NOT YET SCHEDULED FOR ORAL ARGUMENT

No. 15-5294

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

WESTERN ORGANIZATION OF RESOURCE COUNCILS;
FRIENDS OF THE EARTH,
Plaintiffs-Appellants

v.

RYAN ZINKE, ET AL.,
Defendants-Appellees.

STATE OF WYOMING; WYOMING MINING ASSOCIATION;
STATE OF NORTH DAKOTA
Intervenors

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PROOF RESPONSE BRIEF FOR THE FEDERAL APPELLEES

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. Parties and Amici.

All parties, intervenors, and amici appearing before the district court and in this court are listed in the Brief for Appellants.

B. Rulings Under Review.

References to the rulings at issue appear in the Brief for Appellants

C. Related Cases.

Undersigned counsel is unaware of any related cases before this Court or any other court.

s/ Michael T. Gray
MICHAEL T. GRAY

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GLOSSARY

APA	Administrative Procedure Act
BLM	Bureau of Land Management
EIS	Environmental Impact Statement
NEPA	National Environmental Policy Act

STATEMENT OF JURISDICTION

The Plaintiffs claimed that the Bureau of Land Management (BLM) violated the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370h, and the Administrative Procedure Act, 5 U.S.C. § 706. JA __ (ECF 1). The district court had jurisdiction under 28 U.S.C. § 1331.

On August 27, 2015, the district court granted the government's motion to dismiss for failure to state a claim that is remediable under the APA. JA ___ (ECF 41). On October 26, 2015, the Plaintiffs filed a timely notice of appeal. JA ___. Fed. R. App. Proc. 4(a)(1)(B). This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

In 1979, BLM prepared a programmatic environmental impact statement, or EIS, to examine the impacts of proposed regulations to govern the leasing of coal from federal lands, and then it promulgated those regulations. BLM does not propose to amend those regulations, and the Plaintiffs do not allege that BLM is legally obligated to consider amending them. Instead, the Plaintiffs claim that BLM is required to prepare a supplemental EIS to address the impacts of the regulations, and the coal leases granted under them, on global climate change. This appeal presents three issues:

1. The APA provides for judicial review of "final agency action," including a failure to act. 5 U.S.C. § 704. An EIS is not itself a final agency action, but is instead an intermediate action under the APA. The Plaintiffs claim that BLM is required to

prepare a supplemental EIS, but they do not claim that any final agency action taken in reliance on the existing EIS or any failure to take substantive action is arbitrary or capricious. Have the Plaintiffs stated a claim under the APA?

2. NEPA regulations require BLM to supplement an EIS only when there is a "proposed action" that the supplemental EIS might inform. 40 C.F.R. § 1502.9(c). The Plaintiffs seek to compel BLM to supplement an EIS without identifying any substantive action that BLM proposes to take. Have the Plaintiffs stated a claim under the APA?

3. In 1982, BLM repealed a regulation governing the circumstances under which it would update its 1979 programmatic EIS and stated that it would instead update the EIS when NEPA requires an update. Do earlier statements from the 1979 programmatic EIS, noting that the EIS would be updated when "require[d]" or "necessary," create a separate, judicially enforceable duty to supplement the EIS beyond what NEPA requires?

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes and regulations are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

This is a case about fundamental APA principles and a straightforward application of the NEPA regulations. Although the Plaintiffs' brief in this case goes into great detail about the science of global climate change, Op. Br. 3-5, 19-23, the Plaintiffs do not challenge any substantive agency action or allege a failure to carry out

any mandatory duty. This case, therefore, is like any other in which a plaintiff claims to identify a new environmental impact that the agency must take into account in its decisionmaking. In such cases, the failure or refusal to prepare an EIS or supplemental EIS is not directly reviewable under the APA. Instead, the Plaintiffs may challenge the adequacy of the agency's NEPA analysis only as part of a challenge to the concrete action that the agency proposes to take. There is no such action challenged here. The district court therefore correctly granted the government's motion to dismiss for failure to state a claim.

A. The National Environmental Policy Act

NEPA serves the dual purpose of informing agency decisionmakers of the environmental effects of proposed federal actions and insuring that relevant information is made available to the public so that it "may also play a role in both the decisionmaking process and the implementation of that decision." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). NEPA requires a federal agency to prepare an environmental impact statement, or EIS, only when the agency is proposing "legislation or other *major Federal actions* significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C) (emphasis added). An environmental impact statement is designed to "focus[] Government and public attention on the environmental effects of proposed agency action" so that "the agency will not act on incomplete information" and "the public and other government agencies [can] react to the effects of a proposed action at a meaningful time." *Marsh* v.

Oregon Natural Resources Council, 490 U.S. 360, 371 (1989). An agency may undertake an environmental assessment to determine whether the proposed action requires an environmental impact statement. *See* 40 C.F.R §§ 1501.4(b), 1508.9(a)(1), 1508.13.

For "broad Federal actions such as the adoption of new agency programs or regulations" an EIS must be prepared so that it is "relevant to policy" and "timed to coincide with meaningful points in agency planning and decisionmaking." 40 C.F.R. § 1502.4. In what is known as "tiering," whenever an agency prepares this broad "programmatic" EIS, later-prepared environmental assessments or EISs for individual actions within the program "need only summarize the issues discussed in the broader statement . . . and shall concentrate on the issues specific to the subsequent action," so that the agency may "focus on the actual issues ripe for decision at each level of environmental review." 40 C.F.R. § 1502.20. Tiering is generally appropriate in two situations. First, an agency may tier from a "program, plan, or policy" EIS to a "site-specific statement or analysis." 40 C.F.R. § 1508.28(a). Second, an agency may tier from an EIS "on a specific action at an early stage (such as need and site selection) to a supplement (which is preferred) or a subsequent statement or analysis at a later stage (such as environmental mitigation)." 40 C.F.R. § 1508.28(b).

An agency is required to supplement an existing environmental impact statement only in response to "substantial changes in *the proposed action* that are relevant to environmental concerns" or to "significant new circumstances or information relevant to environmental concerns and bearing on *the proposed action* or *its*

impacts." 40 C.F.R. § 1502.9(c)(1)(i), (ii) (emphases added). As the Supreme Court has explained, NEPA "require[s] that agencies take a 'hard look' at the environmental effects of their planned action, even after a proposal has received initial approval," but only if "there remains 'major Federal action' to occur." *Marsh*, 490 U.S. at 374; *see also* 40 C.F.R. § 1500.1(b) ("NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken."). When the major federal action to which the initial environmental impact statement was addressed has not yet been taken or completed, that "hard look" includes intervening developments relevant to environmental concerns to determine whether supplementation is required before it takes or completes the action. *Marsh*, 490 U.S. at 380-85.

B. The Mineral Leasing Act of 1920 and BLM's Promulgation of Coal-Management Regulations

The Mineral Leasing Act authorizes the Secretary of the Interior to lease federal coal deposits to American citizens, firms, and governmental entities. 30 U.S.C. § 181. That authority is governed by a number of overlapping substantive statutes, including the Federal Coal Leasing Amendments Act, Pub. L. No. 94-377, 90 Stat. 1085 (1976); the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701-1787; the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201-1328; and Pub. L. No. 95-554, 92 Stat. 2073 (1978).

