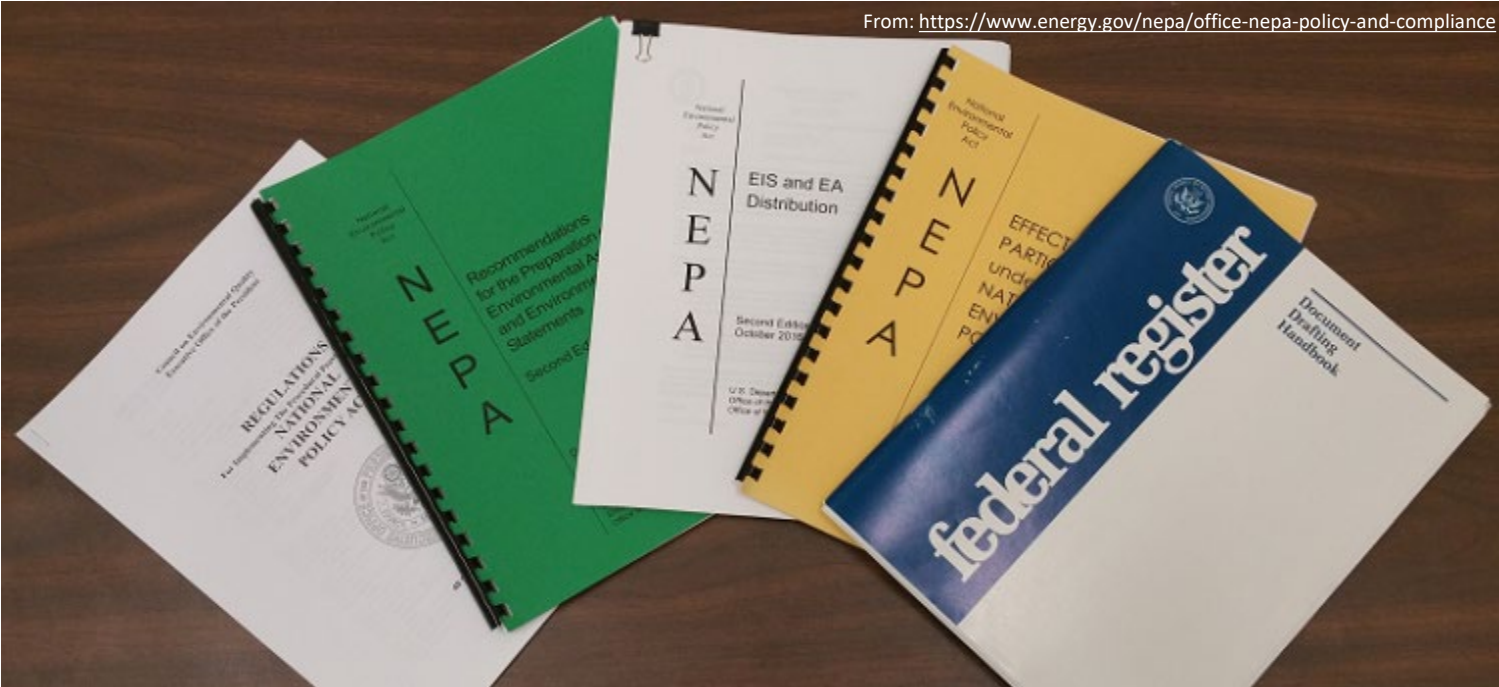




NEPA Streamlining under Executive Order 15807

2019 California AEP Conference

March 24th



1 Background on NEPA Streamlining

Tania Treis
Principal
Panorama Environmental, Inc.



Presentation Overview

- Background
 - Why NEPA in 1970?
 - What is NEPA
 - NEPA implementation in it's early years vs. later years
- NEPA Streamlining
 - EO 13807
 - One Federal Decision for Major Infrastructure
 - Secretarial Order 3355
 - Department of Interior's Guidance



Environmental Law in the 20th Century

Before 1945

- A few federal laws
- Some rules at the local level
- Conservation movement and formation of the USFS (1905)

1962–1970

- Silent Spring by Rachel Carson
- Growth in popularity of outdoor recreation
- High profile environmental disasters (Santa Barbara oil spill)
- Vietnam war use of Agent Orange
- 1965 *Scenic Hudson v Federal Power Commission*



By Federal Government of the United States - http://www.dtra.mil/press_resources/photo_library/CS/CS-3.cfm, Public Domain, <https://commons.wikimedia.org/w/index.php?curid=1353706>

- Automobiles creating smog
- Concerns over health effects of radiation from nuclear testing

1945–1962

- President Nixon signs the **National Environmental Policy Act** Jan 1, 1970
- Widespread support
- Formation of Council on Environmental Quality (CEQ)
- EPA formed
- Clean Air Act
- Clean Water Act (1972)
- Endangered Species Act (1972)

1970

What is NEPA

NEPA requires federal agencies to assess the environmental effects of their proposed actions prior to making decisions

“NEPA’s purpose is not to generate paperwork – even excellent paperwork – but to foster excellent action”

40 CFR Sec. 1500.1 Purpose

When NEPA Applies



When NEPA applies:

- Federal activity needing approval
- Non-federal activity funded, permitted, authorized or approved by federal agency



Who prepares NEPA document:

