Date: September 23, 2013

Subject: Proposed DOE Request for Information (RFI) "*Performance of Federal Permitting and Review of Infrastructure Projects Request for Information*"

Julie A. Smith, Christopher Lawrence, Office of Electricity Delivery and Energy Reliability; juliea.smith@hq.doe.gov; christopher.lawrence@hq.doe.gov

This information is submitted by:

Pathway Consulting Service, LLC
Robert Cunningham, Principal
15269 Surrey House Way
Centreville, VA 20120
703-909-7713
rctriumph23@gmail.com

Environmental Planning Strategies, Inc.
Judith Lee, President
4621 Kelling Street
Davenport, IA 52806
563-332-6870
jleeeps@mchsi.com

We appreciate the opportunity to provide information to the Office of Electricity Delivery and Energy Reliability's request regarding the draft proposed Interagency Integrated Pre-Application (IIP) Process for significant onshore electric transmission projects requiring Federal Authorization(s). We address the questions in *Request for Information (RFI)* regarding the draft IIP Process prepared in collaboration with the Member Agencies of the Rapid Response Team for Transmission and pursuant to section 4(a) of the June 7, 2013 Transmission Presidential Memorandum and in light of Executive Order 13604.

In responding to the RFI, we specify our affiliation, provide feedback on the draft IIP Process, including suggested changes and concerns and comment on whether the proposed IIP Process efficiently meets the goals stated in the RFI and in the Transmission Presidential Memoranda.

As requested, we also comment on:
(1) Whether all Federal agencies with applicable permitting authority to the proposed project should be mandatorily required to participate in the IIP Process;
(2) Whether analogous integrated, interagency pre-application processes should be developed for other permitting of other major infrastructure sector projects covered in section 2(a) of EO 13604;
(3) What should be the high priority sectors that would benefit from this type of process; and
(4) What key changes would need to be made to adapt the proposed IIP Process to other sectors.

Our comments and information are drawn from over seven decades of combined experience in government service and private practice. We have considerable

on-the-ground and executive-level experience developing federal land use authorizations, developing inter-departmental federal land use planning and infrastructure authorizations, and project planning and authorizations implementing the National Environmental Policy Act (NEPA). Our experience and expertise include a wide variety of federal agencies involving renewable energy and electric transmission, transportation, water, and sewer projects, all of which required federal decisionmaking, funding, and/or permits.

In preparing our comments, we undertook a thorough review of the pertinent laws, regulations, and agency direction (Annotated summary in Attachment A) that include, but are not limited to:

- The National Environmental Policy Act (NEPA), its implementing regulations at 40 CFR §1500-1508 (CEQ Regulations), and guidance and interpretation included in the Council on Environmental Quality's Forty Most-Asked Questions (40 Questions);
- The Energy Policy Act of 2005 § 1221 (216(h)) (EPAct 2005);
- The Memorandum Of Understanding Among USDA, DOC, DoD, DOE, EPA, CEQ, FERC, the Advisory Council On Historic Preservation, and DOI (Participating Agencies) Regarding Coordination In Federal Agency Review Of Electric Transmission Facilities On Federal Land (nine-agency MOU);
- The OMB/OFFA Policy Letter 11-01 to the Heads of Executive Departments and Agencies 09/12/2011 *Performance of Inherently Governmental and Critical Functions*;
- The BLM Handbook H-1790-1, *National Environmental Policy Act Handbook*
- The BLM IM 2011-059, *National Environmental Policy Act Compliance for Utility-Scale Renewable Energy Right-of-Way Authorizations*;
- The Federal Land Policy and Management Act Section 503, Right of Way Corridors;
- The Forest Service land use authorization regulations regarding content of an application for use of federal land at 36 CFR § 251.54;
- The BLM land use authorization regulations at 43 CFR § 2804.12;
- The Forest Service pre-application and screening processes for rights-of-way authorizations at 36 CFR § 251.54 and 36 CFR § 251.54(e)(5)(iv);
- The BLM pre-application policies for rights-of-way authorizations in IM 2011-059 and regulations at 43 CFR § 2804.13 and § 2804.25; and
- The DOE proposed rule for implementation of the Energy Policy Act of 2005 § (1221) (216(h)) and our comments submitted on that proposed rule on February 12, 2012.

In order to avoid unnecessary length and duplication, we reference Attachment A and/or include text from these laws, regulations, and agency direction to aid in communicating the basis for our comments and recommendations to the draft IIP Process, as follows.

SUMMARY OF COMMENTS

Overall, implementing a procedure to promote effective pre-application planning on the part of project proponents and affected federal agencies has merit. The procedures outlined in the RFI would help all parties better understand the information needed to effectively site electric transmission projects on federal land.

We have serious concern that the draft procedure would create a duplicative planning process that postpones rather than builds upon existing federal regulations for proponent-initiated use of federal land. The process duplicates government-wide National Environmental Policy Act (NEPA) procedures and existing agency regulations and policies regarding necessary and appropriate guidance federal agencies are to provide to emerging land use applicants.

Most importantly, the draft procedures would have project applicants perform inherently governmental functions in the siting of transmission facilities on federal property supplanting the administrative authority of the extant agency. Delaying the regulatory engagement of a federal agency until after a project is sited on federal property will likely lengthen rather that reduce the time needed for authorizing a project on federal land.

The draft procedures can be improved and made compliant with law and agency authorities by moving the timing of the acceptance of a land use application from the conclusion of meeting number four in the draft IIP to the conclusion of meeting number one or, for particularly complex projects, meeting number two.

We provide recommendations for ensuring that the pre-application process is efficient and effective, with DOE's oversight, assistance, and support, while following existing laws and regulations, especially NEPA and the Federal Land Policy and Management Act of 1976 (FLPMA) regarding Lead Agency responsibilities and proponents' due diligence.

A. ADMINISTRATIVE PROCEDURAL CONCERNS

1. The Deadlines for Receiving and Considering Public Comment and Reporting Results are the Same Date

The FR notice states that comments to the proposed process are due on or before September 30, 2013. Page 53438 of the FR states: "Once the Steering Committee receives and considers the public input and approves the full contours of the IIP Process, it will submit on September 30, 2013, an

implementation plan that includes timelines and milestones to the Chief Performance Officer and the Chair of the CEQ." (per the June 7, 2013 Presidential Memorandum). It is impossible for the Steering Committee to receive and fully consider comments arriving by COB September 30, 2013 and prepare and submit an implementation plan on the same day. The schedule implies that the requested comments will not receive proper consideration for inclusion in the plan. The Steering Committee should request and receive an extension from the Chief Performance Officer and the Chair of the CEQ to allow for sufficient consideration of comments and appropriate revision of the proposed pre-application process prior to submitting its implementation plan.

2. The Role of the Proposed DOE Rule for Implementing Section 216(h) Related to this Proposal is Unclear

The DOE has not issued a final rule in 10 CFR 900 for implementing section 1221 (216(h)) of the EPAct of 2005. The role that the proposed process would play in the context of 216(h), NEPA, the nine-agency MOU, and existing Forest Service and BLM land use regulations and policies is not described in the RFI. The FR notice states that agency procedures may need to be revised in view of this proposed pre-application process. It is not clear how the proposed IIP Process would implement Section 216(h) and developing the DOE 216(h) regulations. The proposed IIP Process outlined in the RFI may be premature.

B. SUPPORT FOR THE INTENT OF THE PROPOSED PRE-APPLICATION PROCESS

1. Considering the overall performance in authorizing Qualifying Projects and other infrastructure crossing federal lands, we applaud the Congress and Administration for seeking improvement. The inefficiencies and delays commonly endured by the public, project proponents, and federal agencies are unnecessary. In particular, the delays in completing requested federal land use authorizations are frequently attributable to failures in the adequate coordination among project proponents and lead and cooperating agencies at all levels of government. Untimely federal consultation with Tribal governments, and failure to implement the integrating planning processes required by the CEQ NEPA Regulations also unnecessarily delay project planning and approvals.

2. The Congress, in EPAct 2005 §216(h), designated a lead agency and coordinating role for the Department of Energy for Qualifying Projects. As described in the nine-agency MOU (Attachment A), federal agencies with authority to allow the use of federal land for Qualifying Project must fulfill their inherently governmental functions and specific legislated responsibilities. Inherently governmental functions are described in the OMB/OFFA Letter 11-01 (Attachment A and below). The responsibilities of federal land management agencies include authorization for the use of federal land, government-to-

government consultations with Tribes, coordination with state and local governments, and compliance with applicable environmental law and regulation. Per the EPAct of 2005 and the nine-agency MOU, these responsibilities include the preparation of an integrated single NEPA document, where appropriate and consistent with NEPA regulations, for use by all federal agencies with decision-making responsibilities for project development and siting on federal land.

DOE oversight during a pre-application process and continuing after a land use application is accepted by an authorizing federal agency would provide an effective means to address conflicts, delays, and inefficiencies as they arise, while supporting implementation of the Lead Agency's responsibilities. The DOE Office of Electricity Delivery and Energy Reliability can serve a valuable role in breaking unnecessary process "logjams" while supporting all parties in the timely execution of their responsibilities in project planning and siting, environmental review, and land use authorization. These valuable roles include project oversight, "timekeeper", interagency conflict resolution, and operation of the project dashboard as outlined in EPAct 2005 §216(h) (Attachment A), the nine-agency MOU, and presentation made by the Office of Electricity Delivery and Energy Reliability.

If performed consistent with 40 CFR §1501.5(c), the process described in the nine-agency MOU for identifying and selecting the Lead Agency early in project planning can function effectively with DOE oversight and concurrence, as needed.

3. Executive Order 13604, the May and June 2013 Presidential Memoranda, EPAct 2005, and FLMPA §503 each acknowledge that federal agencies and executive departments must fulfill their inherently governmental functions in review, permitting, and decisionmaking for transmission and other infrastructure occupying federal lands. Appropriate land use authorizations are to be determined by federal agencies, in coordination with state, local, and tribal governments and strategic engagement of stakeholders.

Federal agencies and departments with jurisdiction by law are fully responsible for the scope and content of their land use planning and associated decisions regarding proponent-driven infrastructure projects seeking to use or occupy federal land. The proposed IIP Process acknowledges these federal agency responsibilities, especially in relation to NEPA compliance.

4. The intent of the proposed IIP Process is noteworthy. Requiring project proponents, at least those agreeing to abide by the process, to prepare a comprehensive application to use federal land for their Qualifying Projects is helpful and a key contribution to both their due diligence and agency efficiency in conducting their inherently governmental functions for planning, consultations, legal compliance, and decisionmaking.

5. The proposed IIP Process is helpful in ensuring that project proponents and potentially involved agencies coordinate early and often in the preparation of a land use application for submission to the Lead Agency.

To efficiently authorize electric transmission on federal lands, follow-on coordination is also needed throughout project planning, siting, environmental review, consultation, coordination, and decision-making for authorizations. Coordination conducted early and often between project proponents and the Lead Agency - both before and after submission of an application - is required explicitly by CEQ NEPA regulations as well as agency NEPA regulations and guidance, particularly regulatory requirements of the Bureau of Land Management (BLM) and the Forest Service (FS) regarding responses to land use applications (Attachment A).

C. CONCERNS REGARDING THE PROPOSED IIP PROCESS

1. The Proposed IIP Process Seeks to Duplicate NEPA Procedures Outside the Public Realm Rather than Use Them as Required

The CEQ NEPA Regulations repeatedly emphasize NEPA's contribution to the decisionmaking process – "Ultimately, of course, it is not better documents but better decisions that count. NEPA's purpose is not to generate paperwork, even excellent paperwork, but to foster excellent action." (40 CFR §1500.1). Documentation is not the purpose of NEPA, but it is to "serve as an action-forcing device to ensure that the policies and goals of the Act are infused into the ongoing programs and actions of the Federal government." (40 CFR §1502.1).