The Mineral Leasing Act authorizes the Secretary to "prescribe necessary and proper rules and regulations" to carry out the purposes of the Act. 30 U.S.C. § 189. In 1979, in exercise of that broad authority, the Secretary promulgated new regulations significantly revising the coal-management program. 43 C.F.R. Subpart 3400; *Coal Management; Federally Owned Coal*, 44 Fed. Reg. 42,584 (July 19, 1979). The new regulations established two leasing mechanisms: (1) "regional leasing" in coal production regions, which was an agency-driven program designed to make government planning the primary factor in leasing decisions, 43 C.F.R. Subpart 3420; and (2) "lease by application" in areas outside of coal production regions, which was an industry-driven program, 43 C.F.R. Subpart 3425. BLM identified eight coal production regions in a separate action. *Identification of Coal Production Regions Having Major Federal Coal Interests*, 44 Fed. Reg. 65,196 (Nov. 9, 1979). But interest in the regional leasing program proved minimal, and so by 1990 BLM decertified the nation's eight coal-production regions and abandoned regional leasing in favor of lease by application, which continues as BLM's exclusive non-emergency leasing mechanism.

Because the promulgation of the new regulations was a "major federal action" under NEPA that would significantly affect the environment, BLM prepared a programmatic environmental impact statement to analyze the environmental impacts of the new coal-management regulations. *Kleppe v. Sierra Club*, 427 U.S. 390, 400 (1976) (noting in dicta that the agency decision to prepare an EIS for the new coal-leasing

program was sound). The 1979 EIS contemplated further site-specific environmental review for individual coal-leasing decisions made under the new regulatory regime. *Id.*; JA ___ (1979 PEIS at 3-68). As explained below, BLM has consistently carried out that review for individual leasing decisions.

One of the regulations adopted in 1979 governed the conditions under which the agency would update its programmatic EIS. Section 3420.3-4 provided that "an environmental assessment in the form of an updating of the most current environmental impact statement on the Federal coal management program shall be conducted by the Secretary if" the Secretary determined either that regional production and leasing goals varied significantly from those previously analyzed or that the next tracts to be leased "may generate significantly different levels or types of environmental impacts than were anticipated" in the programmatic EIS. 44 Fed. Reg. at 42,620. The programmatic EIS prepared to analyze the environmental impacts of the regulations noted in the description of the preferred action that the programmatic EIS "would be updated when conditions change sufficiently to require new analysis." JA __ (1979 PEIS at 3-9).

In 1982, BLM considered and adopted changes to the regulations that would allow leasing to meet industry demand. *Coal Management; Federally Owned Coal; Amendments to Coal Management Program Regulations*, 47 Fed. Reg. 33,114 (July 30, 1982). The agency prepared an environmental assessment, which concluded that the impacts of the regulations "would not be significantly greater than those anticipated from the

existing program." *Id.* at 33,115. Because those "additional impacts are within the impacts assessed and analyzed in the discussion of other alternatives in the Program EIS," no new or supplemental EIS was required. *Id.*

As part of that 1982 rulemaking, BLM also deleted the previously adopted Section 3420.3-4, which (as quoted above) addressed the conditions for updating the programmatic EIS. In response to comments objecting to that deletion, BLM observed that deleting the provision did not change its obligations under NEPA:

> Regardless of whether this provision is deleted or retained, the Department must revise or update the Program EIS when its assumptions, analyses and conclusions are no longer valid. It is extremely difficult to predict when changing circumstances will require preparation of a new environmental impact statement. The exact procedures necessary for compliance with the National Environmental Policy Act of 1969 at some future time are even more difficult to predict. For these reasons, the Department has decided to delete this provision in the final rulemaking, while recognizing that its obligations under the National Environmental Policy Act remain unchanged.

47 Fed. Reg. at 33,115.

In 1985, BLM proposed further changes to the coal-management program in reaction to changes in the energy market, and it prepared a supplemental EIS to address the impacts of those changes. JA ___. In 1986, in reliance on that supplemental EIS, BLM promulgated further revised regulations. *Coal Management—General; Competitive Leasing; and Environment*, 51 Fed. Reg. 18,884 (May 23, 1986).

No further updates to the regulations governing the coal-management program are proposed by the agency, but BLM is obligated by regulation to perform additional

NEPA analysis (including new EISs) to support each specific leasing decision under the program. 43 C.F.R. § 3425.3.

C. Procedural History

In November of 2014, the Plaintiffs filed the complaint in this case alleging that BLM has violated NEPA and the APA by failing to prepare a supplemental EIS to examine the impacts of the coal-management program on global climate change. JA __ (ECF 1). The Plaintiffs sought a declaratory judgment that BLM violated the NEPA regulation's command to supplement an EIS if there are "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." *Id.* at ___ (ECF 1 at 65.) The Plaintiffs also sought an injunction halting all coal leasing under the program and requiring BLM to prepare a supplemental EIS. *Id.* at ___ (ECF 1 at 65-66). The State of Wyoming, the State of North Dakota, and the Wyoming Mining Association intervened as defendants. *See* JA ___ (ECF No. 37).

The government moved to dismiss the complaint for failure to state a claim. The district court granted the motion, concluding that the relevant "action" triggering NEPA was the promulgation of the regulations in 1979; that there is no "proposed action" to trigger the supplementation requirement because BLM has not proposed to amend those regulations; and, consequently, that NEPA does not require a supplemental EIS here. JA ___ (ECF 42).

The Plaintiffs appealed. Before the appeal could be briefed, Secretary of the Interior Sally Jewell announced that the agency would temporarily halt most new coal leasing and prepare a discretionary programmatic EIS to examine potential changes to the coal-management program. *See* Secretarial Order 3338, "Discretionary Programmatic Environmental Impact Statement to Modernize the Federal Coal Program" (Jan. 15, 2016). This Court granted a joint motion to stay the appeal. In March of 2017, Secretary of the Interior Ryan Zinke revoked the previous order, lifted the moratorium on new coal leasing, and stopped work on the discretionary programmatic EIS. *See* Secretarial Order 3348, "Concerning the Federal Coal Moratorium" (Mar. 29, 2017). The parties agreed that this appeal should resume, and this Court granted a motion lifting the stay.

SUMMARY OF ARGUMENT

1. The Plaintiffs have failed to state a claim because they have not identified a "final agency action" (which may include a failure to act) made reviewable under section 704 of the APA. As this Court has held, "an agency's failure to prepare an EIS, by itself, is not sufficient to trigger APA review in the absence of identifiable substantive agency action putting the parties at risk." *Public Citizen v. U.S. Trade Representative*, 5 F.3d 549, 552 (D.C. Cir. 1993). Here, the Plaintiffs challenge no substantive action, instead bringing a free-standing NEPA claim insisting that BLM prepare a supplemental EIS to inform possible *future* actions that have not yet been

proposed. As such, the Plaintiffs have failed to state a claim on which relief can be granted, and the district court's dismissal must be affirmed.

