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A Model for Determining the Scope and Level of Detail that is Appropriate for a Programmatic EIS

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A MODEL FOR DETERMINING THE SCOPE AND LEVEL OF DETAIL THAT IS APPROPRIATE FOR A PROGRAMMATIC ENVIRONMENTAL IMPACT STATEMENT

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ABSTRACT: Since the inception of the *National Environmental Policy Act* (NEPA), no definitive guidance has been established for determining the scope of topics and issues, or the level of detail suitable for presentation within a Programmatic Environmental Impact Statement (P-EIS). Lacking such guidance, an inordinate amount of time and resources can be expended in determining the scope that is most appropriately addressed within a P-EIS versus the more detailed scope that is best reserved for lower-tier documents. Faced with this predicament, agencies often err on the side of including too much detail, resulting in P-EISs that are over bloated and unnecessarily complex. Moreover, lack of definitive guidance leads to a great deal of inconsistency in the preparation of P-EISs among federal agency programs.

A paradigm for assisting decisionmakers in making such determinations is presented below. This model expedites the preparation of P-EISs by providing a consistent and systematic approach for determining the scope and level of detail that is most appropriately addressed at the programmatic level. In many cases, the model provides agencies with an effective tool for managing and streamlining the NEPA process by de-scoping needless and unnecessary issues from the scope of a P-EIS.

INTRODUCTION TO THE PROBLEM

Neither the *National Environmental Policy Act of 1969* (NEPA) nor its subsequent regulations (Regulations), issued by the Council on Environmental Quality (CEQ), provide definitive guidance for determining the scope or the amount of detail, discussion, and analysis that is appropriately addressed within a Programmatic Environmental Impact Statement (P-EIS).^{1,2} Consequently, an exorbitant amount of time and resources can be consumed attempting to reach a consensus regarding the programmatic scope that is most suitable for coverage in a P-EIS versus the more detailed scope that is best deferred to lower-tier documents. An overview of CEQ's guidance is presented below:

Existing Guidance Provides Little Assistance in Determining Appropriate Scope

The Regulations provide only cursory guidance regarding the scope and preparation of a Programmatic Environmental Impact Statement (P-EIS). With regards to preparation of a P-EIS, the Regulations state:

"Environmental impact statements may be prepared, and are sometimes required, for broad Federal actions such as the adoption of new agency programs or regulations. Agencies shall prepare statements on broad actions so that they are relevant to policy and are timed to coincide with meaningful points in agency planning and decisionmaking."³

Furthermore, the Regulations declare that:

"Agencies are encouraged to tier their environmental impact statements to eliminate repetitive discussions of the same issues and to focus on the actual issues ripe for decision at each level of environmental review. Whenever a broad environmental impact statement has been prepared (such as a program or policy statement) and a subsequent statement or environmental assessment is then prepared on an action included within the entire program or policy (such as a site specific action), the subsequent statement or environmental assessment need only summarize the issues discussed in the broader statement and incorporate discussions from the broader statement by reference and shall concentrate on the issues specific to the subsequent action."⁴

Defining the Specific Nature of the Scoping Problem

Experience indicates that no two decisionmakers are likely to agree completely on the scope that is most appropriate for a P-EIS versus the scope that is best reserved for lower-tier documents. Specifically, this paper addresses the following two questions:

- What is the appropriate scope of a P-EIS? That is to say, how does one determine which topics are most appropriately addressed within a P-EIS versus topics that are most appropriately deferred to lower-tier documents?
- What level of detail should be devoted to the topics and issues addressed in a P-EIS? That is, once a decision has been made to include a particular topic within the scope, a

further decision must be made regarding the level of consideration that should be devoted to the topic.

Lack of Definitive Guidance Can Lead to Increased Risks and Inconsistencies

As explained above, definitive guidance regarding the scope and amount of detail sufficient to provide programmatic coverage does not exist. However, decisionmakers are routinely called upon to make such determinations during the scoping, preparation, and review phases of a P-EIS. Lacking systematic guidance, such determinations tend to be made on a case-by-case basis.

