant to NEPA actions, such a community plan should assist in demonstrating their legal standing in the appeals process.

Strategy # 9: Assert the Federal Responsibility for Trust Assets – Allotments and Native Townsites

Native American Trust Assets are those legal interests in property held in trust by the United States for tribes or individual Native Americans, or properties that the United States is charged by law to protect. Examples of resources that could be trust assets are lands, minerals, hunting and fishing rights, water rights and instream flows[11].

[11] Bureau of Reclamation, 1993.

Agencies with jurisdiction by law, or who have special expertise with respect to a proposed project, are required to provide comments. CEQ considers the BIA to have special expertise with regard to all manner of environmental impacts on trust lands, and to have jurisdiction by law over certain kinds of impacts. Thus, a tribe that lacks the resources to review and comment on EISs for proposed actions which may affect its interests may want to stress the BIA's duty to comment on a particular EIS. There have been instances in which the BIA's comments have been helpful in protecting tribal interests, particularly when tribes have insisted that the BIA play a role. Tribes are familiar, though, with the limitations on the BIA's staff resources. Although cooperation among tribes and the BIA in reviewing EISs may well be mutually beneficial, reliance on the BIA to protect tribal interests is not advisable. (see Chapter 3, main guidance). In speaking with BIA's Alaska Office in Juneau, staff indicated that BIA is most likely to become involved when there are trust lands at stake (i.e., Restricted Native Allotments and Restricted Native Townsites)[12]

Alaska BIA NEPA Contact: NEPA Coordinator
Juneau Area Office
P.O. Box 25520
Juneau, AK 99802
(800) 645-8397

Regional BIA NEPA Contact: Portland Regional Office
Resource and Compliance
(503) 231-6749

Strategy # 10: Elevate a Tribal Issue Beyond the Lead Agency When Warranted

If a tribe has a major concern with a NEPA-related action, and has had difficulty raising attention to that issue, they may find it useful to share their concern and seek partners or allies with other, potentially helpful parties, outside of the lead agency. Several such parties have been identified by tribal representatives interviewed, and include other tribes, tribal consortia, tribal interest groups, Native corporations and non-profits, local government, or special interest groups with a common perspective or concern over a particular NEPA action (e.g.,

[12] Personal Communication, Frank Andrews, NEPA Coordinator, BIA Juneau Area Office, Juneau, AK. July 6, 1999.

environmental organizations and public advocacy organizations). In addition, elevating a concern to other federal entities charged with NEPA or a trust responsibility to tribes may serve as a useful strategy.

A few tips:

Contacts:

Environmental Protection Agency, Alaska Field Office,
Tribal Liaisons:
(907) 271-5083

Environmental Protection Agency, Region 10, Seattle, NEPA
Specialists/Reviewers: (206) 553-1200

Environmental Protection Agency,
Office of Federal Activities, Washington, D.C:
(202) 564-7127

Environmental Protection Agency,
American Indian Environmental Office,
Washington, D.C: (202) 260-1489

Council on Environmental Quality
Washington, D.C. 20503
(202) 395-5750 Attn: Associate Director for NEPA

US Department of Justice
Washington D.C.
Director, Office of Tribal Justice (202) 514-8812
Chief, Office of Indian Resources (litigation) (202) 305-0269

U.S. Department of Interior, Division of Indian Affairs,
Solicitor's Office, Washington, D.C.
(202) 208-4361

Strategy # 11: Take a proactive role in Project Monitoring and Oversight of Required Mitigation Measures

Because NEPA is a procedural law, and does not dictate specific outcomes, federal agencies need only demonstrate that they have

followed the procedural requirements of NEPA. Agencies do *not* need to demonstrate that they have chosen the alternative with the least environmental impact. Tribes, among other interested parties participating in NEPA, therefore often feel powerless to influence the ultimate lead agency choice of action alternatives. Agencies do, however, have a responsibility to mitigate the likely adverse impacts of a chosen course of action. By their involvement in NEPA, tribes have the ability to ensure that adverse impacts to their tribe are brought to public attention, and to suggest specific mitigation measures to avoid or minimize them.

Alaska tribes interviewed cited several instances where they were not necessarily able to influence the ultimate outcome of a NEPA process, but were successful in specifying mitigation measures that became part of the agency's "Record of Decision." In a few such cases, tribes were also involved in the monitoring and oversight of those mitigation measures after the project moved forward. Although in some cases this may be of little consolation to tribes, in others it may be all that is needed to address tribal concerns with a given project. In one case, the Red Dog Mine Project, northwest Alaska Native villages became part of a steering committee overseeing the development of the zinc mine, ensuring that the specified mitigation measures were implemented as specified. In the recent Northstar Project decision, a post-project monitoring "subsistence council" composed of local Alaska Native residents was established to monitor the project's impacts on subsistence and the mitigation measures required for project implementation.

One provision of NEPA may be of particular value to tribes seeking assurances that mitigation will be implemented. CEQ regulations provide that if mitigation measures have been adopted, the lead agency is responsible for implementing these measures (unless another agency has agreed to carry out the mitigation program). These measures include appropriate conditions being placed on both agency approvals and funding actions. If the mitigation measures were proposed by a cooperating *or* commenting agency, such as a tribe, they may request that the lead agency keep it informed on its progress in carrying out the mitigation measures. When such a request is made, the lead agency is required to comply. If a tribe proposes mitigation measures that are incorporated into the lead agency's decision, they may find this provision of the regulations, wherein reporting by the lead agency is required, to be of great value.

Strategy # 12: Use the Appeals Process as Necessary and/or Appropriate.

When a tribe's participation in NEPA has not met with favorable results, a tribe may consider appeal or litigation. Alaska tribes should read Chapter 7 of the main guidance document, which addresses this avenue in detail. Based on interviews with tribal representatives, some of the areas under which Alaska tribes have appealed or litigated NEPA actions to date include:

- failure to adequately consider impacts to subsistence uses of resources, or failure to conduct ANILCA Section 810 subsistence evaluation
- failure to adequately consider the cumulative impacts of federal actions
- failure to meet the requirements of federal statutes protecting cultural/archaeological sites
- failure to successfully demonstrate "consistency" with regional coastal zone management programs, pursuant to the Coastal Zone Management Act of 1972
- failure to address the impacts to subsistence users outside of the project area (i.e., other regions of the State) when migratory fish or wildlife species were involved

In many of the cases mentioned, tribes were joined by other tribes or environmental organizations in their litigation – often a prerequisite to obtain sufficient funds and technical expertise to take a lawsuit forward. Although not all cases mentioned were successful, tribes reported that litigation was often effective as a delay tactic, allowing time for tribes to find alternative means to address their concerns.