2. The Plaintiffs' claim also fails because the NEPA regulations require a supplemental EIS only when there remains a "proposed action" to be implemented by the agency. BLM does not propose to amend its coal-management regulations or to take any new action in reliance on the 1979 EIS. Nor can the Plaintiffs point to any such action. The Supreme Court has held that without a proposed action, no obligation to prepare a supplemental EIS arises. The Plaintiffs' contention that the entire regulatory program is a single, ongoing agency action is unavailing. Individual leasing decisions are themselves subject to NEPA's requirements, and for each BLM considers the full range of environmental impacts, including cumulative effects.

3. Finally, the Plaintiffs' effort to create a mandatory duty to prepare a supplemental EIS out of a few statements in the 1979 EIS also fails. In context, those statements related to (and could not override) the agency's adoption of a specific regulation to govern when it would update the 1979 EIS. But that regulation was later repealed, and the agency made clear in so doing that its obligation to update would be governed by NEPA. Consequently, statements in the 1979 EIS do create any independent duty to supplement beyond that required by NEPA.

STANDARD OF REVIEW

This Court reviews de novo the district court's dismissal for failure to state a claim under Rule 12(b)(6). *El Paso Nat. Gas Co. v. United States*, 750 F.3d 863, 874

(D.C. Cir. 2014). In an APA case, "the sufficiency of the complaint is the question on the merits, and there is no real distinction in this context between the question presented on a 12(b)(6) motion and a motion for summary judgment." *Marshall Cty. Health Care Auth. v. Shalala*, 988 F.2d 1221, 1226 (D.C. Cir. 1993).

ARGUMENT

The district court correctly dismissed this case for failure to state a claim under the APA.

To state a claim under the APA, the Plaintiffs must challenge a "final agency action," 5 U.S.C. § 704, as arbitrary, capricious, or contrary to law, *id.* § 706(2); or they must challenge a "failure to act" that has become "final agency action" and seek to "compel agency action unlawfully withheld or unreasonably delayed," 5 U.S.C. § 706(1). Although the Plaintiffs are vague about their claimed statutory basis for the district court's power to compel BLM to act, they do not challenge any final agency action as arbitrary or capricious under section 706(2), and they appear to be relying instead on section 706(1). They do not, however, ask this Court to compel BLM to take any *substantive* agency action like, for example, adopting a specific amendment to the coal-management regulations. Instead, they ask this Court to compel BLM to take a *procedural* action—preparing a supplemental EIS regarding the existing regulations.

The Plaintiffs' claim is not cognizable under the APA for two reasons. First, section 704 of the APA does not provide for judicial review where the complaint alleges only a violation of NEPA that is divorced from any challenge to a final agency

action or alleged failure to take a substantive act. In this case, the decision not to prepare a supplemental EIS is not a "final agency action" as that term is defined in section 704 and is therefore not by itself subject to direct judicial review. Second, even if the agency's choice not to prepare a supplemental EIS were a "final agency action" and the Plaintiffs' claim was reviewable under section 704, the NEPA regulations governing supplementation of a completed EIS do not create a mandatory duty to supplement the EIS that is enforceable under section 706(1) in the absence of a proposed action.

I. Declining to prepare a supplemental EIS is not, by itself, a "failure to act" that qualifies as reviewable "final agency action" under section 704 of the APA.

The Plaintiffs claim that BLM has failed to prepare a supplemental EIS but do not include a claim alleging that any substantive final agency action or failure to act by BLM was unlawful, arbitrary, or capricious. This Court has made clear that no such suit is cognizable under the APA: a "refusal to prepare an EIS is not itself a final agency action for purposes of APA review." *Pub. Citizen v. Office of U.S. Trade Representatives*, 970 F.2d 916, 918–19 (D.C. Cir. 1992) (citing *Foundation on Economic Trends v. Lyng*, 943 F.2d 79, 85 (D.C. Cir. 1991)). Thus, "an agency's failure to prepare an EIS, by itself, is not sufficient to trigger APA review in the absence of identifiable substantive agency action putting the parties at risk." *Pub. Citizen v. U.S. Trade Representative*, 5 F.3d 549, 552 (D.C. Cir. 1993). Here, the Plaintiffs challenge no substantive action, instead bringing a free-standing NEPA claim insisting that BLM

prepare a supplemental EIS. Under this Court's *Public Citizen* decisions, the Plaintiffs have failed to state a claim under the APA.

This Court's case law holding that it cannot review an agency's failure to prepare an EIS (or, as here, a supplemental EIS) in the absence of a challenge to a substantive agency action follows inexorably from the plain language of the APA and the nature of an EIS. NEPA does not provide a cause of action, so NEPA claims must be brought under the APA. *Tulare County v. Bush*, 306 F.3d 1138, 1143 (D.C. Cir. 2002). But the APA provides for judicial review only of agency actions made reviewable by statute (which does not apply here) and of "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. As this Court has recognized, NEPA compliance documents, such as an environmental assessment, EIS, or supplemental EIS, are not by themselves final agency actions made reviewable by section 704; it is generally "the issuance of a [record of decision]" cementing the substantive action that the agency plans to take that "constitutes final agency action." *Gov't of Province of Manitoba v. Zinke*, 849 F.3d 1111, 1115 (D.C. Cir. 2017).[1] A *completed* EIS is therefore not, by itself, final agency action that is subject to review, so the *failure* to complete one is not a "failure to act" that may be independently reviewed under

[1] *See also Oregon Nat. Desert Ass'n v. Bureau of Land Mgmt.*, 625 F.3d 1092, 1118 (9th Cir. 2010) ("Once an EIS's analysis has been solidified in a ROD, an agency has taken final agency action, reviewable under § 706(2)(A)."); *Goodrich v. United States*, 434 F.3d 1329, 1335 (Fed. Cir. 2006) (collecting "case law from our sister circuits holding that, for purposes of the [APA] a ROD is a 'final agency action' ").

the APA in the absence of some challenge to a substantive final agency action for which an EIS or supplemental EIS should have been prepared. 5 U.S.C. § 551(13); *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 62 (2004).

Instead of final agency action, NEPA documents are "preliminary, procedural, or intermediate agency action" meant to inform the agency's decision whether to take some other, substantive final agency action. 5 U.S.C. § 704. NEPA calls for a detailed statement on environmental impacts to be "include[d] in every recommendation or report on . . . major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). Standing alone, an EIS or supplemental EIS under that section does not create rights or obligations or produce other legal consequences. *See Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). An EIS presents the decisionmaker with a study of the impacts of the proposed action and of the impacts of a range of alternatives to that action. 40 C.F.R. § 1502.14 (alternatives are "the heart of the environmental impact statement" and provide the decisionmaker and public with "a clear basis for choice among options"). An EIS is therefore a procedural prerequisite to a decision by the agency to undertake a "major Federal action" that is subject to NEPA's review requirements and, when taken, becomes the final agency action subject to review. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) ("NEPA itself does not mandate particular results, but simply prescribes the necessary process."); *see also*, *e.g.*, *Marsh*, 490 U.S. at 368, 375-378 (reviewing adequacy of EIS supporting a decision to construct a dam).

