CASE NO. 13-6153

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

KENTUCKIANS FOR THE COMMONWEALTH, and SIERRA CLUB

Plaintiffs – Appellants,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, THOMAS P. BOSTICK, LUKE T. LEONARD,

Defendants – Appellees;

and,

LEECO, INC

Intervenor – Appellee

On Appeal from the United States District Court
for the Western District Of Kentucky

Case No: 3:12-cv-682

REPLY BRIEF OF PLAINTIFFS-APPELLANTS KENTUCKIANS FOR THE COMMONWEALTH AND SIERRA CLUB

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INTRODUCTION

Record evidence shows that coal mining at the Stacy Branch mine may cause nearby residents to develop cancer and other serious diseases, and their unborn children to develop birth defects. The Corps does not dispute the "effects of coal mining on human health," Corps Br. (Dkt. 26) at 28, or that it has Clean Water Act ("CWA") authority to regulate the mine to protect against these risks. But the Corps says its regulation allows it to ignore the health risks posed by the mine because the Commonwealth of Kentucky regulates other aspects of the mine. As Appellants Kentuckians For The Commonwealth and Sierra Club ("Kentuckians") explain in this Reply, that interpretation of the regulation conflicts with NEPA and SMCRA.

The Corps even argues it may ignore the potential health effects of coal mining *in jurisdictional waters* because the activity it authorized within jurisdictional waters was not "coal mining" but "discharges." That is factually incorrect. The permit the Corps issued to Leeco expressly authorizes mining and mine waste disposal in streams. The Corps' argument is also contrary to the Corps' regulations, which make clear that the "specific activity" the Corps must fully analyze is the project planned to occur in jurisdictional waters.

Finally, the Corps insists it was free to conduct a wide-ranging appraisal of coal mining's benefits and a truncated review of its costs. That is contrary to a

binding regulation providing that the scope of review for benefits and costs must be "the same."

For these three independent reasons, the Corps was obligated to consider under NEPA whether the surface coal mining operations it authorized will cause increased incidence of serious health problems.

The Corps' response confirms it did not comply with CWA regulations in approving Leeco's compensatory mitigation plan. The Corps claims that by approving the construction specifications in Leeco's mitigation plan it imposed "ecological performance standards" that will ensure the replacement of lost stream functions. The Corps asserts the construction specifications are somehow validated to serve in this way by the "Eastern Kentucky Stream Assessment Protocol." In fact, the rudimentary and mostly short-term construction specifications are very different from the characteristics allegedly validated by the Protocol. The Corps also claims it independently assessed the likelihood that Leeco's planned mitigation will succeed, but the record contains no trace of that required assessment.

ARGUMENT

I. The Corps Did Not Consider The Health Risks Raised In Comments.

The Corps claims it "specifically looked at . . . human health." Corps Br. at 14 (citing ECF 21-2 ("Decision") at Page ID# 166-71). Leeco offers similar

arguments. Leeco Br. (Dkt. 27) at 26-27 (citing Decision at Page ID# 167-70). The pages cited, however, are not directed at the public health risks at issue in this case — the increased risk of cancer, birth defects, and other serious diseases demonstrated by the studies submitted by Sierra Club. *None* of the cited discussion addresses those health risks. There is a cursory and irrelevant one-paragraph discussion of Clean Air Act conformity and a brief mention of the nearest public drinking water intake, but the Corps never relates that discussion to the health risks identified by the studies. Decision at Page ID# 168, 170. The Corps did not undertake even a rudimentary analysis of potential significant impacts of the permitted activity on public health.

II. The Corps Unlawfully Limited The Scope Of Its NEPA Review.

A. The Corps is bound by its regulation but also by NEPA itself.

In defense of its decision to ignore these health risks, the Corps invokes a regulation requiring it to fully analyze "the impacts of the specific activity requiring a [Corps] permit and those portions of the entire project over which the district engineer has sufficient control and responsibility to warrant Federal review." 33 C.F.R. § 325, App. B § 7(b)(1). The Corps argues it was not required to consider the public health risks posed by the coal mine because it lacks "control and responsibility" over the mine. Corps Br. at 18.

The Corps concedes that it had regulatory control over the entire Stacy Branch mine under the CWA, and even concedes that it exercised regulatory control over the entire mine. The Corps admits that it required Leeco to conform the entire mine to the "least environmentally damaging practical alternative." Dkt. 18 ("Kentuckians Br.") at 32-33; Corps Br. at 32; Decision at Page ID# 145-48; *see also* 40 C.F.R. § 230.10(a). The Corps further admits that it regulates Leeco's mining methods, both within and beyond jurisdictional waters. Corps Br. at 32; Kentuckians Br. at 32-33. Finally, the Corps admits that it may impose special conditions in permits to protect the public interest, that it must deny permits that do not serve the public interest, and that it reviews the entire mine to assess the public interest. Corps Br. at 32, 39, 7-8; Kentuckians Br. at 32.

Despite this exercise of regulatory control, the Corps argues it lacked "control and responsibility" over the mine because of Kentucky's responsibilities under SMCRA. Corps Br. at 31. That narrow view of the agency's NEPA responsibilities is incompatible with the regulation. Nothing in the regulation suggests that "control and responsibility" means *total* control and *sole* responsibility. Rather, the Corps has "control and responsibility" over the entire mine because it actually regulates the entire mine. And the Corps' control and responsibility "warrant[s] Federal review" because without a NEPA analysis by the Corps *no agency* will consider the health risks posed by the mine, leaving the

Corps to exercise its broad Clean Water Act regulatory authority without adequate environmental information. Kentuckians Br. at 31-32, 38; Corps Br. at 30; *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 767 (2004)) ("[NEPA's] 'rule of reason' . . . ensures that agencies determine whether and to what extent to prepare an EIS based on the usefulness of any new potential information to the decisionmaking process.").

The Corps is required to comply not only with its own regulations, but also with NEPA. *Kentuckians for the Commonwealth, Inc. v. Rivenburgh*, 317 F.3d 425, 440 (4th Cir. 2003) ("[B]ecause a regulation must be consistent with the statute it implements, any interpretation of a regulation naturally must accord with the statute as well"); *See also Sierra Club v. U.S. Dep't of Agric*., 777 F. Supp. 2d 44, 68 (D.D.C. 2011) (noting that even if an agency's actions are consistent with its own regulation, they are invalid if in conflict with NEPA or CEQ regulations.). So even if the Corps' interpretation comports with its regulation, the Court must assess whether the interpretation is consistent with NEPA. As explained below, the Corps' interpretation and application of its regulation in this case is contrary to NEPA. *See also* Kentuckians Br. at 26, 29-32, 34.

B. No deference is afforded to the Corps' interpretation of NEPA

The Corps and Leeco both argue that the Corps should be granted substantial deference under *Auer v. Robbins*, 519 U.S. 452 (1997). But *Auer* applies only to

disputes over the meaning of an agency's own regulations. 519 U.S. at 461; *Day v. James Marine, Inc.* 518 F.3d 411, 418 (6th Cir. 2008). Statutory interpretation is governed by *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

The Corps does not receive *Chevron* deference with respect to the meaning of NEPA because it has not been delegated NEPA rulemaking authority by Congress. *City of Arlington, Tex. v. F.C.C.* 133 S.Ct. 1863, 1874 (2013) (citing *U.S. v. Mead Corp.*, 533 U.S. 218 (2001)) ("[F]or *Chevron* deference to apply, the agency must have received congressional authority to determine the particular matter at issue in the particular manner adopted."). That authority belongs to CEQ. *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979). Neither the Corps nor Leeco claims that the Corps' interpretations of NEPA receive *Chevron* deference.[1]

In interpreting NEPA, this Court should be guided by CEQ's "mandatory regulations applicable to all federal agencies," *Andrus*, 442 U.S. at 358, which are entitled to "substantial deference" from courts. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 356 (1989).

[1] The Corps claims its scope of analysis determination is entitled to deference. Corps. Br. at 19-20. But the cases it cites do not concern statutory interpretation. *Wetlands Action Network v. U.S. Army Corps of Engineers* only addresses the Corps' interpretation of its regulations. 222 F.3d 1105, 1115 (9th Cir. 2000). *Save Our Cumberland Mountains v. Kempthorne* addresses another issue entirely — the factual question of what "range of alternatives" should be discussed by an agency, saying that determination is "within an agency's discretion" "[a]s a general matter." 453 F.3d 334, 342 (6th Cir. 2006). Neither case suggests that the Corps' statutory interpretations under NEPA are entitled to *Chevron* deference.

C. The Corps' Application of its regulation violated NEPA

The Corps cannot rely on Kentucky's overlapping SMCRA jurisdiction to refuse to consider the full environmental impact of a mine it regulates under the CWA. NEPA specifically addresses projects subject to overlapping state and federal authority. *See* Kentuckians Br. at 34. In situations in which "the State agency or official has statewide jurisdiction and has the responsibility for" an action, NEPA says, the Federal official is not "relieve[d]… of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under [NEPA]," even if the state official prepares a state Environmental Impact Statement. 42 U.S.C. § 4332(2)(D). That statutory language — expressly providing that federal agencies are *not* relieved of any responsibility under NEPA when a "State agency or official" has "jurisdiction" and "responsibility" for the action — forecloses the Corps' view that it may narrow the scope of its NEPA review when it shares jurisdiction with a state agency. Neither the Corps nor Leeco give any reason in their responses why this provision does not control.

Indeed, all of 42 U.S.C. § 4332(2)(D) would be superfluous if the Corps' interpretation of NEPA were correct. The subsection applies when a "State agency or official" administering a federally-funded program "has statewide jurisdiction and has the responsibility for such action" and the subsection sets up a procedure

by which a federal agency may rely on a statement "prepared by a State agency or official" to satisfy the obligation under subsection 4332(2)(C) to prepare an Environmental Impact Statement. *Id.* § 4332(2)(D). But under the Corps' view of NEPA, the federal agency's obligation to prepare an Environmental Impact Statement is *extinguished* when "the State agency or official has statewide jurisdiction and has the responsibility for such action." If the Corps were correct, the procedure of subsection § 4332(2)(D) would be superfluous. "This construction, therefore, offends the well-settled rule of statutory construction that all parts of a statute, if at all possible, are to be given effect." *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 633 (1973).[2]

Cases applying NEPA overwhelmingly support this plain-text reading. *See Calvert Cliffs' Coord. Comm., Inc. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109, 1122-23 (D.C. Cir. 1971) (striking down regulations that barred consideration of effects for which "environmental quality standards and requirements have been established by authorized Federal, State, and regional agencies"). The Corps attempts to shunt this and similar cases aside on the theory that they address only

[2] Regulations promulgated by CEQ confirm that the Corps' view of NEPA is wrong. Kentuckians Br. at 36 n.11. 40 C.F.R. § 1506.2 provides for cooperation between federal and state agencies in situations where "State and local requirements" apply. It provides that in those situations the agencies "shall to the fullest extent possible" conduct joint environmental reviews as "joint lead agencies." 40 C.F.R. § 1506.2(b)-(c). The Corps' view that overlapping state authority extinguishes a federal agency's obligation to review a project it regulates is inconsistent with that regulation.

"how an agency must consider environmental effects," not "which" effects it must consider. Corps Br. at 34. That is wrong. These cases did not merely concern "how" an evaluation was conducted; they concern agency attempts to exclude certain impacts from consideration at all. *See S. Fork Band of W. Shoshone v. U.S. Dep't of Interior*, 588 F.3d 718, 726 (9th Cir. 2009) (rejecting claim that "impacts need not be evaluated because [the] facility operates pursuant to a state permit under the Clean Air Act"); *Limerick Ecology Action, Inc. v. NRC*, 869 F.2d 719, 729 (3d Cir. 1989) (rejecting contention that review under Atomic Energy Act "precludes the need for further consideration under NEPA"); *Idaho v. ICC*, 35 F.3d 585, 595 (D.C. Cir. 1994) (permit conditions requiring consultation with other agencies did not excuse failure to conduct independent evaluation). The ruling in *State of North Carolina v. FAA*, 957 F.2d 1125, 1129-30 (4th Cir. 1992), illustrates appropriate cooperation. There the Fourth Circuit upheld the agency's analysis under NEPA only because the agency independently examined the substance of another agency's evaluation before adopting it, "taking responsibility for [its] scope and content." *Id.* at 1130.