11.3D Securing Adequate Technical Expertise

As noted above, Alaska tribes often felt handicapped by a lack of technical expertise required to effectively analyze NEPA documents. If an individual tribe does not have the resources to maintain a staff of technical experts as needed, it may wish to consider potential alternative sources.

A few tips:

- **Make use of pooled resources** to provide for this expertise; i.e., use a regional tribal organization or consortia to maintain technical expertise that can serve the needs of multiple tribes.
- **Tap federal expertise** (i.e., agency staff resources) pursuant to their trust responsibility to tribes. Many of the individual agency's own Native American policies specifically state their ability and willingness to provide for technical expertise and other resources to tribes. For example, the U.S. Fish and Wildlife Native American Policy (1994) states the following:

> The Fish and Wildlife Service will make available technical expertise from all Service program areas to assist Native American governments in the management of fish and wildlife resources, and to assist the Native American governments in developing their own technical expertise in fish and wildlife conservation and management where requested. ***USFWS Native American Policy, 1994***

- Although all federal agencies may be able to provide some type of expertise to tribes, several agencies have publicly announced their eagerness to develop partnerships with tribes or have already done so in Alaska. They include: Minerals Management Service (MMS), the U.S. Geological Survey (USGS), National Biological Survey (formerly the research branch of the Fish and Wildlife Service), the U.S. Department of Agriculture's Natural Resource Conservation Service (NRCS), and the U.S. Fish and Wildlife Service. Tribes may wish to contact the agency's tribal liaison staff person to make an initial request for technical expertise or other resources from a particular agency. The arrangement could be informal, or formally arranged through an "interpersonnel assignment" (IPA) which can and does take place between tribes and federal agencies. These agencies have, in the past, provided biologists, hydrologists, and Geographic Information System (GIS) specialists to tribes, and can provide other types of technical expertise as well.

- Request that the Bureau of Indian Affairs (BIA) participate in the NEPA process as a cooperating agency or reviewer to represent tribal interests, to "advocate" on behalf of a tribe to

other federal agencies as needed, and/or to provide NEPA training courses to tribes. *Contact:* Natural Resources and Environmental Program Office, NEPA Coordinator, Juneau Area Office, BIA (800) 645-8397

- Build alliances with other organizations, who for a given proposed NEPA action, may have similar concerns or goals, and who have or can secure needed technical expertise (e.g., environmental or conservation organizations, non-profit public interest groups, educational institutions)

11.3E Accessing Funds for Participation

Although tribes may want to participate in NEPA, limited time, staff resources, and ultimately the financial resources needed for what can become a prolonged and intensive effort may prevent tribes from doing so. This may be especially true in Alaska, where tribes/villages are often very small, isolated, and with little natural resource management infrastructure. In seeking funds for NEPA participation, we recommend the same strategies as for finding technical expertise: pooling resources with other area tribes, relying on regional or statewide tribal associations, requesting funds from appropriate federal agencies, and building alliances with other similarly minded organizations that have or can access funds for mutual goals.

In approaching federal agencies for funding for tribal NEPA involvement, tribes can justify their need on the basis of their interests at stake, their status as tribal governments, as well as their special expertise as local indigenous residents in the project area. International law addressing indigenous rights, as well as many federal statutes and executive orders, calls for the integral involvement of indigenous peoples and/or tribal governments in environmental matters affecting them (see Chapter 7 of main guidance document). For example, as mentioned earlier, if tribes are justified in serving as a cooperating agency under NEPA, the law makes explicit reference to the lead agency's responsibility to provide funding for that role, if the cooperating agency lacks funds. Under provisions of the 1994 Environmental Justice Executive Order 12898, Alaska tribes, as minorities, could make a very strong case for funds from federal agencies for their participation in NEPA as necessary. In any case, tribes should approach the lead federal agency with a request for funds, or the BIA, which may be able to provide funds, depending on the specific circumstances involved. If

tribes would not be able to participate effectively without outside funding, and are unsuccessful in procuring them from the sources mentioned, they may wish to elevate the problem to others who could advocate on their behalf (see contacts suggested under Strategy #10, "Elevating a Concern," of this section).

Tribes may also attempt to secure funds for their NEPA participation directly from the project applicant, when the applicant is a private entity such as a real-estate developer or industrial company (i.e., oil and gas, mining, hydropower, or pipeline company) or even a Native Corporation. Although this is a common practice in other countries, such as in Canada, funding of local communities and tribes as "intervenors" in NEPA actions does not appear to be common in rural Alaska. However, one example of a similar type of arrangement grew out of the proposed Canada Yukon Pacific Company's proposal to construct a gas pipeline in Alaska. At the time of proposal, the company provided funds for local communities to collect information on the potential impacts of the project to their community. In other cases in Alaska, the project applicant has paid for consulting firms to gather additional information for NEPA documents. Although it appears that these funds did not go directly to tribes, there is no reason why this couldn't happen when tribes possess the needed expertise.

A few tips:

- Rely on regional or statewide tribal associations
- Request funds from appropriate federal agencies (BIA and lead NEPA agencies)
- Build alliances with other like-minded organizations that have or can access funds for mutual goals
- Pool resources with other area tribes
- Request funding directly from a private project applicant, such as industry

11.4 The TEPA Alternative

This final section describes a uniquely tribal approach to environmental assessment -– the Tribal Environmental Policy Act or "TEPA." Although to this point the focus has been on tribal involvement in a largely *external* process (i.e., NEPA), the TEPA, by contrast, is a largely

internal tribal process developed and implemented by tribes themselves. Chapters 8 and 9 of the main guidance document provide detailed background on the TEPA, its current use by several tribes in the lower 48 states, its benefits and limitations, and a model code or template for tribes who may wish to adopt their own. For this supplement, we will address issues relating specifically to the potential application of a TEPA in Alaska. We would recommend to tribes in Alaska that they read the more brief section on TEPA that follows. If the concept of a TEPA appears to be a potentially useful one, we recommend reading the two chapters in the main guidance document for a more in-depth understanding of this form of tribal law.

11.4A What is a TEPA (Tribal Environmental Policy Act)?

Like NEPA, a TEPA is a mechanism for evaluating impacts to the environment from a proposed development of some kind. However, it is a "tribalized" version of NEPA, and can be drafted to meet a tribe's unique environmental and cultural protection needs. It is a tool for ensuring the long-term health of the tribal community and protection of their natural and cultural resources, while at the same time balancing demands for economic development, job creation, and increased self-sufficiency.