As a procedural prerequisite to some other final agency action, an EIS is "not directly reviewable" under the APA, but "is subject to review on the review of the final agency action"—the record of decision. 5 U.S.C. § 704; *Pub. Citizen*, 970 F.2d at 918-19; *see also FTC v. Standard Oil Co.*, 449 U.S. 232, 244-45 (1980) (discussing APA's treatment of preliminary action); *Flue-Cured Tobacco Coop. Stabilization Corp. v. EPA*, 313 F.3d 852, 860 (4th Cir. 2002) (holding second-hand smoke report not final agency action and noting that "even when agency action significantly impacts the choices available to the final decisionmaker, this distinction does not transform the challenged action into reviewable agency action under the APA."). A plaintiff may not bring a suit challenging the EIS until the agency sets forth its final, substantive choice among alternatives in a record of decision consummating its process and giving rise to legal rights or consequences. *See Bennett*, 520 U.S. at 177-78. If the record of the reviewable final agency action, for which an EIS was or should have been prepared, does not reflect adequate consideration of environmental impacts, then it is the final agency action itself that violates NEPA, and not the faulty or incomplete NEPA document in the underlying record. As such, "refusal to prepare an EIS is not itself a final agency action" authorized for direct review under section 704, *Pub. Citizen*, 970 F.2d at 918-19, and a plaintiff must also identify "the *particular* agency action . . . that allegedly triggered the violation and thereby caused the injury," *Found. On Economic Trends*, 943 F. 2d at 87.

Here, the Plaintiffs do not challenge any final agency action. They do not contend that any specific, final agency action on the part of BLM, taken in reliance on the 1979 EIS, must be set aside under the APA. They also do not allege that BLM has any statutory obligation to amend the regulations that the district court could compel under section 706(1). Their claim is that BLM's failure to prepare a supplemental EIS deprives the public of information about coal leasing's effects on global climate change and introduces vulnerability in *other* agency actions taken under the regulations and not directly challenged here. The Plaintiffs seek to compel the agency to complete a supplemental EIS in the hopes that doing so will prompt the agency to take some other, future agency action in reliance on the supplement. That is not only contrary to APA review principles, it gets NEPA, which is designed to inform an agency of the impacts of its proposed actions, exactly backwards. In the absence of a challenge to an identifiable final agency action, there is no basis for judicial review under section 704; the failure to prepare a supplemental EIS is, by itself, not enough. The Plaintiffs have therefore failed to state a claim under the APA on which relief can be granted.

If the Plaintiffs believe that BLM should take particular action (such as promulgating new or amended regulations governing the coal-management program), the APA allows interested persons to "petition for the issuance, amendment, or repeal of a rule." 5 U.S.C. § 553(e). When such petitions are denied, agencies shall give "a brief statement of the grounds for denial." *Id.* § 555(e). If the Plaintiffs were to file such a petition, and if BLM were to issue a final decision to take (or not to take) such

action, the Plaintiffs could seek review of that decision, including review of any NEPA analysis that BLM conducted or allegedly should have conducted in connection with its decision. *Marshall Cty. Health Care Auth. v. Shalala*, 988 F.2d 1221, 1224 (D.C. Cir. 1993) ("a refusal to engage in rulemaking is, of course, reviewable under the APA") (citing *American Horse Protection Assoc. v. Lyng,* 812 F.2d 1, 4-5 (D.C. Cir. 1987); *Natural Resources Defense Council v. SEC,* 606 F.2d 1031, 1047 (D.C. Cir.1979)). Indeed, other plaintiffs filed a petition regarding BLM's administration of federal coal leasing and unsuccessfully challenged BLM's denial of that petition. *See WildEarth Guardians v. Salazar*, 859 F. Supp. 2d 83 (D.D.C. 2012) (dismissing action for lack of standing). But the Plaintiffs here have not done so, and they may not short-circuit that substantive process by alleging only an intermediate, procedural failure on the part of the agency.

The failure or refusal to prepare a supplemental EIS is not a "final agency action" within the meaning of section 704 of the APA. Thus, the APA does not make reviewable the intermediate, procedural step of deciding whether to prepare a supplemental EIS in the absence of a claim that the agency has taken or failed to take a reviewable final agency action based on that decision. The district court's judgment dismissing the Plaintiffs' claim should therefore be affirmed.

II. The NEPA regulations do not require BLM to supplement its EIS in this case.

Even if the failure to prepare a supplemental EIS were reviewable under section 704 of the APA in the absence of a challenge to substantive final agency action, the NEPA regulations do not require BLM to take a "hard look" at whether to supplement its EIS in this case. Accordingly, the Plaintiffs have failed to state a claim under section 706(1) of the APA. The governing NEPA regulation, 40 C.F.R. § 1502.9(c), requires supplementation when there are "significant new circumstances or information relevant to environmental concerns and bearing *on the proposed action* or *its* impacts." 40 C.F.R. § 1502.9(c) (emphasis added). Section 1502.9(c) does not require supplementation in this case because, by its plain language, it applies only when there is a "proposed action." That limitation is not surprising, as the regulations provide that an EIS "shall serve as the means of assessing the environmental impacts of proposed agency action, rather than justifying decisions already made." 40 C.F.R. § 1502.2(g). BLM is not proposing to take any new action in reliance on the 1979 EIS, and so this regulation simply does not apply.

Instead of pointing to a "proposed action," as the regulation requires, the Plaintiffs contend that the entire coal-management regulatory program is an "ongoing" action. They would impermissibly transform the test under the NEPA regulations from one focused on a "proposed action" into a "pragmatic, environmental-impacts-based test" that turns on whether a plaintiff can identify

supposed "environmentally significant decisions" that might remain to be taken under the governing regulations, giving rise to a "*possibility* of major federal action" to come. Op. Br. 32-34. But the NEPA regulations do not require supplementation of an EIS when further agency action is possible, only when it is proposed. *Cf. Defenders of Wildlife v. Andrus*, 627 F.2d 1238, 1246 (D.C. Cir. 1980) ("No agency could meet its NEPA obligations if it had to prepare an environmental impact statement every time the agency had power to act but did not do so.").

Thus, the Plaintiffs' argument finds no support in the text of what they admit is "the governing NEPA regulation." Op. Br. 40-41. The Plaintiffs emphasize the last three words of the regulation—"or its impacts"—and contend that advances in climate science provide "'significant new information' on the 'impacts' of the coal-leasing program." *Id.* Of course, "its impacts" refers back to "the proposed action"—the regulation is concerned with new information "bearing on" the *proposed action's* impacts, not on the impacts of a completed agency action, like the promulgation of regulations. Otherwise, as the Supreme Court has explained, agency decisionmaking would be intractable. *Marsh*, 490 U.S. at 373. Moreover, under the Plaintiffs' theory, any regulatory regime that required an EIS would forever be subject to a claim that the EIS required supplementation, even when the agency has not proposed a change to that regime.