Ultimately, lack of definitive guidance may result in project delays, inconsistencies in the treatment of NEPA documents, and increased risk that a project may be challenged as a result of inappropriate coverage or treatment of a topic. Moreover, experience indicates that P-EISs are often over bloated and unnecessarily complex.

To reduce the risk of a successful challenge, decisionmakers may err on the side of preparing a P-EIS that contains a scope much more detailed than is reasonably necessary to support programmatic decisionmaking. Such tactics, however, may incur their own set of consequences and repercussions. Repercussions, may include significantly increased cost, project delays, and reduced flexibility to implement lower-tier actions. As discussed later, it may be unwise to overly constrain an agency's ability to implement detailed lower-tier aspects of a policy or program. Clearly, a consistent and systematic approach is needed.

TOWARDS A CONSISTENT, SYSTEMATIC AND OBJECTIVE MODEL

In developing a defensible model, one might best begin by asking a simple question: "What is the fundamental purpose for preparing a P-EIS?" In other words, what would a P-EIS provide that a standard Environmental Impact Statement (EIS) does not? Why should one even make a distinction between an EIS and a P-EIS? The answer to these questions provides a starting point for developing a defensible model because no model will work unless it fulfills the underlying purpose of a P-EIS. As viewed in this paper, the underlying reason for preparing a P-EIS is to:

Evaluate programmatic direction and approaches that will support high-level decisions regarding the implementation of broad policies, programs, or activities.

Accordingly, the scope and level of detail provided within a P-EIS is considered appropriate if it satisfies the purpose described above. Conversely, the scope of coverage is considered inappropriate if it is not consistent with this purpose.

A Programmatic Analysis Will Always Reach a Point of Diminishing Returns

A point of diminishing returns will typically occur, beyond which the consideration of additional issues or information will not contribute measurably to high-level decisionmaking. Based on this proposition, the scope of the analysis should be considered adequate if a more extensive discussion would not provide information that substantially improves the ability of an agency to make programmatic decisions.

After all, what purpose is served by providing a more extensive discussion if the information does not improve the decisionmakers' ability to make programmatic decisions? Alternatively, a more detailed scope is not warranted if the information does not improve the decisionmakers' ability to make programmatic decisions. This simple thesis provides the cornerstone for the model which will be presented shortly.

THE BASIS FOR DEVELOPING A MODEL FOR DETERMINING THE SCOPE OF A P-EIS

Figure 1 presents eight criteria (or tests) that have been developed for assisting agencies in determining which topics are most appropriately included within the scope of a P-EIS. These criteria provide the foundation for the model described in Figure 2. The criteria are not ordered in terms of importance.

The criteria are presented in terms of answering the first question that was introduced in the beginning of this paper. For example, the third criterion (Figure 1) can assist an agency in determining the appropriate scope of a P-EIS. Based on this criterion, discussion of a particular topic is warranted if it would substantially improve or affect programmatic decisionmaking. This criterion is not 'triggered', however, if the discussion improves lower-tier decisionmaking but does not substantially contribute to decisions at the programmatic level.

Once a decision has been made to include a particular topic within the scope, the model may assist the agency in addressing the second question presented in this paper. This question pertains to the amount of detail that is most appropriately devoted to a given topic. For instance, the third criterion could be used to make such decisions by simply substituting the

Figure 1. Criteria for Determining the Appropriate Scope and Level of Detail Appropriate for a P-EIS.