Because of its broad language, a TEPA can also serve as a "springboard" for a tribe to develop a more comprehensive regulatory framework. Implementation of a TEPA, for example, can help a tribe to identify, organize, and develop its technical, administrative, and legal resources. By conducting their own environmental review process, tribes are making a statement to other governments that they are responsible stewards of their environment and are making a commitment to the protection of valuable natural resources. As lead, the tribes can determine what, how, and when development occurs. A TEPA can serve a valuable function in preventing impacts from occurring, by conditioning or mitigating a project while it is still in the design stage.

11.4B Where Would a TEPA Apply?

As conventionally used by tribes to date, a TEPA applies to those lands over which a tribe or tribes have jurisdiction. In the lower 48 states, a TEPA typically applies to all lands within the exterior boundaries of an Indian reservation. With the exception of the Metlakatla Reservation in southeast Alaska, the land status and question of tribal jurisdiction

throughout the remainder of the state of Alaska is less straightforward. As a result, the question of how and where a TEPA might be effectively applied in Alaska is a complex one.

There is no question that the Alaska Native Claims Settlement Act of 1971 (ANCSA) represented a significant departure from the way in which a tribe's land claims had been traditionally settled elsewhere in the country. The settlement under ANCSA made it more complicated to draw legal parallels between Alaska tribes and Indian treaty tribes of the lower 48 states. By conveying Alaska Native land title to 12 regional and 200 local village corporations chartered under Alaska state law, ANCSA changed the relationship between Natives and the land from one of co-ownership of shared lands to one of corporate shareholding; i.e., land ownership was based on a corporate model, and governmental entities, including traditional or IRA "tribal" governments, were bypassed.[13]

If a tribal government seeks to control the activities of private persons and governmental entities other than itself, civil regulatory jurisdiction over a defined territory is essential. In *Alaska v. Native Village of Venetie Tribal Government*, decided on February 25, 1998, the U.S. Supreme Court reversed a Ninth Circuit decision, ruling that the land occupied by the Neets'aii Gwich'in people of Venetie and Arctic Village was not "Indian Country." Hence, tribal powers over state law in areas such as taxation, zoning, land use management, criminal misdemeanor jurisdiction over tribal members, similar to those of Indian tribes on reservations in the lower 48 states, were not recognized by the court. The net effect of this decision on the Venetie Tribal Government, and likely other Alaska tribes, with the exception of the Metlakatla Reservation, is that a tribe cannot regulate or tax nonmembers on Native corporation lands.

The degree to which Alaska tribes retain jurisdiction over other types of properties, such as Native allotments or townsites was not addressed, nor was the issue of their inherent sovereignty over certain activities of *members* of the tribe. In a recently filed case in federal district court, the Native Village of Barrow has raised the argument that townsite lots are "Indian Country" (Native Village of Barrow v. National Indian Gaming Commission). If the Village of Barrow ultimately prevails, the case may open the possibility of tribal governments exercising territorial jurisdiction over townsite lots. In regard to tribes regulating members' activities, it is clear that even in the absence of "Indian Country," tribes retain the power "to determine tribal membership, to regulate domestic relations among members, and to

[13] Department of Planning and Development Tanana Chiefs Conference, Fairbanks, AK., March 6, 1997, excerpt from essay on ANCSA.

prescribe rules of inheritance for members."[14] Therefore, tribes possess the authority to control the conduct of their members that might affect the environment outside of Indian Country[15]. The degree to which this might be useful for purposes of TEPA, however, remains to be seen. In summary, although issues concerning Alaska tribal jurisdiction over lands are far from being settled, the stage set by Venetie makes it difficult to conclude which lands, if any, a tribe may be able to successfully and productively cover under its TEPA umbrella.

11.4C Is a TEPA a Useful Tool for Alaska Tribes?

Although the Venetie decision was a blow to Alaska tribal governments seeking recognition of their jurisdiction on existing or former Native corporation lands, we do not believe that the ruling forecloses the option of tribal adoption of a TEPA in Alaska. The court decision may, at this time, make the *enforcement* of a TEPA against nontribal members difficult, as it has been conventionally applied in the lower 48 states to date. However, it is clear that tribes have the authority to enforce a TEPA on its own members, *and* there remain other ways a tribe may effectively use a TEPA more broadly (i.e., as applied to nonmembers) in the Alaska setting. These different forms of TEPA are discussed below:

#1 - The "Conventional" TEPA

A TEPA, as described in this guidance document, can take on a number of forms. However, all employ TEPA as a tool for codifying a tribe's process for environmental review or permitting of development projects based on a tribe's own environmental and cultural values. A TEPA can be applied to actions of the tribal government, nontribal actions, and concurrently with NEPA where federal funding or permits are involved. In some cases, tribes use TEPA to launch an environmental regulatory program. TEPA serves as a good starting place since it is a broad-based, multi-media code, and can accommodate media-specific regulations that may come later.

All forms of what we are referring to as a "conventional" TEPA are predicated on a tribe being able to successfully demonstrate jurisdiction over the lands to which their TEPA applies. Given the recent U.S. Supreme Court ruling in Venetie, Alaska tribes may well be reluctant to adopt this type of code. Tribes should keep in mind, however, that adoption of a TEPA is not, by itself, something that will

[14] Montana v. United States, 450 U.S. 544 (1981).
[15] Aschenbrenner, 1999.

generate a lawsuit. Rather it is a tribe's *enforcement* of the code that may lead them to court. A tribe may not want to pursue enforcement if the circumstances of the case are not favorable for the tribe, or if the tribe has no chance of winning the larger jurisdictional issue. However, even a code with little or no chance of being upheld in court can be used successfully to posture a legal position to attain concessions from developers.[16]

Ultimately, Alaska tribes must ask whether the efforts needed to put a TEPA in place, which may be considerable (see Chapters 8 and 9), are worth the potential benefits accrued. Although such a code *may* afford tribes a negotiating advantage under certain circumstances, having an environmental code that is largely unenforceable, except perhaps on tribal members in limited areas (i.e., trust lands), may be more of a burden than benefit. Applied in conjunction with some of the other potential applications of a TEPA described below, however, the benefits may begin to justify the efforts required.

#2 - The "Voluntary" TEPA

This form of a TEPA would be based upon the voluntary agreement of a Village Native Corporation, regional Native Corporation, federal agency or any other land-holding entity to submit to a tribe's implementation of a TEPA on lands under their ownership. The acceptance of a tribe's TEPA would be over and above any federal or state regulation that may apply to those same lands. Under such an arrangement, the TEPA would be implemented in this type of "voluntary" manner. The details of such a voluntary arrangement between a tribe and the land-owning entity could be worked out through a Memorandum of Agreement, or Understanding (MOA, MOU).