Federal agencies are to "Integrate the requirements of NEPA with other planning and environmental review procedures required by law or by agency practice so that all such procedures run concurrently rather than consecutively." (40 CFR §1500.2(c)).

NEPA implementing procedures in the CEQ Regulations clearly promote integrated interdisciplinary planning, well documented. These procedures enable the decision maker and the public to make well-reasoned comments and fully informed decisions, and actions that meet the need while protecting, restoring, and enhancing the environment (40 CFR §1500.2 and §1502.1; Attachment A).

Activities contributing to effective planning and informed decisionmaking further the purpose of the nation's environmental policy clearly described in NEPA.

Contrary to some interpretations of NEPA, a Notice of Intent (NOI) to prepare an environmental statement does not start the NEPA process. The NOI publicly announces the agency's decisionmaking needs and begins the public components of the NEPA process. The NEPA environmental documents (NOI, EA, FONSI and EIS) provide the evidence of the deliberative process and the results of planning such that the public and decision makes may understand the

consequences of informed decisions (the "action-forcing device" of NEPA (40 CFR §1502.1))[1].

A lengthy pre-application process that fundamentally duplicates the NEPA planning process before issuing a NOI would actually *lengthen* overall project planning and NEPA compliance. The work conducted during the pre-application process would be documented as information in the administrative record and the "repeat planning" conducted after the NOI would be documented in an EIS. The lengthy and duplicative proposed IIP Process would likely actually decrease efficiency and increase time, costs, risk of conflict and litigation, confusion, and distrust.

2. Agencies Must Not Delegate their Inherently Governmental Functions to Project Proponents

On September 11, 2011, OMB/OFFA published Policy Letter 11-01 to Executive Departments and Agencies. The letter clearly defines inherently governmental functions and the reasons why it is important that the federal government fulfill its discretionary decision-making responsibilities (Attachment A). An inherently governmental function means "a function that is so intimately related to the public interest as to require performance by Federal Government employees, functions that require either the exercise of discretion in applying Federal Government authority or the making of value judgments in making decisions for the Federal Government…[T]he term does not include gathering information for or providing advice, opinions, recommendations, or ideas to Federal government officials… It is the policy of the Executive Branch to ensure that government action is taken as a result of informed, independent judgments made by government officials who are ultimately accountable to the President and bound by laws controlling the conduct and performance of Federal employees that are intended to protect or benefit the public and ensure the proper use of funds appropriated by Congress."

NEPA and the CEQ NEPA Regulations, as well as the Forest Service and BLM regulations and policies regarding land use authorizations clearly identify the roles, responsibilities, and legal authorities of "responsible officials" and the Lead Agency(ies) engaged the planning and decision-making processes. These regulations and policies address agency action prior to a project proponent formally submitting a land use application to the Lead Agency (see the NEPA tables and Forest Service and BLM regulations in Attachment A).

[1] Lee, J.L. and R. Cunningham. 2013. Demystifying NEPA to Speed the Review and Permitting of Energy Generation and Transmission and Other Projects and Programs. Environmental Law Institute Environmental Law Reporter April 2013. 43 ELR 10331-10341.

The BLM, Forest Service, and CEQ NEPA Regulations clearly define and require Federal Lead Agencies to coordinate early and often with project proponents to provide guidance both before and after an application is formally submitted. Agencies are to retain full responsibility for the scope and process of planning, decision-making, legal compliance, full coordination and integration with state and local requirements, public and stakeholder engagement, and government-to-government consultation with Tribal governments (Attachment A).

We acknowledge that federal Lead Agencies may not be consistently fulfilling their regulatory requirements and agency policies nor executing their inherently governmental functions in an efficient, committed, and effective manner for siting electric transmission projects. However, delegating these responsibilities to a project proponent is not an appropriate remedy.

The failure to achieve the permitting efficiencies discussed in EO 13604 and the associated Presidential Memoranda and EPAct 2005 § 216(h) are not failures associated with existing law (including NEPA), regulation, or agency policy. The failures lie in agency commitment to and implementation of current requirements and policies. Many people recognize that agencies may respond to applications from project proponents with delay and cost inefficiencies because of the lack of funds, effective cost recovery procedures, insufficient staff, overwhelming schedules, insufficient assistance from higher organizational levels, fear of appeals/litigation, and other factors often outside the local manager's control or jurisdiction.

We support the DOE role of "third-party neutral" to provide oversight, schedules, interagency dispute resolution, documentation, notification, and other helpful tasks in ensuring agencies are not only capable of, but actually fulfill, their Lead Agency, cooperating agency, and participating agencies' inherently governmental responsibilities. DOE should support the pre-application and application processes, but not usurp the Lead Agency's responsibilities. Similarly, project proponents should not be required to infringe on agency responsibilities and duties.

Based on our experience in federal land uses and planning, siting, and permitting of electric transmission and other proponent-submitted linear infrastructure such as highways and water and sewer systems, our concern is that the proposed IIP Process would require project proponents choosing to use the process to improperly fulfill inherently governmental functions as described by OMB/OFFA Policy Letter 11-01, NEPA and the CEQ Regulations, EO 13604 and associated 2013 Presidential Memoranda, including Tribal government-to-government consultations.

3. Two Detailed Consecutive Detailed Processes are Duplicative and Inefficient

To achieve the goals in the RFI, it is not necessary to implement two consecutive planning processes that draw a "bright line" between a lengthy and detailed proponent-responsible pre-application planning process and agency-responsible NEPA/environmental review/permitting/decisionmaking processes. The proposed pre-application process would require the proponent to improperly site a project on federal land. The proposed process creates a single siting design with full and detailed stakeholder and Tribal government and staff engagement prior to publicizing a NOI. The agencies then must repeat project planning using the work conducted during the pre-application process as "information" documented the administrative record. Agency planning and environmental review would identify new issues and alternatives and redo public engagement and Tribal consultations. The proposed IIP draft repeatedly states that the work conducted during the pre-application process does not suffice for the work needed after the application is accepted and the NOI is issued. The BLM, Forest Service, and CEQ NEPA Regulations already require Federal Lead Agencies to coordinate early and often with proponents both before and after submission of a formal application.

We recognize that Federal Lead Agencies are not consistently meeting their legal requirements and agency policies in siting electric transmission or fulfilling their inherently governmental functions in an efficient, committed, and effective manner. Creating an additional planning process that is the responsibility of a project proponent seeking to use federal land duplicates existing processes that rightfully place the duty on federal agencies for their own planning and decision-making, lengthens timelines, increases the risk of conflict and litigation, and does not resolve the underlying problems confronting project delays.

4. NEPA Must Not Be Used to Justify Decisions Already Made

The purpose of NEPA is clearly stated in the law and CEQ NEPA Regulations (see Attachment A in the tables "Purpose of NEPA" and "Timing and Scoping"). As stated previously, this purpose is best summarized as:

"The statement shall be prepared early enough so that it can serve practically as an important contribution to the decision making process and will not be used to rationalize or justify decisions already made (40 CFR §1500.2(c), §1501.2, and §1502.2 (b)…For applications to the agency appropriate environmental assessments or statements shall be commenced no later than immediately after the application is received. Federal agencies are encouraged to begin preparation of such assessments or statements earlier, preferably jointly with applicable State or local agencies." (40 CFR §1502.5).

The CEQ guidance document, 40 Questions (Question No. 8), explains the timing of NEPA related to proponent-submitted proposals:

"Section 1501.2(d) requires federal agencies to take steps toward ensuring that private parties and state and local entities initiate environmental studies as soon as federal involvement in their proposals can be foreseen. This section is intended to ensure that environmental factors are considered at an early stage in the planning process and to avoid the situation where the applicant for a federal permit or approval has completed planning and eliminated all alternatives to the proposed action by the time the EIS process commences or before the EIS process has been completed. Section 1501.2(d) requires federal agencies to take steps toward ensuring that private parties and state and local entities initiate environmental studies as soon as federal involvement in their proposals can be foreseen. This section is intended to ensure that environmental factors are considered at an early stage in the planning process and to avoid the situation where the applicant for a federal permit or approval has completed planning and eliminated all alternatives to the proposed action by the time the EIS process commences or before the EIS process has been completed."

The proposed IIP Process involving up to four pre-application meetings, with full public, stakeholder, and Tribal involvement implemented by the project proponent, resulting in a detailed fully-sited and mitigated proposed project prior to the issuance of a public NOI per NEPA, is inconsistent with both the spirit and the regulatory requirements of NEPA. Most importantly, such a departure from agency requirements is likely to create the basis for controversy, conflict, litigation, and inherent delays. Delaying a federal agency's public engagement in NEPA procedures until after a pre-application process actually sites the project on federal land will likely create unnecessary and extensive costs to both the project proponent and the involved agencies, frustrating the goals of the proposed pre-application process and the intents and requirements of existing law and regulation.

5. Limitations to Cost Recovery During Pre-application Processes

Cost recovery authority as currently provided to the Forest Service and the Department of Interior Bureaus and Services prohibits collection of funds prior to the formal acceptance of an application submitted by a project proponent (Attachment A). Some agencies may keep an accounting of costs expended during the pre-application process, but may not actually bill until the application is formally accepted. These constraints would most likely result in responsible agencies either not participating in meetings, or participating via electronic media – a process that is often ineffective for communication and cumbersome, especially with multiple participants.

The consecutive and duplicative processes of the IIP Process are likely to prove more costly than current procedures. Even though cost recovery authority is not available during the pre-application process, project proponents will need to invest considerable funds in completing work that will need to be repeated once the Lead Agency accepts the land use application. Without cost recovery funds, Lead, cooperating, and participating agencies cannot commit staff to accomplish legal compliance, public engagement, and informed decision-making, and ultimately issuing land use authorizations.

D. RECOMMENDATIONS FOR REVISION TO THE PROPOSED IIP PROCESS

Introduction

Considering applicable laws, regulations, executive orders and agency procedures (Attachment A), it becomes clear that inefficiencies and delays are not due to the lack of a clear regulatory and policy framework. Delay is likely due to a lack of resources and commitment on the part of the Lead and Cooperating Agencies and lack of due diligence and early coordination with Lead Agencies on the part of proponents related to evaluating and providing the information outlined in comment D1 below prior to formally submitting an application - the very issues the proposed IIP Process seeks to remedy.

The National Environmental Policy Act explicitly provides for Lead Agencies to coordinate and provide guidance to proponents before a proposal is submitted. NEPA procedural requirements are to be initiated at the earliest practical time after a proposal is submitted to avoid unnecessary delays and to be responsive to the public trust.

NEPA also provides for scoping, which is an open and early process for determining the scope of issues to be addressed and for identifying the significant issues related to a proposed action (40 CFR §1501.7). The Lead Agency is explicitly responsible for conducting the seven components of scoping listed at 40 CFR §1501.7. These are efficiency and streamlining processes, with only one directly associated with public involvement. Most of the scoping components should be initiated if not completed prior to issuing a NOI. These include:

- Inviting the participation of affected federal, state and local agencies, affected Tribes, and the proponent, and identifying non-governmental stakeholders;
- Determine the scope of decisions to be made and make a preliminary determination of issues that should be considered in detail and those eliminated from detailed review;

- Determine the lead and cooperating agency and their respective roles, with the Lead Agency retaining responsibility for the EIS;
- Identify any other NEPA documents to which this environmental document should be tiered or that provides information or analyses that should be considered; and
- Identify the planning and decision-making schedule so that environmental factors can be considered as a practical contribution to the decision making process.

Only after completing the scoping steps above, should the Lead Agency issue the NOI, with the above information included, which then initiates the public aspects of scoping (40 CFR §1508.22). The NOI should also include the dates, times, and locations of public meetings.