Both the Corps and Leeco rely heavily on a single decision, *Ohio Valley Envt'l Coalition v. Aracoma Coal Co.*, 556 F.3d 177 (4th Cir. 2009). *Aracoma*, however, was almost entirely concerned with whether the Corps' narrow NEPA review violated its regulation. *See* Corps Br. at 20 ("[T]he plaintiffs [in *Aracoma*]

claimed that 'the Corps acted contrary to its regulations by limiting the scope of its NEPA analysis'") (quoting *Aracoma*, 556 F.3d at 193); *Aracoma*, 556 F.3d at 193-97. The *Aracoma* court recognized that the consistency of the Corps' scope of review *with the statute* was a separate question, *id*. at 197 n.12, and addressed the statutory question in a footnote. The entire statutory analysis is a single sentence: "NEPA is not a results-driven statute, and requires only that federal agencies carefully consider and weigh competing policy values, which the Corps has plainly done here." *Id.* (citation omitted). That analysis is not persuasive. NEPA does not mandate particular results, but it does mandate particular procedures. *Robertson*, 490 U.S. at 350. The fact that NEPA is not "results-oriented" sheds no light on whether agencies are relieved of their *procedural* obligations when they share regulatory authority with a state. Rather than follow this terse footnote from *Aracoma*, this Court should follow the Ninth Circuit, the D.C. Circuit, the Third Circuit, other decisions from the Fourth Circuit, and the plain text of NEPA, and hold that overlapping state authority does not relieve the Corps of its obligation to conduct a full NEPA review.

In any event, *Aracoma* is not on point. *Aracoma* turned on the overlap between the state's regulation of valley fills and the Corps' regulation of stream filling. The Court determined that the local terrestrial and aquatic impacts of valley fills were in fact regulated under SMCRA, *Aracoma*, 556 F.3d at 195-96, and that

the analysis the plaintiffs argued was required would simply duplicate "an environmental review process . . . delegated to federally approved state programs." *Id.* at 196. This case is different because there is no SMCRA process that addresses the health studies presented by Sierra Club. Kentuckians Br. at 38. If the Corps does not investigate and address these serious health concerns, no agency will. Thus the Corps' legal position here is that federal agencies may forego NEPA analysis based on overlapping state regulation *even if the state's regulatory regime does not consider those issues that NEPA requires the federal agency to analyze.* That position is much more extreme than the position the Corps defended in *Aracoma.* NEPA truly would "wither away in disuse" if the interpretation the Corps now advances were the law. *Calvert Cliffs*, 449 F.2d at 1122-23.

D. *The Corps' Interpretation is foreclosed by* Save Our Cumberland Mountains v. Kempthorne.

The Corps' decision to narrow its environmental review also contravenes this Court's decision in *Save Our Cumberland Mountains v. Kempthorne* ("*SOCM*"), 453 F.3d 334 (6th Cir. 2006). The Corps admits that, under its approach, "[SMCRA] places the mining activity . . . within Kentucky's control and responsibility," limiting the Corps' NEPA obligation. Corps Br. at 37. *SOCM* specifically rejected the argument that SMCRA can limit an agency's NEPA duties. 453 F.3d at 343 ("[SMCRA] does not suspend the agency's independent obligations under [NEPA].").

The Corps argues that *SOCM* is inapposite because it concerned the duty to evaluate alternatives, not impacts. Corps Br. at 36. But there is no reason why *SOCM*'s holding about alternatives under § 4332(2)(C)(iii) does not apply equally to impacts under § 4332(2)(C)(i). The Corps suggests none. The Corps also protests that it acts under the CWA, not under SMCRA. Corps Br. at 36. But that distinction is irrelevant. The Corps *is* subject to NEPA, just like the defendant agency in *SOCM*. And just like the NEPA obligations in *SOCM*, the Corps' NEPA obligations cannot be limited by SMCRA. 453 F.3d at 343.

III. Even Under the Corps' Own Scope of Analysis, the Public Health Impact of Mining Must be Considered.

A. The Corps authorized mining in jurisdictional waters.

Even if the Corps may limit its scope of review to jurisdictional waters, it still must analyze all direct, indirect, and cumulative effects that may result from the coal mining activities it authorizes within that scope. Kentuckians Br. at 27-29, 26.

The Corps' lawyers now attempt to deny that the Corps authorized any coal mining, arguing that the activity authorized by the permit is only "discharges." Corps Br. at 23. That is wrong as a factual matter. The permit issued to Leeco expressly authorizes mining and mine waste disposal in streams, not just "discharges." Permit, ECF 21-1 at Page ID# 123 (authorizing "construct[ion of] one excess disposal fill…, one sediment control pond…, and various 'mine-

throughs.’”). Like the permit, the Decision describes the activities permitted as “mine-throughs” or “mining through” and construction of a hollowfill and sediment control pond. Decision, ECF 21-2 at Page ID# 142 (Proposed Project Description); *id.* (Scope of Analysis).

The record is clear that mining through streams entails excavating the stream bed to expose coal, extracting the coal, and redepositing material back into the stream bed. *See, e.g.*, *id.* at Page ID# 157 (“The substrate of the stream reaches proposed to be impacted by mine-throughs would be excavated. In most cases, the substrate would be replaced by large rocks in the reconstructed channel as required by SMCRA reclamation criteria.”). This is surface coal mining, plain and simple.

Tellingly, Leeco admits that the Corps has authorized it to mine in streams. Leeco prefers to call these protected U.S. waters “drainage channels” or “channels,” but it admits that the Corps has permitted the “disturbance” of “9,809 linear feet of channels . . . where contour mining cuts across a drainage channel.” Leeco Br. at 5. Leeco further admits that the “disturbance” is part of the “excavation” of coal. *Id.*

Leeco concedes that mining in streams requires a 404 permit, Leeco Br. at 8, and indeed that is settled law. 404 permits are required for discharges of both “dredged” material and “fill” material, 33 U.S.C. 1344(a), and “‘dredged’ material is by definition material that comes from the water itself.” *Avoyelles Sportsmen’s*

League, Inc. v. Marsh, 715 F.2d 897, 923 n.42 (5th Cir. 1983). Disturbing and redepositing material from the bed of a waterbody is such a discharge. *See, e.g.*, *City of Olmsted Falls, Ohio v. U.S. EPA*, 435 F.3d 632, 633 (6th Cir. 2006) (filling and replacing streambed with culvert); *Avoyelles*, 715 F.2d at 920-26 (relocation of soil and other material within wetland); *United States v. Deaton*, 209 F.3d 331 (4th Cir. 2000) (relocation of dredged material from ditch to the edge of the ditch); *United States v. Huebner*, 752 F.2d 1235, 1241-43 (7th Cir. 1985) (spreading of soil around wetlands with earthmoving equipment). Thus the 404 permit *must* authorize all the mining planned to occur in streams, or Leeco's planned mining would violate the CWA.

Moreover, the Corps' regulations say that the "specific activity" the Corps must analyze in full is the project planned to occur in jurisdictional waters, not simply the "discharges" it generates. 33 C.F.R. § 325 App. B(7)(b). Examples of "specific activities" in the Corps' regulation include "e.g., construction of a pier in a navigable water of the United States," a "pipeline," a "supply loading terminal," and a "fill road." 33 C.F.R. § 325, App. B(7)(b)(1), (3).

Even if the Corps could limit the "specific activity" to the discharges generated by the project, the Corps would still have "control and responsibility," over mining because the regulations provide that control and responsibility extends to the entire project in jurisdictional waters:

> if an applicant seeks a [Corps] permit to fill waters or wetlands on which other construction or work is proposed, the control and responsibility of the Corps, as well as its overall Federal involvement would extend to the portions of the project to be located on the permitted fill.

Id. § 325 App. B(7)(b)(3).

The regulation leaves no room for doubt. The Corps must fully analyze the activity proposed to occur in jurisdictional waters — here, "construct[ion of] one excess disposal fill…, one sediment control pond…, and various 'mine-throughs.'" Permit, ECF 21-1 at Page ID# 123.

B. Kentuckians need not prove the mining causes health problems.

Appellants need not *prove* that mining at Stacy Branch will cause health problems. NEPA requires the Corps to examine not only effects that are likely to occur but those that *may* occur. 40 C.F.R. § 1508.3 ("Affecting means will *or may* have an effect on.") (emphasis added). The only limitation is that an impact must be reasonably foreseeable. 40 C.F.R. § 1508.8. To require more "would in essence be requiring that the plaintiff conduct the same environmental investigation that he seeks in his suit to compel the agency to undertake." *City of Davis v. Coleman*, 521 F.2d 661, 670-71 (9th Cir. 1975); *see also American Bird Conservancy, Inc. v. FCC*, 516 F.3d 1027, 1033 (D.C. Cir. 2008). For that reason, a plaintiff succeeds on a NEPA claim "[i]f substantial questions are raised whether a project may have a significant effect upon the human environment." *Foundation for North American Wild Sheep v. U.S. Dept. of Agric.*, 681 F.2d 1172, 1177-78 (9th Cir. 1982); *accord*

Anglers of the Au Sable v. U.S. Forest Service, 565 F. Supp. 2d 812, 825 (E.D. Mich. 2008) ("'a plaintiff need not show that a significant effects *will in fact occur*'") (quoting *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1150 (9th Cir. 1998)).

The Corps argues that Kentuckians have failed to show "a reasonably close causal relationship between the environmental effect and the alleged cause." Corps Br. at 28 (quoting *Public Citizen*, 541 U.S. at 767 and *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983)). But the Corps misunderstands the cases that used this phrase. In *Public Citizen,* the agency was statutorily precluded from taking any action that could alleviate the harms plaintiffs sought to have analyzed under NEPA, 541 U.S. at 768, and only for that reason did the Court hold that causation was lacking. *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1213–15 (9th Cir. 2008) (quoting *Sierra Club v. Mainella*, 459 F. Supp. 2d 76, 105 (D.D.C. 2006) ("The holding in *Public Citizen* extends only to those situations where an agency has 'no ability' because of lack of 'statutory authority' to address the impact.")). In *Metropolitan Edison* the human health impacts were unrelated to any environmental effect. 460 U.S. at 778. Here, negative health outcomes are associated with the environmental impacts of mining that the Corps permitted.

Moreover, NEPA requires analysis of indirect and cumulative effects, not just direct ones. 40 C.F.R. §§ 1502.16, 1508.27(7). While direct effects "are caused by the action and occur at the same time and place," 40 C.F.R. § 1508.8, indirect effects "are later in time or farther removed in distance" and need only be reasonably foreseeable. *Id.* Cumulative effects are "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions." 40 C.F.R. § 1508.7.

The health studies submitted in comments are more than sufficient to trigger the Corps' duty to investigate indirect and cumulative effects of mining on public health. *See, e.g.*, Hitt and Hendryx (2010) (ECF 21-5 at Page ID# 291 ("Our results demonstrated significant relationships between increasing coal mining (CMI), decreasing ecological integrity (SCI), and increasing cancer mortality. . . . These results suggest, but cannot prove a causal link between coal mining and cancer mortality."). The Corps cherry-picks isolated statements from the health studies to imply that they address off-site coal processing activities, not surface coal mining itself. Corps. Br. at 26. Each of the studies, however, also discusses on-site mining. *See, e.g.*, Ahern (2011) at 2 (ECF 21-8 at Page ID# 323 (stating that surface mining creates "large-scale impairment of surface water and groundwater

and significant disturbances in local water quality," and describing how blasting on site creates fine particulates, including metals and nitrogen dioxide); Hendryx (2008) at 8-9 (ECF 21-12 at Page ID# 481-82) ("Coal contains mercury, lead, cadmium, arsenic, manganese, beryllium, chromium and many other toxic and carcinogenic substances, and the *mining* and preparation of coal at local processing sites releases tons of annual ambient particulate matter and contaminates billions of gallons of water.") (emphasis added); Hendryx et al. (2007) at 1 (ECF 21-13 at Page ID# 468) ("The harmful exposures faced by coal miners—diesel particulates, dust, chemicals, fuels, and elemental toxins. . . may be found in less concentrated form but for larger populations of individuals living near the mining sites.").