Two situations where such a "voluntary" form of NEPA might be most useful are: (1) between a tribe or tribes and its associated village or regional native corporation, and (2) between a tribe and a federal agency or other governmental entity that oversees lands in the vicinity of the tribal community. In both cases, this approach provides a proactive way for tribes to become more involved in environmental issues affecting their members.

Between Tribe and Native Corporation: A tribal government may wish to have more influence over the types of development and how it occurs on Native village corporation lands. By developing a TEPA, the tribe could lay out an environmental review process, reflecting the multiple values of the tribal membership. *If* the Village corporation

[16] Schmanska, 1998.

agreed to the screening of proposed development on their lands by the tribe under the provisions of the tribal TEPA, the details of the arrangement could be formalized by a MOU or similar agreement. Such a TEPA could serve as a bridge between the more traditional subsistence, religious, and cultural values of the land, on the one hand, and the economic value and need for profit as mandated by the corporation's charter, on the other. It could also function as a more formal communication tool between tribe and corporation to protect important ecological and cultural resources to the community**.** *Clearly, however, a TEPA would only serve as an effective mechanism for a partnership between tribe and native corporation where there already existed the will and desire for collaboration on the part of both parties.* A similar arrangement could be contemplated between a consortium of area tribes with their associated Regional Native Corporation.

Between tribe and federal agency or state or local governmental entity: Tribes may find that enacting a TEPA is a practical means for negotiating with federal, state, and local government agencies, on a government-to-government basis, providing ways in which these agencies can meet their obligations to protect subsistence and cultural resources under various federal laws and executive orders (e.g.: ANILCA Title 8, ESA, MMPA, NEPA, Environmental Justice Executive Order 12898.). Although some agencies may be very willing to work with tribes on a government-to-government basis, they often don't know how to do so very well. A TEPA may be a useful tool in guiding a federal agency to work effectively in this capacity with tribes.

If the various statutory provisions for evaluation or consultation with Alaska are taken in conjunction with the federal policy of working with tribes on a government-to-government basis, a tribe could fashion the following policy argument: *If a tribe or regional organization of tribes decides to take a proactive approach to the various consultations and determinations that must be done under these statutes by enacting tribal legislation, then agencies should comply with the procedural aspects of the tribal legislation.* In essence, a tribe would be saying to federal or other agencies "You have certain obligations to consider impacts on our subsistence cultural practices and to consult with us. We have established our own process for evaluating these impacts. It would save us a lot of time and trouble if you would make your procedure fit ours."

A tribe may use this same approach to try to get federal agencies to use a consultation process that serves tribal needs for other more general federal statutes that require consultation with affected tribes, such as the NHPA, ARPA, and the NAGPRA. Likewise, tribal

governments could potentially use a TEPA to serve as the basis for conducting their own environmental review of potential project impacts and ANILCA 810 evaluations when federal environmental review is required, or to serve as a foundation for negotiating co-management agreements with the federal and state agencies.

#3 - A TEPA to Codify Tribal Customary Law

This potential strategy is a theory based on an application of the "Doctrine of Custom," but has not yet been well tested. The concept is that tribal custom may be incorporated into the common law of a state, except where the state's statutory law is inconsistent with a rule that would be established by looking to tribal custom. (The Alaska statute incorporating common law is Alaska Stat. # 164 #01.10.010). Under this theory, even though a tribe may no longer have regulatory jurisdiction over a defined territory, tribal customary law still provides substantive rules for behavior that state and federal courts can look to and apply as part of the common law. This approach may be particularly appealing to Alaska tribes who believe that state and federal environmental management and enforcement is lacking in their area, or who, by virtue of their historical occupancy, isolation, and customary control of the area, are in the best position to ensure protection of resources of importance to the tribe.

If an Alaskan tribe wanted to use this approach, it might enact a TEPA which could make an assertion of the territory over which it once held sovereignty, and establish a tribal institution and a process for determining the applicable customary law in specific cases. The tribe would also probably want to assert that tribal regulatory authority still exists over some portion of this aboriginal territory. The tribal institution might be a commission of elders or a tribal court.

Rather than leaving all of the customary law to be determined in rulings on specific cases, a TEPA might codify some of the basic principles. The TEPA might assert that ANCSA entities, such as regional and village corporations, should conform their activities to the basic principles set forth in the TEPA. As stated before, whether or not a tribe can make its custom stick as enforceable law is yet untested. Still, a tribe may be able to realize some moral and political gain through the process of formally declaring what it believes to be the customary law in their traditional use area.

Conclusion

Although we have presented a few options for consideration in developing a TEPA in Alaska, there are probably many more ways a TEPA could be adapted to suit the needs of Alaska tribes that are not presented here. As would be the case for any tribe in the country, Alaska tribes should carefully consider whether a TEPA is the best tool to address their needs, and whether the investment of time to establish and maintain this type of environmental code will justify the potential benefits to the tribal membership. Again, we refer tribes who have further interest in the potential value of a TEPA to read Chapters 8 and 9 of the main guidance to get a better understanding of the mechanics and effort required for adopting a TEPA.

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APPENDIX A:

The National Environmental Policy Act of 1969, as Amended

(Pub. L. 91-190, 42 U.S.C. 4321-4347, January 1, 1970, as amended by Pub. L. 94-52, July 3, 1975, Pub. L. 94-83, August 9, 1975, and Pub. L. 97-258, § 4(b), Sept. 13, 1982)

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.

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 [42 USC § 4321].

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

CONGRESSIONAL DECLARATION OF NATIONAL ENVIRONMENTAL POLICY

Sec. 101 [42 USC § 4331].

(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, consist 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 aesthetically 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.

Sec. 102 [42 USC § 4332].

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;

(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 Act; 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 title II of this Act.

Sec. 103 [42 USC § 4333].

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 [42 USC § 4334].

Nothing in section 102 [42 USC § 4332] or 103 [42 USC § 4333] 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 [42 USC § 4335].

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

Sec. 201 [42 USC § 4341].

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 an 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.

Sec. 202 [42 USC § 4342].

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, aesthetic, 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 [42 USC § 4343].

(a) 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).

(b) Notwithstanding section 1342 of Title 31, the Council may accept and employ voluntary and uncompensated services in furtherance of the purposes of the Council.

Sec. 204 [42 USC § 4344].

It shall be the duty and function of the Council --

1. to assist and advise the President in the preparation of the Environmental Quality Report required by section 201 [42 USC § 4341] of this title;
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
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 [42 USC § 4345].