As stated in Comments B2 and C2 above, DOE's Office of Electricity Delivery and Energy Reliability can play a powerful role (per EPAct of 2005 §216(h)) in keeping Lead Agencies on task and ensuring proper coordination with cooperating and participating federal, state and local agencies, and Tribal governments. Such oversight would promote the efficient integration of planning, siting, NEPA reviews, permitting, and other requirements prior to a land use application submittal by a project proponent and after the land use application is accepted by the Lead Agency. However, as we stated in Comment C2, a pre-application process should support agency planning and decision-making, not seek to replicate it by project proponents tasked to inappropriately perform inherently governmental functions.

The proposed IIP Process requires a project proponent to implement functions and tasks required by NEPA and other consultation and permitting requirements. The proposed IIP Process then repeatedly states that the project proponent's and agencies' detailed and site-specific work during the pre-application process (including full public, agency, and Tribal government engagement leading to an identified route on the ground) is intended to simply inform government processes as part of the administrative record, as appropriate. We have experienced a similar approach with Habitat Conservation Plans (HCP) prepared per the Endangered Species Act.

In preparation of HCP's, many governmental and non-governmental parties may invest years negotiating an agreement, only to have the hard-won agreement subject to after-the-fact NEPA review with new issues and alternatives as the agencies and publics re-engage in the NEPA procedures. This after-the-fact repeat planning creates many misunderstandings, unnecessary delays, and extensive costs, with little "value added" to informed decision making.

Recommendations

The CEQ NEPA Regulations and associated agency regulations and policies for proponent-initiated projects already require pre-application engagement. However, pre-application processes are meant to "inform" the NEPA process and its contribution to agency decisionmaking, not duplicate it.

The stated overall goal of the pre-application process is to move the application process toward either acceptance or denial of the application by the Federal Lead Agency as expeditiously as possible. With this goal in mind, we offer the following recommendations to improve the pre-application and application planning and decision-making processes:

1. Proponents should conduct their due diligence in preparing applications for use of federal lands. Such applications for requests must be fully descriptive in terms of:

- The need for the proposed project;
- Reasonable and foreseeable corridor, siting, and design options;
- Potential for co-location and use of developed or disturbed areas or federally designated utility corridors;
- Planning schedule;
- General land use constraints;
- Potential issues;
- Consistency with agency first-and second-level screening criteria;
- Potential "fatal flaws";
- Foreseeable legal requirements for federal, state, and local permits, consultations, environmental reviews, and jurisdictional agencies;
- Standards and requirements from existing agency land use planning documents;
- List potential stakeholders and foreseeable controversies/concerns; and
- Other foreseeable concerns and needed administrative information.

In the proposed pre-application process, much of this information is scattered across multiple meetings. As all this information is readily attainable from both public sources and informal early consultation with agencies, this can easily be documented in the original application submitted to the apparent Lead Agency to initiate the pre-application process.

2. The pre-application and post-application acceptance processes should be guided and overseen by DOE, but should not usurp Lead Agency responsibilities and authorities as described by NEPA, FLPMA Section 503, the nine-agency MOU, and EO 13604 and associated Presidential memoranda. The pre-application process should involve only the first, or at the most the first and the second, meetings identified in the FR notice. The Lead Agency, cooperating

agencies, and participating agencies should fulfill appropriate inherently governmental functions regarding a proposal as soon as practicable.

Based on our experience, having only one or two pre-application meetings would be sufficient for obtaining the necessary information to make procedural governmental determinations on processes, roles, schedules, and identification of the Federal Lead Agency (and joint lead agencies) and primary cooperating and participating agencies. The Lead Agency would provide guidance to the proponent, prepare to conduct any further governmental actions for accepting the application (if appropriate), and begin to formally initiate inherently governmental functions, including NEPA and permitting procedures, consultation, compliance requirements, public involvement, and Tribal government-to-government consultations.

The objectives of the first meeting or, if necessary, the first two meetings, should be to:

- Understand the need/justification for the proposal and the project itself, including all due diligence conducted by the proponent and information provided by the agencies involved;
- Clarify the roles, responsibilities, authorities/jurisdictions, and involvement of each of the agencies related to federal, state, local, and Tribal decision making for the proposal and the roles of the proponent in supporting that decision making;
- Identify pertinent federal, state, and local requirements that might apply to the project and discuss how and to what extent they can be integrated for efficient decision making;
- Identify the Lead Federal Agency (per 40 CFR §1501.5(c) and the nine-agency MOU), and any joint lead agencies per 40 CFR §1506.2 and make a preliminary determination of cooperating and participating agencies subject to agreement and agency approval (using the 216(h) process of DOE involvement, as necessary).
- Review the project under the BLM/Forest Service screening criteria, land use plans, and pre-designated corridors;
- Review all known resource, land use/status, historic/cultural information and identify concerns, constraints, potential controversies, and legal inconsistencies, leading toward an identification of any “fatal flaws” that could or should stop route selection or create planning complexities that need to be addressed for the proposed project to move forward;
- Review the expectations for a completed application that can be accepted;
- Identify cost recovery authorities for the Lead and Cooperating/Participating agencies and the expectations for the content for necessary cost recovery agreements;

- Make preliminary determinations of federal, state, and local processes, schedules, responsible officials and points of contact, and roles of all participants, including contracting for integrated federal and federal/state compliance;
- Outline a public engagement process and responsible entities for the various components, and identify the Lead Agency responsible for preparing and implementing the detailed public engagement plan;
- Outline a government-to-government consultation plan for potentially affected Tribes and identify the agency responsible for preparing and implementing the detailed consultation plan;
- Identify action items for the next step and determine if the land use application can be made sufficiently complete without a subsequent meeting or provide guidance for what is still necessary for a completed application and plan the next meeting.

3. NEPA requires that the Notice of Intent (NOI) be issued as soon as possible after acceptance of an application (40 CFR §1501.2(d)(3)), but it does not have to be issued immediately upon acceptance (40 CFR 1507.3(e)). If the Federal Lead Agency and cooperating agencies have additional work for preparing initiation of their inherently governmental functions associated with planning, environmental review, permitting, and decision making, then the public notification per FLPMA can identify a proposed schedule for issuance of the NOI. The NOI, which initiates the formal public processes of NEPA including public scoping, can be issued "as soon as practicable after its decision to prepare an environmental impact statement…" (40 CFR §1501.7).

4. Selection of alternative corridors, routes, and on-site and off-site mitigation should never occur in negotiations during the pre-application period – these should be developed based on the issues associated with each corridor/siting route (as appropriate) during the ongoing public NEPA process. Any landscape/regional mitigation should be considered only if project-specific on-site, indirect and/or cumulative impacts cannot be mitigated sufficiently and the agencies believe that the need/justification for the transmission infrastructure makes the on-site, indirect and/or cumulative impacts acceptable only if mitigated with off-site compensatory and/or regional mitigation.

5. Each cause-and-effect relationship (issue) associated with route selection or project design will have its own geographic and temporal boundaries regarding identification of impacts and associated mitigation (see CEQ (1997) and EPA (1999) guidance documents on cumulative impacts)[2]. Indirect and/or cumulative

[2] *Considering Cumulative Effects Under the National Environmental Policy Act*, Council on Environmental Quality (CEQ), January 1997. *Consideration of Cumulative Impacts in EPA*

impacts and associated mitigation for certain resources may need to be considered outside the delineated corridor/route boundaries when they are indirect and/or cumulative For example, noise impacts on a sensitive receptor, or visual impacts when viewed from a community or roadway should be considered as they would occur, often outside the corridor boundaries.

6. Consultation with Tribal staff and government officials should NEVER be the responsibility of the proponent or a contractor. Consultation must always be government-to-government communication within inherently governmental functions.

7. The pre-application process should be completed within one or two meetings and the Lead Agency identified to avoid:

- Duplication of efforts in the pre-application process with those of the agency-required project planning, NEPA review, public engagement, permitting, and decision making;
- Requiring a proponent to implement inherently governmental functions such as public and Tribal engagement and focusing NEPA on one siting option; and
- Delaying agencies with cost recovery authority to develop an agreement and begin charging for federal work.

After the conclusion of meeting one (or two for complex projects or projects requiring more information for making the acceptance/denial decision), the application is then made ready for denial or acceptance, with a plan and schedule for the agencies developed and implemented within the DOE monitored timeframes. The meeting results then become components of the Federal Lead Agency's deliberations after the land use application is accepted for consideration.

After the application is accepted, DOE should continue to guide and oversee the process and schedules to ensure full commitment of and resources for the involved federal agencies. The Lead Agency is responsible for any contracting services within inherently governmental functions and authorities, with cost recovery support. The information identified for subsequent meetings are rightfully within NEPA compliance after the NOI has been issued by the Lead/Joint Lead Agencies and are inherently governmental functions conducted in coordination with the proponent, not the responsibility of the proponent.

8. The Forest Service provides for "planning permits" for major projects (36 CFR §251.4(f)(2)), allowing for further refinement of an application once the agency has determined that the application has merit. Perhaps this approach could be

Review of NEPA Documents, U.S. Environmental Protection Agency, (EPA 315-R-99-002), May 1999.

considered for applications that meet the screening criteria with no determined "fatal flaws" but prior to the issuance of an NOI.

9. DOE may need to address how to fund the involvement of agencies lacking cost recovery authority.

10. In Environmental Planning Strategies, Inc. experience as a prime contractor for the USFWS for a major statewide programmatic EIS prepared jointly with the state of Hawaii per HRS 343 (Hawaii's environmental review statute), the USFWS determined that any written correspondence between the federal and state joint lead agencies were public and immediately subject to FOIA disclosure. This determination makes all written communication and review of internal joint draft documents awkward at best. This situation should be considered and addressed during multiple-agency pre-application efforts among other states.

11. The appropriate involvement of proponents in the pre-application process, as long as they are not affecting inherently governmental functions, can comply with Federal Advisory Committee Act (FACA) procedures. However, Lead Agencies should carefully avoid the perception of "back-room agreements." Opening the process as soon as possible after the submittal of a proposal determined to have merit with no "fatal flaws" would strengthen the coordination within FACA rules while enjoying publicly transparent project planning among stakeholders.

12. We believe that the regulations implementing EPAct of 2005 § 216(h) should be finalized consistent with NEPA, the nine-agency MOU, agency policies and regulations, FLPMA § 503, and Presidential direction, particularly as related to oversight and Lead Agency identification and responsibilities.

E. COMMENTS REQUESTED BY THE DOE IN THE FR NOTICE

Our responses are predicated on our comments and recommendations stated above, including our concerns with proponents inappropriately conducting inherently governmental functions and the government creating two consecutive and duplicative planning processes.

1. Whether all Federal agencies with applicable permitting authority to the proposed project should be mandatorily required to participate in the IIP Process

Federal coordination with and guidance to proponents prior to accepting an application is already required in CEQ NEPA regulations, and BLM and FS regulations and policy. Additional guidance is found in the CEQ's 40 Questions. Without incorporating the recommended changes above (which include the DOE role in oversight, conflict resolution, and timing), we strongly recommend that the proposed process remain voluntary. Providing detailed recommendations for Lead Agency guidance to project proponents as required by NEPA and agency regulations and policies and DOE oversight would be extremely helpful in

improving the implementation of current requirements. We also recommend that DOE track all Qualifying Projects per the nine-agency MOU regardless of whether or not the proposed pre-application process is chosen for implementation.

2. Whether analogous integrated, interagency pre-application processes should be developed for other permitting of other major infrastructure sector projects covered in section 2(a) of EO 13604

As stated earlier, NEPA already requires pre-application coordination and guidance, and the integration of all pertinent issues, state environmental review procedures, and compliance with other laws (Attachment A). Consistent with our previous responses, providing detailed recommendations for Lead Agency guidance as required by NEPA and agency regulations and policies, with DOE oversight, would be extremely helpful in improving the implementation of current requirements for other proponent-driven projects.