Instead, the duty under the NEPA regulations to supplement an existing EIS arises only when an agency is proposing to take a new "major Federal action" or

deciding whether to make substantial changes to a previously analyzed action that has not been completed. 42 U.S.C. § 4332(2)(C); *see Kleppe v. Sierra Club*, 427 U.S. 390, 401 (1976); *Northcoast Envtl. Ctr. v. Glickman*, 136 F.3d 660, 670 (9th Cir. 1998) (NEPA analysis not required in absence of "discrete agency action"). Indeed, when BLM proposed to amend its regulations for the coal-management program in 1982 and in 1985, it prepared an environmental assessment (in 1982) and a supplement to the programmatic EIS (in 1985) to inform those decisions. JA ___, ___. The Plaintiffs, however, do not point to a single agency action that BLM has taken that is currently a proper focus for judicial review.

Finding no support for their novel test in the regulations, the Plaintiffs point to the Supreme Court's decision in *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360 (1989). But *Marsh* involved neither an alleged "ongoing program" with "possible" remaining action, nor a programmatic EIS. Instead, it involved a single project, the construction of a dam on Elk Creek in southwest Oregon. In 1979, when *Marsh* was argued and decided in the Supreme Court, dam construction was about one-third completed. 490 U.S. at 367. Even though a great deal of construction remained, the Court upheld the Army Corps of Engineers' decision not to prepare a supplemental EIS. In so doing, the Court observed that there comes a point in the life of a project where it "make[s] sense to hold NEPA inapplicable." But "up to that point, NEPA cases have generally required agencies to file [EISs] when the remaining governmental

action would be environmentally significant." *Id.* at 371-72 (internal quotation marks and citation omitted).

That latter quote appears to be the genesis of the Plaintiffs' test involving remaining "environmentally significant decisions," but it is no help to them. First, as the quoted language indicates, the Court's rationale considered an individual project, not an ongoing program. The Court in *Marsh* never considered any programmatic EIS, let alone the question whether a programmatic EIS must be supplemented. Second, the quoted language makes clear that for a duty to supplement to arise, there must be "remaining governmental action"; when there is not (and perhaps even at some point before), NEPA is "inapplicable." *Id.* at 372. The Plaintiffs' argument fails because they point to nothing remaining to be done with respect to promulgating the coal-management regulations, which is the only action examined in the 1979 EIS.

The Supreme Court's decision in *SUWA* is much closer to this case than is *Marsh*. In *SUWA*, the Court rejected a very similar attempt to require supplementation of an existing EIS for a land use plan that governed ongoing agency decisionmaking. The Court first rejected the *SUWA* plaintiffs' argument that BLM had failed to carry out a mandatory duty to manage wilderness study areas as one that failed to identify a discrete, required agency action that the Court could compel the agency to take. 542 U.S. at 65. The Court then considered SUWA's claim that BLM was independently required to supplement its EIS for the governing land use plan to consider an increase in the use of off-road vehicles. *Id.* at 72-73. The Court concluded

that the "land use plan is the 'proposed action' contemplated by the regulation" and "that action is completed when the plan is approved." *Id.* The land use plan was not an "ongoing 'major Federal action'" even though BLM made many day-to-day decisions to implement the governing plan, and without an ongoing action, there is nothing "that could require supplementation." *Id.* at 73. Thus, BLM was under no obligation to supplement its EIS for the adopted land use plan. *Id.*

This case is just the same. The "major Federal action" here was the promulgation of the regulations in 1979, and the agency's decision to take that action was informed by the 1979 programmatic EIS that the agency prepared precisely for that purpose. Once the regulations were promulgated, the relevant major Federal action concluded. Later individual decisions under the regulations require their own NEPA analysis. *See* 43 C.F.R. § 3425.3 ("Before a lease sale may be held under this subpart, the authorized officer shall prepare an environmental assessment or environmental impact statement of the proposed lease area . . . ."). Since the agency does not propose to amend those regulations or adopt new ones, and since the Plaintiffs have not identified any obligation to do so, there is "no ongoing 'major Federal action' that could require supplementation" in this case. *SUWA*, 542 U.S. at 73.[2] When BLM formally promulgated the new regulations in July 1979, it completed

[2] The Plaintiffs say that the "most vivid" example of possible agency action here "may be the various alternatives to managing the program that BLM *itself* proposed to consider." Op. Br. 34. Of course, when BLM was considering those actions, it was

Cont.

the proposed action that was the subject of its NEPA analysis. Consequently, the duty to supplement has no application here. The Plaintiffs' claim that BLM breached a mandatory, non-discretionary duty to prepare a supplemental EIS is unfounded as a matter of law.

The Plaintiffs also point to the various leasing and other decisions that BLM makes under the regulations, and to the scale of the program, as constituting the "ongoing" action requiring a supplemental EIS in this case. Op. Br. 35-38. But NEPA either separately applies to those individual actions, as in the case of individual leasing decisions, or does not apply because they are not major federal actions. In fact, BLM prepares an EIS or environmental assessment for every coal lease it issues, and it examines climate change impacts in those documents. *See* 43 C.F.R. § 3425.3. The courts routinely review those decisions and assess BLM's consideration of environmental impacts by examining both programmatic and decision-specific NEPA documents as necessary.

That the 1979 EIS does not itself discuss the current state of climate science is of no moment; it may affect the ability of BLM to "tier" to that document when making individual leasing decisions, but it renders neither the programmatic

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also preparing a discretionary programmatic EIS. Now that BLM is no longer considering those actions, there is no current "proposed action" or even possibility of one, and no programmatic EIS is needed or required. The Plaintiffs do not and may not challenge BLM's decision to forgo consideration of those alternatives to managing the program in this case.

document in need of supplementing nor the individual document flawed per se. 40 C.F.R. § 1502.20 (providing than an individual EIS need only "summarize" and "incorporate by reference" items discussed in a programmatic EIS and "shall concentrate on the issues specific to the subsequent action" that are not discussed in the programmatic EIS). The Plaintiffs' overblown rhetoric about "blinders," "assaults on the fundamental purposes of administrative law," and "hiding the ball" completely ignores BLM's analysis of climate change in individual EISs, analysis that this Court has previously held sufficient to satisfy NEPA's obligations. *See Powder River Basin Resources Council v. Jewell*, 738 F.3d 298, 308-311 (D.C. Cir. 2013) ("BLM satisfied its obligations under NEPA to consider climate change."); *see also*, *WildEarth Guardians v. BLM*, 8 F. Supp. 3d 17, 34-35 (D.D.C. 2014).

If the Plaintiffs believe that BLM is not meeting its responsibilities under NEPA to examine the impacts of federal coal leasing on the environment, they may avail themselves of the APA's waiver of sovereign immunity by challenging individual leasing decisions that actually put the "parties at risk." *Pub. Citizen*, 5 F.3d at 552. But they may not attempt to enjoin the entire coal-management program without actually challenging any substantive aspect of that program or any decision made under it. ECF 1 at 66 (asking court to "issue an injunction ordering BLM not to accept, approve, or otherwise take action with regard to any application for a new lease or to modify an existing lease, now pending or to be filed in the future"); *Lujan v. National*

Wildlife Federation, 497 U.S. 871, 894 (1990) ("The case-by-case approach . . . is the traditional, and remains the normal, mode of operation of the courts.").