- (1) Can the topic be appropriately considered and analyzed at the programmatic level (i.e., 'ripe for decision') or should it be deferred to a later point in time when more information is available and events are better understood?
 - (2) Would discussion/analysis of an alternative reduce flexibility (i.e., 'box the agency into a corner') to adapt or tailor specific lower-tier actions to accommodate a dynamic and often evolving planning process where future events often change or new information becomes available?
 - (3) Would discussion/analysis of the topic substantially improve or effect high-level decisions regarding the program/policy or would it merely provide additional detail? Specifically, would the discussion allow the agency to "concentrate on the [programmatic] issues that are truly significant to the action in question?"
 - (4) Would the discussion/analysis provide a technical basis (e.g., Provide descriptions, analysis, parameters, constraints, or bound the impacts) that would support or facilitate tiering of more detailed documents at a later date?
 - (5) Would the analysis enhance the understanding of the potential environmental impacts from a programmatic perspective?
 - (6) Would the discussion/analysis enhance an outside agency's or the public's understanding or ability to provide comments regarding the programmatic implications of the policy/program?
 - (7) Would the discussion and analysis assist the agency in identifying or developing an alternative approach or course of action that could affect the outcome of the programmatic decision. The discussion should not be included if it merely "fine tunes" the decisionmaking process.
 - (8) Would the discussion/analysis identify programmatic mitigation measures that could be implemented to substantially mitigate or reduce programmatic environmental impacts?
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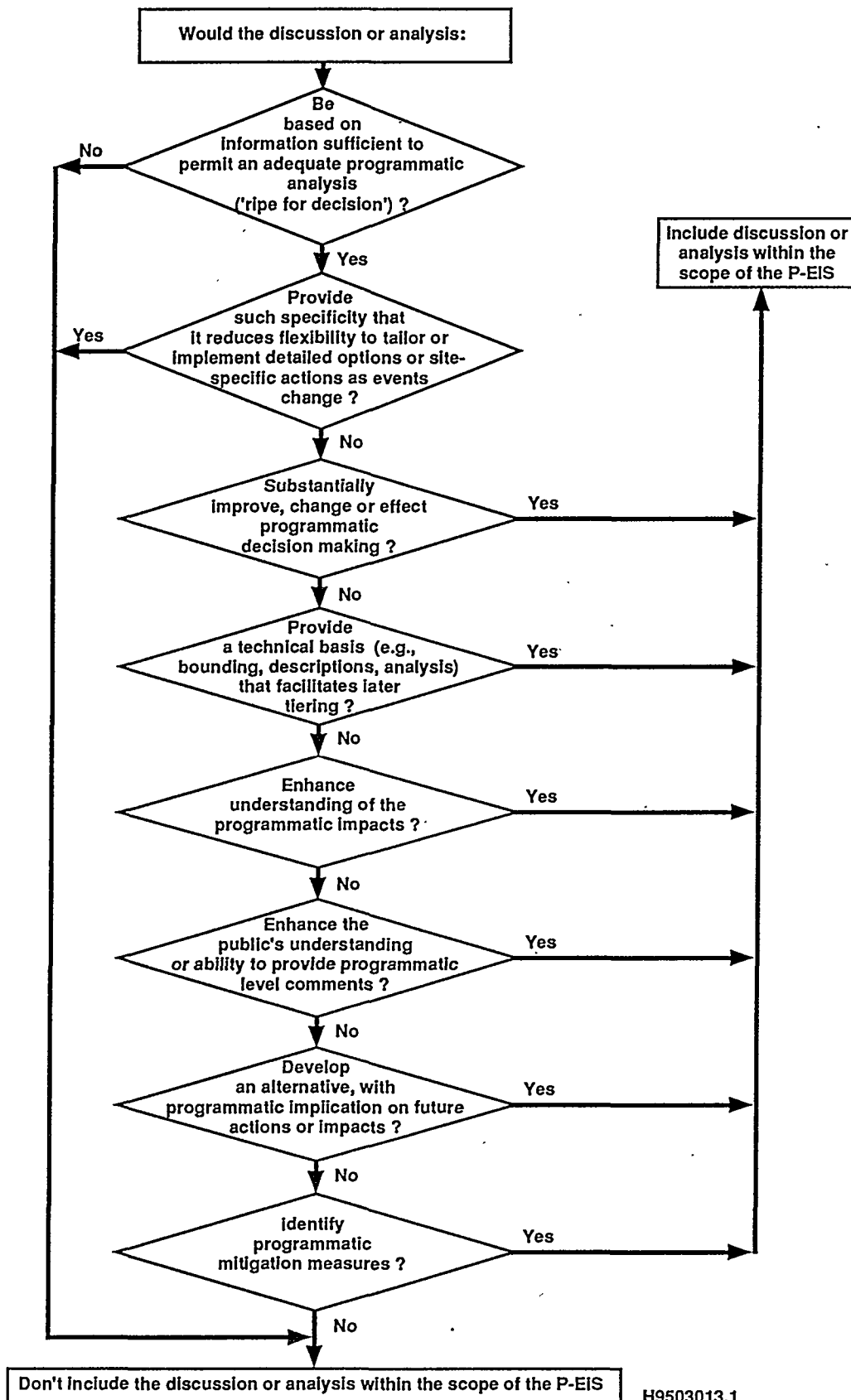