3. What we believe should be the high priority sectors that would benefit from this type of process

The Corps of Engineers Regulatory, USDA Rural Utilities Service, and FHWA already coordinate with and provide guidance to proponents by practice and policy (for FHWA, proponents are often state DOTs, with SAFETEA-LU and 23 CFR 771 providing guidance for streamlining the NEPA process with conflict resolution and unique routing and siting processes), both during the pre-application process and once an application is formally accepted. Coordination integrates early with their NEPA and other planning and compliance requirements. In our experience, the Bureau of Ocean Energy Management also works closely with proponents, primarily through NEPA procedures and existing OCS processes. Both the BLM and the Forest Service are experienced with coordinating early with applicants for use of federal lands for ski areas. Implementing the processes already in place, with DOE oversight and assistance, for electric transmission and renewable energy applications should be the highest priority, especially with the current critical need for such projects.

4. What key changes would need to be made to adapt the proposed IIP Process to other sectors

Please see questions 2 and 3 above. Each agency involved in authorizing and permitting proponent-driven projects should be involved in improving its own processes, as needed and appropriate. Different sectors and agencies have differing planning needs and processes, most of which are operating relatively smoothly with experience and practice. Because new renewable energy is a relatively recent sector and large new electric transmission projects serving all generating sources have been infrequent over the last 30 to 40 years and lengthy

transmission lines crossing multiple jurisdictions are often complex, the sector and authorizing agencies are undergoing difficult growing pains.

Applying the electric transmission siting and authorization process to other sectors would not be advantageous and may be inappropriate. The fact that agencies have different authorities, needs, and decision-making processes is the very reason that the CEQ NEPA regulations require individual agencies to promulgate their own NEPA procedures consistent with NEPA, the CEQ NEPA Regulations, and their own planning and decision-making needs and processes (40 CFR §1507.3 and §1500.2(b)). The CEQ NEPA Regulations also recognize that agencies should coordinate their procedures, especially for programs requiring similar information from applicants (40 CFR §1507.3(a)). Keeping planning and decision-making processes flexible and practical per 40 CFR §1507.3 for the various agencies and sectors, indeed makes NEPA a "practical contribution to the decision-making process" (40 CFR §1502.5) and a truly "intelligent law" ("*Rediscovering the National Environmental Policy Act: Back to the Future*" ELI, September 1995).

ATTACHMENT A
Comments from Environmental Planning Strategies, Inc. and Pathway Consulting Service, LLC to Proposed IIP Process

EPAct 2005 SEC. 1221. SITING OF INTERSTATE ELECTRIC TRANSMISSION FACILITIES.

(a) Part II of the Federal Power Act (16 U.S.C is amended by adding at the end the following:

Sec. 216. Siting of Interstate Electric Transmission Facilities.

Section 216(h). Coordination of Federal Authorizations for Transmission Facilities. (1) (A) and (B): the term **'Federal authorization'** includes such permits, special use authorization required under Federal law in order to site a transmission facility, including such permits, special use authorizations, certifications, opinions or other approvals as may be required under Federal law in order to site a transmission facility. (2) The Department of Energy shall act as the lead agency for purposes of coordinating all applicable Federal authorizations and related environmental reviews for the facility. (3) To the maximum extent practicable under applicable Federal law, **the Secretary shall coordinate the Federal authorization and review process under this subsection with any Indian tribes, multistate entities, and State agencies that are responsible for conducting any separate permitting and environmental review to ensure timely and efficient review and permit decisions.**
(4)(A) As head of the lead agency, **the [DOE] Secretary in consultation with agencies responsible for Federal authorization and, as appropriate, with Indian tribes, multistate entities and State agencies that are willing to coordinate their own separate permitting and environmental reviews with the Federal authorization and environmental reviews, shall establish prompt and binding intermediate milestones and ultimate deadlines for the review of and Federal authorization decisions relating to the proposed facility.**

(4)(B) The Secretary shall ensure that, once an application has been submitted with such data as the Secretary considers necessary, all permit decisions and related environmental reviews under all applicable Federal laws shall be completed – (i) within 1 year; or (ii) if a requirement of another provision of Federal law does not permit compliance with cause (i), as soon thereafter as is practicable.

(4)(C) The Secretary shall provide an expeditious pre-application mechanism for prospective applicants to confer with the agencies involved to have each

such agency determine and communicate to the prospective applicant not later than 60 days after the prospective applicant submits a request for such information concerning – (i) the likelihood of approval for a potential facility; and (ii) key issues of concern to the agencies and public.

(5)(A) As lead agency head, the Secretary, in consultation with the affected agencies, shall prepare a single environmental review document, which shall be used as the basis for all decisions on the proposed project under Federal law.

(5)(B) The Secretary and the heads of other agencies shall streamline the review and permitting of transmission within corridors designated under section 503 of the Federal Land Policy and Management Act by fully taking into account prior analyses and decisions relating to the corridors. (5)(C) The document shall include consideration by the relevant agency of any applicable criteria or other matters as required under applicable law.

(6)(C) If any agency has denied a Federal authorization required for a transmission facility or has failed to act by the deadline established by the Secretary pursuant to this section for deciding whether to issue the authorization, the applicant or any State in which the facility would be located may file an appeal with the President who shall, in consultation with the affected agency, review the denial or failure to take action on the pending application. [The President may issue the authorization with appropriate conditions or deny the application not later than 90 days after the date of filing of appeal, complying with NMFA, ESA, CWA, NEPA, and FLPMA].

6(B)(i) Not later than 1 year after the date of enactment, the Secretary and heads of all Federal agencies with authority to issue Federal authorizations shall enter into a memorandum of understanding to ensure the timely and coordinated review and permitting of electricity transmission facilities. (ii) Interested Indian tribes, multistate entities, and State agencies may enter the memorandum of understanding.

(6)(C) The head of each Federal agency with authority to issue a Federal authorization shall designate a senior official responsible for and dedicate sufficient other staff and resources to ensure full implementation of the regulations and memorandum required under this paragraph.

(8)(A) Each Federal land use authorization for an electricity transmission facility shall be issued (i) for a duration as determined by the Secretary, commensurate with the anticipated use of the facility; and (ii) with appropriate authority to manage the right of way for reliability and environmental protection.

(8)(B) On the expiration of the authorization (including an authorization issued before the enactment of this section), the authorization shall be reviewed for renewal taking fully into account reliance on such electricity infrastructure, recognizing the importance of the authorization for public health, safety, and economic welfare and as a legitimate use of Federal Land.

NINE AGENCY MOU SECTION 372 OF EPAct 2005

Memorandum Of Understanding Among USDA, DOC, DoD, DOE, EPA, CEQ, FERC, the Advisory Council On Historic Preservation, and DOI (Participating Agencies) Regarding Coordination In Federal Agency Review Of Electric Transmission Facilities On Federal Land

This MOU implements Section 372 of the EPAct of 2005 and **improves coordination among project applicants, federal agencies, and states and tribes involved in the siting and permitting process for electric transmission facilities on Federal land. It improves uniformity, consistency, and transparency by setting forth the roles and responsibilities of these entities when project applicants wish to construct electric transmission infrastructure.** In addition, this MOU provides a single point of contact (POC) for coordinating all federal authorizations required to site electric transmission facilities on federal lands, which include interests in land administered by the Participating Agencies. The intent of this MOU is the coordination of these various requirements and designation of a single federal point-of-contact. On non-federal lands, project applicants must adhere to the processes and comply with the requirements of each landowner and state.

DOE implements its authority under section 216 of the Federal Power Act (FPA), as amended by Section 1221(a) of the Energy Policy Act of 2005, **to designate a lead agency to: (1) serve as the point of contact for applicants, state agencies, Indian tribes, and others regarding proposed projects; (2) coordinate preparation of unified environmental documentation that will serve as the basis for all federal decisions necessary to authorize the use of federal lands for Qualifying Projects as defined in Section III; (3) coordinate all federal agency reviews necessary for project development and siting, including the Bald and Golden Eagle Protection Act, the Clean Air Act, Clean Water Act (CWA), Coastal Zone Management Act (CZMA), Endangered Species Act (ESA), Magnuson-Stevens Act (MSA), Marine Mammal Protection Act (MMPA), National Marine Sanctuaries Act, Fish and Wildlife Coordination Act (FWCA), Migratory Bird Treat Act (MBTA), National Environmental Policy Act (NEPA), and National Historic Preservation Act (NHPA); and (4) maintain a**

consolidated administrative record of all federal actions taken with respect to a Qualifying Project.

Under section **216(h)** of the FPA, **DOE is authorized to act as the lead agency to coordinate federal authorizations and related Federal agency reviews required to site an interstate electric transmission facility on federal land.** DOE has previously delegated its 216(h) authority to FERC for transmission projects located within National Interest Electric Transmission Corridors (NIETCs) as designated by the Secretary of Energy. That authorization remains unchanged by this MOU. Through this MOU, **DOE exercises its authority to designate a lead agency for coordinating all required federal authorizations and Federal agency reviews for transmission proposals other than applications made pursuant to section 216(b) of the FPA.** With respect to such transmission projects the Participating Agencies will carry out their responsibilities under this MOU pursuant to the FERC regulations concerning the siting of transmission facilities in NIETCs (National Interest Energy Transmission Corridors).

Qualifying Projects: For purposes of this MOU, Qualifying Projects are high voltage transmission line projects (generally though not necessarily 230 kV or above), and their attendant facilities, or otherwise regionally or nationally significant transmission lines and their attendant facilities, in which all or part of a proposed transmission line crosses jurisdictions administered by more than one participating agency. Qualifying Projects will not include those transmission projects proposed to be sited in a NIETC pursuant to section 216(b) of the FPA.

DOE will designate a lead agency for Qualifying Projects. This designation will recognize the agency with the most significant land management interests related to the Qualifying Project or the agency recommended by other Participating Agencies impacted by the project to be the lead agency.

For Qualifying Projects that would cross DOI-administered lands, including trust or restricted Indian land, and USDA-administered lands, the DOI and USDA will consult and jointly determine: 1) whether a sufficient land management interest exists to support their assumption of the agency role and 2) if so, which of the two agencies should assume that role. For those qualifying projects crossing BLM and USFS lands, the BLM and USFS will select an authorizing officer in accordance with the Service First authority. The AO has the authority and responsibility to supervise the work for BLM and USFS personnel on project teams and to issue the right of way and temporary use permits on federal lands administered by the BLM or the USFS. (Project Manager, Project Teams)

Cost Recovery Account: The BLM, USFS, and Participating Agencies will, consistent with relevant law, fund their costs for each project through cost-recovery funds.

[NOTE: See cost recovery chapter for DOI Secretarial delegation of authority for cost recovery to all DOI bureaus and offices per FLMPA].

Lead agency responsibilities: Pre-application coordination, consultation with cooperating agencies, schedule, NEPA and other environmental compliance, consolidated administrative record, electronic format and data standards, implementing procedures.

Cooperating agency responsibilities: Timely coordination, personnel and expertise, data and studies, communicate effectively, issue resolution.