In arguing that the programmatic EIS must be supplemented because individual leasing decisions remain to be made under the regulations, the Plaintiffs rely on the Ninth Circuit's decision in *Friends of the Clearwater v. Dombeck*, 222 F.3d 552 (9th Cir. 2000). The Plaintiffs contend that individual leasing decisions here are just like the timber sales in that case. But *Friends of the Clearwater* involved a challenge to specific timber sales, not a regulatory program, and it did not consider whether a programmatic EIS must be supplemented. Instead, *Friends of the Clearwater* considered the need to supplement a separate "site-specific EIS" prepared two years after the relevant Forest Plan (in 1989) for four timber sales (two of which had been completed prior to litigation). *Id.* at 555. Thus the plaintiffs in *Friends of the Clearwater* never asserted that the programmatic EIS for the Forest Plan required supplementation; they asserted that the Forest Service must supplement the site-specific EIS prepared in 1989 for the timber sales themselves. *Id.* The rule of *Friends of the Clearwater* might apply, for example, if an EIS were prepared for an individual coal lease where half the coal remained to be mined, and plaintiffs claimed that a supplemental EIS is required. But it does not apply here to require supplementation of a programmatic EIS that was intended to be followed—and has been followed—by additional NEPA analysis of particular decisions under the program.

The Plaintiffs' reliance on *Kleppe v. Sierra Club*, 427 U.S. 390 (1976), Op. Br. 48, is also misplaced. In *Kleppe*, the plaintiffs had argued that BLM was required to prepare an EIS analyzing the region-wide impacts of coal operations in what BLM then called the Northern Great Plains region. The court rejected the claim, based on the "absence of a proposal for a regional plan of development." 427 U.S. at 401. Although the decision did not discuss supplementation or even the APA, its ultimate conclusion and factual similarities to this case—in particular, a demand for NEPA analysis of the impacts of multiple coal operations across a broad geographic area, and not of any specific mining project or other proposed action—counsel in favor of dismissal here. In the end, the *Kleppe* court reinstated the district court's order dismissing the case for failure to identify a proposed "major federal action" under NEPA. Just as the absence of a proposed plan of development in the Northern Great Plains precluded the claim for relief in *Kleppe*, here the absence of a national plan of coal development precludes any claim that BLM must supplement the 1979 EIS.

While the Plaintiffs are insistent that BLM is engaged in a national plan governing all aspects of coal, that picture is quite inaccurate. The 1979 "lease-by-application" regulations have nationwide applicability, but that does not mean that the regulations embody some national plan for coal development. They do not. The 1979 regulations for the lease-by-application system (now BLM's exclusive non-emergency leasing system) simply establish how lease application and approval will occur. That system is a decentralized, industry-driven system that requires the BLM to respond

meaningfully to the applications that it receives, not to take affirmative action to seek out lessees for coal or develop a national plan for coal leasing. *See Coal Management, Federally Owned Coal*, 44 Fed. Reg. 42,584, 42,625 (July 19, 1979) (Final Rulemaking) (establishing procedures for "leasing on application" outside of coal production regions, *see* 43 C.F.R. Subpart 3425). Moreover, BLM engages in a full NEPA analysis before every leasing decision is made. Given those realities, a supplemental EIS is unnecessary as well as not required.

III. Statements in the 1979 EIS that BLM would update it as "necessary" or "required" impose no obligation above and beyond that imposed by NEPA.

The Plaintiffs are incorrect in contending that BLM's statements about updating the programmatic EIS create an obligation independent of NEPA in this case. In the 1979 programmatic EIS, BLM stated that the EIS would be "updated when necessary" or "when conditions change sufficiently to require new analysis". JA __ (1979 PEIS at 3-9). But in that same rulemaking, BLM promulgated a regulation in the section on "regional production goals and leasing targets" to govern when it would update the programmatic EIS. 44 Fed. Reg. at 42,619-20. The general statements in the programmatic EIS reflected the commitment BLM later made final in the regulations for regional leasing, not some independent obligation to update the EIS (the sections governing lease by application, by contrast, provided for environmental assessments or EISs for each sale, *id.* at 42,627).

In 1982, the agency repealed that regulation and clearly stated that "its obligations under the National Environmental Policy Act remain unchanged." 47 Fed. Reg. at 33,115. Whatever the import of the general statement in the 1979 programmatic EIS was at the time, by 1982 BLM's position was clear—it would update the programmatic EIS when NEPA required it. Thus, BLM has essentially stated that "if the law requires an update, the agency will prepare an update." *See*, *e.g.*, *Alliance for Bio-Integrity v. Shalala*, 116 F.Supp.2d 166, 174 (D.D.C. 2000) (holding that an agency statement "[did] not bind its decisionmaking authority" where there had been no "irreversible and irretrievable commitment of resources to an action that will affect the environment") (internal quotations and citations omitted). As we have explained, NEPA does not require a supplemental EIS in this situation, and its previous general statements about when an update would be required add nothing to that analysis.

The cases on which the Plaintiffs rely are not helpful to them. Each one focuses on conditions adopted as part of the record of decision—the formal, substantive document laying out the decision on the agency's course of action—and not on general statements made in the EIS. Op. Br. at 66-67. And the basis for a claim is even weaker here, where BLM made its statements about updating the programmatic EIS as part of the agency action that was later repealed. BLM stated at that time that it would update the programmatic EIS when NEPA requires it. NEPA

does not require an update here, and the district court's judgment in favor of BLM must be affirmed.

CONCLUSION

The district court's judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(A)

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains **7,574 words**, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

s/ Michael T. Gray
MICHAEL T. GRAY

CERTIFICATE OF SERVICE

I hereby certify that on November 7, 2017, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

s/ Michael T. Gray
MICHAEL T. GRAY

Addendum

Index to Addendum

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

United States Code Annotated
Title 5. Government Organization and Employees (Refs & Annos)
Part I. The Agencies Generally
Chapter 7. Judicial Review (Refs & Annos)

5 U.S.C.A. § 704

§ 704. Actions reviewable

Currentness

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

CREDIT(S)

(Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 392.)

Notes of Decisions (958)

5 U.S.C.A. § 704, 5 USCA § 704
Current through P.L. 115-68. Also includes P.L. 115-72. Title 26 current through 115-73.

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KeyCite Yellow Flag - Negative Treatment
Unconstitutional or PreemptedLimitation Recognized by Krafsur v. Davenport, 6th Cir.(Tenn.), Dec. 04, 2013

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United States Code Annotated
Title 5. Government Organization and Employees (Refs & Annos)
Part I. The Agencies Generally
Chapter 7. Judicial Review (Refs & Annos)

5 U.S.C.A. § 706

§ 706. Scope of review

Currentness

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

CREDIT(S)

(Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 393.)