To the extent the Corps' lawyers suggest that the off-site processing activities are the true cause of the health problems, they offer an impermissible *post hoc* rationale. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983). Lawyers at the Department of Justice cannot be presumed to have scientific expertise to determine which surface coal mining activities are making people sick and which are not. This is a technical determination that the agency must make based on a review of the evidence.

IV. The Corps Violated Its Regulation By Conducting A Very Broad Analysis of Economic Benefits And A Very Narrow Review of Environmental Costs.

The Corps' use of a much more expansive scope of review for analysis of benefits than for analysis of environmental costs violated 33 C.F.R. § 325, App. B (7)(b)(3).

Leeco argues that the Corps did in fact consider the environmental and health impacts of the entire mining operation "by analyzing the overlapping protections provided by the SMCRA permit." Leeco Br. at 29. But the Kentucky program does not address the health impacts at issue here. Kentuckians Br. at 38. The Corps did not analyze the environmental and health impacts of the entire mining operation, and even the Corps does not claim that it did.

The Corps argues that it did not violate the regulation because the broad discussion of benefits counted only under the CWA, not under NEPA. But the Corps discussed meeting the "nation's growing demand for energy," "employment opportunities for miners," and "coal severance taxes, property taxes, and payroll taxes" in the section of its decision entitled "Alternatives." (Decision at Page ID# 145-46). That analysis of alternatives is required under NEPA. *SOCM*, 453 F.3d 334, 344 (6th Cir. 2006) (discussing 40 C.F.R. § 1508.9). If the "Alternatives" discussion was intended to discharge duties under the CWA only, then the agency violated its obligation to consider alternatives under NEPA.

The Corps mentions other regulations that it claims compel a broad analysis of benefits. Corps Br. at 38. The Corps provides no reason why its environmental review obligations are trumped by its scope of analysis while its economic analysis obligations are not. But even if the Corps is correct that it has no discretion to adjust the scope of its economic analysis, that would not excuse the Corps' failure to follow 33 C.F.R. § 325, App. B (7)(b)(3). The Corps could have complied with all of its legal obligations by fully analyzing the public health consequences of the mine.

The Corps argues next that it is free to consider the economic benefits of the permit "in terms of its contribution" to the mine without doing the same for public health costs. Corps Br. at 40-41. This makes mince meat of the regulation's command that the scope of analysis for costs and benefits be "the same." 33 C.F.R. § 325, App. B(7)(b). If the Corps considers the 404 permit's contribution to the mine's economic benefits, it must consider the permit's contribution to the mine's public health costs.

In defense of its lopsided analysis, the Corps cites *Sylvester v. U.S. Army Corps of Engineers*, 882 F.2d 407 (9th Cir. 1989) and *California Trout v. Schaefer*, 58 F.3d 469 (9th Cir. 1995). Corps Br. at 40. But in those cases, the agency "did not weigh the benefits of the entire project," *California Trout*, 58 F.3d at 474 (quoting *Sylvester*, 882 F.2d at 410), but only the benefits of the fill to the project.

Id. *Sierra Club v. Sigler* is more closely analogous. 695 F.2d 957 (5th Cir. 1983). In *Sigler*, the Corps permitted the deepening of a channel to build an oil terminal. It touted the docking of ships carrying bulk commodities as a benefit of the dredging, but did not assess the environmental costs associated with that activity. In analyzing the Leeco permit, the Corps did the same thing. It touted the benefits of the whole coal mine, *e.g.*, Decision at Page ID#142 ("fuel[ing] electrical power generation"), without considering its environmental costs.

V. The Corps' Reliance on Compensatory Mitigation is Procedurally Flawed and Arbitrary and Capricious.

A. The Corps did not impose the required ecological performance standards.

The Corps does not dispute that a binding CWA regulation required it to impose "ecological performance standards" to measure whether Leeco's mitigation project is "developing into the desired resource type, [and] providing the expected functions[.]" 33 C.F.R. § 332.5(a).[3] The Corps argues that construction

[3] The Corps determined that the 2008 mitigation regulations govern this permit. Corps Br. at 6 n.2. Leeco argues that the 2008 regulations are inapplicable. Leeco Br. at 31-34. The Court should not consider this issue because only Leeco, an Intervenor in this case, has raised it. *See State of New York v. Reilly*, 969 F.2d 1147, 1154 n.11 (D.C. Cir. 1992) (citing *Illinois Bell Tel. Co. v. FCC*, 911 F.2d 776 (D.C. Cir. 1990)); *accord New Jersey v. E.P.A.*, 517 F.3d 574, 581 (D.C. Cir. 2008).

Even if the Court considers this issue, the Court should reject Leeco's argument. "It is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *State Farm*, 463 U.S. at 50. Because the Corps applied the 2008 regulations, the permit can be upheld only on the ground that the 2008 regulations were complied with.

In any event, Leeco is wrong. The 2008 mitigation regulations govern Leeco's 2011 application. The regulations apply to "applications received after [June 9, 2008]." 73 Fed. Reg. 19,594, 19,608/2. Leeco's 2011 application is an "application[] received after" 2008. It must be

specifications in the mitigation plan are enough. Corps Br. at 49; Mitigation Plan, ECF 62-2 at Page ID# 2167. The Corps' argument relies heavily on the Eastern Kentucky Stream Assessment Protocol, which is an assessment tool, not a set of requirements. The Corps claims that construction specifications become ecological performance standards "through the Protocol." Corps Br. at 47.

The Corps' argument rests on the premise that the construction specifications require Leeco to achieve the same structural characteristics identified in the Protocol. That premise is false. The construction specifications fall far short of the structural characteristics the Protocol says demonstrate functional success.

The Protocol measures ten structural characteristics:

1. More than 70% epifaunal substrate cover with a mix of structures
2. Appropriate embeddedness of rocks and gravel
3. Presence of four out of four velocity/depth regimes
4. Sedimentation of less than 5%
5. Optimal water flow
6. Minimal or no channelization or signs of past dredging
7. Frequent and diverse riffles
8. Stable stream banks
9. At least 90% of streambank vegetated with mostly native plants
10. Zone of vegetation greater than 18 meters wide

Corps Br. at 48; ECF 66-7 at Page ID# 2382-83. Of these ten characteristics only

---

considered a new application because it differed from the 2007 application in almost all relevant respects, including the configuration of the mine, the location and size of the proposed impacts to waters, and the type and location of proposed mitigation. The 2011 application is not grandfathered simply because it bore the same application number as that submitted in 2007.

three are addressed by the standards in the plan. Mitigation Plan at Page ID# 2167 (discussing stability of banks, extent of vegetation, and width of vegetation). Beyond that, the plan says only that "stream channel morphology will be determined a success when the proposed structures that will be used for the restoration project are constructed in the approximate location proposed in the mitigation plan." *Id.* There is no provision for assessing whether the "proposed structures," their "proposed location," or their number and diversity are sufficient to ensure functional improvement or adequate in terms of the Protocol. Substrate characteristics, velocity and depth, sedimentation, water flow, channelization and dredging, and riffles are not addressed at all.

Thus the Corps' claim that "the construction specifications of the Compensatory Mitigation Plan directly address the same physical characteristics of Spring Branch that serve as inputs into the Protocol" is, at best, misleading. Corps Br. at 48. The rudimentary construction specifications in the mitigation plan actually fall far short of the structural improvements in the Protocol. So even if the Protocol measures functional improvement, it does not follow that the construction specifications do. The construction specifications are not the ecological performance standards required by law.

B. The Corps did not assess the likelihood of ecological success and sustainability.

The Corps adopted Leeco's representation that the mitigation is 80%-likely to succeed. Corps Br. at 53. The Corps claims it conducted an independent assessment of that likelihood, as required by 33 C.F.R. 332.3(a)(1). But no such assessment appears anywhere in the record. "The record . . . contains not a hint of professional judgment on the [Corps'] part as to why the [80%] number, as opposed to some other number, is reasonable." *Meister v. U.S. Dep't of Agric.*, 623 F.3d 363, 373 (6th Cir. 2010).[4]

The Corps cites a letter in the record in which EPA raised questions about Leeco's proposed mitigation, claiming this letter shows that the Corps conducted an independent assessment of the likelihood of success and sustainability. Corps Br. at 51. But nothing in the letter references or even alludes to any assessment by the Corps. (ECF 21-9 at Page ID# 334). At most it shows that *EPA* examined Leeco's proposed mitigation plan. Moreover, the concerns EPA raised in the letter

[4] The Corps argues that Kentuckians failed to object in comments to the Corps' treatment of this issue. Corps Br. at 53-54. It would have been impossible for Kentuckians to object in comments to the lack of explanation in the Corps' decision, because the decision had not yet occurred. *See* Kentuckians Br. at 5-6. All the Corps released for the comment period was a cursory two-and-a-half-page Public Notice. (ECF 21-20 at Page ID# 626-28.) Kentuckians' *did* object in comments to the lack of explanation in that document. Comments at 3 (ECF 21-3 at Page ID# 208) ("The Public Notice Bulletin is insufficient and illegal because it does not adequately describe the compensatory mitigation plan[.]"). Kentuckians also objected extensively to the Corps' failure to confront the risk that mitigation was likely to fail. *See* Kentuckians Br. at 12-15.

were not about the risk of failure or unsustainability. EPA's concern was that the *amount* of planned mitigation was likely insufficient. *Id*. That letter provides no support for the Corps' claim to have assessed the likelihood for ecological success and sustainability of Leeco's proposed mitigation.[5]

The Corps next asserts that it "approved [Leeco's] plan as likely to succeed," citing nothing in support. Corps Br. at 51. Later it asserts it accepted Leeco's proposal "because its experts reasonably believed that on the whole, there is a good likelihood (but not a perfect likelihood) that those efforts will be successful." Corps Br. at 53. The Corps only cites Leeco's proposal in support of this assertion. The Corps is asking the Court to infer that it conducted the required assessment from the fact that Leeco submitted a proposal and the Corps approved it. But the Court may not simply assume that the Corps discharged its duties. The Corps must provide "documentary support" for its claim to have conducted the assessment required by law. *GTE Midwest, Inc. v. FCC*, 233 F.3d 341, 345 (6th Cir. 2000).

Finally the Corps relies on its continuing discretion to "add stream reaches to Leeco's mitigation obligations" if the planned mitigation proves unsuccessful.

[5] Nor do a subsequent letter and email from EPA provide any support. The second letter only states that the Corps coordinated with EPA to "avoid and minimize environmental and water quality impacts." ECF 62-7 at Page ID# 2256. The email says that EPA "has no further concerns" about unspecified "project changes," ECF 66-3 at Page ID# 2356, and that EPA still has concerns about the mitigation but "won't let that hold things up." *Id.* Nothing in either document suggests that EPA or the Corps conducted any assessment of the likelihood of success and sustainability.

Corps Br. at 52. This is not an argument that the Corps conducted the required assessment of likelihood of success, but an argument that it should not have to. The regulation plainly requires that likelihood of success be assessed *before* permit issuance. 33 C.F.R. § 332.3(a) (providing that the Corps "must assess the likelihood for ecological success and sustainability" "when evaluating compensatory mitigation options"). If the Corps defers this assessment until afterwards, issuance of the permit is "without observance of procedure required by law." *Meister*, 623 F.3d at 375 (quoting 5 U.S.C. § 706(2)(D)).