NEPA CEQ IMPLEMENTING REGULATIONS

Purposes of NEPA

40 CFR 1500.1	Ultimately, of course, it is not better documents but better decisions that count. NEPA's purpose is not to generate paperwork - even excellent paperwork - but to foster excellent action. The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment.
40 CFR 1500.2	(b) Implement procedures to make the NEPA process more useful to decisionmakers and the public; to reduce paperwork and the accumulation of extraneous background data; and to emphasize real environmental issues and alternatives.
40 CFR 1500.2 Policy	Federal agencies shall to the fullest extent possible: **a) Interpret and administer the policies, regulations, and public laws of the United States in accordance with the policies set forth in the Act and in these regulations.** **(b) Implement procedures to make the NEPA process more useful to decisionmakers and the public; to reduce paperwork and the accumulation of extraneous background data; and to emphasize real environmental issues and alternatives. Environmental impact statements shall be concise, clear, and to the point, and shall be supported by evidence that agencies have made the necessary environmental analyses.** **(c) Integrate the requirements of NEPA with other planning and environmental review procedures required by law or by agency practice so that all such procedures run concurrently rather than consecutively.**

	(d) Encourage and facilitate public involvement in decisions which affect the quality of the human environment. **(e) Use the NEPA process to identify and assess the reasonable alternatives** to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment. (f) **Use all practicable means, consistent with the requirements of the Act and other essential considerations of national policy, to restore and enhance the quality of the human environment and avoid or minimize any possible adverse effects of their actions** upon the quality of the human environment.
40 CFR 1502.1	The primary purpose of an EIS is to **serve as an action-forcing device to ensure that the policies and goals defined in the Act are infused in the ongoing programs and actions of the Federal Government.** It shall provide full and fair discussion of significant environmental impacts and shall inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment…An environmental impact statement is more than a disclosure document. It shall be used by Federal officials in conjunction with other relevant material to plan actions and make decisions.
40 Q No. 9	Agencies shall integrate the NEPA process with other planning at the earliest possible time to ensure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts.

Responsibilities of Lead Agencies (also see Timing and Scoping)

NEPA Section 102(2)(C)	As the "responsible official," preparing the "detailed statement" on alternatives and environmental impacts
NEPA Section 102(2)(C)	The "responsible 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
40 CFR 1508.15 Lead Agency	*Lead agency* means the agency or agencies **preparing or having taken primary responsibility for preparing the environmental impact statement.**
40 CFR 1503.1, 1503.2	**Lead agencies shall:** • Obtain the comments of agencies with jurisdiction by law and special expertise, which must provide comments." • Request the comments of appropriate State and local environmental agencies, which must provide comments, Indian tribes, and any agency requesting that it receive EISs on actions of the kind proposed.

	• Request comments from the applicant, if any. • Request comments from the public, affirmatively soliciting comments from those persons or organizations who may be interested or affected.
NEPA Section 102(2)(D)	**(ii) the responsible Federal official furnishes guidance and participates in such preparation** [of an EIS prepared by a state agency or official], (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."**
40 CFR 1501.7(4) Scoping	"Allocate assignments for preparation of the environmental impact statement among the lead and cooperating agencies, with **the lead agency retaining responsibility for the statement."**
40 CFR 1501.5 Lead Agencies	(a) **A lead agency shall supervise the preparation of an environmental impact statement** if more than one Federal agency either: (1) Proposes or is involved in the same action; or (2) Is involved in a group of actions directly related to each other because of their functional interdependence or geographical proximity. (b) Federal, State, or local agencies, including at least one Federal agency, may act as joint lead agencies to prepare an environmental impact statement (§1506.2).
40 CFR 1501.5 Lead Agencies	"(c) If an action falls within the provisions of paragraph (a) of this section the **potential lead agencies shall determine by letter of memorandum which agency shall be the lead agency and which shall be the cooperating agencies**… If there is disagreement among the [lead and cooperating] agencies, the following factors (which are listed in order of descending importance) shall determine lead agency designation: (1) Magnitude of agency's involvement. (2) Project approval/disapproval authority.

	(2) Expertise concerning the action's environmental effects. (4) Duration of agency's involvement. (5) Sequence of agency's involvement. "(d) **If Federal agencies are unable to agree on which agency will be the lead agency or if the procedure described in paragraph (c) of this section has not resulted within 45 days in a lead agency designation**, any of the agencies or persons concerned may file a request with the Council asking it to determine which Federal agency shall be the lead agency." (f) A response may be filed by any potential lead agency concerned within 20 days after a request is filed with the Council. **The Council shall determine as soon as possible but not later than 20 days after receiving the request and all responses to it which Federal agency shall be the lead agency** and which other Federal agencies shall be cooperating agencies.
40 CFR 1501.6(a)(2)	"The lead agency shall... (1) Request the participation of each cooperating agency in the NEPA process at the earliest possible time. (2) **Use the environmental analysis and proposals of cooperating agencies with jurisdiction by law or special expertise to the maximum extent possible consistent with its responsibility as lead agency."**
40 CFR 1501.6(b,c)	"Each cooperating agency shall: (3) **Assume on request of the lead agency** responsibility for developing information and preparing environmental analyses including portions of the environmental impact statement concerning which the cooperating agency has special expertise. (4) Make available staff support **at the lead agency's request** to enhance the latter's interdisciplinary capability. (5) Normally use its own funds. **The lead agency shall, to the extent available funds permit, fund those major activities or analyses it requests from cooperating agencies. Potential lead agencies shall include such funding requirements in their budget requests.** (c) **A cooperating agency may in response to a lead agency's request for assistance in preparing the environmental impact statement (described in paragraph (b)(3), (4), or (5) of this section) reply that other program commitments preclude any involvement or the degree of involvement requested in the action that is the subject of the environmental impact statement. A copy of this reply shall be submitted to the Council.** [note: 40 Q 14a states that they if don't have time to assist the lead agency *in the action* (not just the EIS), then they don't have time to submit adversarial comments related *to the action*]

40 CFR 1501.6	"**Upon request of the lead agency, any other Federal agency which has jurisdiction by law shall be a cooperating agency.** In addition, any other Federal agency which has special expertise with respect to any environmental issue, which should be addressed in the statement **may be a cooperating agency upon request of the lead agency**. **Any agency may request the lead agency to designate it a cooperating agency.**
40 CFR 1501.8(a,b,c)	**When multiple agencies are involved the reference to agency below means lead agency.** (a) **The [lead] agency shall set time limits if an applicant** for the proposed action requests them: Provided, that the limits are consistent with the purposes of NEPA and other essential considerations of national policy. (b) The agency may: **(1) Consider the following factors in determining time limits:** (i) Potential for environmental harm. (ii) Size of the proposed action. (iii) State of the art of analytic techniques. (iv) Degree of public need for the proposed action, including the consequences of delay. (v) Number of persons and agencies affected. (vi) Degree to which relevant information is known and if not known the time required for obtaining it. (vii) Degree to which the action is controversial. (viii) Other time limits imposed on the agency by law, regulations, or executive order. **(2) Set overall time limits or limits for each constituent part of the NEPA process, which may include:** **(i) Decision on whether to prepare an environmental impact statement (if not already decided).** **(ii) Determination of the scope of the environmental impact statement.** **(iii) Preparation of the draft environmental impact statement.** (iv) Review of any comments on the draft environmental impact statement from the public and agencies. (**v) Preparation of the final environmental impact statement.** (vi) Review of any comments on the final environmental impact statement. (vii) Decision on the action based in part on the environmental

	impact statement. **(3) Designate a person (such as the project manager or a person in the agency's office with NEPA responsibilities) to expedite the NEPA process.** **(c) State or local agencies or members of the public may request a Federal Agency to set time limits.**
40 CFR 1506.5(c)	*Environmental impact statements.* Except as provided in 1506.2 and 1506.3 any environmental impact statement prepared pursuant to the requirements of NEPA **shall be prepared directly by or by a contractor selected by the lead agency** or where appropriate under 1501.6(b), a cooperating agency. It is the **intent of these regulations that the contractor be chosen solely by the lead agency, or by the lead agency in cooperation with cooperating agencies**, or where appropriate by a cooperating agency **to avoid any conflict of interest**.
40 CFR 1506.10(d)	**The lead agency may extend prescribed periods**. The **Environmental Protection Agency may upon a showing by the lead agency of compelling reasons of national policy reduce** the prescribed periods and may upon a showing by any other Federal agency of compelling reasons of national policy also extend prescribed periods, but only after consultation with the lead agency. (Also see 1507.3(d).) Failure to file timely comments shall not be a sufficient reason for extending a period. **If the lead agency does not concur with the extension of time, EPA may not extend it for more than 30 days.** When the Environmental Protection Agency reduces or extends any period of time it shall notify the Council.
40 CFR 1502.9 Draft, final, and supplemental EISs	(a) Draft environmental impact statements shall be prepared in accordance with the scope decided upon in the scoping process. **The lead agency shall work with the cooperating agencies and shall obtain comments** as required in part 1503 of this chapter.
40 CFR 1502.14(c)	**Include reasonable alternatives not within the jurisdiction of the lead agency.**
40 CFR 1502.1(a)(iii)	The clearinghouses may be used, by **mutual agreement of the lead agency and the clearinghouse**, for securing State and local reviews of the draft environmental impact statements.
40 CFR 1504.2 Referrals	Environmental referrals should be made to the Council only after concerted, timely (as early as possible in the process), but **unsuccessful attempts to resolve differences with the lead agency.**
40 Q 14b. Interagency disputes regarding	**Such disputes are resolved by the agencies themselves. A lead agency, of course, has the ultimate responsibility for the content of an EIS**. But it is supposed to use the

content and analyses	environmental analysis and recommendations of cooperating agencies with jurisdiction by law or special expertise to the maximum extent possible, consistent with its own responsibilities as lead agency. If the lead agency leaves out a significant issue or ignores the advice and expertise of the cooperating agency, the EIS may be found later to be inadequate. Similarly, where cooperating agencies have their own decisions to make and they intend to adopt the environmental impact statement and base their decisions on it, one document should include all of the information necessary for the decisions by the cooperating agencies. Otherwise they may be forced to duplicate the EIS process by issuing a new, more complete EIS or Supplemental EIS, even though the original EIS could have sufficed if it had been properly done at the outset. **Thus, both lead and cooperating agencies have a stake in producing a document of good quality.** A cooperating agency with jurisdiction by law may determine in its own ROD that alternative A is the environmentally preferable action, **even though the lead agency has decided** in its separate ROD that Alternative B is environmentally preferable.
40 Q 33a,b. Referrals	Section 1504.3 requires that a referring agency must deliver its referral to the Council not later than 25 days after publication by EPA of notice that the final EIS is available (**unless the lead agency grants an extension of time** under Section 1504.3(b))…. **If a lead agency has granted an extension of time** for another agency to take action on a referral, the ROD may not be issued until the extension has expired.
40 CFR 1505.2 Monitoring	**The lead agency shall:** (a) Include appropriate conditions in grants, permits or other approvals. (b) Condition funding of actions on mitigation. (c) Upon request, inform cooperating or commenting agencies on progress in carrying out mitigation measures which they have proposed and which were adopted by the agency making the decision. (d) Upon request, make available to the public the results of relevant monitoring.
40 CFR 1508.28 Tiering	Tiering is appropriate when the sequence of statements or analyses is:

	(b) From an environmental impact statement on a specific action at an early stage (such as need and site selection) to a supplement (which is preferred) or a subsequent statement or analysis at a later stage (such as environmental mitigation). Tiering in such cases is **appropriate when it helps the lead agency to focus on the issues which are ripe for decision** and exclude from consideration issues already decided or not yet ripe.
40 Q 4c. Who recommends the Preferred Alternative?	The lead agency's official with line responsibility for preparing the EIS and assuring its adequacy is responsible for identifying the agency's preferred alternative(s**)… The public and other agencies reviewing a Draft EIS can assist the lead agency** to **develop and determine environmentally preferable alternatives** by providing their views in comments on the Draft EIS. Through the identification of the environmentally preferable alternative, the decisionmaker is clearly faced with a choice between that alternative and others, and must consider whether the decision accords with the Congressionally declared policies of the Act.
40 Q 6b. Who recommends or determines what is environmentally preferable?	Q6a. The Council recognizes that the identification of the environmentally preferable alternative may involve difficult judgments, particularly when one environmental value must be balanced against another. ..In any event the **lead agency official responsible for the EIS is encouraged to identify the environmentally preferable alternative(s) in the EIS**… **The agency must identify the environmentally preferable alternative in the ROD.**
40 Q 14a. Rights and responsibilities of lead and cooperating agencies	**After a lead agency has been designated** (Sec. 1501.5), that agency has the **responsibility to solicit cooperation from other federal agencies** that have jurisdiction by law or special expertise on any environmental issue that should be addressed in the EIS being prepared. Where appropriate**, the lead agency should seek the cooperation of state or local agencies of similar qualifications.** When the proposal may affect an Indian reservation, **the agency should consult with the Indian tribe.** Section 1508.5. **The request for cooperation should come at the earliest possible time in the NEPA process**.
40 Q 14d. Uncooperative agencies with jurisdiction by law or expertise	**A lead agency has the responsibility to respond to all substantive comments** raising significant issues regarding a draft EIS. Section 1503.4…. In practical terms, if a cooperating agency fails to cooperate at the outset, such as during scoping, it will find that **its comments at a later stage will not be as persuasive to the lead agency.**