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Notes of Decisions (3869)

5 U.S.C.A. § 706, 5 USCA § 706
Current through P.L. 115-68. Also includes P.L. 115-72. Title 26 current through 115-73.

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KeyCite Yellow Flag - Negative Treatment
Unconstitutional or PreemptedLimitation Recognized by Miccosukee Tribe of Indians of Florida v. U.S. Army Corps of Engineers, 11th Cir.(Fla.), Sep. 15, 2010

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United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 55. National Environmental Policy (Refs & Annos)
Subchapter I. Policies and Goals (Refs & Annos)

42 U.S.C.A. § 4332

§ 4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

Currentness

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

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

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

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on--

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

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

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

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

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

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

(iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this chapter; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction. [1]

(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

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

CREDIT(S)

(Pub.L. 91-190, Title I, § 102, Jan. 1, 1970, 83 Stat. 853; Pub.L. 94-83, Aug. 9, 1975, 89 Stat. 424.)

EXECUTIVE ORDERS

EXECUTIVE ORDER NO. 13352

<Aug. 26, 2004, 69 F.R. 52989>

FACILITATION OF COOPERATIVE CONSERVATION

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. Purpose. The purpose of this order is to ensure that the Departments of the Interior, Agriculture, Commerce, and Defense and the Environmental Protection Agency implement laws relating to the environment and natural resources in a manner that promotes cooperative conservation, with an emphasis on appropriate inclusion of local participation in Federal decisionmaking, in accordance with their respective agency missions, policies, and regulations.

Sec. 2. Definition. As used in this order, the term "cooperative conservation" means actions that relate to use, enhancement, and enjoyment of natural resources, protection of the environment, or both, and that involve collaborative activity among Federal, State, local, and tribal governments, private for-profit and nonprofit institutions, other nongovernmental entities and individuals.

Sec. 3. Federal Activities. To carry out the purpose of this order, the Secretaries of the Interior, Agriculture, Commerce, and Defense and the Administrator of the Environmental Protection Agency shall, to the extent permitted by law and subject to the availability of appropriations and in coordination with each other as appropriate:

(a) carry out the programs, projects, and activities of the agency that they respectively head that implement laws relating to the environment and natural resources in a manner that:

(i) facilitates cooperative conservation;

(ii) takes appropriate account of and respects the interests of persons with ownership or other legally recognized interests in land and other natural resources;

(iii) properly accommodates local participation in Federal decisionmaking; and

(iv) provides that the programs, projects, and activities are consistent with protecting public health and safety;

(b) report annually to the Chairman of the Council on Environmental Quality on actions taken to implement this order; and

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(c) provide funding to the Office of Environmental Quality Management Fund (42 U.S.C. 4375) for the Conference for which section 4 of this order provides.

Sec. 4. White House Conference on Cooperative Conservation. The Chairman of the Council on Environmental Quality shall, to the extent permitted by law and subject to the availability of appropriations:

(a) convene not later than 1 year after the date of this order, and thereafter at such times as the Chairman deems appropriate, a White House Conference on Cooperative Conservation (Conference) to facilitate the exchange of information and advice relating to (i) cooperative conservation and (ii) means for achievement of the purpose of this order; and

(b) ensure that the Conference obtains information in a manner that seeks from Conference participants their individual advice and does not involve collective judgment or consensus advice or deliberation.

Sec. 5. General Provision. This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, instrumentalities or entities, its officers, employees or agents, or any other person.

GEORGE W. BUSH

Notes of Decisions (4666)

Footnotes

1 So in original. The period probably should be a semicolon.

42 U.S.C.A. § 4332, 42 USCA § 4332

Current through P.L. 115-68. Also includes P.L. 115-72. Title 26 current through 115-73.

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Code of Federal Regulations
Title 40. Protection of Environment
Chapter V. Council on Environmental Quality
Part 1502. Environmental Impact Statement (Refs & Annos)

40 C.F.R. § 1502.2

§ 1502.2 Implementation.

Currentness

To achieve the purposes set forth in § 1502.1 agencies shall prepare environmental impact statements in the following manner:

(a) Environmental impact statements shall be analytic rather than encyclopedic.

(b) Impacts shall be discussed in proportion to their significance. There shall be only brief discussion of other than significant issues. As in a finding of no significant impact, there should be only enough discussion to show why more study is not warranted.

(c) Environmental impact statements shall be kept concise and shall be no longer than absolutely necessary to comply with NEPA and with these regulations. Length should vary first with potential environmental problems and then with project size.

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

(e) The range of alternatives discussed in environmental impact statements shall encompass those to be considered by the ultimate agency decisionmaker.

(f) Agencies shall not commit resources prejudicing selection of alternatives before making a final decision (§ 1506.1).

(g) Environmental impact statements shall serve as the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made.

SOURCE: 43 FR 55994, Nov. 29, 1978, unless otherwise noted.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 et seq.), Sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and Executive Order 11514 (Mar. 5, 1970, as amended by Executive Order 11991, May 24, 1977).

Notes of Decisions (1494)

Current through November 2, 2017; 82 FR 50843.

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Code of Federal Regulations
Title 40. Protection of Environment
Chapter V. Council on Environmental Quality
Part 1502. Environmental Impact Statement (Refs & Annos)

40 C.F.R. § 1502.4

§ 1502.4 Major Federal actions requiring the preparation of environmental impact statements.

Currentness

(a) Agencies shall make sure the proposal which is the subject of an environmental impact statement is properly defined. Agencies shall use the criteria for scope (§ 1508.25) to determine which proposal(s) shall be the subject of a particular statement. Proposals or parts of proposals which are related to each other closely enough to be, in effect, a single course of action shall be evaluated in a single impact statement.

(b) Environmental impact statements may be prepared, and are sometimes required, for broad Federal actions such as the adoption of new agency programs or regulations (§ 1508.18). Agencies shall prepare statements on broad actions so that they are relevant to policy and are timed to coincide with meaningful points in agency planning and decisionmaking.

(c) When preparing statements on broad actions (including proposals by more than one agency), agencies may find it useful to evaluate the proposal(s) in one of the following ways:

(1) Geographically, including actions occurring in the same general location, such as body of water, region, or metropolitan area.

(2) Generically, including actions which have relevant similarities, such as common timing, impacts, alternatives, methods of implementation, media, or subject matter.

(3) By stage of technological development including federal or federally assisted research, development or demonstration programs for new technologies which, if applied, could significantly affect the quality of the human environment. Statements shall be prepared on such programs and shall be available before the program has reached a stage of investment or commitment to implementation likely to determine subsequent development or restrict later alternatives.

(d) Agencies shall as appropriate employ scoping (§ 1501.7), tiering (§ 1502.20), and other methods listed in §§ 1500.4 and 1500.5 to relate broad and narrow actions and to avoid duplication and delay.

SOURCE: 43 FR 55994, Nov. 29, 1978, unless otherwise noted.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 et seq.), Sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and Executive Order 11514 (Mar. 5, 1970, as amended by Executive Order 11991, May 24, 1977).

Notes of Decisions (296)

Current through November 2, 2017; 82 FR 50843.

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Code of Federal Regulations
Title 40. Protection of Environment
Chapter V. Council on Environmental Quality
Part 1502. Environmental Impact Statement (Refs & Annos)

40 C.F.R. § 1502.9

§ 1502.9 Draft, final, and supplemental statements.