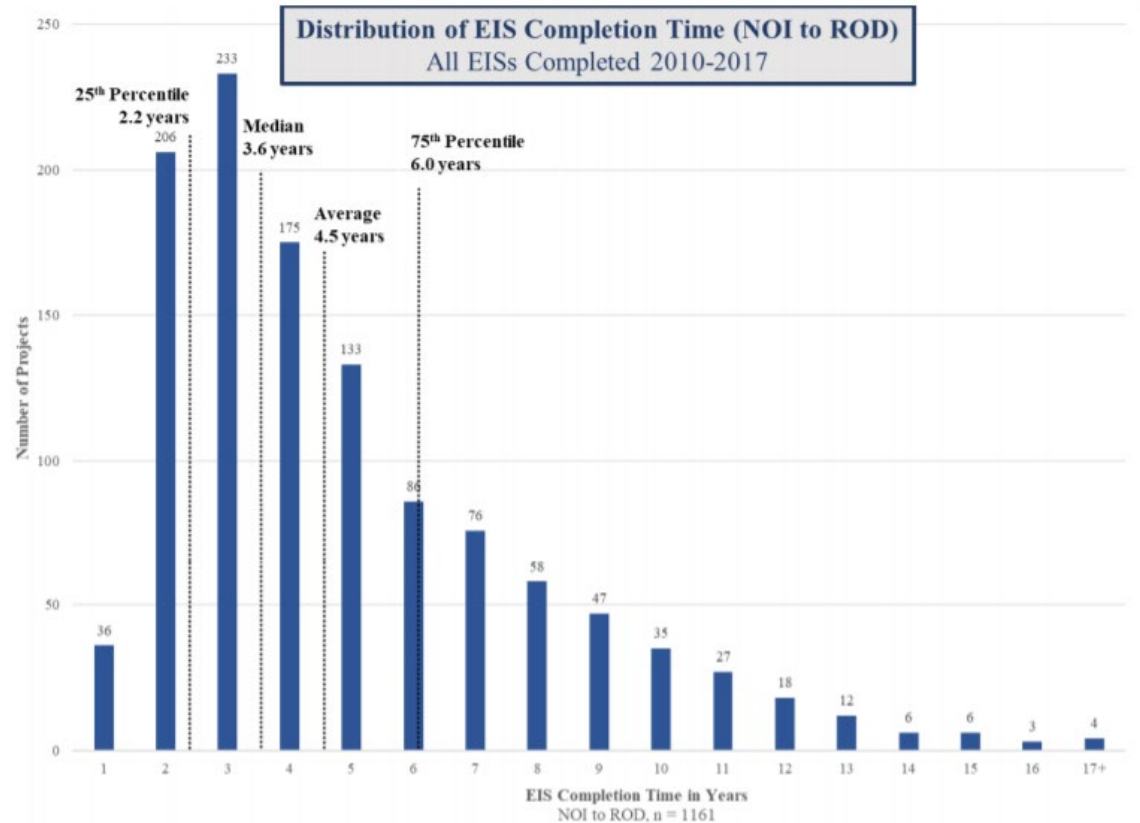
- Federal agency has ultimate responsibility
- Writing the document often delegated to an applicant or consultant on behalf of the federal agency

Length of EISs

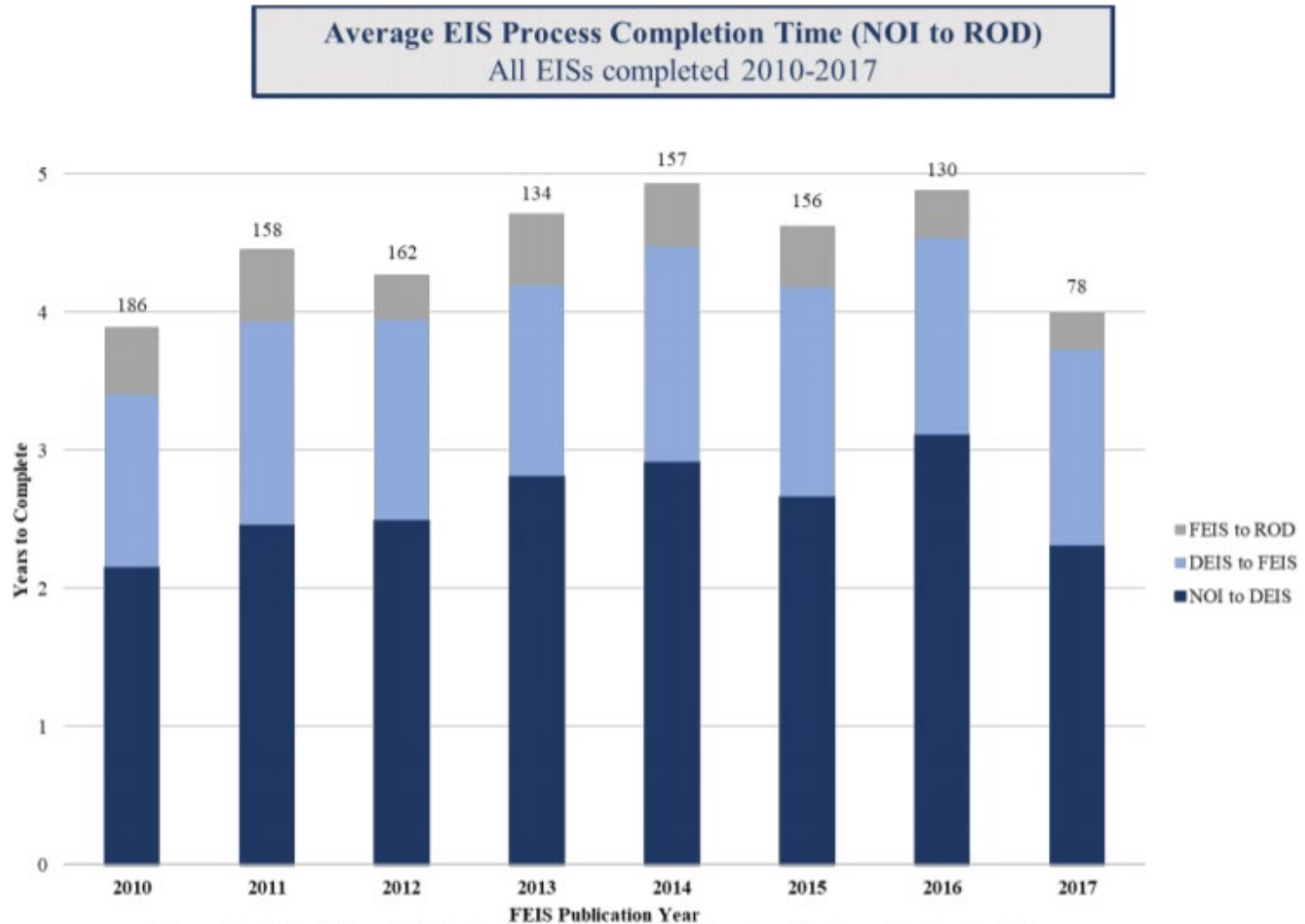
- Over time become longer and more dense
- EPA reviewed length of 270 EISs in 1996
 - Average EIS was 204 pages
 - National Supercollider Superconductor Project was 8,000 pages
 - Shortest was 12 pages
- Length in 2017 – couldn't find any data, but assume much longer
- Why have EISs become so long?
 - Agency solicitor comments
 - Greater availability of information and data in general