Timing and Scoping (see also Lead Agencies)

40 CFR 1501.7 Scoping	There shall be early and open process for determining the scope of issues to be addressed and for identifying the significant issues related to a proposed action.
40 CFR 1501.7 Scoping	(a) As **part of the scoping process the lead agency** shall: **(1) Invite the participation** of affected Federal, State and local agencies, any affected Indian tribe, the proponent of the action, and other interested persons (including those who might not be in accord with the action on environmental grounds). **(2) Determine the scope and the significant issues** to be analyzed in depth. **(3) Identify and eliminate from detailed study the issues which are not significant** or which have been covered by prior environmental review, narrowing the discussion of these issues in the environmental impact statement to a brief presentation of why they will not have a significant effect on the human environment or providing a reference to their coverage elsewhere. **(4) Allocate assignments for preparation of the environmental impact statement** among the lead and cooperating agencies, with the lead agency retaining responsibility for the statement. **(5) Indicate any public environmental assessments and other environmental impact statements** which are being or will be prepared that are related to but are not part of the scope of the environmental impact statement under consideration. **(6) Identify other environmental review and consultation requirements** so the lead and cooperating agencies may prepare other required analyses and studies concurrently with, and integrated with, the environmental impact statement. **(7) Indicate the relationship between the timing of the preparation** of environmental analyses and the agency's tentative planning and decisionmaking schedule.
40 CFR 1500.1	**NEPA procedures must ensure that environmental**

	information is available to public officials and citizens before decisions are made and before actions are taken. The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA. Most important, NEPA documents must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail.
40 CFR 1501.7	"There shall be an early and open process for determining the scope of issues to be addressed and for identifying the significant issues related to a proposed action. This process shall be termed scoping. As soon as practicable after its decision to prepare an environmental impact statement and before the scoping process the lead agency shall publish a notice of intent (1508.22) in the FEDERAL REGISTER except as provided in 1507.3(e)."
40 CFR 1501.7(b)	"As part of the scoping process **the lead agency** may: (1) Set page limits on environmental documents (1502.7). (2) Set time limits (1501.8). (3) Adopt procedures under 1507.3 to combine its environmental assessment process with its scoping process. (4) Hold an early scoping meeting or meetings which may be integrated with any other early planning meeting the agency has. Such a scoping meeting will often be appropriate when the impacts of a particular action are confined to specific sites.
40 CFR 1501.2	**Agencies shall integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts.**
40 CFR 1500.2	(c) **Integrate the requirements of NEPA with other planning and environmental review procedures** required by law or by agency practice so that all such procedures run concurrently rather than consecutively**.**
40 CFR 1508.23 Proposal	*Proposal* exists at that stage in the development of an action when an agency subject to the Act has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the effects can be meaningfully evaluated.
40 CFR 1502.5 Timing	**An agency shall commence preparation of an environmental impact statement as close as possible to the time the agency is developing or is presented with a proposal** (1508.23) so that preparation can be completed in time for the final statement to be included in any recommendation or report on the proposal.

	The statement shall be prepared early enough so that it can serve practically as an important contribution to the decisionmaking process and will not be used to rationalize or justify decisions already made (1500.2(c), 1501.2, and 1502.2). For instance: (a) For projects directly undertaken by Federal agencies the environmental impact statement shall be prepared at the **feasibility analysis (go-no go) stage** and may be supplemented at a later stage if necessary. **(b) For applications to the agency appropriate environmental assessments or statements shall be commenced no later than immediately after the application is received. Federal agencies are encouraged to begin preparation of such assessments or statements earlier, preferably jointly with applicable State or local agencies.**
Sierra Club v. Marsh. 872 F.2d 487, 500 (1st Cir. 1989)	The harm consists of added risk to the environment that takes place when governmental decisionmakers make up their minds without having before them an analysis (with public comment) of the likely effects of their decision upon the environment. NEPA's objective is to minimize that risk, the risk of uninformed choice."
40 CFR 1501.2	(e) Provide for cases where actions are **planned by private applicants or other non-Federal entities before Federal involvement** so that: (1) Policies or designated staff are available to advise potential applicants of studies or other information foreseeably required for later Federal action. (2) The **Federal agency consults early** with appropriate State and local agencies and Indian tribes and with interested private persons and organizations when its own involvement is reasonably foreseeable. (3) **The Federal agency commences its NEPA process at the earliest possible time.**
40 Q no. 8 Early NEPA application for private applicants	Section 1501.2(d) requires federal agencies to take steps toward ensuring that private parties and state and local entities initiate environmental studies as soon as federal involvement in their proposals can be foreseen. This section is intended to ensure that environmental factors are considered at an early stage in the planning process and **to avoid the situation where the applicant for a federal permit or approval has completed planning and eliminated all alternatives to the proposed action by the time the**

	EIS process commences or before the EIS process has been completed. Through early consultation, business applicants and approving agencies may gain **better appreciation of each other's needs and foster a decisionmaking process which avoids later unexpected confrontations**.
40 Q no. 8 Early NEPA application for private applicants	Federal agencies are required by Section 1507.3(b) to develop procedures to carry out Section 1501.2(d). The procedures should include an "outreach program", such as **a means for prospective applicants to conduct pre-application consultations with the lead and cooperating agencies**. Applicants need to find out, in advance of project planning, what **environmental studies or other information will be required, and what mitigation requirements are likely, in connection with the later federal NEPA process.** Agencies should designate staff to advise potential applicants of the agency's NEPA information requirements and should publicize their pre-application procedures and information requirements in newsletters or other media used by potential applicants. Complementing Section 1501.2(d), Section 1506.5(a) requires agencies to assist applicants by **outlining the types of information required in those cases where the agency requires the applicant to submit environmental data** for possible use by the agency in preparing an EIS. Section 1506.5(b) allows agencies to authorize preparation of environmental assessments by applicants. Thus, the procedures should also include a **means for anticipating and utilizing applicants' environmental studies or "early corporate environmental assessments" to fulfill some of the federal agency's NEPA obligations. However, in such cases the agency must still evaluate independently the environmental issues and take responsibility for the environmental assessment**. **These provisions are intended to encourage and enable private and other non-federal entities to build environmental considerations into their own planning processes in a way that facilitates the application of NEPA and avoids delay**.
40 Q No. 9 Applicant projects with multiple agencies	These provisions create an affirmative obligation on federal agencies to inquire early, and to the maximum degree possible, to ascertain whether an applicant is or will be seeking other federal assistance or approval, or whether the applicant is waiting until a proposal has been substantially developed before requesting federal aid or approval… a federal agency receiving a request for approval or assistance should determine whether the applicant has filed separate requests for federal approval or assistance with other federal agencies. **Other federal agencies that are likely to become involved should then**

	be contacted, and the NEPA process coordinated, to insure an early and comprehensive analysis of the direct and indirect effects of the proposal and any related actions. The agency should inform the applicant that action on its application may be delayed unless it submits all other federal applications (where feasible to do so), so that **all the relevant agencies can work together on the scoping process and preparation of the EIS**.
40 CFR 1506.1	f) Agencies shall not commit resources prejudicing selection of alternatives before making a final decision.
40 CFR 1502.2	g) Environmental impact statements shall serve as the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made.

Inherently Governmental Responsibilities

40 CFR 1506.6 Public Involvement	**Agencies shall:** (a) Make diligent efforts to involve the public in preparing and implementing their NEPA procedures. (b) Provide public notice of NEPA-related hearings, public meetings, and the availability of environmental documents so as to inform those persons and agencies who may be interested or affected. (1) In all cases the agency shall mail notice to those who have requested it on an individual action. (2) In the case of an action with effects of national concern notice shall include publication in the *Federal Register* and notice by mail to national organizations reasonably expected to be interested in the matter and may include listing in the 102 Monitor. (3) In the case of an action with effects primarily of local concern the notice may include: (i) Notice to State and areawide clearinghouses pursuant to OMB Circular A-95 (Revised). (ii) Notice to Indian tribes when effects may occur on reservations. (iii) Following the affected State's public notice procedures for comparable actions. (iv) Publication in local newspapers (in papers of general circulation rather than legal papers). (v) Notice through other local media.

	(vi) Notice to potentially interested community organizations including small business associations. (vii) Publication in newsletters that may be expected to reach potentially interested persons. (viii) Direct mailing to owners and occupants of nearby or affected property. (ix) Posting of notice on and off site in the area where the action is to be located. (c) Hold or sponsor public hearings or public meetings whenever appropriate or in accordance with statutory requirements applicable to the agency.
1506.5(a,b)	**Information.** If an agency requires an applicant to submit environmental information for possible use by the agency in preparing an environmental impact statement, then the agency should assist the applicant by outlining the types of information required. **The agency shall independently evaluate the information submitted and shall be responsible for its accuracy.** If the agency chooses to use the information submitted by the applicant in the environmental impact statement, either directly or by reference, then the names of the persons responsible for the independent evaluation shall be included in the list of preparers (1502.7). **It is the intent of this paragraph that acceptable work not be redone, but that it be verified by the agency.** **Environmental assessments.** If an agency permits an applicant to prepare an environmental assessment, **the agency, besides fulfilling the requirements of paragraph (a) of this section, shall make its own evaluation of the environmental issues and take responsibility for the scope and content of the environmental assessment.**
40 CFR 1506.5(c) EIS contractors	EISs must be prepared by the agency or a third-party contractor **selected by the lead or cooperating agency so as to avoid conflict of interest. The responsible Federal agency shall furnish guidance and participate in its preparation, and shall independently evaluate the EIS and take responsibility for its scope and content.**
Policy Letter 11-01 to the Heads of Executive Departments and Agencies	3a-b. Definitions. **"Inherently governmental function" means** a function that is so intimately related to the public interest as to require performance by Federal Government employees, functions that **require either the exercise of discretion in applying Federal Government authority or the**