Figure 2. Model for Determining Appropriate Scope and Coverage of a P-EIS

beginning phrase "Would discussion of the..." for the phrase "Would a more detailed discussion of the...". If the answer to this question is "yes," a more detailed discussion/analysis of a particular topic is warranted.

TECHNICAL JUSTIFICATION FOR THE CRITERIA

The technical justification for each of the criteria used in Figure 1 is described below:

Criterion 1: This criterion is based on guidance concerning tiering and deferring topics that are not "ripe for decision." As stated in the Regulations, agencies should use tiering "... to focus on the actual issues ripe for decision at each level of environmental review."⁵ Such guidance is particularly relevant in the case of a P-EIS, since its underlying purpose is to support programmatic decisions that are typically made very early in the decisionmaking process, before detailed site or project-specific information is available. Thus, in the case of a P-EIS, it is particularly important to focus on programmatic decisions and defer issues that are not "ripe" for analysis to lower-tier documents.

Criterion 2: The degree of freedom that may be exercised in implementing lower-tier actions tends to decrease as the discussion of alternatives within a P-EIS becomes increasingly detailed. As the description of the alternatives becomes more detailed, the agency's flexibility to respond to policy or program changes diminishes. Subsequent changes in either policy or the program may result in the need to pursue lower-tier actions that may be inconsistent with highly specific description presented in the P-EIS, thus causing the P-EIS to become antiquated and obsolete.

To avoid this dilemma, discussions should normally be kept sufficiently general to provide agencies with flexibility necessary to tailor lower-tier actions to changing events and circumstances. Consequently, a balance must be struck between providing too much specificity versus not enough. Vague or superficial discussions are unlikely to provide an analysis that is sufficient to support decisionmaking. Conversely, a highly specific analysis may be invalidated as events unfold and additional site- or project-specific information becomes available. Information should be specific enough to support programmatic decisionmaking, yet not so specific that the agency "boxes itself into a corner." Such guidance, tends to minimize obsolescence of the P-EIS as events change.

This criterion is consistent with direction provided in the Regulations. Specifically, this direction states that preparation of a P-EIS should be "timed to coincide with meaningful points in agency planning and decisionmaking."⁶ Discussions of specific issues and topics, conducted so early in the decisionmaking process that it could adversely restrict later decisionmaking, is not consistent with this guidance. Such a discussion is premature because it has not been timed to coincide with a meaningful point in the agency's planning process. For this reason, criteria 2 is an important consideration in determining the appropriate scope.

Criteria 3, 5, and 7: Each of these criteria are based on specific guidance provided in the Regulations. According to the Regulations, the fundamental intent and purpose of NEPA is to foster excellent decisionmaking by taking environmental factors into consideration. Specifically, NEPA "...is intended to help public officials make decisions that are based on an understanding of environmental consequences..."⁷ Furthermore, agencies are required to prepare NEPA documents that "concentrate on issues that are truly significant to the action in question, rather than amassing needless detail."⁸

Based on this guidance, a discussion of a particular issue or topic (or a more detailed discussion) in a P-EIS is warranted if it would allow decisionmakers to focus on programmatic considerations and thus improve their ability to make high-level decisions. Discussions that do not promote decisionmaking at the programmatic level might best be deferred to lower-tier analyses.

Criterion 4: A P-EIS is not generally suited for considering highly detailed or site-specific details of a policy or program. Such details should normally be deferred until such time that specific information is available to support preparation of lower-tier documents. Therefore, tiering takes on particular importance with respect to a P-EIS. For this reason, discussions that support or facilitate future tiering of more detailed actions should be included within the scope of the P-EIS.