Time to Complete an EIS

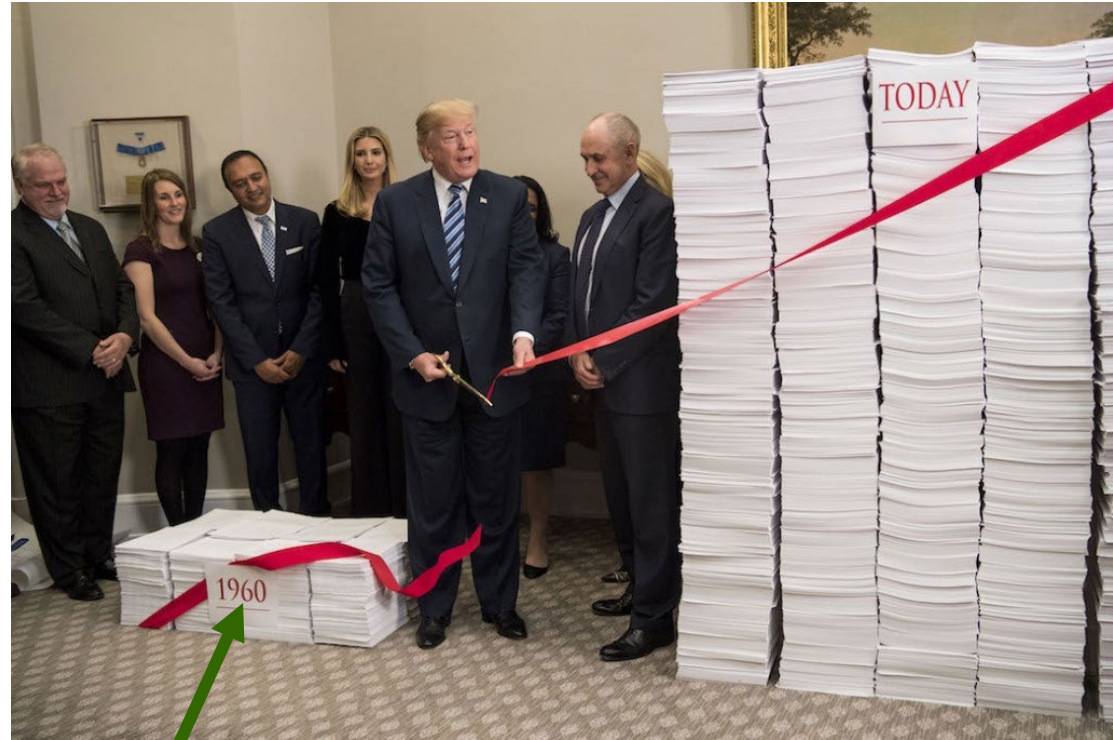
Agency	EISs (2011 – 2017)	Time NOI to ROD (yrs)
US Forest Service	276	3.35
Bureau of Land Management	128	4.41
US Army Corps of Engineers	89	6.13
National Parks Service	77	6.72
National Oceanic and Atmospheric Administration	54	3.59
US Fish and Wildlife	40	4.64
Bureau of Reclamation	34	5.42



Time to Complete an EIS



NEPA Streamlining



I think you
meant
1970...

EO 13807


- Signed by Trump on August 15, 2017
- **Goal:** Environmental review in 2 years for major infrastructure projects
- **One Federal Decision**
 - MOU in April 2018 with 12 fed agencies
 - A single federal lead agency throughout the process and include all approving agency NEPA decisions in one ROD
 - 90 days after ROD for all decisions
- **Predictable schedule**
- **Shorter review times**



FAST-41 and EO 13807

- Builds on **FAST Act of 2015, Title 41** – that established Federal Permitting Improvement Steering Committee (FPISC)
 - Projects proponents can request to be covered under FAST-41
 - Agencies must agree on a permitting timetable with FPICS
 - Dashboard – timetable publicly available on the dashboard
 - Lead agencies must develop a Coordinated Project Plan at the start of a project. FAST-41 provides a formal process for lead and cooperating agencies to coordinate on a quarterly basis to update the project plan

Department of
Interior
responded
quickly with
Secretarial Order
3355



- August 31, 2017
- Applies to all Interior Departments (BIA, BLM, BOR, USFWS, NPS, USGS, BOEM)
- Followed up with a series of memorandums on implementation SO 3355