09/12/2011	**making of value judgments in making decisions for the Federal Government**…**the term does not include gathering information for or providing advice, opinions, recommendations, or ideas to Federal government officials.** 1. Purpose. **Contractors can provide expertise, innovation, and cost-effective support to Federal agencies for a wide range of services**…The work they perform is not work that should be reserved for Federal employees and that Federal officials are appropriately managing and overseeing contractor performance. 4. Policy. (a) To ensure that work that should be performed by Federal employees is properly reserved to government performance, agencies shall: (1) ensure that contractors do not perform inherently governmental functions; (2) **give special consideration to Federal employee performance of functions closely associated with inherently governmental functions and, when such work is performed by contractors, provide greater attention and an enhanced degree of management oversight of the contractors' activities to ensure that contractors' duties do not expand to include performance of inherently governmental functions;** and (3) ensure that Federal employees perform and/or manage critical functions to the extent necessary for the agency to operate effectively and maintain control of its mission and operations. 4. Policy. It is the policy of the Executive Branch to ensure that **government action is taken as a result of informed, independent judgments made by government officials** who are ultimately accountable to the President and bound by laws controlling the conduct and performance of Federal employees that are intended to protect or benefit the public and ensure the proper use of funds appropriated by Congress. To implement this policy, agencies must reserve certain work for performance by Federal employees and take special care to retain sufficient management oversight over how contractors are used to support government operations and ensure that Federal employees have the technical skills and expertise needed to maintain control of the agency mission and operations. 5. **Guidelines for identifying inherently governmental functions and critical functions… (ii) The exercise of discretion.** (A) A function requiring the exercise of

	discretion shall be deemed inherently governmental if the exercise of that discretion commits the government to a course of action where two or more alternative courses of action exist and decision making is not already limited or guided by existing policies, procedures, directions, orders, and other guidance…where the contractor does not have the authority to decide on the overall course of action, but is tasked to develop options or implement a course of action, and the agency official has the ability to override the contractor's action…and where the contractor's involvement is or would be so extensive, or the contractor's work product so close to a final agency product, as to effectively preempt the Federal officials' decision-making process, discretion or authority.
BLM H-1790-1	13.5. Contracting may be used for the preparation of a NEPA document or for certain portions of the analyses. **Contracting an environmental document does not eliminate the BLM's active role in the NEPA process; you must still put forth substantial efforts to develop the contract, meet frequently with the contractor, review all products, and develop necessary partnerships with counties, the state, Tribes, other Federal agencies, and other BLM offices.** The contractor-developed work becomes your work: you are responsible for all content within NEPA document and the supporting materials, which must be included in the administrative record. Additionally, **decisions and findings are those of the BLM, not of the contractor, and these must reflect a review of underlying NEPA document.** As such, we recommend that you prepare the findings and decision records, not the contractor. The BLM may permit an applicant to prepare the EA. An applicant may also pay a contractor to prepare an EA (this is called third-party contracting). When an applicant or contractor prepares an EA, the BLM must independently evaluate the information submitted and its accuracy, and the environmental issues. **Though the applicant or contractor prepares the EA, the BLM is responsible for the scope and content of the EA.** **The BLM remains responsible for all of the content within the EIS**. Additionally, the BLM or a cooperating agency (ies) must select the cooperator [sic] "contractor", and a conflict of interest disclaimer must be included in the EIS…**While the CEQ only requires this disclaimer for EISs, we recommend including such statements in your**

	contractor-prepared EAs as well. Additionally, when using **third-party contracting, we recommend an MOU between the BLM and the applicant**. This MOU must: • **establish the roles and responsibilities of each party; and** • **specify that all costs of using a contractor in the preparation of the NEPA document will be borne by the applicant.**

Need for Action

40 CFR 1502.4(a)	(a) Agencies shall make sure the proposal which is the subject of an environmental impact statement is properly defined
40 CFR 1502.13	The statement shall briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action.
40 CFR 1508.9	Environmental assessment…(b) shall include brief discussions of the need for the proposal
FSH 1909.15	**11.21. Purpose and Need.** The need for action discusses the relationship between the desired condition and the existing condition in order to answer the question, "why consider taking any action?" The breadth or narrowness of the need for action has a substantial influence on the scope of the subsequent analysis. **A well-defined "need" or "purpose and need" statement narrows the range of alternatives that may need to be considered.** For example, a statement like "there is a need for more developed recreation" would lead to a very broad analysis and consideration of many different types of recreation. However, a statement like "there is a need for more developed campsites along Clear Creek" would result in a more focused analysis with consideration of a much narrower range of alternatives. "Purpose" and "need" may be discussed separately, but normally they are discussed as one because the purpose of an action will be to respond to the stated need. **It is critical that the responsible official and interdisciplinary team members all understand and agree on the need for action. An informed decision can only be made when everyone is working together to solve the same problem.**
BLM IM 2011-059, re-authorized	**The purpose and need statement as a whole describes the problem or opportunity to which the BLM is**

February 2013	**responding and what the BLM hopes to accomplish by the action. The purpose and need statement in a NEPA document for a renewable energy right-of-way application must describe the BLM's purpose and need for action, not the applicant's interests and objectives** (BLM NEPA Handbook Section 6.2). The applicant's interests and objectives, including any constraints or flexibility with respect to their proposal, help to inform the BLM's decision and cannot be ignored in the NEPA process. **The applicant's interest and objectives should be described in the NEPA document** (e.g., in the background section or in the project description). This information will help **determine which alternatives are analyzed in detail through the NEPA process** and may also provide a basis for eliminating some alternatives from detailed analysis. For most renewable energy projects the BLM's purpose and need for action will arise from the BLM's responsibility under the **Federal Land Policy and Management Act (FLPMA) to respond to a right-of way application requesting authorized use of public lands for a specific type of renewable energy development.** The purpose and need statement should also describe the BLM's authorities and management objectives with respect to renewable energy and public lands (see example below). Additionally, offices should include a description of the BLM's decision(s) to be made as part of the purpose and need statement to help establish the scope of the NEPA analysis (BLM NEPA Handbook Section 6.2). In responding to a right-of-way application the BLM may decide to deny the proposed right-of-way, grant the right-of way, or grant the right-of-way with modifications. In accordance with the right-of-way regulations, modifications may include modifying the proposed use or changing the route or location of the proposed facilities (43 CFR 2805.10(a)(1)). The following purpose and need statement is provided as an example. Changes in the statement as written are expected based on project-specific circumstances including appropriate reference to land use plans or other management objectives or policies for an area (e.g., Secretarial Order 3310, dated December 22, 2010, Protecting Wilderness Characteristics on Lands Managed by the BLM). In some situations, distinguishing the "purpose" from the "need" as two separate aspects of the purpose and need statement may provide an opportunity to better clarify why

	the BLM is proposing an action (BLM NEPA Handbook Section 6.2). In accordance with FLPMA (Section 103(c)), public lands are to be managed for multiple use that takes into account the long-term needs of future generations for renewable and non-renewable resources. The Secretary of the Interior is authorized to grant rights-of-way on public lands for systems of generation, transmission, and distribution of electric energy (Section 501(a)(4)). Taking into account the BLM's multiple use mandate, the purpose and need for the proposed action is to respond to a FLPMA right-of-way application submitted by [Company X] to construct, operate, maintain, and decommission a [type of energy] facility and associated infrastructure on public lands administered by the BLM in compliance with FLPMA, BLM right-of-way regulations, and other applicable Federal laws and policies. This proposed action would, if approved, assist the BLM in addressing the management objectives in the Energy Policy Act of 2005 (Title II, Section 211) which establish a goal for the Secretary of the Interior to approve 10,000 MWs of electricity from non-hydropower renewable energy projects located on public lands. This proposed action, if approved, would also further the purpose of Secretarial Order 3285A1 (March 11, 2009) that establishes the development of environmentally responsible renewable energy as a priority for the Department of the Interior. The BLM will decide whether to deny the proposed right-of-way, grant the right-of way, or grant the right-of-way with modifications. Modifications may include modifying the proposed use or changing the route or location of the proposed facilities (43 CFR §2805.10(a)(1)). .

Notice of Intent

40 CFR 1508.22	*Notice of intent* means a notice that an environmental impact statement will be prepared and considered. The notice shall briefly: (a) Describe the proposed action and possible alternatives. (b) Describe the agency's proposed scoping process including whether, when, and where any scoping meeting will be held. (c) State the name and address of a person within the agency who can answer questions about the proposed action and the environmental impact statement.

FEDERAL LAND POLICY and MANAGEMENT ACT of 1976

Right-Of-Way Corridors

Sec. 503. [43 U.S.C. 1763] **In order to minimize adverse environmental impacts and the proliferation of separate rights-of-way, the utilization of rights-of-way in common shall be required to the extent practical, and each right-of-way or permit shall reserve to the Secretary concerned the right to grant additional rights-of-way or permits for compatible uses on or adjacent to rights-of-way granted pursuant to this Act. In designating right-of-way corridors and in determining whether to require that rights-of-way be confined to them, the Secretary concerned shall take into consideration national and State land use policies, environmental quality, economic efficiency, national security, safety, and good engineering and technological practices.** The Secretary concerned shall issue regulations containing the criteria and procedures he will use in designating such corridors. Any existing transportation and utility corridors may be designated as transportation and utility corridors pursuant to this subsection without further review.

Sec. 504. [43 U.S.C. 1764] (a) **The Secretary concerned shall specify the boundaries of each right-of-way as precisely as is practical. Each right-of-way shall be limited to the ground which the Secretary concerned determines (1) will be occupied by facilities which constitute the project for which the right-of-way is granted, issued, or renewed, (2) to be necessary for the operation or maintenance of the project, (3) to be necessary to protect the public safety, and (4) will do no unnecessary damage to the environment.** The Secretary concerned may authorize the temporary use of such additional lands as he determines to be reasonably necessary for the construction, operation, maintenance, or termination of the project or a portion thereof, or for access thereto.

(b) Each right-of-way or permit granted, issued, or renewed pursuant to this **section shall be limited to a reasonable term in light of all circumstances concerning the project**. In determining the duration of a right-of-way the Secretary concerned shall, among other things, take into consideration the cost of the facility, its useful life, and any public purpose it serves. The right-of-way shall specify whether it is or is not renewable and the terms and conditions applicable to the renewal.

(c) Rights-of-way shall be granted, issued, or renewed pursuant to this title under such regulations or stipulations, consistent with the provisions of this title or any other applicable law, and shall also be **subject to such terms and conditions as the Secretary concerned may prescribe regarding extent, duration, survey, location, construction, maintenance, transfer or assignment, and termination**.
(d) The Secretary concerned prior to granting or issuing a right-of-way pursuant to this title for **a new project which may have a significant impact on the environment, shall require the applicant to submit a plan of construction, operation, and rehabilitation for such right-of-way which shall comply with stipulations or with regulations issued by that Secretary,** including the terms and conditions required under section 505 of this Act.

Coordination of Applications

Sec. 511. [43 U.S.C. 1771] Applicants before Federal departments and agencies other than the Department of the Interior or Agriculture seeking a license, certificate, or other authority for a project which involve a right-of-way over, upon, under, or through public land or National Forest System lands **must simultaneously apply to the Secretary concerned for the appropriate authority to use public lands or National Forest System lands and submit to the Secretary concerned all information furnished to the other Federal department or agency**.

Section 103 Definitions (e) The term_ public lands" means any land and interest in land owned by the United States within the several States and administered by the Secretary of the Interior through the Bureau of Land Management, without regard to how the United States acquired ownership. (g) The term "Secretary," unless specifically designated otherwise, means the Secretary of the Interior.

CONTENTS OF A LAND USE AUTHORIZATION
Forest Service

(d) Proposal content— (1) Proponent identification. Any proponent for a special use authorization must provide the proponent's name and mailing address, and, if the proponent is not an individual, the name and address of the proponent's agent who is authorized to receive notice of actions pertaining to the proposal.

(d)(2) Required information—(ii) All other special uses. At a minimum, proposals for special uses other than noncommercial group uses must include the information contained in paragraphs (d)(3) through (d)(5) of this section [note: as well as information about its corporate structure and ownership].

(d)(3) Technical and financial capability. The proponent is required to provide sufficient evidence to satisfy the authorized officer that the proponent has, or prior to commencement of construction will have, the technical and financial capability to construct, operate, maintain, and terminate the project for which an authorization is requested, and the proponent is otherwise acceptable.

(d)(4) Project description. Except for requests for planning permits for a major development, a proponent must provide a project description, including maps and appropriate resource information, in sufficient detail to enable the authorized officer to determine the feasibility of a proposed project or activity, any benefits to be provided to the public, the safety of the proposal, the lands to be occupied or used, the terms and conditions to be included, and the proposal's compliance with applicable laws, regulations, and orders.