Leeco argues that the Corps approved the 80% estimate based on "long-standing practice" and comparison with other projects. Leeco Br. at 40-41. But in support Leeco cites only the Corps' brief below. *Id.* (citing ECF 67 at Page ID# 2400). The cited page of the Corps' brief cited irrelevant spreadsheets, Leeco's mitigation plan, and Leeco's application, none of which support this claim. (ECF 67 at Page ID# 2400). The Court should reject Leeco's attempt to resurrect this unsubstantiated claim, which the Corps has abandoned on appeal.

C. The Corps did not give adequate consideration to the extensive scientific evidence in the record showing that stream creation and enhancement is likely to fail.

The Corps' mitigation decision, including its acceptance of an 80% likelihood of success, was arbitrary and capricious because it ignored the extensive scientific evidence in the record that the mitigation is actually likely to fail. This

Court has held that agencies "must 'respond in a reasoned manner to the comments received'" and "explain how the agency resolved any significant problems raised by the comments." *Navistar Int'l Transp. Corp. v. EPA*, 941 F.2d 1339, 1359 (6th Cir. 1991) (quoting *Action on Smoking and Health v. CAB*, 699 F.2d 1209, 1216 (D.C. Cir. 1983)). The Corps gives no answer to this argument in its response brief.

Leeco argues that the Corps did respond to scientific evidence that the proposed mitigation will fail. Leeco Br. at 41-42 (citing Decision at Page ID# 156)). Leeco cites only the Corps' statement that "comments received from … interested parties" "have been considered." *Id.* Leeco cites nothing showing how this evidence was considered or reconciled with the decision. A blanket statement that all public comments "have been considered," cannot discharge the obligation to consider and respond to contrary evidence. *Navistar*, 941 F.2d at 1359.[6]

CONCLUSION

For the foregoing reasons, the Corps' decision violated NEPA and the CWA. Kentuckians respectfully request that the Court instruct the District Court to set the Stacy Branch permit aside.

[6] Neither Appellee argues that the Corps' summary of comments discharged its duty to respond to Kentuckians' comments. Decision at Page ID# 152-53. The Corps' summary does not give any response to Kentuckians' commentsor acknowledge the evidence that the mitigation is likely to fail. *See* Kentuckians Br. at 19. Likewise, no party argues that the Corps' summary of Leeco's response, Decision at Page ID# 152-53, discharges the Corps' duty. The agency must respond to comments, not the applicant. *Navistar*, 941 F.2d at 1359.

DATED: January 21, 2013

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation set forth in Rule 32(a)(7)(B)(ii) of the Federal Rules of Appellate Procedure. Excepting the portions of the brief described in Fed. R. App. P. 32(a)(7)(B)(iii), the brief contains 6,761 words.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). The brief has been prepared in a proportionally-spaced typeface using Microsoft Word 2010 in Times New Roman, 14-point.

DATED: January 21, 2014

/s/ J. Michael Becher
J. Michael Becher

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of January 2014, I have served the foregoing Reply Brief of Plaintiffs-Appellants on all registered counsel through the Court's electronic filing system (ECF).

/s/ J. Michael Becher
J. Michael Becher

Statutory and Regulatory Text

Westlaw.

Effective:[See Text Amendments]

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

§ 706. Scope of review

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.)

Current through P.L. 113-65 (excluding P.L. 113-54) approved 12-20-13

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

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

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

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

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

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

(i) the environmental impact of the proposed action,

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

(iii) alternatives to the proposed action,

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

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed

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action should it be implemented.

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

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

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

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

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

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

The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this chapter; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction. [FN1]

(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;

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

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

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

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.)

[FN1] So in original. The period probably should be a semicolon.

Current through P.L. 113-65 (excluding P.L. 113-54) approved 12-20-13

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Effective:[See Text Amendments]

Code of Federal Regulations Currentness
Title 33. Navigation and Navigable Waters
Chapter II. Corps of Engineers, Department of the Army
Part 325. Processing of Department of the Army Permits (Refs & Annos)

Appendix B to Part 325--NEPA Implementation Procedures for the Regulatory Program

1. Introduction. In keeping with Executive Order 12291 and 40 CFR 1500.2, where interpretive problems arise in implementing this regulation, and consideration of all other factors do not give a clear indication of a reasonable interpretation, the interpretation (consistent with the spirit and intent of NEPA) which results in the least paperwork and delay will be used. Specific examples of ways to reduce paperwork in the NEPA process are found at 40 CFR 1500.4. Maximum advantage of these recommendations should be taken.

2. General. This Appendix sets forth implementing procedures for the Corps regulatory program. For additional guidance, see the Corps NEPA regulation 33 CFR Part 230 and for general policy guidance, see the CEQ regulations 40 CFR 1500–1508.

3. Development of Information and Data. See 40 CFR 1506.5. The district engineer may require the applicant to furnish appropriate information that the district engineer considers necessary for the preparation of an Environmental Assessment (EA) or Environmental Impact Statement (EIS). See also 40 CFR 1502.22 regarding incomplete or unavailable information.

4. Elimination of Duplication with State and Local Procedures. See 40 CFR 1506.2.

5. Public Involvement. Several paragraphs of this appendix (paragraphs 7, 8, 11, 13, and 19) provide information on the requirements for district engineers to make available to the public certain

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environmental documents in accordance with 40 CFR 1506.6.

6. Categorical Exclusions--a. General. Even though an EA or EIS is not legally mandated for any Federal action falling within one of the "categorical exclusions," that fact does not exempt any Federal action from procedural or substantive compliance with any other Federal law. For example, compliance with the Endangered Species Act, the Clean Water Act, etc., is always mandatory, even for actions not requiring an EA or EIS. The following activities are not considered to be major Federal actions significantly affecting the quality of the human environment and are therefore categorically excluded from NEPA documentation:

(1) Fixed or floating small private piers, small docks, boat hoists and boathouses.

(2) Minor utility distribution and collection lines including irrigation;

(3) Minor maintenance dredging using existing disposal sites;

(4) Boat launching ramps;

(5) All applications which qualify as letters of permission (as described at 33 CFR 325.5(b)(2)).

b. Extraordinary Circumstances. District engineers should be alert for extraordinary circumstances where normally excluded actions could have substantial environmental effects and thus require an EA or EIS. For a period of one year from the effective data of these regulations, district engineers should maintain an information list on the type and number of categorical exclusion actions which, due to extraordinary circumstances, triggered the need for an EA/FONSI or EIS. If a district engineer determines that a categorical exclusion should be modified, the information will be furnished to the division engineer who will review and analyze the actions and circumstances to determine if there is a basis for recommending a modification to the list of categorical exclusions. HQUSACE (CECW–OR) will review recommended changes for Corps-wide consistency and revise the list accordingly.

7. EA/FONSI Document. (See 40 CFR 1508.9 and 1508.13 for definitions)--a. Environmental Assessment (EA) and Findings of No Significant Impact (FONSI). The EA should normally be combined with other required documents (EA/404(b)(1)/SOF/FONSI). "EA" as used throughout this Appendix normally refers to this combined document. The district engineer should complete an EA as soon as practicable after all relevant information is available (i.e., after the comment period for the public notice of the permit application has expired) and when the EA is a separate document it must be completed prior to completion of the statement of finding (SOF). When the EA confirms that the impact of the applicant's proposal is not significant and there are no "unresolved conflicts concerning alternative uses of available resources * * * ' (section 102(2)(E) of NEPA), and the proposed activity is a "water dependent" activity as defined in 40 CFR 230.10(a)(3), the EA need not include a discussion on alternatives. In all other cases where the district engineer determines that there are unresolved conflicts concerning alternative uses of available resources, the EA shall include a discussion of the reasonable alternatives which are to be considered by the ultimate decision-maker. The decision options available to the Corps, which embrace all of the applicant's alternatives, are issue the permit, issue with modifications or deny the permit. Modifications are limited to those project modifications within the scope of established permit conditioning policy (See 33 CFR 325.4). The decision option to deny the permit results in the "no action" alternative (i.e. no activity requiring a Corps permit). The combined document normally should not exceed 15 pages and shall conclude with a FONSI (See 40 CFR 1508.13) or a determination that an EIS is required. The district engineer may delegate the signing of the NEPA document. Should the EA demonstrate that an EIS is

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necessary, the district engineer shall follow the procedures outlined in paragraph 8 of this Appendix. In those cases where it is obvious an EIS is required, an EA is not required. However, the district engineer should document his reasons for requiring an EIS.

b. Scope of Analysis. (1) In some situations, a permit applicant may propose to conduct a specific activity requiring a Department of the Army (DA) permit (e.g., construction of a pier in a navigable water of the United States) which is merely one component of a larger project (e.g., construction of an oil refinery on an upland area). The district engineer should establish the scope of the NEPA document (e.g., the EA or EIS) to address the impacts of the specific activity requiring a DA permit and those portions of the entire project over which the district engineer has sufficient control and responsibility to warrant Federal review.

(2) The district engineer is considered to have control and responsibility for portions of the project beyond the limits of Corps jurisdiction where the Federal involvement is sufficient to turn an essentially private action into a Federal action. These are cases where the environmental consequences of the larger project are essentially products of the Corps permit action.

Typical factors to be considered in determining whether sufficient “control and responsibility” exists include:

(i) Whether or not the regulated activity comprises “merely a link” in a corridor type project (e.g., a transportation or utility transmission project).

(ii) Whether there are aspects of the upland facility in the immediate vicinity of the regulated activity which affect the location and configuration of the regulated activity.

(iii) The extent to which the entire project will be within Corps jurisdiction.

(iv) The extent of cumulative Federal control and responsibility.

A. Federal control and responsibility will include the portions of the project beyond the limits of Corps jurisdiction where the cumulative Federal involvement of the Corps and other Federal agencies is sufficient to grant legal control over such additional portions of the project. These are cases where the environmental consequences of the additional portions of the projects are essentially products of Federal financing, assistance, direction, regulation, or approval (not including funding assistance solely in the form of general revenue sharing funds, with no Federal agency control over the subsequent use of such funds, and not including judicial or administrative civil or criminal enforcement actions).

B. In determining whether sufficient cumulative Federal involvement exists to expand the scope of Federal action the district engineer should consider whether other Federal agencies are required to take Federal action under the Fish and Wildlife Coordination Act (16 U.S.C. 661 et seq.), the National Historic Preservation Act of 1966 (16 U.S.C. 470 et seq.), the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.), Executive Order 11990, Protection of Wetlands, (42 U.S.C. 4321 91977), and other environmental review laws and executive orders.

C. The district engineer should also refer to paragraphs 8(b) and 8(c) of this appendix for guidance on determining whether it should be the lead or a cooperating agency in these situations.

These factors will be added to or modified through guidance as additional field experience develops.

(3) Examples: If a non-Federal oil refinery, electric generating plant, or industrial facility is proposed to be built on an upland site and the only DA permit requirement relates to a connecting pipeline, supply loading terminal or fill road, that pipeline, terminal or fill road permit, in and of itself, normally would not constitute sufficient overall Federal

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involvement with the project to justify expanding the scope of a Corps NEPA document to cover upland portions of the facility beyond the structures in the immediate vicinity of the regulated activity that would effect the location and configuration of the regulated activity.

Similarly, if an applicant seeks a DA permit to fill waters or wetlands on which other construction or work is proposed, the control and responsibility of the Corps, as well as its overall Federal involvement would extend to the portions of the project to be located on the permitted fill. However, the NEPA review would be extended to the entire project, including portions outside waters of the United States, only if sufficient Federal control and responsibility over the entire project is determined to exist; that is, if the regulated activities, and those activities involving regulation, funding, etc. by other Federal agencies, comprise a substantial portion of the overall project. In any case, once the scope of analysis has been defined, the NEPA analysis for that action should include direct, indirect and cumulative impacts on all Federal interests within the purview of the NEPA statute. The district engineer should, whenever practicable, incorporate by reference and rely upon the reviews of other Federal and State agencies.

For those regulated activities that comprise merely a link in a transportation or utility transmission project, the scope of analysis should address the Federal action, i.e., the specific activity requiring a DA permit and any other portion of the project that is within the control or responsibility of the Corps of Engineers (or other Federal agencies).