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 No. 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
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.

Sec. 206 [42 USC § 4346].

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 USC § 5313]. The other members of the Council shall be compensated at the rate provided for Level IV of the Executive Schedule Pay Rates [5 USC § 5315].

Sec. 207 [42 USC § 4346a].

The Council may accept reimbursements from any private nonprofit organization or from any department, agency, or instrumentality of the Federal Government, any State, or local government, for the reasonable travel expenses incurred by an officer or employee of the Council in connection with his attendance at any conference, seminar, or similar meeting conducted for the benefit of the Council.

Sec. 208 [42 USC § 4346b].

The Council may make expenditures in support of its international activities, including expenditures for: (1) international travel; (2) activities in implementation of international agreements; and (3) the support of international exchange programs in the United States and in foreign countries.

Sec. 209 [42 USC § 4347].

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

The Environmental Quality Improvement Act, as amended (Pub. L. No. 91- 224, Title II, April 3, 1970; Pub. L. No. 97-258, September 13, 1982; and Pub. L. No. 98-581, October 30, 1984.

42 USC § 4372.

> (a) There is established in the Executive Office of the President an office to be known as the Office of Environmental Quality (hereafter in this chapter referred to as the "Office"). The Chairman of the Council on Environmental Quality established by Public Law 91-190 shall be the Director of the Office. There shall be in the Office a Deputy Director who shall be appointed by the President, by and with the advice and consent of the Senate.
>
> (b) The compensation of the Deputy Director shall be fixed by the President at a rate not in excess of the annual rate of compensation payable to the Deputy Director of the Office of Management and Budget.
>
> (c) The Director is authorized to employ such officers and employees (including experts and consultants) as may be necessary to enable the Office to carry out its functions ;under this chapter and Public Law 91-190, except that

he may employ no more than ten specialists and other experts without regard to the provisions of Title 5, governing appointments in the competitive service, and pay such specialists and experts without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates, but no such specialist or expert shall be paid at a rate in excess of the maximum rate for GS-18 of the General Schedule under section 5332 of Title 5.

(d) In carrying out his functions the Director shall assist and advise the President on policies and programs of the Federal Government affecting environmental quality by --

1. providing the professional and administrative staff and support for the Council on Environmental Quality established by Public Law 91-190;
2. assisting the Federal agencies and departments in appraising the effectiveness of existing and proposed facilities, programs, policies, and activities of the Federal Government, and those specific major projects designated by the President which do not require individual project authorization by Congress, which affect environmental quality;
3. reviewing the adequacy of existing systems for monitoring and predicting environmental changes in order to achieve effective coverage and efficient use of research facilities and other resources;
4. promoting the advancement of scientific knowledge of the effects of actions and technology on the environment and encouraging the development of the means to prevent or reduce adverse effects that endanger the health and well-being of man;
5. assisting in coordinating among the Federal departments and agencies those programs and activities which affect, protect, and improve environmental quality;
6. assisting the Federal departments and agencies in the development and interrelationship of environmental quality criteria and standards established throughout the Federal Government;
7. collecting, collating, analyzing, and interpreting data and information on environmental quality, ecological research, and evaluation.

(e) The Director is authorized to contract with public or private agencies, institutions, and organizations and with individuals without regard to section 3324(a) and (b) of Title 31 and section 5 of Title 41 in carrying out his functions.

42 USC § 4373. Each Environmental Quality Report required by Public Law 91-190 shall, upon transmittal to Congress, be referred to each standing committee having jurisdiction over any part of the subject matter of the Report.

42 USC § 4374. There are hereby authorized to be appropriated for the operations of the Office of Environmental Quality and the Council on Environmental Quality not to exceed the following sums for the following fiscal years which sums are in addition to those contained in Public Law 91- 190:

(a) $2,126,000 for the fiscal year ending September 30, 1979.

(b) $3,000,000 for the fiscal years ending September 30, 1980, and September 30, 1981.

(c) $44,000 for the fiscal years ending September 30, 1982, 1983, and 1984.

(d) $480,000 for each of the fiscal years ending September 30, 1985 and 1986.

42 USC § 4375.

(a) There is established an Office of Environmental Quality Management Fund (hereinafter referred to as the "Fund") to receive advance payments from other agencies or accounts that may be used solely to finance --

1. study contracts that are jointly sponsored by the Office and one or more other Federal agencies; and
2. Federal interagency environmental projects (including task forces) in which the Office participates.

(b) Any study contract or project that is to be financed under subsection (a) of this section may be initiated only with the approval of the Director.

(c) The Director shall promulgate regulations setting forth policies and procedures for operation of the Fund.

APPENDIX B:

CITATIONS FOR FEDERAL AGENCY REGULATIONS IMPLEMENTING NEPA[1]

AGENCY	CITATION
Department of Agriculture	7 CFR 1b, Part 3100 (1988)
Agricultural Research Service	7 CFR Part 520
Agricultural Stabilization and Conservation Program Service	7 CFR Part 799
Animal and Plant Health Inspection Service	7 CFR 372 (1995)
Cooperative State Research Service	56 FR 8156 (1991)
Farmers Home Administration	7 CFR Parts 1901, 1940
Forest Service	36 CFR Part 219, FS Manual Chapter (1950)
Soil Conservation Service	7 CFR Part 650 (1988)
Rural Electrification Administration	7 CFR 1794 (1988)
Central Intelligence Agency	44 FR 45431 (08/02/79)
Department of Commerce	45 CFR 47898 (1980)
Department of Administration	Order 216-6
Economic Development Administration	45 FR 63310 (1980), amended by 45 FR 74902 (1980), and 10 ELR 10204 (1980).
National Oceanic and Atmospheric Administration (NOAA)	48 FR 14734 (1983); NOAA Directives Manual 2-10, Environmental Review Procedures, July 23, 1984
Consumer Product Safety Commission	16 CFR 1021 (1988)
Department of Defense	32 CFR Part 214 (1988)
Department of the Air Force	32 CFR Part 214 (1988)
Army Corps of Engineers	33 CFR Part 230, 32 CFR, Chapter 11

[1] Sources: Council on Environmental Quality. NEPA Website: NEPAnet; and Kreske, 1996.