The Skinny:

- Applies to all projects
- 1 year from NOI to ROD
- 150/300 page limit with waiver only from Deputy Secretary of the Interior

Department of the Interior's Response – SO 3355

Guides for Implementing DOI SO 3355

Date	Memo Summary
April 27, 2018	Waiver template for page limits; NEPA database and handbook guidance
June 11, 2018	Standardized intra-department procedures replacing MOUs between cooperating agencies If FAST-41, go with those timeline requirements
June 27, 2018	Permanent IM; established a new review and approval process for all EISs and their Federal Register Notices; Lays out Briefing Process
August 6, 2018	Direction under SO 3355 for EAs (10-15 pages and 3 months but no more than 75 pages and 6 months)
August 9, 2018	Environmental Review Memorandum (ERM): guidance for determining FAST-41 applicability for a project under EO 13807

The background of the slide features several thin, curved lines in shades of gray and green, creating a sense of motion and depth. A dark green rectangular box with a white border is positioned on the left side, containing the title text.

Other Federal Agencies

- No changes akin to SO 3355 for other federal agencies committed to EO13807:
 - Agriculture
 - Commerce
 - Housing and Urban Development
 - Transportation
 - Energy
 - Homeland Security
 - Environmental Protection Agency
 - Army Corps of Engineers
 - Federal Energy Regulatory Commission (“FERC”)
 - Advisory Council on Historic Preservation

The Future Under EO 13807



CEQ will implement an action plan to improve environmental reviews Government-wide



OMB, in consultation with FPISC, will develop a Government-wide modernization goal



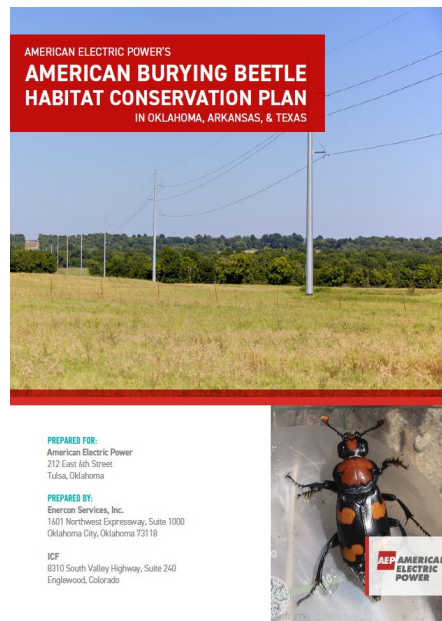
Agencies will improve their environmental review and authorization processes, and be accountable for showing improvement



OMB, in consultation with FPISC, will establish a performance accountability system and score each agency with budgetary penalties



QUESTION?



2 Case Studies in NEPA Streamlining

Sally Zeff AICP
Principal
ICF

Let's Streamline!

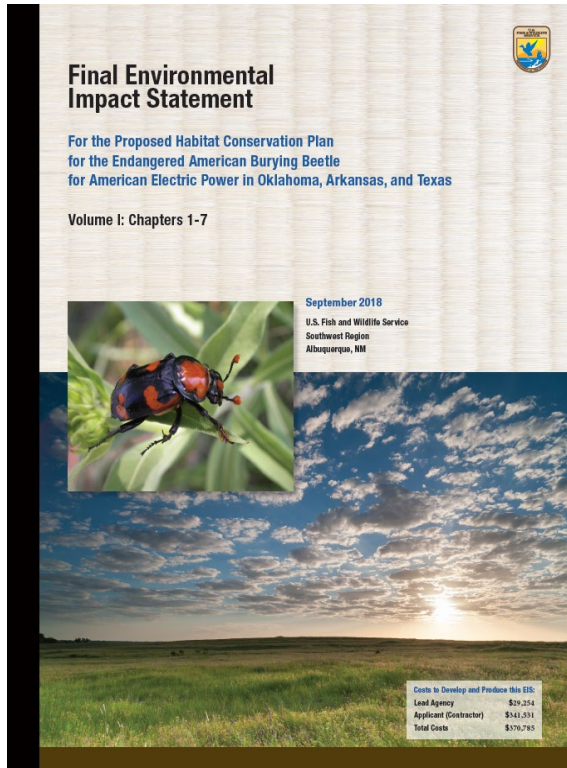


American Electric Power HCP EIS

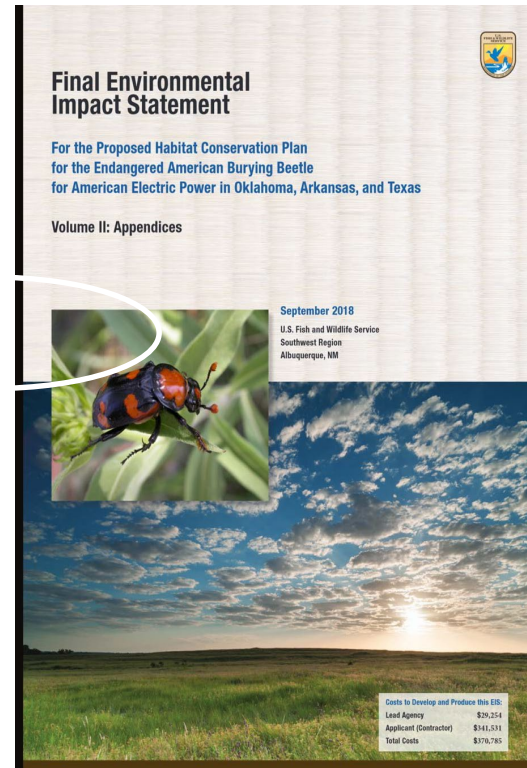
- **Developing a new EIS approach**

- American Electric Power is one of the largest utilities in the U.S., generating and delivering power in over a dozen states
- The goal of the project is to streamline company operations and mitigate their impacts on the endangered American Burying Beetle across 62 counties in Oklahoma, Arkansas, and Texas over the next 30 years
- ICF prepared the HCP and the EIS
- *The draft EIS was U.S. Fish & Wildlife Service's first 150-page EIS per DOI SO 3355 and related guidance*

American Electric Power HCP EIS



149 pages cover to cover!