For example, a 50–mile electrical transmission cable crossing a 1 1/4 mile wide river that is a navigable water of the United States requires a DA permit. Neither the origin and destination of the cable nor its route to and from the navigable water, except as the route applies to the location and configuration of the crossing, are within the control or responsibility of the Corps of Engineers. Those matters would not be included in the scope of analysis which, in this case, would address the impacts of the specific cable crossing.

Conversely, for those activities that require a DA permit for a major portion of a transportation or utility transmission project, so that the Corps permit bears upon the origin and destination as well as the route of the project outside the Corps regulatory boundaries, the scope of analysis should include those portions of the project outside the boundaries of the Corps section 10/404 regulatory jurisdiction. To use the same example, if 30 miles of the 50–mile transmission line crossed wetlands or other “waters of the United States,” the scope of analysis should reflect impacts of the whole 50–mile transmission line.

For those activities that require a DA permit for a major portion of a shoreside facility, the scope of analysis should extend to upland portions of the facility. For example, a shipping terminal normally requires dredging, wharves, bulkheads, berthing areas and disposal of dredged material in order to function. Permits for such activities are normally considered sufficient Federal control and responsibility to warrant extending the scope of analysis to include the upland portions of the facility.

In all cases, the scope of analysis used for analyzing both impacts and alternatives should be the same scope of analysis used for analyzing the benefits of a proposal.

8. Environmental Impact Statement--General--a. Determination of Lead and Cooperating Agencies. When the district engineer determines that an EIS is required, he will contact all appropriate Federal agencies to determine their respective role(s), i.e., that of lead agency or cooperating agency.

b. Corps as Lead Agency. When the Corps is lead agency, it will be responsible for managing the EIS process, including those portions which come under the jurisdiction of other Federal agencies. The district engineer is authorized to require the

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applicant to furnish appropriate information as discussed in paragraph 3 of this appendix. It is permissible for the Corps to reimburse, under agreement, staff support from other Federal agencies beyond the immediate jurisdiction of those agencies.

c. Corps as Cooperating Agency. If another agency is the lead agency as set forth by the CEQ regulations (40 CFR 1501.5 and 1501.6(a) and 1508.16), the district engineer will coordinate with that agency as a cooperating agency under 40 CFR 1501.6(b) and 1508.5 to insure that agency's resulting EIS may be adopted by the Corps for purposes of exercising its regulatory authority. As a cooperating agency the Corps will be responsible to the lead agency for providing environmental information which is directly related to the regulatory matter involved and which is required for the preparation of an EIS. This in no way shall be construed as lessening the district engineer's ability to request the applicant to furnish appropriate information as discussed in paragraph 3 of this appendix.

When the Corps is a cooperating agency because of a regulatory responsibility, the district engineer should, in accordance with 40 CFR 1501.6(b)(4), “make available staff support at the lead agency's request” to enhance the latter's interdisciplinary capability provided the request pertains to the Corps regulatory action covered by the EIS, to the extent this is practicable. Beyond this, Corps staff support will generally be made available to the lead agency to the extent practicable within its own responsibility and available resources. Any assistance to a lead agency beyond this will normally be by written agreement with the lead agency providing for the Corps expenses on a cost reimbursable basis. If the district engineer believes a public hearing should be held and another agency is lead agency, the district engineer should request such a hearing and provide his reasoning for the request. The district engineer should suggest a joint hearing and offer to take an active part in the hearing and ensure coverage of the Corps concerns.

d. Scope of Analysis. See paragraph 7b.

e. Scoping Process. Refer to 40 CFR 1501.7 and 33 CFR 230.12.

f. Contracting. See 40 CFR 1506.5.

(1) The district engineer may prepare an EIS, or may obtain information needed to prepare an EIS, either with his own staff or by contract. In choosing a contractor who reports directly to the district engineer, the procedures of 40 CFR 1506.5(c) will be followed.

(2) Information required for an EIS also may be furnished by the applicant or a consultant employed by the applicant. Where this approach is followed, the district engineer will (i) advise the applicant and/or his consultant of the Corps information requirements, and (ii) meet with the applicant and/or his consultant from time to time and provide him with the district engineer's views regarding adequacy of the data that are being developed (including how the district engineer will view such data in light of any possible conflicts of interest).

The applicant and/or his consultant may accept or reject the district engineer's guidance. The district engineer, however, may after specifying the information in contention, require the applicant to resubmit any previously submitted data which the district engineer considers inadequate or inaccurate. In all cases, the district engineer should document in the record the Corps independent evaluation of the information and its accuracy, as required by 40 CFR 1506.5(a).

g. Change in EIS Determination. If it is determined that an EIS is not required after a notice of intent has been published, the district engineer shall terminate the EIS preparation and withdraw the notice of intent. The district engineer shall notify in writing the appropriate division engineer; HQUSACE (CECW–OR); the appropriate EPA regional administrator, the Director, Office of

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Federal Activities (A–104), EPA, 401 M Street SW., Washington, DC 20460 and the public of the determination.

h. Time Limits. For regulatory actions, the district engineer will follow 33 CFR 230.17(a) unless unusual delays caused by applicant inaction or compliance with other statutes require longer time frames for EIS preparation. At the outset of the EIS effort, schedule milestones will be developed and made available to the applicant and the public. If the milestone dates are not met the district engineer will notify the applicant and explain the reason for delay.

9. Organization and Content of Draft EISs--a. General. This section gives detailed information for preparing draft EISs. When the Corps is the lead agency, this draft EIS format and these procedures will be followed. When the Corps is one of the joint lead agencies, the joint lead agencies will mutually decide which agency's format and procedures will be followed.

b. Format--(1) Cover Sheet. (a) Ref. 40 CFR 1502.11.

(b) The “person at the agency who can supply further information” (40 CFR 1502.11(c) is the project manager handling that permit application.

(c) The cover sheet should identify the EIS as a Corps permit action and state the authorities (sections 9, 10, 404, 103, etc.) under which the Corps is exerting its jurisdiction.

(2) Summary. In addition to the requirements of 40 CFR 1502.12, this section should identify the proposed action as a Corps permit action stating the authorities (sections 9, 10, 404, 103, etc.) under which the Corps is exerting its jurisdiction. It shall also summarize the purpose and need for the proposed action and shall briefly state the beneficial/adverse impacts of the proposed action.

(3) Table of Contents.

(4) Purpose and Need. See 40 CFR 1502.13. If the scope of analysis for the NEPA document (see paragraph 7b) covers only the proposed specific activity requiring a Department of the Army permit, then the underlying purpose and need for that specific activity should be stated. (For example, “The purpose and need for the pipe is to obtain cooling water from the river for the electric generating plant.”) If the scope of analysis covers a more extensive project, only part of which may require a DA permit, then the underlying purpose and need for the entire project should be stated. (For example, “The purpose and need for the electric generating plant is to provide increased supplies of electricity to the (named) geographic area.”) Normally, the applicant should be encouraged to provide a statement of his proposed activity's purpose and need from his perspective (for example, “to construct an electric generating plant”). However, whenever the NEPA document's scope of analysis renders it appropriate, the Corps also should consider and express that activity's underlying purpose and need from a public interest perspective (to use that same example, “to meet the public's need for electric energy”). Also, while generally focusing on the applicant's statement, the Corps, will in all cases, exercise independent judgment in defining the purpose and need for the project from both the applicant's and the public's perspective.

(5) Alternatives. See 40 CFR 1502.14. The Corps is neither an opponent nor a proponent of the applicant's proposal; therefore, the applicant's final proposal will be identified as the “applicant's preferred alternative” in the final EIS. Decision options available to the district engineer, which embrace all of the applicant's alternatives, are issue the permit, issue with modifications or conditions or deny the permit.

(a) Only reasonable alternatives need be considered in detail, as specified in 40 CFR 1502.14(a). Reasonable alternatives must be those that are feasible and such feasibility must focus on the

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accomplishment of the underlying purpose and need (of the applicant or the public) that would be satisfied by the proposed Federal action (permit issuance). The alternatives analysis should be thorough enough to use for both the public interest review and the 404(b)(1) guidelines (40 CFR Part 230) where applicable. Those alternatives that are unavailable to the applicant, whether or not they require Federal action (permits), should normally be included in the analysis of the no-Federal-action (denial) alternative. Such alternatives should be evaluated only to the extent necessary to allow a complete and objective evaluation of the public interest and a fully informed decision regarding the permit application.

(b) The "no-action" alternative is one which results in no construction requiring a Corps permit. It may be brought by (1) the applicant electing to modify his proposal to eliminate work under the jurisdiction of the Corps or (2) by the denial of the permit. District engineers, when evaluating this alternative, should discuss, when appropriate, the consequences of other likely uses of a project site, should the permit be denied.

(c) The EIS should discuss geographic alternatives, e.g., changes in location and other site specific variables, and functional alternatives, e.g., project substitutes and design modifications.

(d) The Corps shall not prepare a cost-benefit analysis for projects requiring a Corps permit. 40 CFR 1502.23 states that the weighing of the various alternatives need not be displayed in a cost-benefit analysis and "* * * should not be when there are important qualitative considerations." The EIS should, however, indicate any cost considerations that are likely to be relevant to a decision.

(e) Mitigation is defined in 40 CFR 1508.20, and Federal action agencies are directed in 40 CFR 1502.14 to include appropriate mitigation measures. Guidance on the conditioning of permits to require mitigation is in 33 CFR 320.4(r) and 325.4. The nature and extent of mitigation conditions are dependent on the results of the public interest review in 33 CFR 320.4.

(6) Affected Environment. See Ref. 40 CFR 1502.15.

(7) Environmental Consequences. See Ref. 40 CFR 1502.16.

(8) List of Preparers. See Ref. 40 CFR 1502.17.

(9) Public Involvement. This section should list the dates and nature of all public notices, scoping meetings and public hearings and include a list of all parties notified.

(10) Appendices. See 40 CFR 1502.18. Appendices should be used to the maximum extent practicable to minimize the length of the main text of the EIS. Appendices normally should not be circulated with every copy of the EIS, but appropriate appendices should be provided routinely to parties with special interest and expertise in the particular subject.

(11) Index. The Index of an EIS, at the end of the document, should be designed to provide for easy reference to items discussed in the main text of the EIS.

10. Notice of Intent. The district engineer shall follow the guidance in 33 CFR Part 230, Appendix C in preparing a notice of intent to prepare a draft EIS for publication in the Federal Register.

11. Public Hearing. If a public hearing is to be held pursuant to 33 CFR Part 327 for a permit application requiring an EIS, the actions analyzed by the draft EIS should be considered at the public hearing. The district engineer should make the draft EIS available to the public at least 15 days in advance of the hearing. If a hearing request is received from another agency having jurisdiction as provided in 40 CFR 1506.6(c)(2), the district engineer should coordinate a joint hearing with that agency whenever appropriate.

12. Organization and Content of Final EIS. The

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organization and content of the final EIS including the abbreviated final EIS procedures shall follow the guidance in 33 CFR 230.14(a).

13. Comments Received on the Final EIS. For permit cases to be decided at the district level, the district engineer should consider all incoming comments and provide responses when substantive issues are raised which have not been addressed in the final EIS. For permit cases decided at higher authority, the district engineer shall forward the final EIS comment letters together with appropriate responses to higher authority along with the case. In the case of a letter recommending a referral under 40 CFR Part 1504, the district engineer will follow the guidance in paragraph 19 of this appendix.

14. EIS Supplement. See 33 CFR 230.13(b).

15. Filing Requirements. See 40 CFR 1506.9. Five (5) copies of EISs shall be sent to Director, Office of Federal Activities (A–104), Environmental Protection Agency, 401 M Street SW., Washington, DC 20460. The official review periods commence with EPA's publication of a notice of availability of the draft or final EISs in the Federal Register. Generally, this notice appears on Friday of each week. At the same time they are mailed to EPA for filing, one copy of each draft or final EIS, or EIS supplement should be mailed to HQUSACE (CECW–OR) WASH DC 20314–1000.