Department of the Army	32 CFR Parts 650, 651 (1988), as amended by: 53 FR 46322 (1988), and 19 ELR 10037 (1988).
Department of the Navy	32 CFR Part 775 (1988)
Defense Logistics Agency	DLA 1000.22
Department of Energy	45 FR 20694 (1980), amended by 47 FR 7976 (1982), 48 FR 685 (1983), 52 FR 659 (1987), 52 FR 47662 (1987)
Coal Utilization Program	10 CFR Part 305
Federal Energy Regulatory Commission (FERC)	18 CFR 2.80, 380 (1988)
Federal Emergency Management Agency	44 CFR 10 (1987)
Federal Maritime Commission	46 CFR 504 (1988)
Federal Trade Commission	16 CFR 1, Subpart I (1988)
General Services Administration	50 FR 7648 (2/25/85)
Department of Health and Human Services (HHS)	HHS General Administration manual; 45 FR 76519 (1980), amended by 47 FR 2414 (1982)
Food and Drug Administration	21 CFR Part 25 (1988)
Department of Housing and Urban Development	24 CFR Part 50, 51 (1988), as amended by: 53 FR 11224 (4/5/88)
Housing and Community Development Act	24 CFR Part 50, 58
Community Development Block Grant Program	24 CFR 58 (1988), as amended by: 53 FR 30186 (8/10/88)
Department of the Interior	516 Department Manual 1-7; 45 FR 27541 (1980), as amended by: 49 FR 21437 (1984), and 14 ELR 10286 (07/84)
Bureau of Indian Affairs	30 BIAM Supplement 1, NEPA Handbook; 46 FR 7490 (1981)
Bureau of Mines	45 FR 85528 (1980); 516 WBM 1-5, Environmental Quality-National Environmental Policy Act of 1969 (March 29, 1990)
Bureau of Land Management	46 FR 7492 (1981), as amended by: 48 FR 43731 (1983), and 13 ELR 10385 (11/83)
Fish and Wildlife Service	45 FR 47941 (7/17/80) as amended by: 47 Fr 28841 (7/1/82)(12 ELR 05095; 8/82) and 49 FR 7881 (3/2/84)(14 ELR 10182; 4/84)
Geological Survey	46 FR 7485 (1981)
Minerals Management Service	51 FR 1855 (1986)

National Park Service	46 FR 1042 (1981); NPS-12, NEPA Compliance Guideline
Office of Surface Mining, Reclamation and Control	OMRE NEPA Handbook on Procedures for Implementing NEPA
Bureau of Reclamation	45 FR 47944 (1980), amended by 48 FR 17151 (1983)
International Boundary and Water Commission	46 FR 44083 (1981)
International Communication Agency	44 FR 45489 (1979)
Interstate Commerce Commission	49 CFR 1105 (1987), as amended by: 54 FR 9822 (3/8/89), and 19 ELR 10241 (05/89)
Department of Justice	28 CFR Part 61 (1988)
Drug Enforcement Agency	28 CFR Part 61, Appendix B
Immigration and Naturalization Service	28 CFR Part 61, Appendix C
Bureau of Prisons	28 CFR Part 61, Appendix A
Office of Justice, Assistance, Research and Statistics	28 CFR Part 61, Appendix D
Department of Labor	29 CFR Part 11
Department of State	22 CFR Part 161
Department of the Treasury	45 FR 1828 (1980)
Department of Transportation	44 FR 56420 (1979); Order DOT 5610.1c
Coast Guard	45 FR 32816 (1980), amended by 50 FR 32944 (1985)
Federal Aviation Administration	45 FR 2244 (1980), as amended by: 49 FR 28501 (1984)
Federal Highway Administration	23 CFR Parts 771
Federal Railroad Administration	45 FR 40854 (1980)
Maritime Administration	Maritime Administrative Order 600.1, July 23, 1985
National Highway Traffic Safety Administration	49 CFR Part 520 (1987)
Saint Lawrence Seaway Development Corporation	46 FR 28795 (1981)
Urban Mass Transportation Administration	23 CFR Part 771 (1988)
Department of Veteran's Affairs	38 CFR Part 26 (1988)
Advisory Council on Historic Preservation	36 CFR Part 805 (1988)
Agency for International Development	22 CFR Part 216
Environmental Protection Agency	40 CFR Part 6 (1988)
Arms Control Disarmament Agency	45 FR 69510 (1980)
Central Intelligence Agency	44 FR 45441 (1979)
Committee for Purchase from Blind and	

Other Severely Handicapped	41 CFR Part 51-6
Delaware River Basin Commission	18 CFR Part 401, subpart D
Environmental Protection Agency	40 CFR Part 6 (1988)
Export-Import Bank	12 CFR Part 408
Farm Credit Administration	12 CFR Chapter VI
Federal Communications Commission	47 CFR Part I, subpart I
Federal Emergency Management Agency	44 CFR Part 10 (1987)
Federal Energy Regulatory Commission	18 CFR Part 2.80, Part 380 (1988)
Federal Maritime Commission	46 CFR Part 504
Federal Trade Commission	16 CFR Part 1, Subpart I
General Services Administration	50 FR 7648 (1985)
International Boundary and Water Commission	46 FR 44083 (1981)
International Communication Agency	44 FR 45489 (1979)
Interstate Commerce Commission	49 CFR Part 1105, amended by 54 FR 9822 (1989)
Marine Mammal Commission	50 CFR Part 530 (1988)
National Aeronautics and Space Administration (NASA)	14 CFR Part 1216 (1988), as amended by: 53 FR 9759 (3/25/88)
National Capital Planning Commission	44 FR 64923 (1979)
National Institutes of Health	General Administration Manual, 30-10
National Science Foundation	45 CFR Part 640 (1987)
Nuclear Regulatory Commission	10 CFR Part 51
Overseas Private Investment Corporation	44 FR 51385 (1979); Foreign Assistance Act, 231, 237m, 239g
Pennsylvania Avenue Development Corporation	36 CFR Part 907
Securities and Exchange Commission	17 CFR Part 200, subpart K
Small Business Administration	45 CFR 7358 (1980)
Tennessee Valley Authority	45 FR 54511 (1980), amended by 47 FR 54586 (1982), 48 FR 19264 (1983), and 13 ELR 10193 (1983)
United States Postal Service	39 CFR Part 775
Water Resources Council	18 CFR Part 707 (1988)

APPENDIX C:

BUREAU OF INDIAN AFFAIRS
NATIONAL ENVIRONMENTAL POLICY ACT:
IMPLEMENTING PROCEDURES (516 DM 6, Appendix 4)

Published in: 61 FR 67845 (December 24, 1996)

Appendix D:

Tulalip Tribes Environmental Checklist and Code Cross-Reference

The Tulalip Tribes' Department of Community Development uses a checklist when initially reviewing proposed land-use actions. The checklist, completed by applicants, provides information for staff to evaluate the potential environmental impacts of a proposal. It also helps the Tribes determine whether or not to conduct further studies, and whether or not to invoke the Tribes' Environmental Policy Act.