Appendices: 153 pages

American Electric Power HCP EIS

- How did we do that?
- To meet the **tight deadlines, page limits**, and NEPA information requirements, we use creative strategies for both
 - Working with the agencies
 - Document presentation
- Pros: A tighter, more readable document
- Drawbacks: Not how it is usually done; not a belt & suspenders approach lawyers often prefer; more work up front

American Electric Power HCP EIS

- **A collaborative approach**

- Collaborative working sessions *early in the process* with Service to storyboard the document
 - What is the narrative?
 - What does the EIS really need to address?
 - Walk through what it is important that the document cover
 - Do this after project is defined but before text is written
- Working meetings to discuss review comments and make real-time decisions

American Electric Power HCP EIS

- **Key document approaches**

- Streamlined approach to presentation of alternatives analysis (eliminated redundancy)
- Eliminated resource areas from further detailed study where there was no impact (e.g., geology)
- Removed text unnecessary for agency decision-making (i.e., lengthy description of regulations and statutes)

Example: EAs Documents in Final Review

- EAs must meet even more stringent requirements
 - 75 pages (max. – 15-30 pages encouraged)
 - 6 months
 - Some guidance says is that this does not include appendices
- General approach: Focus only on key issues; incorporate by reference from other documents
- Pros: A very short and to-the-point document
- Drawbacks: Works best if other approved & publicly available documents really cover the effects of the project; most applicable to projects in states such as California with a state environmental assessment requirement

Example: HCP EA for Large Development Project

- **Project**

- EA for HCP for a large development
 - Project was large in scale
 - An EIR had been completed for the entire project



Example: HCP EA for Large Development Project

- **Approaches**

- Incorporated by reference from the project EIR
 - Affected Environment
 - Regulatory Background
 - Impacts other than impacts on non-covered species
 - Mitigation measures that reduced other impact and impacts on non-covered species
- Focused on effects on biological resources
- Used document design & formatting ICF editors developed for USFWS that reduced white space but made pages more readable
- Eliminated repetition and cross referencing

- **Result: Draft EA is 30 pages** – *still under final review*



Example: HCP EA for Large Development Project

- Project was large in scale
- Several previously adopted CEQA documents applied
 - Project level IS/MND for CDFW permitting for a portion of the project
 - Oil and Gas Permitting/Zoning EIR – Kern County



Kern County
Oil and Gas Permitting Handbook



AA 1,100



Example: EA for HCP for Oil and Gas Operation

- Reduced scope of EA to affected topics
- Incorporated by reference from CEQA documents
 - Regulatory background
 - Existing Conditions
 - Required CEQA Mitigation Measures that reduced impacts



Example: EA for HCP for Oil and Gas Operation

- Focused on effects on biological resources
- Used formatting ICF editors developed for USFWS that reduced white space but made pages more readable
- Eliminated repetition and cross referencing
- **Result: Draft EA is under 30 pages** – *still under final review*





3 Strategies for Energy Projects on Federal Land

Tania Treis
Principal
Panorama Environmental, Inc.