16. Timing. 40 CFR 1506.10 describes the timing of an agency action when an EIS is involved.

17. Expedited Filing. 40 CFR 1506.10 provides information on allowable time reductions and time extensions associated with the EIS process. The district engineer will provide the necessary information and facts to HQUSACE (CECW–RE) WASH DC 20314–1000 (with copy to CECW–OR) for consultation with EPA for a reduction in the prescribed review periods.

18. Record of Decision. In those cases involving an EIS, the statement of findings will be called the record of decision and shall incorporate the requirements of 40 CFR 1505.2. The record of decision is not to be included when filing a final EIS and may not be signed until 30 days after the notice of availability of the final EIS is published in the Federal Register. To avoid duplication, the record of decision may reference the EIS.

19. Predecision Referrals by Other Agencies. See 40 CFR Part 1504. The decisionmaker should notify any potential referring Federal agency and CEQ of a final decision if it is contrary to the announced position of a potential referring agency. (This pertains to a NEPA referral, not a 404(q) referral under the Clean Water Act. The procedures for a 404(q) referral are outlined in the 404(q) Memoranda of Agreement. The potential referring agency will then have 25 calendar days to refer the case to CEQ under 40 CFR Part 1504. Referrals will be transmitted through division to CECW–RE for further guidance with an information copy to CECW–OR.

20. Review of Other Agencies' EISs. District engineers should provide comments directly to the requesting agency specifically related to the Corps jurisdiction by law or special expertise as defined in 40 CFR 1508.15 and 1508.26 and identified in Appendix II of CEQ regulations (49 FR 49750, December 21, 1984). If the district engineer determines that another agency's draft EIS which involves a Corps permit action is inadequate with respect to the Corps permit action, the district engineer should attempt to resolve the differences concerning the Corps permit action prior to the filing of the final EIS by the other agency. If the district engineer finds that the final EIS is inadequate with respect to the Corps permit action, the district engineer should incorporate the other agency's final EIS or a portion thereof and prepare an appropriate and adequate NEPA document to address the Corps involvement with the proposed action. See 33 CFR 230.21 for guidance. The agency which prepared the original EIS should be

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given the opportunity to provide additional information to that contained in the EIS in order for the Corps to have all relevant information available for a sound decision on the permit.

21. Monitoring. Monitoring compliance with permit requirements should be carried out in accordance with 33 CFR 230.15 and with 33 CFR Part 325.

[53 FR 3134, Feb. 3, 1988]

SOURCE: 51 FR 41236, Nov. 13, 1986; 55 FR 27821, July 6, 1990, unless otherwise noted.

AUTHORITY: 33 U.S.C. 401 et seq.: 33 U.S.C. 1344; 33 U.S.C. 1413.

33 C. F. R. Pt. 325, App. B, 33 CFR Pt. 325, App. B

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Effective: June 9, 2008

Code of Federal Regulations Currentness
Title 33. Navigation and Navigable Waters
Chapter II. Corps of Engineers, Department of the Army
Part 332. Compensatory Mitigation for Losses of Aquatic Resources (Refs & Annos)

§ 332.3 General compensatory mitigation requirements.

(a) General considerations.

(1) The fundamental objective of compensatory mitigation is to offset environmental losses resulting from unavoidable impacts to waters of the United States authorized by DA permits. The district engineer must determine the compensatory mitigation to be required in a DA permit, based on what is practicable and capable of compensating for the aquatic resource functions that will be lost as a result of the permitted activity. When evaluating compensatory mitigation options, the district engineer will consider what would be environmentally preferable. In making this determination, the district engineer must assess the likelihood for ecological success and sustainability, the location of the compensation site relative to the impact site and their significance within the watershed, and the costs of the compensatory mitigation project. In many cases, the environmentally preferable compensatory mitigation may be provided through mitigation banks or in-lieu fee programs because they usually involve consolidating compensatory mitigation projects where ecologically appropriate, consolidating resources, providing financial planning and scientific expertise (which often is not practical for permittee-responsible compensatory mitigation projects), reducing temporal losses of functions, and reducing uncertainty over project success. Compensatory mitigation requirements must be commensurate with the amount and type of impact that is associated with a particular DA permit. Permit applicants are responsible for proposing an appropriate compensatory mitigation option to offset unavoidable impacts.

(2) Compensatory mitigation may be performed using the methods of restoration, enhancement, establishment, and in certain circumstances preservation. Restoration should generally be the first option considered because the likelihood of success is greater and the impacts to potentially ecologically important uplands are reduced compared to establishment, and the potential gains in terms of aquatic resource functions are greater, compared to enhancement and preservation.

(3) Compensatory mitigation projects may be sited on public or private lands. Credits for compensatory mitigation projects on public land must be based solely on aquatic resource functions provided by the compensatory mitigation project, over and above those provided by public programs already planned or in place. All compensatory mitigation projects must comply with the standards in this part, if they are to be used to provide compensatory mitigation for activities authorized by DA permits, regardless of whether they are sited on public or private lands and whether the sponsor is a governmental or private entity.

(b) Type and location of compensatory mitigation.

(1) When considering options for successfully

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providing the required compensatory mitigation, the district engineer shall consider the type and location options in the order presented in paragraphs (b)(2) through (b)(6) of this section. In general, the required compensatory mitigation should be located within the same watershed as the impact site, and should be located where it is most likely to successfully replace lost functions and services, taking into account such watershed scale features as aquatic habitat diversity, habitat connectivity, relationships to hydrologic sources (including the availability of water rights), trends in land use, ecological benefits, and compatibility with adjacent land uses. When compensating for impacts to marine resources, the location of the compensatory mitigation site should be chosen to replace lost functions and services within the same marine ecological system (e.g., reef complex, littoral drift cell). Compensation for impacts to aquatic resources in coastal watersheds (watersheds that include a tidal water body) should also be located in a coastal watershed where practicable. Compensatory mitigation projects should not be located where they will increase risks to aviation by attracting wildlife to areas where aircraft-wildlife strikes may occur (e.g., near airports).

(2) Mitigation bank credits. When permitted impacts are located within the service area of an approved mitigation bank, and the bank has the appropriate number and resource type of credits available, the permittee's compensatory mitigation requirements may be met by securing those credits from the sponsor. Since an approved instrument (including an approved mitigation plan and appropriate real estate and financial assurances) for a mitigation bank is required to be in place before its credits can begin to be used to compensate for authorized impacts, use of a mitigation bank can help reduce risk and uncertainty, as well as temporal loss of resource functions and services. Mitigation bank credits are not released for debiting until specific milestones associated with the mitigation bank site's protection and development are achieved, thus use of mitigation bank credits can also help reduce risk that mitigation will not be fully successful. Mitigation banks typically involve larger, more ecologically valuable parcels, and more rigorous scientific and technical analysis, planning and implementation than permittee-responsible mitigation. Also, development of a mitigation bank requires site identification in advance, project-specific planning, and significant investment of financial resources that is often not practicable for many in-lieu fee programs. For these reasons, the district engineer should give preference to the use of mitigation bank credits when these considerations are applicable. However, these same considerations may also be used to override this preference, where appropriate, as, for example, where an in-lieu fee program has released credits available from a specific approved in-lieu fee project, or a permittee-responsible project will restore an outstanding resource based on rigorous scientific and technical analysis.

(3) In-lieu fee program credits. Where permitted impacts are located within the service area of an approved in-lieu fee program, and the sponsor has the appropriate number and resource type of credits available, the permittee's compensatory mitigation requirements may be met by securing those credits from the sponsor. Where permitted impacts are not located in the service area of an approved mitigation bank, or the approved mitigation bank does not have the appropriate number and resource type of credits available to offset those impacts, in-lieu fee mitigation, if available, is generally preferable to permittee-responsible mitigation. In-lieu fee

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projects typically involve larger, more ecologically valuable parcels, and more rigorous scientific and technical analysis, planning and implementation than permittee-responsible mitigation. They also devote significant resources to identifying and addressing high-priority resource needs on a watershed scale, as reflected in their compensation planning framework. For these reasons, the district engineer should give preference to in-lieu fee program credits over permittee-responsible mitigation, where these considerations are applicable. However, as with the preference for mitigation bank credits, these same considerations may be used to override this preference where appropriate. Additionally, in cases where permittee-responsible mitigation is likely to successfully meet performance standards before advance credits secured from an in-lieu fee program are fulfilled, the district engineer should also give consideration to this factor in deciding between in-lieu fee mitigation and permittee-responsible mitigation.

(4) Permittee-responsible mitigation under a watershed approach. Where permitted impacts are not in the service area of an approved mitigation bank or in-lieu fee program that has the appropriate number and resource type of credits available, permittee-responsible mitigation is the only option. Where practicable and likely to be successful and sustainable, the resource type and location for the required permittee-responsible compensatory mitigation should be determined using the principles of a watershed approach as outlined in paragraph (c) of this section.

(5) Permittee-responsible mitigation through on-site and in-kind mitigation. In cases where a watershed approach is not practicable, the district engineer should consider opportunities to offset anticipated aquatic resource impacts by requiring on-site and in-kind compensatory mitigation. The district engineer must also consider the practicability of on-site compensatory mitigation and its compatibility with the proposed project.

(6) Permittee-responsible mitigation through off-site and/or out-of-kind mitigation. If, after considering opportunities for on-site, in-kind compensatory mitigation as provided in paragraph (b)(5) of this section, the district engineer determines that these compensatory mitigation opportunities are not practicable, are unlikely to compensate for the permitted impacts, or will be incompatible with the proposed project, and an alternative, practicable off-site and/or out-of-kind mitigation opportunity is identified that has a greater likelihood of offsetting the permitted impacts or is environmentally preferable to on-site or in-kind mitigation, the district engineer should require that this alternative compensatory mitigation be provided.

(c) Watershed approach to compensatory mitigation.

(1) The district engineer must use a watershed approach to establish compensatory mitigation requirements in DA permits to the extent appropriate and practicable. Where a watershed plan is available, the district engineer will determine whether the plan is appropriate for use in the watershed approach for compensatory mitigation. In cases where the district engineer determines that an appropriate watershed plan is available, the watershed approach should be based on that plan. Where no such plan is available, the watershed approach should be based on information provided by the project sponsor or available from other sources. The ultimate goal of a watershed approach is to maintain and improve

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the quality and quantity of aquatic resources within watersheds through strategic selection of compensatory mitigation sites.

(2) Considerations.

(i) A watershed approach to compensatory mitigation considers the importance of landscape position and resource type of compensatory mitigation projects for the sustainability of aquatic resource functions within the watershed. Such an approach considers how the types and locations of compensatory mitigation projects will provide the desired aquatic resource functions, and will continue to function over time in a changing landscape. It also considers the habitat requirements of important species, habitat loss or conversion trends, sources of watershed impairment, and current development trends, as well as the requirements of other regulatory and non-regulatory programs that affect the watershed, such as storm water management or habitat conservation programs. It includes the protection and maintenance of terrestrial resources, such as non-wetland riparian areas and uplands, when those resources contribute to or improve the overall ecological functioning of aquatic resources in the watershed. Compensatory mitigation requirements determined through the watershed approach should not focus exclusively on specific functions (e.g., water quality or habitat for certain species), but should provide, where practicable, the suite of functions typically provided by the affected aquatic resource.

(ii) Locational factors (e.g., hydrology, surrounding land use) are important to the success of compensatory mitigation for impacted habitat functions and may lead to siting of such mitigation away from the project area. However, consideration should also be given to functions and services (e.g., water quality, flood control, shoreline protection) that will likely need to be addressed at or near the areas impacted by the permitted impacts.

(iii) A watershed approach may include on-site compensatory mitigation, off-site compensatory mitigation (including mitigation banks or in-lieu fee programs), or a combination of on-site and off-site compensatory mitigation.