(d)(5) Additional information. The authorized officer may require any other information and data necessary to determine feasibility of a project or activity proposed; compliance with applicable laws, regulations, and orders; compliance with requirements for associated clearances, certificates, permits, or licenses; and suitable terms and conditions to be included in the authorization. The authorized

officer shall make requests for any additional information in writing. *(36 CFR §251.54)*

Bureau of Land Management

(a) File your application on Standard Form 299, available from any BLM office, and fill in the required information as completely as possible. Your completed application must include:

(1) A description of the project and the scope of the facilities;

(2) The estimated schedule for constructing, operating, maintaining, and terminating the project;

(3) The estimated life of the project and the proposed construction and reclamation techniques;

(4) A map of the project, showing its proposed location and existing facilities adjacent to the proposal;

(5) A statement of your financial and technical capability to construct, operate, maintain, and terminate the project;

(6) Any plans, contracts, agreements, or other information concerning your use of the right-of-way and its effect on competition; [note: as well as information about its corporate structure and ownership]

(e) If you are filing with another Federal agency for a license, certificate of public convenience and necessity, or other authorization for a project involving a right-of-way on public lands, simultaneously file an application with BLM for a grant. Include a copy of the materials, or reference all the information, you filed with the other Federal agency. *(43 CFR §2804.12)*

THE FOREST SERVICE AND BLM PRESCRIBE GOVERNMENT ROLES DURING THE PRE-APPLICATION PROCESS

Forest Service

(a) Early notice. When an individual or entity proposes to occupy and use National Forest System lands, the proponent is required to contact the Forest Service office(s) responsible for the management of the affected land as early as possible in advance of the proposed use.

(c) Rights of proponents. A proposal to obtain a special use authorization does not grant any right or privilege to use National Forest System lands. Rights or privileges to occupy and use National Forest System lands under this subpart are conveyed only through issuance of a special use authorization.

(e)(3) The authorized officer, to the extent practicable, shall provide the proponent guidance and information on the following:

(i) Possible land use conflicts as identified by review of forest land and resource management plans, landownership records, and other readily available sources;

(ii) Proposal and application procedures and probable time requirements;

(iii) Proponent qualifications;

(iv) Applicable fees, charges, bonding, and/or security requirements;

(v) Necessary associated clearances, permits, and licenses;

(vi) Environmental and management considerations;

(vii) Special conditions; and

(viii) identification of on-the-ground investigations which will require temporary use permits.

(e)(4) Confidentiality. If requested by the proponent, the authorized officer, or other Forest Service official, to the extent reasonable and authorized by law, shall hold confidential any project and program information revealed during pre-application contacts. *(36 CFR §251.54)*

The Forest Service second-level screening factors for proponent proposed actions before accepting an application:

(5) Second-level screening of proposed uses. A proposal which passes the initial screening set forth in paragraph (e)(1) and for which the proponent has submitted information as required in paragraph (d)(2)(ii) of this section, proceeds to second-level screening and consideration. In order to complete this screening and consideration, the authorized officer may request such additional information as necessary to obtain a full description of the proposed use and its effects. An authorized officer shall reject any proposal, including a proposal for commercial group uses, if, upon further consideration, the officer determines that: (i) The proposed use would be inconsistent or incompatible with the purposes for which the lands are managed, or with other uses; or (ii) The proposed use would not be in the public interest; or (iii) The proponent is not qualified; or (iv) The proponent does not or cannot demonstrate technical or economic feasibility of the proposed use or the financial or technical capability to undertake the use and to fully comply with the terms and conditions of the authorization; or (v) There is no person or entity authorized to sign a special use authorization and/or there is no person or entity willing to accept responsibility for adherence to the terms and conditions of the authorization. *36 CFR §251.54(e)(5)(iv)*

Bureau of Land Management

Pre-application activities are an essential part of the BLM right-of-way application and NEPA process for utility-scale renewable energy projects. It is important that offices incorporate pre-application activities in their NEPA documents and discuss this information in scoping meetings and other public meetings that are part of the NEPA process. *BLM IM 2011-059*

(a) Before filing an application with BLM, we encourage you to make an appointment for a pre-application meeting with the appropriate personnel in the

BLM field office having jurisdiction over the lands you seek to use. During the pre-application meeting, BLM can:

(1) Identify potential routing and other constraints;

(2) Determine whether or not the lands are located within a designated or existing right-of-way corridor;

(3) Tentatively schedule the processing of your proposed application; and

(4) Inform you of your financial obligations, such as processing and monitoring costs and rents.

(b) Subject to § 2804.13 of this subpart, BLM may share any information you provide under paragraph (a) of this section with Federal, state, Tribal, and local government agencies to ensure that:

(1) These agencies are aware of any authorizations you may need from them; and

(2) We initiate effective coordinated planning as soon as possible. *(43 CFR §2804.10)*

BLM will keep confidential any information in your application that you mark as "confidential" or "proprietary" to the extent allowed by law. *(43 CFR §2804.13)*

(b) BLM may require you to submit additional information necessary to process the application. This information may include a detailed construction, operation, rehabilitation, and environmental protection plan, i.e., a "Plan of Development," and any needed cultural resource surveys or inventories for threatened or endangered species. If BLM needs more information, we will identify this information in a written deficiency notice asking you to provide the additional information within a specified period of time. BLM will notify you of any other grant applications which involve all or part of the lands for which you applied. *(43 CFR §2804.25)*

RECOMMENDATIONS TO PROPONENTS BY ENVIRONMENTAL PLANNING STRATEGIES, INC. AND PATHWAY CONSULTING SERVICE, LLC, TO INCREASE AGENCY EFFICIENCY AND CONTRIBUTE TO POSITIVE RELATIONSHIPS WITH THE LEAD AND PARTICIPATING AGENCIES (Workshop manual "Integrated Planning and Review: Implementing Presidential Direction in EO 13604©;" Lee, J.L. and R. Cunningham).

- Set clear project need and objectives that may help the agency draft its need analysis and identify reasonable alternatives to the proposed action. This should include a summary of the analysis of load that cannot be served, reliability, congestion, and/or generation additions/transmission requirements. For linear features, consider connected actions including: 1) connecting logical termini; 2) having independent utility or independent significance - be usable and be a reasonable expenditure even if no additional transmission improvements in the area are made.

- Seek guidance and assistance from the lead agency during the pre-application process.
- Based on the need for action, make a preliminary determination of the decisions that Federal and state regulatory, land authorization, consultations, permits, entities must make. Consider questions associated with "connected actions" such as transmission lines crossing multiple jurisdictions that need to tie together rationally between the logical termini from generation to load.
- Clearly identify the proposed action in detail and the absolute minimum actions/locations needed for feasibility.
- Identify issues (cause-and-effect relationships) and potential "fatal flaws" with the proposed action and modify it appropriately.
- Collect field and other data as identified as needed by lead and participating agencies as identified by the cause-and-effect relationships and legal compliance requirements.
- Identify feasible alternatives that would meet project objectives while addressing the issues differently.
- Identify and integrate mitigation into alternatives and the proposed action based on the cause-and-effect relationships.
- Meet in a collaborative manner with the lead, regulatory, and participating Federal and state agencies to further identify and refine issues, potential "fatal flaws," alternatives, and mitigation during the pre-application process.
- Negotiate with the lead agency regarding cost recovery essentials, schedules, roles and responsibilities, conflict resolution procedures, and coordination related to permitting, consultations, and environmental review.
- Assist with public outreach compatible and partnered with the lead agency requirements.
- Work with private landowners who might be affected by siting the project.
- Assist by providing information and conducting analyses in an objective and transparent manner needed by the lead and regulatory agencies during the pre-application and application processes.
- Provide pertinent documents for the lead agency planning record during the progress of the analysis.
- Provide comments to draft documents and assist in responding appropriately to public and agency comments if requested by the lead agency, particularly regarding feasibility and cost-effectiveness of alternatives and mitigation.
- Coordinate with county and local governments.

We recommend that a project proponent prepare themselves on the following topics before engaging a Federal agency:

A. Understand the organizational landscape

- Know the organizational culture, key agency leaders, the wiring diagram of authority, and any relevant history of the staff you will be dealing with.
- Know the responsible official and their supervisor.
- Understand the fundamentals of the agency mission, the status of existing land use plans, developing initiatives, and relationship of the agency with local, state, regional, and national interests.

- Read and understand the applicable land use plan in detail.
- Fully understand applicable law, regulation, and written agency direction regarding use of Federal land.
- Identify roles, jurisdictions, authorities, and geographic reach of Federal, state, and local agencies (such as DOE, DOI, FERC, DOC, DOD, DOT, and FAA), and tribes concerning the scope of decisions to be made by agencies under authorities of ESA, NHPA, NEPA, 404 permits, and others regarding the actions of the proponent as practiced and as actually needed.
- Identify the current status of the project with respect to siting, compliance, review, and consultation processes of multiple parties.
- Understand in detail any and all land use authorizations in effect or desired.
- Identify all the Federal and state (and local if possible) government compliance, reviews, and consultations requirements, processes, and minimum legal timelines and opportunities for concurrent and integrated completion schedules and opportunities for concurrent integrated compliance and data collections.
- Understand ongoing or resolved litigation involving the land management agency.
- Understand the relationship of the Federal agency offices with state, county, and Tribal governments and regulatory authorities. Are there any signs of conflict or less than ideal working relationships.
- Understand the interaction of the agency offices with regulatory authorities such as EPA, FWS, other land management agencies, FAA, DOD, DOE, DOI, NCHP, FERC, and DOC. As with other governmental units, the relationships should be strong and positive.

B. Understand the physical, biological, social, and economic environment

- Identify the role and location of private land ownership and ownership dynamics.
- Search news articles and editorials for evidence of public engagement, developing issues, and accomplishments of the agency.
- Ensure that your geographical and summary data systems are compatible with those used by the Federal agency. Considerable time and resources can be squandered in meshing data systems or arguing over the precision or reliability of project data and information.
- Understand the land you are proposing to use. Is it actually Federal property? You would think a published map would be correct. It may not be.
- Know if there are any conservation easements in your proposed right-of-way. The NRCS does not maintain a land status atlas of USDA conferred easements—several million acres nationwide. A recent pipeline project endured a multimillion-dollar work around over a conservation easement that did not allow any new construction of utilities. A title record search found the problem during construction of the project. Plan a title records search early enough to make a difference – before redirecting bulldozer traffic.
- Know the baseline condition of the environment—all elements. This information is vital to designing the project and describing the no-action alternative and the "hard look" necessary in the agency's environmental review. The physical and biological as well as social and economic status of the area is critical. Fire history and management may prove to be a tipping point for project design and operation.
- Know who is using the land and for what purposes under what authorities. An existing land use may preclude utility construction or operation.

- Know the status of existing and proposed conservation and other classifications such as wilderness, Roadless areas, critical habitat, military training, scientific studies, and pending land uses.
- Understand the cultural heritage of the area from multiple perspectives of Tribal interests, long-term residences, and other interested parties.
- Understand the expectations of recent residents or people who use the area for recreation and the expectations of those who an interest.
- Understand the project area's relationship to national security and ongoing law enforcement efforts.
- Understand the mineral development history of the area and other likely uses of the landscape within or near the proposed right-of-way.
- Understand the dynamics of natural hazards from floods, avalanche, rockslides, and seismic activity, and so forth to ensure your information is compatible with that of the agency you are dealing with.
- Identify sensitive and problematic geographical areas and issues (cause and effect relationships) to focus data collection and analyses.

C. Prepare to engage the Federal agency

- Identify challenges already encountered, dig for underlying causes of the challenges and identify potential solutions and opportunities.
- Identify public involvement opportunities and approaches, including integrated processes, and existing and potential resistances and controversies.
- Identify expertise needed and where the expertise may be found, within all levels of each agency.
- Prepare to discuss existing and proposed alternative route and mitigation processes and opportunities.
- Identify contracting needs within inherently governmental responsibilities and FACA.
- Identify the means to efficiently use NEPA and state SEPA laws as an integrating mechanism for regulatory compliance, consultations, review, and public engagement.