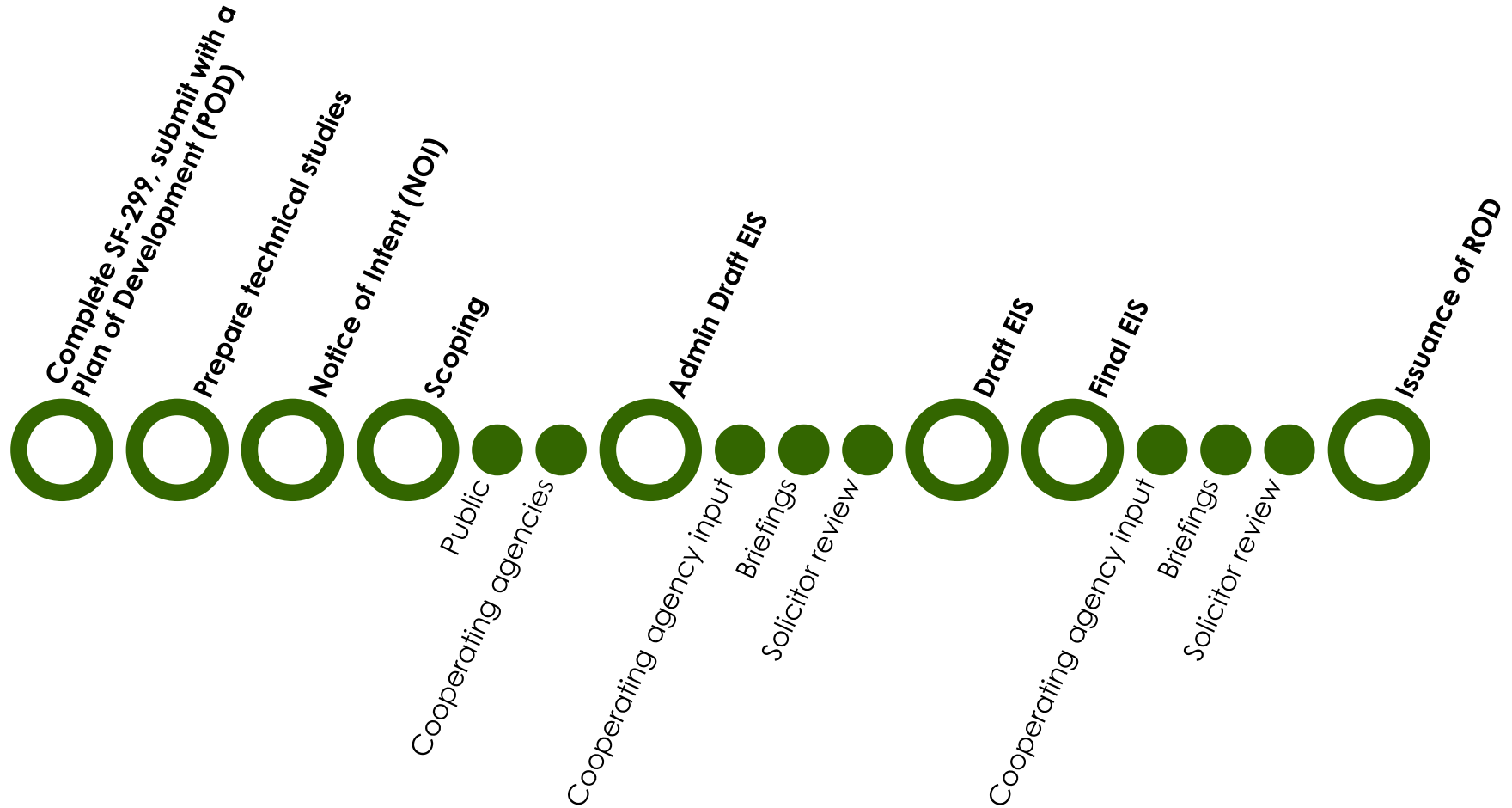
PANORAMA

What About Energy Projects on BLM Land?

- Tend to be more controversial with public
- Need to address many topics and issues
- Traditionally taken many years with many technical analyses
 - Solar PEIS for 6 Southwestern States
 - NOI May 2008
 - ROD October 2012
 - TranswestExpress EIS
 - NOI Jan 2011
 - ROD December 2016



What is Needed for Energy Project Applications?





DOI Requirement

**1 year and 150
pages**

Challenges on Early Projects (My Experience)

Continuous edits to the Plan of Development to refine the Project

- Constant learning and refining as technical studies complete – ripples through all documentation

Technical studies to incorporate by reference

- Cover topics that normally are covered in EIS (e.g. socioeconomic study)

Defining alternatives

ADEIS comments, particularly from cooperating agencies

- E.g., Army Corps not part of DOI, not subject to 150 pages
- Not enough time!
- Is subject to One Federal Decision – Add. Add. Add
- Solicitor comments – Add. Add. Add.

Government shutdown for 5 weeks!!!

How To Address Challenges – Technical Issues



Understand all Project issues *before* NOI release

- Prepare technical studies before NOI release
 - Consider biology and survey timeframes
 - Cultural resources
 - Land uses
- Start BLM review of technical studies before NOI release



Engage cooperating agencies

- Needs to be initiated immediately after NOI release
- Demand input early (particularly NPS)
- Separate teams dealing with each issue in parallel

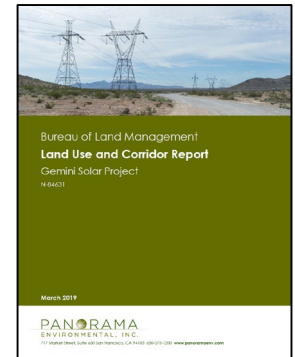
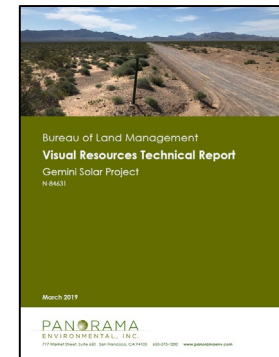
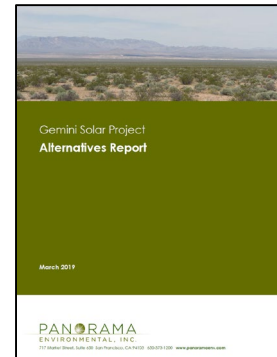


Push for early alternative definition

- Alternatives Report to define considered and rejected alternatives
- Like POD, case of continuous revision

How to Address Challenges – Documentation

- Develop formats, style guides, consistency guides for technical studies and EIS
- EIS
 - Can't have small fonts
 - Incorporate by reference...everywhere
 - Appendices
 - 124 pages of figures on 150 page EIS
 - Regulatory setting
- Tracking system for reviews
 - Google doc shared with BLM



Outcome

Gemini Solar Project

- Reviews
 - Short turnaround on edits from BLM, solicitor, cooperating agencies (1 day in some cases)
 - Long days and all hands
 - Timeframes don't seem to add up
- BLM solving problems more quickly – must keep moving
 - Addressed desert tortoise early
- Concise, easy-to-read document, BUT...
 - Does NOT create less documentation
 - Decisions on critical issues somewhat rushed
 - Legal challenges – we'll see!





QUESTION?



San Luis Reservoir
Bureau of Reclamation

4 A California Agency Perspective

Michael Coleman, AICP
Environmental Planner
Santa Clara Valley Water District

Valley Water District and Bureau of Reclamation

- Santa Clara Valley Water District, now known as “Valley Water” , A California Special District works closely with the Bureau of Reclamation that provides Central Valley Project (CVP) water to Valley Water.
- San Felipe Division of the CVP covers Santa Clara County, the northern portion of San Benito County and portions of Santa Cruz and Monterey Counties.
- Water from San Luis Reservoir is transported to the Santa Clara-San Benito service area through Pacheco Tunnel and other project features which include 48.5 miles of closed conduits, two pumping plants and one small reservoir.