(iv) A watershed approach to compensatory mitigation should include, to the extent practicable, inventories of historic and existing aquatic resources, including identification of degraded aquatic resources, and identification of immediate and long-term aquatic resource needs within watersheds that can be met through permittee-responsible mitigation projects, mitigation banks, or in-lieu fee programs. Planning efforts should identify and prioritize aquatic resource restoration, establishment, and enhancement activities, and preservation of existing aquatic resources that are important for maintaining or improving ecological functions of the watershed. The identification and prioritization of resource needs should be as specific as possible, to enhance the usefulness of the approach in determining compensatory mitigation requirements.

(v) A watershed approach is not appropriate in areas where watershed boundaries do not exist, such as marine areas. In such cases, an appropriate spatial scale should be used to replace lost functions and services within the same ecological system (e.g., reef complex, littoral drift cell).

(3) Information Needs.

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(i) In the absence of a watershed plan determined by the district engineer under paragraph (c)(1) of this section to be appropriate for use in the watershed approach, the district engineer will use a watershed approach based on analysis of information regarding watershed conditions and needs, including potential sites for aquatic resource restoration activities and priorities for aquatic resource restoration and preservation. Such information includes: current trends in habitat loss or conversion; cumulative impacts of past development activities, current development trends, the presence and needs of sensitive species; site conditions that favor or hinder the success of compensatory mitigation projects; and chronic environmental problems such as flooding or poor water quality.

(ii) This information may be available from sources such as wetland maps; soil surveys; U.S. Geological Survey topographic and hydrologic maps; aerial photographs; information on rare, endangered and threatened species and critical habitat; local ecological reports or studies; and other information sources that could be used to identify locations for suitable compensatory mitigation projects in the watershed.

(iii) The level of information and analysis needed to support a watershed approach must be commensurate with the scope and scale of the proposed impacts requiring a DA permit, as well as the functions lost as a result of those impacts.

(4) Watershed scale. The size of watershed addressed using a watershed approach should not be larger than is appropriate to ensure that the aquatic resources provided through compensation activities will effectively compensate for adverse environmental impacts resulting from activities authorized by DA permits. The district engineer should consider relevant environmental factors and appropriate locally developed standards and criteria when determining the appropriate watershed scale in guiding compensation activities.

(d) Site selection.

(1) The compensatory mitigation project site must be ecologically suitable for providing the desired aquatic resource functions. In determining the ecological suitability of the compensatory mitigation project site, the district engineer must consider, to the extent practicable, the following factors:

(i) Hydrological conditions, soil characteristics, and other physical and chemical characteristics;

(ii) Watershed-scale features, such as aquatic habitat diversity, habitat connectivity, and other landscape scale functions;

(iii) The size and location of the compensatory mitigation site relative to hydrologic sources (including the availability of water rights) and other ecological features;

(iv) Compatibility with adjacent land uses and watershed management plans;

(v) Reasonably foreseeable effects the compensatory mitigation project will have on ecologically important aquatic or terrestrial resources (e.g., shallow sub-tidal habitat, mature forests), cultural sites, or habitat for federally- or state-listed threatened and endangered species; and

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(vi) Other relevant factors including, but not limited to, development trends, anticipated land use changes, habitat status and trends, the relative locations of the impact and mitigation sites in the stream network, local or regional goals for the restoration or protection of particular habitat types or functions (e.g., re-establishment of habitat corridors or habitat for species of concern), water quality goals, floodplain management goals, and the relative potential for chemical contamination of the aquatic resources.

(2) District engineers may require on-site, off-site, or a combination of on-site and off-site compensatory mitigation to replace permitted losses of aquatic resource functions and services.

(3) Applicants should propose compensation sites adjacent to existing aquatic resources or where aquatic resources previously existed.

(e) Mitigation type.

(1) In general, in-kind mitigation is preferable to out-of-kind mitigation because it is most likely to compensate for the functions and services lost at the impact site. For example, tidal wetland compensatory mitigation projects are most likely to compensate for unavoidable impacts to tidal wetlands, while perennial stream compensatory mitigation projects are most likely to compensate for unavoidable impacts to perennial streams. Thus, except as provided in paragraph (e)(2) of this section, the required compensatory mitigation shall be of a similar type to the affected aquatic resource.

(2) If the district engineer determines, using the watershed approach in accordance with paragraph (c) of this section that out-of-kind compensatory mitigation will serve the aquatic resource needs of the watershed, the district engineer may authorize the use of such out-of-kind compensatory mitigation. The basis for authorization of out-of-kind compensatory mitigation must be documented in the administrative record for the permit action.

(3) For difficult-to-replace resources (e.g., bogs, fens, springs, streams, Atlantic white cedar swamps) if further avoidance and minimization is not practicable, the required compensation should be provided, if practicable, through in-kind rehabilitation, enhancement, or preservation since there is greater certainty that these methods of compensation will successfully offset permitted impacts.

(f) Amount of compensatory mitigation.

(1) If the district engineer determines that compensatory mitigation is necessary to offset unavoidable impacts to aquatic resources, the amount of required compensatory mitigation must be, to the extent practicable, sufficient to replace lost aquatic resource functions. In cases where appropriate functional or condition assessment methods or other suitable metrics are available, these methods should be used where practicable to determine how much compensatory mitigation is required. If a functional or condition assessment or other suitable metric is not used, a minimum one-to-one acreage or linear foot compensation ratio must be used.

(2) The district engineer must require a mitigation ratio greater than one-to-one where necessary to account for the method of compensatory mitigation (e.g., preservation), the likelihood of success, differences between the functions lost at the impact site and the

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functions expected to be produced by the compensatory mitigation project, temporal losses of aquatic resource functions, the difficulty of restoring or establishing the desired aquatic resource type and functions, and/or the distance between the affected aquatic resource and the compensation site. The rationale for the required replacement ratio must be documented in the administrative record for the permit action.

(3) If an in-lieu fee program will be used to provide the required compensatory mitigation, and the appropriate number and resource type of released credits are not available, the district engineer must require sufficient compensation to account for the risk and uncertainty associated with in-lieu fee projects that have not been implemented before the permitted impacts have occurred.

(g) Use of mitigation banks and in-lieu fee programs. Mitigation banks and in-lieu fee programs may be used to compensate for impacts to aquatic resources authorized by general permits and individual permits, including after-the-fact permits, in accordance with the preference hierarchy in paragraph (b) of this section.

(h) Preservation.

(1) Preservation may be used to provide compensatory mitigation for activities authorized by DA permits when all the following criteria are met:

(i) The resources to be preserved provide important physical, chemical, or biological functions for the watershed;

(ii) The resources to be preserved contribute significantly to the ecological sustainability of the watershed. In determining the contribution of those resources to the ecological sustainability of the watershed, the district engineer must use appropriate quantitative assessment tools, where available;

(iii) Preservation is determined by the district engineer to be appropriate and practicable;

(iv) The resources are under threat of destruction or adverse modifications; and

(v) The preserved site will be permanently protected through an appropriate real estate or other legal instrument (e.g., easement, title transfer to state resource agency or land trust).

(2) Where preservation is used to provide compensatory mitigation, to the extent appropriate and practicable the preservation shall be done in conjunction with aquatic resource restoration, establishment, and/or enhancement activities. This requirement may be waived by the district engineer where preservation has been identified as a high priority using a watershed approach described in paragraph (c) of this section, but compensation ratios shall be higher.

(i) Buffers. District engineers may require the restoration, establishment, enhancement, and preservation, as well as the maintenance, of riparian areas and/or buffers around aquatic resources where necessary to ensure the long-term viability of those resources. Buffers may also provide habitat or corridors necessary for the ecological functioning of aquatic resources. If buffers are required by the district engineer as part of the compensatory mitigation project, compensatory mitigation credit will be provided for those buffers.

(j) Relationship to other federal, tribal, state, and

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local programs.

(1) Compensatory mitigation projects for DA permits may also be used to satisfy the environmental requirements of other programs, such as tribal, state, or local wetlands regulatory programs, other federal programs such as the Surface Mining Control and Reclamation Act, Corps civil works projects, and Department of Defense military construction projects, consistent with the terms and requirements of these programs and subject to the following considerations:

(i) The compensatory mitigation project must include appropriate compensation required by the DA permit for unavoidable impacts to aquatic resources authorized by that permit.

(ii) Under no circumstances may the same credits be used to provide mitigation for more than one permitted activity. However, where appropriate, compensatory mitigation projects, including mitigation banks and in-lieu fee projects, may be designed to holistically address requirements under multiple programs and authorities for the same activity.

(2) Except for projects undertaken by federal agencies, or where federal funding is specifically authorized to provide compensatory mitigation, federally-funded aquatic resource restoration or conservation projects undertaken for purposes other than compensatory mitigation, such as the Wetlands Reserve Program, Conservation Reserve Program, and Partners for Wildlife Program activities, cannot be used for the purpose of generating compensatory mitigation credits for activities authorized by DA permits. However, compensatory mitigation credits may be generated by activities undertaken in conjunction with, but supplemental to, such programs in order to maximize the overall ecological benefits of the restoration or conservation project.

(3) Compensatory mitigation projects may also be used to provide compensatory mitigation under the Endangered Species Act or for Habitat Conservation Plans, as long as they comply with the requirements of paragraph (j)(1) of this section.

(k) Permit conditions.

(1) The compensatory mitigation requirements for a DA permit, including the amount and type of compensatory mitigation, must be clearly stated in the special conditions of the individual permit or general permit verification (see 33 CFR 325.4 and 330.6(a)). The special conditions must be enforceable.

(2) For an individual permit that requires permittee-responsible mitigation, the special conditions must:

(i) Identify the party responsible for providing the compensatory mitigation;

(ii) Incorporate, by reference, the final mitigation plan approved by the district engineer;

(iii) State the objectives, performance standards, and monitoring required for the compensatory mitigation project, unless they are provided in the approved final mitigation plan; and

(iv) Describe any required financial assurances or long-term management provisions for the compensatory mitigation project, unless they

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are specified in the approved final mitigation plan.

(3) For a general permit activity that requires permittee-responsible compensatory mitigation, the special conditions must describe the compensatory mitigation proposal, which may be either conceptual or detailed. The general permit verification must also include a special condition that states that the permittee cannot commence work in waters of the United States until the district engineer approves the final mitigation plan, unless the district engineer determines that such a special condition is not practicable and not necessary to ensure timely completion of the required compensatory mitigation. To the extent appropriate and practicable, special conditions of the general permit verification should also address the requirements of paragraph (k)(2) of this section.

(4) If a mitigation bank or in-lieu fee program is used to provide the required compensatory mitigation, the special conditions must indicate whether a mitigation bank or in-lieu fee program will be used, and specify the number and resource type of credits the permittee is required to secure. In the case of an individual permit, the special condition must also identify the specific mitigation bank or in-lieu fee program that will be used. For general permit verifications, the special conditions may either identify the specific mitigation bank or in-lieu fee program, or state that the specific mitigation bank or in-lieu fee program used to provide the required compensatory mitigation must be approved by the district engineer before the credits are secured.

(l) Party responsible for compensatory mitigation.

(1) For permittee-responsible mitigation, the special conditions of the DA permit must clearly indicate the party or parties responsible for the implementation, performance, and long-term management of the compensatory mitigation project.

(2) For mitigation banks and in-lieu fee programs, the instrument must clearly indicate the party or parties responsible for the implementation, performance, and long-term management of the compensatory mitigation project(s). The instrument must also contain a provision expressing the sponsor's agreement to assume responsibility for a permittee's compensatory mitigation requirements, once that permittee has secured the appropriate number and resource type of credits from the sponsor and the district engineer has received the documentation described in paragraph (l)(3) of this section.

(3) If use of a mitigation bank or in-lieu fee program is approved by the district engineer to provide part or all of the required compensatory mitigation for a DA permit, the permittee retains responsibility for providing the compensatory mitigation until the appropriate number and resource type of credits have been secured from a sponsor and the district engineer has received documentation that confirms that the sponsor has accepted the responsibility for providing the required compensatory mitigation. This documentation may consist of a letter or form signed by the sponsor, with the permit number and a statement indicating the number and resource type of credits that have been secured from the sponsor. Copies of this documentation will be retained in the administrative records for both the permit and the instrument. If the sponsor fails to provide the required compensatory mitigation, the district engineer may pursue measures against the sponsor to ensure compliance.