The staff version of the checklist (**excerpt** below) also serves as a valuable reference tool, with citations throughout that refer to various tribal land-use and environmental codes. This allows tribal staff to quickly identify when and where a tribal code might be violated by a proposed activity, and whether or not a tribal permit is needed for that activity. (Applicant copies do not contain the code references, but allow blank space for responses to be written.)

A. BACKGROUND

1. Name of proposed project, if applicable:
2. Name of proponent:
3. Address and phone number of proponent and contact person:
4. Date checklist prepared:
5. Agency requesting checklist:
6. Proposed timing or schedule (include phasing, if applicable):
7. Are there any plans for future additions, expansions, or further activity related to or connected with this proposal? If yes, explain.
8. List any environmental information you know about that has been, 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 the proposal? If yes, explain:
10. List any government approvals or permits that will be needed for the proposal, if known:

11. Give brief, complete description of the project including (but not limited to) size, general design elements, and other factors that will give an accurate understanding of its scope and nature.
12. Location of the proposal. Give sufficient information for a person to understand the precise location of the proposed project, including a street address, if any, and section, township and range, if known. If the proposal would occur over a range of area, provide the range boundaries of the site(s). Provide a legal description, site plan, vicinity map, and topographic map, if reasonably available:

1. **Earth**
   a. General description of the site: (flat, rolling hills, steep slopes, mountainous, other):
   b. What is the steepest slope on the site (approximate percent of slope)?

See EIO .04.030 Steep Slopes – Violation if over 15% grade is developed without permit
See TZO 23.9 Steep Slopes
See TZO 23.2 Environmentally Sensitive Lands - Definition (Check for potential landslide and significant erosion.)
See TZO 23.3 Environmentally Sensitive Lands - Identification and Mitigation

   c. What general types of soils are found on the site (e.g., clay, sand, gravel, peat, muck)? If you know the classification of agricultural soils, specify them and note any prime farmland:

See TZO 23.3 Environmentally Sensitive Lands - Identification and Mitigation
See TZO 23.5.1 Wetland - Definition (Type of soil may indicate presence of wetlands; e.g. peat, muck, clay).
See TZO 23.5.2 Wetlands Categories (If there is a likelihood that wetlands are present, given soil type)
See TZO 34.4 (e) Subdivision – Minimum Subdivision Standards (Sensitive lands)

d. Are there any indications of a history of unstable soils in the immediate vicinity? If so, describe:

See TZO 23.2 Environmentally Sensitive Lands - Definition
See TZO 23.9 (b) Steep Slopes

e. Describe the purpose, type, and approximate quantities of any filling or grading proposed. Indicate source of fill:

See TZO 3.25 Filling - Definition
See TZO 23.3 Environmentally Sensitive Lands - Identification and Mitigation (Will fill or grading impact these areas?)
See TZO 23.8.5 Marine Shorelines - Principles and Practices
See TZO 25.2 General Conditions - Hydraulic Projects
See EIO .03.030 Digging/Excavation/Removal (Involving Cultural and Archaeological Resources)
See EIO .04.010 Waters/Wetlands/Tidelands
See EIO .04.020 Lands of Tribes
See EIO .04.040 Use of Fill Material

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

See TZO 23.8.5 Marine Shorelines - Principles and Practices
See TZO 23.9.1 (a) Steep Slopes - Design and Review (Development requirements)
See TZO 23.9.1 (c) Steep Slopes - Design and Review (Clearing)
See EIO .02.100 Pollutant - Definition
See EIO .02.110 Pollution - Definition
See EIO .04.050 Earth or Construction Debris
See WQS 6.01 (5) Turbidity/Sediment Narrative Criteria

g. About what percent of the site would be covered with impervious surfaces after project construction (e.g., asphalt, buildings)?

See TZO 25.1 General Conditions - Construction Practices

See TZO 34.4 (a) Subdivision - Minimum Subdivision Standards (Drainage)
See WPO 23.10.6 (b) Design and Operations Criteria for Drainage
See WPO 23.10.7 (a) Density and Lot Coverage Regulations

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

See TZO 23.8.2 Marine Shorelines - Bulkheads
See TZO 23.8.5 Marine Shorelines - Principles and Practices
See TZO 23.9 Steep Slopes
See TZO 24.6 Culturally Sensitive Lands - Natural Areas
See TZO 25.1 General Conditions - Construction Practices
See TZO 25.2 General Conditions - Hydraulic Projects
See EIO .04.050 Earth or Construction Debris
See EIO .10.040 Reparation - Best Available Technology

2. <u>Air</u>

a) What types of emissions to the air would result from the proposal (e.g., dust, automobile, odors, industrial, wood smoke) during construction and when the project is completed? If any, generally describe and give approximate quantities, if known:

See generally EIO .05 Fires
See AQO Article 3 Exhibit A (Emissions that are excluded from registration)
See AQO 4.04 Land Clearing Burning

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

See AQO 5.15 Odor and Nuisance Control Measures

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

See AQO 5.17 Emission of Air Contaminant: Concealment and Masking Restricted

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, name the stream or river into which it flow:

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

See WQS 6.01 (2) Criteria Applicable to All Waters - General Conditions
See TZO 23.7.2 Freshwater Wetland Buffers
See generally TZO 23.7 Wetlands
See TZO 23.8 Marine Shorelines - Definition
See TZO 23.9.1 (c) Steep Slopes - Design and Review (Clearing within buffers)
See EIO .09.040 Construction of Septic System within Buffer Zone

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

See WQS 5.04 Wetlands Class (Criteria)
See WQS 6.01 Criteria Applicable to All Waters - General Conditions
See WQS 6.02 Narrative Criteria
See WQS 6.05 Biological Criteria
See WQS 6.07 Sediment Criteria
See EIO .02.110 Pollution - Definition
See EIO .03.030 Digging/Excavation/Removal (Cultural and archaeological resources)
See generally EIO .04 Excavation/Dredging/Filling
See EIO .11.010 Destruction of Lands (Tribal resources)

See EIO .12.040 Water Quality Standards Violations
See TZO 23.7.8 Wetland Alterations
See TZO 23.8.5 Marine Shorelines - Principles and Practices
See TZO 25.1 General Conditions - Construction Practices
See TZO 25.2 General Conditions - Hydraulic Projects

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

See WQS 6.01 (1) Criteria Applicable to All Waters - General Conditions
See WQS 6.05 (1) Biological Criteria (Water quality standards)
See also WQS 6.05 (2) Biological Criteria
See WQS 6.06 Wildlife Criteria
See EIO .11.070 Depletion of Tribal Water Resources