Central Valley Project System in San Felipe

Water is conveyed from the Delta of the San Joaquin and Sacramento Rivers through the Delta-Mendota Canal to O'Neill Forebay.

Water lifted to the Pacheco Tunnel and flows without additional pumping through the Pacheco Conduit to the bifurcation of the Santa Clara and Hollister Conduits. The water is then conveyed throughout the service areas for irrigation and municipal uses.

The water is then pumped into San Luis Reservoir and diverted through the 1.8 miles of Pacheco Tunnel Reach 1 to the Pacheco Pumping Plant.

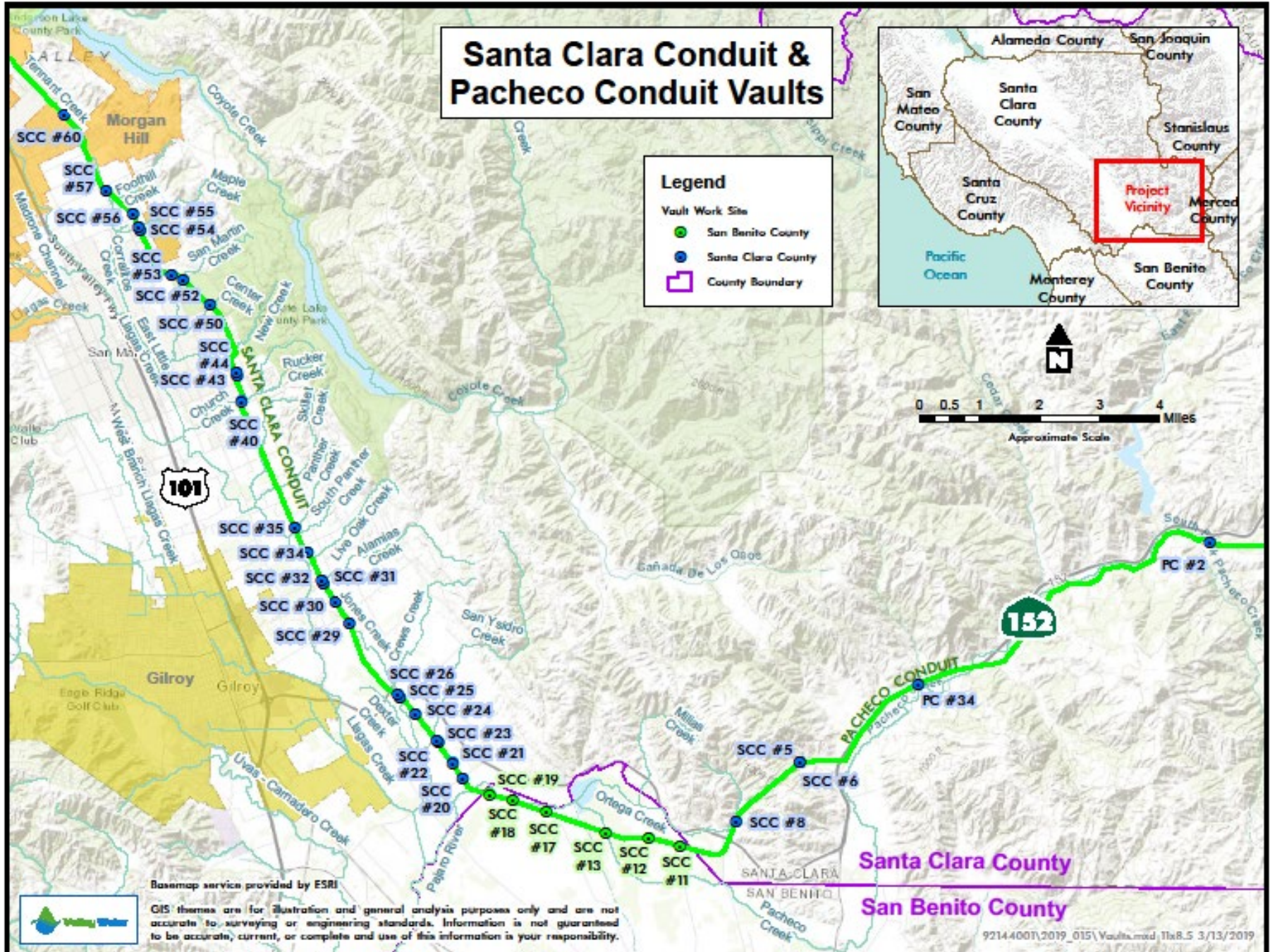


Santa Clara Conduit & Pacheco Conduit Vaults

Legend

Vault Work Site

- San Benito County
- Santa Clara County
- County Boundary



Basemap service provided by ESRI

GIS themes are for illustration and general analysis purposes only and are not accurate to surveying or engineering standards. Information is not guaranteed to be accurate, current, or complete and use of this information is your responsibility.

Santa Clara County

San Benito County

92144001\2019_015\Vaults.mxd 11x8.5 3/13/2019

Joint Documents? +/-

- NEPA and CEQA are similar, both in intent and in the review process (the analyses, public engagement, and document preparation) that they dictate. Importantly, both statutes encourage a joint Federal and state review where a project requires both Federal and state approvals.¹
- While, a joint review process can avoid redundancy, improve efficiency and interagency cooperation, and be easier for applicants and citizens to navigate, there are several differences that require careful coordination between the Federal and state agencies.
- Conflict arising from these differences can create unnecessary delay, confusion, and legal vulnerability.