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(m) Timing. Implementation of the compensatory mitigation project shall be, to the maximum extent practicable, in advance of or concurrent with the activity causing the authorized impacts. The district engineer shall require, to the extent appropriate and practicable, additional compensatory mitigation to offset temporal losses of aquatic functions that will result from the permitted activity.

(n) Financial assurances.

(1) The district engineer shall require sufficient financial assurances to ensure a high level of confidence that the compensatory mitigation project will be successfully completed, in accordance with applicable performance standards. In cases where an alternate mechanism is available to ensure a high level of confidence that the compensatory mitigation will be provided and maintained (e.g., a formal, documented commitment from a government agency or public authority) the district engineer may determine that financial assurances are not necessary for that compensatory mitigation project.

(2) The amount of the required financial assurances must be determined by the district engineer, in consultation with the project sponsor, and must be based on the size and complexity of the compensatory mitigation project, the degree of completion of the project at the time of project approval, the likelihood of success, the past performance of the project sponsor, and any other factors the district engineer deems appropriate. Financial assurances may be in the form of performance bonds, escrow accounts, casualty insurance, letters of credit, legislative appropriations for government sponsored projects, or other appropriate instruments, subject to the approval of the district engineer. The rationale for determining the amount of the required financial assurances must be documented in the administrative record for either the DA permit or the instrument. In determining the assurance amount, the district engineer shall consider the cost of providing replacement mitigation, including costs for land acquisition, planning and engineering, legal fees, mobilization, construction, and monitoring.

(3) If financial assurances are required, the DA permit must include a special condition requiring the financial assurances to be in place prior to commencing the permitted activity.

(4) Financial assurances shall be phased out once the compensatory mitigation project has been determined by the district engineer to be successful in accordance with its performance standards. The DA permit or instrument must clearly specify the conditions under which the financial assurances are to be released to the permittee, sponsor, and/or other financial assurance provider, including, as appropriate, linkage to achievement of performance standards, adaptive management, or compliance with special conditions.

(5) A financial assurance must be in a form that ensures that the district engineer will receive notification at least 120 days in advance of any termination or revocation. For third-party assurance providers, this may take the form of a contractual requirement for the assurance provider to notify the district engineer at least 120 days before the assurance is revoked or terminated.

(6) Financial assurances shall be payable at the direction of the district engineer to his designee or to a standby trust agreement. When a standby trust is used (e.g., with performance bonds or letters of credit) all amounts paid by the financial assurance provider shall be

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deposited directly into the standby trust fund for distribution by the trustee in accordance with the district engineer's instructions.

(o) Compliance with applicable law. The compensatory mitigation project must comply with all applicable federal, state, and local laws. The DA permit, mitigation banking instrument, or in-lieu fee program instrument must not require participation by the Corps or any other federal agency in project management, including receipt or management of financial assurances or long-term financing mechanisms, except as determined by the Corps or other agency to be consistent with its statutory authority, mission, and priorities.

SOURCE: 73 FR 19670, April 10, 2008, unless otherwise noted.

AUTHORITY: 33 U.S.C. 401 et seq.; 33 U.S.C. 1344; and Pub.L. 108–136.

33 C. F. R. § 332.3, 33 CFR § 332.3

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Code of Federal Regulations Currentness
Title 40. Protection of Environment
Chapter I. Environmental Protection Agency (Refs & Annos)
Subchapter H. Ocean Dumping
Part 230. Section 404(b)(1) Guidelines for Specification or Disposal Sites for Dredged or Fill Material (Refs & Annos)
Subpart B. Compliance with the Guidelines

§ 230.10 Restrictions on discharge.

Note: Because other laws may apply to particular discharges and because the Corps of Engineers or State 404 agency may have additional procedural and substantive requirements, a discharge complying with the requirement of these Guidelines will not automatically receive a permit.

Although all requirements in § 230.10 must be met, the compliance evaluation procedures will vary to reflect the seriousness of the potential for adverse impacts on the aquatic ecosystems posed by specific dredged or fill material discharge activities.

(a) Except as provided under section 404(b)(2), no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences.

(1) For the purpose of this requirement, practicable alternatives include, but are not limited to:

(i) Activities which do not involve a discharge of dredged or fill material into the waters of the United States or ocean waters;

(ii) Discharges of dredged or fill material at other locations in waters of the United States or ocean waters;

(2) An alternative is practicable if it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes. If it is otherwise a practicable alternative, an area not presently owned by the applicant which could reasonably be obtained, utilized, expanded or managed in order to fulfill the basic purpose of the proposed activity may be considered.

(3) Where the activity associated with a discharge which is proposed for a special aquatic site (as defined in subpart E) does not require access or proximity to or siting within the special aquatic site in question to fulfill its basic purpose (i.e., is not “water dependent”), practicable alternatives that do not involve special aquatic sites are presumed to be available, unless clearly demonstrated otherwise. In addition, where a discharge is proposed for a special aquatic site, all practicable alternatives to the proposed discharge which do not involve a discharge into a special aquatic site are presumed to have less adverse impact on the aquatic ecosystem, unless clearly demonstrated otherwise.

(4) For actions subject to NEPA, where the Corps of Engineers is the permitting agency, the analysis of alternatives required for NEPA environmental documents, including supplemental Corps NEPA documents, will in

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most cases provide the information for the evaluation of alternatives under these Guidelines. On occasion, these NEPA documents may address a broader range of alternatives than required to be considered under this paragraph or may not have considered the alternatives in sufficient detail to respond to the requirements of these Guidelines. In the latter case, it may be necessary to supplement these NEPA documents with this additional information.

(5) To the extent that practicable alternatives have been identified and evaluated under a Coastal Zone Management program, a section 208 program, or other planning process, such evaluation shall be considered by the permitting authority as part of the consideration of alternatives under the Guidelines. Where such evaluation is less complete than that contemplated under this subsection, it must be supplemented accordingly.

(b) No discharge of dredged or fill material shall be permitted if it:

(1) Causes or contributes, after consideration of disposal site dilution and dispersion, to violations of any applicable State water quality standard;

(2) Violates any applicable toxic effluent standard or prohibition under section 307 of the Act;

(3) Jeopardizes the continued existence of species listed as endangered or threatened under the Endangered Species Act of 1973, as amended, or results in likelihood of the destruction or adverse modification of a habitat which is determined by the Secretary of Interior or Commerce, as appropriate, to be a critical habitat under the Endangered Species Act of 1973, as amended. If an exemption has been granted by the Endangered Species Committee, the terms of such exemption shall apply in lieu of this subparagraph;

(4) Violates any requirement imposed by the Secretary of Commerce to protect any marine sanctuary designated under title III of the Marine Protection, Research, and Sanctuaries Act of 1972.

(c) Except as provided under section 404(b)(2), no discharge of dredged or fill material shall be permitted which will cause or contribute to significant degradation of the waters of the United States. Findings of significant degradation related to the proposed discharge shall be based upon appropriate factual determinations, evaluations, and tests required by subparts B and G, after consideration of subparts C through F, with special emphasis on the persistence and permanence of the effects outlined in those subparts. Under these Guidelines, effects contributing to significant degradation considered individually or collectively, include:

(1) Significantly adverse effects of the discharge of pollutants on human health or welfare, including but not limited to effects on municipal water supplies, plankton, fish, shellfish, wildlife, and special aquatic sites;

(2) Significantly adverse effects of the discharge of pollutants on life stages of aquatic life and other wildlife dependent on aquatic ecosystems, including the transfer, concentration, and spread of pollutants or their byproducts outside of the disposal site through biological, physical, and chemical processes;

(3) Significantly adverse effects of the

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discharge of pollutants on aquatic ecosystem diversity, productivity, and stability. Such effects may include, but are not limited to, loss of fish and wildlife habitat or loss of the capacity of a wetland to assimilate nutrients, purify water, or reduce wave energy; or

(4) Significantly adverse effects of discharge of pollutants on recreational, aesthetic, and economic values.

(d) Except as provided under section 404(b)(2), no discharge of dredged or fill material shall be permitted unless appropriate and practicable steps have been taken which will minimize potential adverse impacts of the discharge on the aquatic ecosystem. Subpart H identifies such possible steps.

SOURCE: 45 FR 85344, Dec. 24, 1980, unless otherwise noted.

AUTHORITY: Secs. 404(b) and 501(a) of the Clean Water Act of 1977, (33 U.S.C. § 1344(b) and § 1361(a)).

40 C. F. R. § 230.10, 40 CFR § 230.10

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Code of Federal Regulations Currentness
Title 40. Protection of Environment
Chapter V. Council on Environmental Quality
Part 1506. Other Requirements of NEPA (Refs & Annos)

§ 1506.2 Elimination of duplication with State and local procedures.

(a) Agencies authorized by law to cooperate with State agencies of statewide jurisdiction pursuant to section 102(2)(D) of the Act may do so.

(b) Agencies shall cooperate with State and local agencies to the fullest extent possible to reduce duplication between NEPA and State and local requirements, unless the agencies are specifically barred from doing so by some other law. Except for cases covered by paragraph (a) of this section, such cooperation shall to the fullest extent possible include:

(1) Joint planning processes.

(2) Joint environmental research and studies.

(3) Joint public hearings (except where otherwise provided by statute).

(4) Joint environmental assessments.

(c) Agencies shall cooperate with State and local agencies to the fullest extent possible to reduce duplication between NEPA and comparable State and local requirements, unless the agencies are specifically barred from doing so by some other law. Except for cases covered by paragraph (a) of this section, such cooperation shall to the fullest extent possible include joint environmental impact statements. In such cases one or more Federal agencies and one or more State or local agencies shall be joint lead agencies. Where State laws or local ordinances have environmental impact statement requirements in addition to but not in conflict with those in NEPA, Federal agencies shall cooperate in fulfilling these requirements as well as those of Federal laws so that one document will comply with all applicable laws.

(d) To better integrate environmental impact statements into State or local planning processes, statements shall discuss any inconsistency of a proposed action with any approved State or local plan and laws (whether or not federally sanctioned). Where an inconsistency exists, the statement should describe the extent to which the agency would reconcile its proposed action with the plan or law.

SOURCE: 43 FR 56000, 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).

40 C. F. R. § 1506.2, 40 CFR § 1506.2

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Title 40. Protection of Environment
Chapter V. Council on Environmental Quality
Part 1508. Terminology and Index (Refs & Annos)
§ 1508.3 Affecting.

Affecting means will or may have an effect on.

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).

40 C. F. R. § 1508.3, 40 CFR § 1508.3

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§ 1508.7 Cumulative impact.

Cumulative impact is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

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).

40 C. F. R. § 1508.7, 40 CFR § 1508.7

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§ 1508.8 Effects.

Effects include:

(a) Direct effects, which are caused by the action and occur at the same time and place.

(b) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.

Effects and impacts as used in these regulations are synonymous. Effects includes ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative. Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.

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).

40 C. F. R. § 1508.8, 40 CFR § 1508.8

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Part 1508. Terminology and Index (Refs & Annos)
§ 1508.9 Environmental assessment.

Environmental Assessment:

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

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

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

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

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

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).

40 C. F. R. § 1508.9, 40 CFR § 1508.9

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Part 1508. Terminology and Index (Refs & Annos)
§ 1508.27 Significantly.

Significantly as used in NEPA requires considerations of both context and intensity:

(a) Context. This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short- and long-term effects are relevant.

(b) Intensity. This refers to the severity of impact. Responsible officials must bear in mind that more than one agency may make decisions about partial aspects of a major action. The following should be considered in evaluating intensity:

(1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.

(2) The degree to which the proposed action affects public health or safety.

(3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.

(4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.

(5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.

(6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.

(7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.

(8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.

(9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act

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of 1973.

(10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

[43 FR 56003, Nov. 29, 1978; 44 FR 874, Jan. 3, 1979]

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).

40 C. F. R. § 1508.27, 40 CFR § 1508.27

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