Criterion 6: According to the Regulations, an EIS must be issued to "public officials and citizens before decisions are made and before actions are taken." The Regulations also state that "...expert agency comments, and public scrutiny are essential to implementing NEPA."⁹ Agencies are expected to "Encourage and facilitate public involvement in decisions which affect the quality of the human environment."¹⁰ With regards to the draft

EIS, agencies are required to "Request comments from the public, affirmatively soliciting comments from those persons or organizations who may be interested or affected."¹¹ Clearly, NEPA is a public process, and a discussion that allows the public to understand or provide comments regarding the programmatic implications of the policy or program should be included in a P-EIS.

Criterion 8: According to the Regulations, federal agencies are expected to "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."¹² The Regulations go on to state that agencies are to use all practicable means 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."¹³ Consequently, a discussion that identifies and evaluates programmatic methods for mitigating environmental impacts should be included whenever practical.

A MODEL FOR DETERMINING THE SCOPE AND LEVEL OF DETAIL WITHIN A PROGRAMMATIC ENVIRONMENTAL IMPACT STATEMENT

The model shown in Figure 2 is based on the eight criteria established in Figure 1. Each of the tests presented in Figure 2 is a summation of the criteria that are more fully explained in Figure 1.

This model provides a systematic and concise process for assisting decisionmakers in determining the scope of topics, issues, impacts, and alternatives that are most appropriate for a P-EIS. Ultimately, the model provides agencies with a consistent methodology for streamlining the NEPA process by de-scoping needless and unnecessary issues from a P-EIS.

While the model is primarily intended to be used in the scoping process, it can also be employed at various steps throughout the life-cycle of the P-EIS. Once the P-EIS has been prepared, it can be used by reviewers in determining if particular topics or issues are best addressed at the programmatic level. During the comment incorporation process, the model may also assist analysts in determining if a comment is relevant, as well as the amount of discussion that may be necessary. In the event of a challenge, the model might provide a basis for demonstrating that a systematic approach was used in determining the appropriate scope of issues, impacts, and alternatives.

Using the Model to Determine the Appropriate Scope

Application of the model (See Figure 2) begins with a review of a particular issue, impact, alternative, or other topic that is being considered for inclusion within the scope of a P-EIS. This examination is conducted by reviewing the particular topic in terms of each of the eight tests that are presented in Figure 2, with respect to the following question: "Would the discussion or analysis..."

The first two tests provide an initial screening mechanism for identifying discussions that are normally best deferred to lower-tier documentation. The first test simply indicates that consideration of the topic should be deferred to lower-tier documentation if it cannot be appropriately considered and analyzed at the programmatic level (i.e., "not ripe for decision").

As indicated in the second test, a discussion should be deferred if it would tend to substantially reduce the agency's flexibility to modify a policy/program or to pursue other options as events change and more information becomes available. A P-EIS should provide programmatic high-level direction without overly constraining the detailed implementation of lower-tier decisionmaking. Ultimately, the goal should be to determine a programmatic direction, yet provide flexibility in determining the optimum implementation of the programmatic goals at the site-specific level.

The remaining six tests provide criteria for determining if discussion of a particular topic is appropriate for consideration within a P-EIS. A "yes" answer to any of the remaining six tests would support a decision to include the discussion within the scope of the P-EIS. A "no" answer to all of the remaining six tests would indicate that a particular discussion should be deferred to lower-tier documents.

The model must be applied on a case-by-case basis according to the decisionmakers' best professional judgment. Each individual issue, impact, and alternative that is considered for inclusion within the scope of the P-EIS can be reviewed using this model. Decisionmakers must exercise professional experience, especially in cases where the response to a particular test is not clearly obvious.

Benefits and Limitations of the Model

Indisputably, exceptions may arise that cannot be appropriately addressed with this model. Other considerations may need to be

taken into account before determining the ultimate scope of the P-EIS.