¹ State of California, OPR, February 2014. NEPA and CEQA: Integrating Federal and State Environmental Reviews

Valley Water Current and Past Strategy on Joint Documents

My Opinion - what it means for California state and local agencies that work on Joint Documents given my experience with Bureau of Reclamation

- Valley Water has predominantly performed separate CEQA and NEPA documents based on concern for time delays and cost control.
- Current strategy to keep consistency and avoid conflicting mitigation/analysis is to complete the CEQA document first and port over to BOR to maintain consistency as NEPA document is completed.

NEPA and Secretary Order 3355 Good Points and Bad

Page

- Page limits on EIS (150 or 300 pages) and EA (15 pages and by exception 75 pages)are good not counting appendix. Problem is fitting in all the analysis.

Time

- Time limits of EIS (365 days)and EA (3 months)can be good but complex projects can be difficult to fit in this time frame
- Time waivers and Page waivers are not easily obtainable –BOR.


Joint CEQA/NEPA Documents

Good Points and Bad

New NEPA Restrictions on page and time limits pose added high bars



Given the ever increasing complexity of CEQA and NEPA, most environmental documents at Valley Water I estimate will remain as separate CEQA and separate NEPA documents



Special circumstances not ruled out. However MOU's between District and feds a must to spell out responsibilities



Bears Ears Monument, By U.S. Bureau of Land Management, via Wikimedia Commons

5 Legal Perspectives and Implications for CEQA

Strategies for Legal Defensibility

Core principles for a legally adequate EIS support brevity and conciseness:

- Environmental impacts must be discussed in an EIS in proportion to their significance
- An EIS must be analytic, not encyclopedic. An EIS “shall be kept concise”
 - Discussion of impacts and alternatives “need not be exhaustive”
 - Not required to speculate about all conceivable impacts
- Less important material can be summarized, consolidated, or simply referenced

Strategies for Legal Defensibility

Be conscious of NEPA standards:

- Does the EIS foster informed decision making and informed public participation?
- Is the agency considering the relevant factors? Does the EIS/ROD articulate a rational connection between the facts found and the choice made?
- Does the record show that the agency is exercising its judgment within the bounds of reasoned decision making?

Strategies for Legal Defensibility

- Include all relevant information in the record, if not in the EIS
 - Judicial review usually limited to the record before the decisionmaker at the time of the decision
- Address issues raised in comments to mitigate potential judicial claims
- Adequacy of an EIS is only one potential claim under NEPA
 - Make your project more defensible by eliminating other easy targets under NEPA



Escape Hatches

E.O. 13807 §5(b)

Project sponsor can request agencies issue separate NEPA documents

Lead agency can determine single ROD does not best promote completion of environmental review

Cooperating agencies can evaluate whether the FEIS “includes an adequate level of detail to inform agency decisions pursuant to their specific statutory authority and requirements”

DOI Order No. 3355

Assistant Secretary may be willing to waive page and timing limits for projects DOI favors

Implications for Joint NEPA/CEQA Review

- Bifurcate EIS/EIR to better defend EIR

Differing legal standards of review

- CEQA: was there a prejudicial abuse of discretion? I.e. did the agency proceed in a manner required by law or are the agency's findings supported by substantial evidence in the record?
- NEPA: was the agency's action arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law?

Substantive requirements under CEQA require more discussion in the EIR

- e.g. must show how the agency mitigates a potential impact to less than significant
- More requests for exemption from the page limit to prepare joint EIS/EIR?



QUESTION?

Useful Case Law and References

- Did the EIS “accomplish[] its purpose of fostering informed decision making and informed public participation”? *Animal Lovers Volunteer Ass'n, Inc. v. Cheney*, 795 F.Supp. 991, 993 (C.D. Cal. 1992)
- Did the agency “consider[] the relevant factors and articulate a rational connection between the facts found and the choice made”? *Alaska Wilderness Recreation & Tourism v. Morrison*, 67 F.3d 723 (9th Cir. 1995)
- Did the agency exercise its judgment within the bounds of reasoned decision making”? *Baltimore Gas and Elec. Co. v. Natural Resources Defense Council*, 462 U.S. 87, 105 (1983)
- See 15 C.F.R. 1502.2 (b): “Impacts shall be discussed in proportion to their significance. There shall be only brief discussion of other significant issues. As in a finding of no significant impact, there should be only enough discussion to show why more study is not warranted.”
- Not required to discuss remote and highly speculative consequences of a proposed action. *Concerned About Trident v. Rumsfeld*, 555 F.2d 817, 828 (D.C.Cir. 1977)
- See 15 C.F.R. 1502.2 (c): “Environmental impact statements shall be kept concise and shall be no longer than absolutely necessary to comply with NEPA and with these regulations. Length should vary first with potential environmental problems and then with project size.”
- See 15 C.F.R. 1502.2 (a): “Environmental impact statements shall be analytic rather than encyclopedic” *Minn. PIRG v. Butz*, 541 F.2d 1292, 1300 (8th Cir. 1976) “the discussion of environmental effects and alternative courses of action need not be exhaustive.”
- See 15 C.F.R. 1502.15: “The environmental impact statement shall **succinctly describe** the environment of the area(s) to be affected or created by the alternatives under consideration. The **descriptions shall be no longer than is necessary to understand the effects** of the alternatives. Data and analyses in a statement shall be commensurate with the importance of the impact, with less important material summarized, consolidated, or simply referenced. Agencies **shall avoid useless bulk in statements** and shall concentrate effort and attention on important issues. **Verbose descriptions of the affected environment are themselves no measure of the adequacy** of an environmental impact statement.”
- Cal. Code Civ. Proc. § 1094.5 and Cal. Pub. Res. Code § 21168 with 5 U.S.C. § 706(2)(A)