(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:

See WQS 5.04 Wetlands Class (Criteria)
See WQS 6.01 Criteria Applicable to All Waters - General Conditions
See WQS 6.02 Narrative Criteria
See WQS 6.03 Toxic Pollutants
See WQS 6.05 Biological Criteria
See WQS 7.0 (1) Antidegradation Policy
See WQS 10.01 (1) Implementation and Enforcement
See WQS 10.03 Sampling and Analysis
See EIO .02.100 Pollutant - Definition
See EIO .04.050 Earth or Construction Debris
See EIO .08 Pesticides
See EIO .10 Spills

See EIO .10.060 Negligence (Spills)
See EIO .10.070 Willful Misconduct/Reckless Disregard (Spills)
See EIO .15.100 Cleanup Orders
See WPO 23.10.6 (b) Design and Operations Criteria (Drainage)

WQS = Water Quality Standards
TZO = Tulalip Zoning Ordinance
AQO = Air Quality Ordinance
EIO = Environmental Infractions Ordinance
WPO = Tulalip Wellhead Protection Ordinance

APPENDIX E:

LIST OF ALASKA NEPA SURVEY RESPONDENTS

Christine Celentano
Environmental Health
Program Director
Chugachmiut

Walter Meganack
Community Facilitator
Port Graham Village
Corporation

Francine Benis
Project Coordinator
Alaska Marine
Conservation Council

Sven Haakanson, Sr.
Tribal Officer (retired)
Kodiak Area
Native Association

Jean Gamache
Tribal Liaison
Environmental
Protection Agency

Sven Haakanson, Jr.
Member
Kodiak Area
Native Association

Bob Childers
Political Advisor
Gwich'in Tribes

Glenn Ujioka
Native Village of Eyak
Traditional Council

Jude Pate
Tribal Attorney
Sitka Tribe

Earle Chase
Tribal Administrator
Nunapitchuk

George Yaska
Huslia, Koyukuk-Lower
Yukon Spokesperson
Alaska Federation of Natives

Frank Peterson
Rural Environmental
Coordinator
Kodiak Area Native
Association

Doug Dobyns
Environmental Planner
Douglas Indian Association

Don Long
President
Inupiat Community
of the Arctic

Alma Upicksoun
Assistant House Council
Arctic Slope
Regional Corporation

John Owen
Tribal Administrator
Kwethluk IRA Council

June McAtee
Vice President Lands and
Natural Resources
Calista Native Corporation

George Peter
President
Akiachak IRA Council

Michelle Metz
Cultural Resource Specialist
Tlingit Haida Council

Vernita Herdman
Executive Director
RurAL CAP

Paul Jackson
formerly Conservation
Program Manager
Chugachmiut

George Owletuck
Director Natural
Resources Program
Alaska Inter-Tribal Council

Ann Rothe
Executive Director
Trustees for Alaska

Peter Wallis
Director, Office of
Environmental Health
Tanana Chiefs Conference

Glenn Tarr
Environmental Planner
Association of Village
Council Presidents

Bob Sattler
Realty Specialist
Tanana Chiefs Conference

Mary Lynn Nation
NEPA Coordinator
U.S. Fish and Wildlife
Service, Anchorage

APPENDIX F: ADDITIONAL RESOURCES

NEPA Oversight Agencies (CEQ and EPA):

Council on Environmental Quality
Washington, D.C. 20503
Phone: (202) 395-5750
Web Site: www.whitehouse.gov/CEQ/
*See also: NEPAnet at: http://ceq.eh.doe.gov/nepa/nepanet.htm
**See also: "NEPA Points of Contact" for specific NEPA contacts within many of the federal agencies:
http://ceq.eh.doe.gov/nepa/liaisons.cfm

Environmental Protection Agency, Office of Federal Activities
Phone: (202) 564-7127
Web Site: www.epa.gov/oeca/ofa

Tribal Organizations and Resources

National Tribal Environmental Council
Albequerque, N.M.
Phone: (505) 242-2175
Web Site: www.ntec.org

National Congress of American Indians
Washington, D.C.
Phone: (202) 466-7767
Web Site: http://www.ncai.org/

Native American Rights Fund (NARF)
Boulder, CO
Phone: (303) 447-8760
Web Site: http://www.narf.org/index.html
* See Also: NARF's *Native American Law Library* at:
http://www.narf.org/nill/Nillindex.html, or call: (303) 447-8760

FedLaw – Native Americans
http://www.legal.gsa.gov/legal22x.htm

Tribal Court Clearinghouse
Tribal Law & Policy Institute
San Francisco, CA
Web Site: http://www.tribal-institute.org/

Native American Constitution and Law Digitization Project
Web Site: http://thorpe.ou.edu/

NativeWeb (Web-based resources for indigenous cultures)
Web Site: http://www.nativeweb.org/

Index of Native American Resources on the Internet
http://www.hanksville.org/NAresources/

NEPA Training

Duke University's NEPA Training Program
http://taxodium.env.duke.edu/cee/execed.html

USDA NEPA Policy Courses
Phone: (888) 744-GRAD
http://www.grad.usda.gov/index.cfm

Environmental Impact Assessment Organizations

National Association of Environmental Professionals – NEPA Working Group
Web Site: http://www.naep.org/NEPAWG/NEPAWG.html

International Association of Impact Assessors
Fargo, ND
Phone: (701) 297-7908
http://www.iaia.org/

Federal Agencies and Federal NEPA Websites

Environmental Protection Agency
American Indian Environmental Office
Washington, D.C.
Phone: (202) 260-1489
Web Site: http://www.epa.gov/indian/

US Department of Justice, **Office of Tribal Justice**
Washington D.C.
Phone: (202) 514-8812
Web Site: http://www.usdoj.gov/otj/index.html
Note Also: Office of Indian Resources (litigation)
Phone: (202) 305-0269

Administration for Native Americans
Washington, D.C.
Phone: (202) 690-7776
Web Site: http://www.acf.dhhs.gov/programs/ana/

Bureau of Indian Affairs
Washington, D.C.
Phone: (202) 208-3711
Web Site: http://www.doi.gov/bureau-indian-affairs.html

Tribal Historic Preservation Offices
National Park Service
Washington, D.C.
Phone: (202) 343-9583
Web Site: http://www2.cr.nps.gov/tribal/thpo.htm

Department of Interior, Bureau of Land Management
Washington, DC
Phone: (202) 452-5125
Web Site: http://www.blm.gov/nhp/index.htm