Nor does the proposed model completely eliminate subjectivity. After all, decisionmaking by its very nature is subjective. Two decisionmakers, for example, may not completely agree on whether a discussion of a particular topic would substantially improve or change high-level decisionmaking (i.e., test #3).

While this model does not entirely eliminate such subjectivity, it substantially reduces it because the vast spectrum of potential considerations that can be used to justify a particular position, is essentially reduced to eight narrowly defined tests.

WHY THE PROPOSED MODEL IS DEFENSIBLE

It is reasonable to ask if an agency can legitimately use this model to determine the scope of a P-EIS. As we will see, agencies have not only the prerogative to adopt such methodologies but are, in fact, encouraged by the Regulations to do so.

Agencies Have Been Given a Wide Degree of Latitude to Adopt Approaches for Implementing the NEPA Process

A review of the Regulations reveals that agencies have been given, not only the right but also, the duty for developing procedures and methodologies for implementing NEPA. The Regulations have been specifically designed to provide agencies with the flexibility needed to tailor the NEPA process to their internal needs.

In accordance with this philosophy, the CEQ has placed only a minimal number of constraints on how agencies may implement their NEPA process. The following provisions affirm this philosophy:

- "It is the intent of these regulations to allow each agency flexibility in adapting its implementing procedures..."¹⁴
- Agencies shall "Identify methods and procedures...to ensure that presently unquantified environmental amenities and values may be given appropriate consideration."¹⁵
- Agencies shall "utilize a systematic" approach.¹⁶

Clearly, the Regulations provide agencies with the flexibility to develop a systematic model for determining the scope of a P-EIS. The soundness and defensibility of the proposed model is further substantiated by Daniel Mandelkar, who reports:¹⁷

"Because a consensus is usually lacking on the state of the art in environmental methodology, the courts have usually accepted the methodology used by an agency in analyzing environmental impacts. They put the burden of proof on plaintiffs to prove the methodology was unacceptable...These decisions reflect the usual judicial willingness to uphold an agency when the evidence shows that there is only a disagreement among experts."

Determination of Scope are Routinely Made on an Ad Hoc Basis

Decisionmakers routinely make determinations regarding the scope and depth of analysis within a P-EIS. Lacking formal and systematic procedures, these determinations are often made on an ad hoc basis.

The proposed model does not promote any degree of decisionmaking beyond the level that is already exercised on a regular basis. Instead, the model simply substitutes a consistent, rigorous, and systematic approach for the one currently used. If it is within the agency's discretion to make determinations, without a consistent methodology, surely a systematic approach is equally justifiable. Adoption of this model amounts to nothing more than replacing a formal, systematic procedure for the informal, haphazard process currently followed.

SUMMARY

Decisionmakers are routinely confronted with the problem of determining the appropriate scope of a P-EIS. Definitive direction for making such determinations does not exist. Lack of definitive direction may lead to highly complex and over bloated documents, project delays, inconsistencies in the treatment of issues, and increased risk that a project may be challenged as a result of inappropriate treatment of a particular topic. The proposed model provides agencies with an excellent tool for streamlining the NEPA process by de-scoping needless and unnecessary issues from the P-EIS.

The proposed model does not promote any measure of decisionmaking beyond that already employed on a routine basis. Quite the contrary. The model provides a rigorous, systematic, and

defensible approach for determining the scope that is most appropriately addressed within a P-EIS versus the more detailed scope that is best reserved for lower-tier documents. The criteria on which the model is based provide a reasonable and defensible approach for making such determinations. As we have seen, agencies have discretion to adopt such methodologies to facilitate the NEPA process and are, in fact, encouraged by the Regulations to do so.

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3. 40 CFR 1502.4 (b)
4. 40 CFR 1502.20
5. 40 CFR 1502.20 and 1508.28
6. 40 CFR 1502.4 (b)
7. 40 CFR 1500.1 (c)
8. 40 CFR 1500.1 (b)
9. 40 CFR 1500.1 (b)
10. 40 CFR 1500.2 (d)
11. 40 CFR 1503.1 (a) (4)
12. 40 CFR 1500.2 (e)
13. 40 CFR 1500.2 (f)
14. 40 CFR 1507.1
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