Currentness

Except for proposals for legislation as provided in § 1506.8 environmental impact statements shall be prepared in two stages and may be supplemented.

(a) Draft environmental impact statements shall be prepared in accordance with the scope decided upon in the scoping process. The lead agency shall work with the cooperating agencies and shall obtain comments as required in part 1503 of this chapter. The draft statement must fulfill and satisfy to the fullest extent possible the requirements established for final statements in section 102(2)(C) of the Act. If a draft statement is so inadequate as to preclude meaningful analysis, the agency shall prepare and circulate a revised draft of the appropriate portion. The agency shall make every effort to disclose and discuss at appropriate points in the draft statement all major points of view on the environmental impacts of the alternatives including the proposed action.

(b) Final environmental impact statements shall respond to comments as required in part 1503 of this chapter. The agency shall discuss at appropriate points in the final statement any responsible opposing view which was not adequately discussed in the draft statement and shall indicate the agency's response to the issues raised.

(c) Agencies:

(1) Shall prepare supplements to either draft or final environmental impact statements if:

(i) The agency makes substantial changes in the proposed action that are relevant to environmental concerns; or

(ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.

(2) May also prepare supplements when the agency determines that the purposes of the Act will be furthered by doing so.

(3) Shall adopt procedures for introducing a supplement into its formal administrative record, if such a record exists.

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(4) Shall prepare, circulate, and file a supplement to a statement in the same fashion (exclusive of scoping) as a draft and final statement unless alternative procedures are approved by the Council.

SOURCE: 43 FR 55994, Nov. 29, 1978, unless otherwise noted.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 et seq.), Sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and Executive Order 11514 (Mar. 5, 1970, as amended by Executive Order 11991, May 24, 1977).

Notes of Decisions (603)

Current through November 2, 2017; 82 FR 50843.

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Code of Federal Regulations
Title 40. Protection of Environment
Chapter V. Council on Environmental Quality
Part 1502. Environmental Impact Statement (Refs & Annos)

40 C.F.R. § 1502.14

§ 1502.14 Alternatives including the proposed action.

Currentness

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

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

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

(c) Include reasonable alternatives not within the jurisdiction of the lead agency.

(d) Include the alternative of no action.

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

(f) Include appropriate mitigation measures not already included in the proposed action or alternatives.

SOURCE: 43 FR 55994, Nov. 29, 1978, unless otherwise noted.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 et seq.), Sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and Executive Order 11514 (Mar. 5, 1970, as amended by Executive Order 11991, May 24, 1977).

Notes of Decisions (1395)

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Code of Federal Regulations
Title 40. Protection of Environment
Chapter V. Council on Environmental Quality
Part 1502. Environmental Impact Statement (Refs & Annos)

40 C.F.R. § 1502.20

§ 1502.20 Tiering.

Currentness

Agencies are encouraged to tier their environmental impact statements to eliminate repetitive discussions of the same issues and to focus on the actual issues ripe for decision at each level of environmental review (§ 1508.28). Whenever a broad environmental impact statement has been prepared (such as a program or policy statement) and a subsequent statement or environmental assessment is then prepared on an action included within the entire program or policy (such as a site specific action) the subsequent statement or environmental assessment need only summarize the issues discussed in the broader statement and incorporate discussions from the broader statement by reference and shall concentrate on the issues specific to the subsequent action. The subsequent document shall state where the earlier document is available. Tiering may also be appropriate for different stages of actions. (Section 1508.28).

SOURCE: 43 FR 55994, Nov. 29, 1978, unless otherwise noted.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 et seq.), Sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and Executive Order 11514 (Mar. 5, 1970, as amended by Executive Order 11991, May 24, 1977).

Notes of Decisions (32)

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Code of Federal Regulations
Title 40. Protection of Environment
Chapter V. Council on Environmental Quality
Part 1508. Terminology and Index (Refs & Annos)

40 C.F.R. § 1508.28

§ 1508.28 Tiering.

Currentness

Tiering refers to the coverage of general matters in broader environmental impact statements (such as national program or policy statements) with subsequent narrower statements or environmental analyses (such as regional or basinwide program statements or ultimately site-specific statements) incorporating by reference the general discussions and concentrating solely on the issues specific to the statement subsequently prepared. Tiering is appropriate when the sequence of statements or analyses is:

(a) From a program, plan, or policy environmental impact statement to a program, plan, or policy statement or analysis of lesser scope or to a site-specific statement or analysis.

(b) From an environmental impact statement on a specific action at an early stage (such as need and site selection) to a supplement (which is preferred) or a subsequent statement or analysis at a later stage (such as environmental mitigation). Tiering in such cases is appropriate when it helps the lead agency to focus on the issues which are ripe for decision and exclude from consideration issues already decided or not yet ripe.

SOURCE: 43 FR 56003, Nov. 29, 1978, unless otherwise noted.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 et seq.), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and Executive Order 11514 (Mar. 5, 1970, as amended by Executive Order 11991, May 24, 1977).

Notes of Decisions (32)

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Code of Federal Regulations
Title 43. Public Lands: Interior
Subtitle B. Regulations Relating to Public Lands
Chapter II. Bureau of Land Management, Department of the Interior
Subchapter C. Minerals Management(3000)
Group 3400. Coal Management (Refs & Annos)
Part 3420. Competitive Leasing (Refs & Annos)
Subpart 3425. Leasing on Application

43 C.F.R. § 3425.3

§ 3425.3 Environmental analysis.

Currentness

(a) Before a lease sale may be held under this subpart, the authorized officer shall prepare an environmental assessment or environmental impact statement of the proposed lease area in accordance with 40 CFR parts 1500 through 1508. BLM will publish a notice in the Federal Register, and at least once per week for two consecutive weeks in a newspaper of general circulation in the area of the sale, announcing the availability of the environmental assessment or draft environmental impact statement and the hearing required by § 3425.4(a)(1). BLM also will mail to the surface owner a notice of any lands to be offered for sale and to any person who has requested notice of sales in the area.

(b) For lease applications involving lands in the National Forest System, the authorized officer shall submit the lease application to the Secretary of Agriculture for consent, for completion or consideration of an environmental assessment and for the attachment of appropriate lease stipulations, and for the making of any other findings prerequisite to lease issuance. (43 CFR 3400.3, 3461.1(a))

Credits
[44 FR 42615, July 19, 1979, as amended at 47 FR 33141, July 30, 1982; 64 FR 52243, Sept. 28, 1999]

SOURCE: 44 FR 42615, July 19, 1979; 51 FR 18888, May 23, 1986, unless otherwise noted.

AUTHORITY: The Mineral Leasing Act of 1920, as amended and supplemented (30 U.S.C. 181 et seq.), the Mineral Leasing Act for Acquired Lands of 1947, as amended (30 U.S.C. 351–359), the Multiple Mineral Development Act of 1954 (30 U.S.C. 521–531 et seq.), the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1201 et seq.), the Department of Energy Organization Act of 1977 (42 U.S.C. 7101 et seq.), the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1701 et seq.) and the Small Business Act of 1953, as amended (15 U.S.C. 631 et seq.).

Notes of Decisions (1)

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