

Boston College Environmental Affairs Law Review

Volume 37 | Issue 1

Article 7

1-1-2010

The Same NEPA Proposal or Connected NEPA Actions?: Why the Bureau of Land Management's New Oil Shale Rules and Regulations Should be Set Aside

Alexander Hood

Follow this and additional works at: <http://lawdigitalcommons.bc.edu/ealr>

 Part of the [Administrative Law Commons](#), [Environmental Law Commons](#), and the [Oil, Gas, and Mineral Law Commons](#)

Recommended Citation

Alexander Hood, *The Same NEPA Proposal or Connected NEPA Actions?: Why the Bureau of Land Management's New Oil Shale Rules and Regulations Should be Set Aside*, 37 B.C. Env'tl. Aff. L. Rev. 191 (2010), <http://lawdigitalcommons.bc.edu/ealr/vol37/iss1/7>

This Notes is brought to you for free and open access by the Law Journals at Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College Environmental Affairs Law Review by an authorized administrator of Digital Commons @ Boston College Law School. For more information, please contact nick.szydowski@bc.edu.

THE SAME NEPA PROPOSAL OR CONNECTED NEPA ACTIONS?: WHY THE BUREAU OF LAND MANAGEMENT'S NEW OIL SHALE RULES AND REGULATIONS SHOULD BE SET ASIDE

ALEXANDER HOOD*

Abstract: In November 2008, the Bureau of Land Management (BLM) finalized a rule opening public land in Colorado, Utah, and Wyoming for oil shale leasing and finalized regulations creating policies and procedures for that leasing. The rule and regulations are the BLM's attempt to fulfill their mandate under the Energy Policy Act of 2005 to create a commercial oil shale leasing program in the western United States. As federal actions significantly affecting the environment, both the rule and regulations, are subject to the procedural requirements of the National Environmental Policy Act (NEPA). The purpose of this Note is to point to two possible errors by the BLM in fulfilling NEPA's procedural requirements. These procedural errors are fodder for citizen-plaintiffs hoping to have the Bush-era rule and regulations judicially set aside and subsequently abandoned by the Obama Administration.

INTRODUCTION

On November 17, 2008 the Bureau of Land Management (BLM) finalized a rule making public land in Colorado, Utah, and Wyoming available for commercial oil shale leasing through the amendment of twelve resource management plans.¹ The next day, the BLM finalized regulations creating policies and procedures for leasing that land for

* Solicitations Editor, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW, 2009–2010.

¹ See Notice of Availability of Approved Resource Management Plan Amendments/Record of Decision (ROD) for Oil Shale and Tar Sands Resources, 73 Fed. Reg. 72,519, 72,519–20 (Nov. 28, 2008); BUREAU OF LAND MGMT., U.S. DEP'T OF THE INTERIOR, APPROVED RESOURCE MANAGEMENT PLAN AMENDMENTS/RECORD OF DECISION (ROD) FOR OIL SHALE AND TAR SANDS RESOURCES TO ADDRESS LAND USE ALLOCATIONS IN COLORADO, UTAH, AND WYOMING AND FINAL PROGRAMMATIC ENVIRONMENTAL IMPACT STATEMENT, at ii (2008), available at http://ostseis.anl.gov/documents/docs/OSTS_ROD.pdf [hereinafter ROD].

commercial oil shale development.² According to the BLM, these two acts fulfilled its obligation under the Energy Policy Act of 2005 to create an oil shale leasing program on public lands (the rule) and to implement that program (the regulations).³ The late November finalization dates meant that both the rule and regulations became effective just days before Barack Obama took office as president of the United States.⁴ This made both actions part of the flurry of “midnight” rules and regulations finalized at the end of the Bush Administration.⁵

With one presidential administration creating a midnight rule or regulation and another administration left to enforce it, midnight rules and regulations are especially vulnerable to judicial attack. Having rules or regulations set aside in the middle of a presidential administration is little more than a delay tactic: with time, the administration can correct the procedural deficiency and reinstate the rule or regulation.⁶ However, absent an outside judicial challenge, an incoming administration is forced to justify rescinding or revising a previous administration’s midnight rule or regulations through the time-consuming administrative process. Faced with the prospect of the administrative process, incoming administrations will often leave midnight rules or regulations intact or become hopelessly bogged down in the process of rescinding them.⁷ However, if an incoming administration disagrees with a midnight rule or regulation, it will likely not reinstate it if it is judicially attacked by a third party and set aside.⁸ Thus, unlike a rule or regulation

² Rules and Regulations: Oil Shale Management—General, 73 Fed. Reg. 69,414, 69,487 (Nov. 18, 2008) (to be codified at 43 C.F.R. pt. 3900).

³ See Rules and Regulations: Oil Shale Management—General, 73 Fed. Reg. at 69,414; ROD, *supra* note 1, at 2.

⁴ The Congressional Review Act mandates that a “major rule” can become effective no earlier than sixty days after the rule’s record of decision. See 5 U.S.C. § 801(3)(A) (2006). The rule was executed on January 16, 2009 and the regulations were executed on January 17, 2009. See *id.* Barack Obama took office on January 20, 2009. Carl Hulse, *Obama Is Sworn in as the 44th President*, N.Y. TIMES, Jan. 20, 2008, <http://www.nytimes.com/2009/01/21/us/politics/20web-inaug2.html?hp>.

⁵ See Jack M. Beermann, *Combating Midnight Regulation*, 103 Nw. U. L. REV. 352, 352 (2009).

⁶ WILLIAM F. FOX, JR., UNDERSTANDING ADMINISTRATIVE LAW § 12.01 (4th ed. 2000).

⁷ Beermann, *supra* note 5, at 361. The Bush Administration’s experience with the Clinton administration’s midnight “roadless rule” would be an example of the difficulty an incoming administration could have rescinding a midnight regulation; first choosing not to defend the rule and then unsuccessfully trying to amend the rule in 2005, the Bush Administration spent considerable time over its two terms attempting to rescind or erode the midnight rule. See MARTIN NIE, THE GOVERNANCE OF WESTERN PUBLIC LANDS 96–103 (2008).

⁸ See Beermann, *supra* note 5, at 361 (discussing desire, but inability, to rescind a rule promulgated by the Carter Administration); see also NIE, *supra* note 7, at 97 (noting that in

promulgated in the middle of a presidential term, finding a procedural deficiency can lead to midnight rules and regulations being permanently set aside.

The identification of a procedural deficiency in the midnight oil shale rule and regulations presents just such an opportunity. If a procedural deficiency can be found, the rule, regulations, or both could be set aside. Further, the Obama Administration's dislike for the rule and regulations makes it appear likely that the rule and regulations would not be reinstated if judicially set aside. The Administration has been explicit in its distaste for the rule and regulations; Ken Salazar, the current Interior Secretary who oversees the BLM, described the Bush Administration's oil shale rule and regulations as "a frenzied attempt to move a failed agenda."⁹ Moreover, Secretary Salazar believes that the Bush Administration "put the cart before the horse" by moving forward with commercial oil shale leasing without fully understanding the environmental impacts or whether oil shale is economically viable.¹⁰

The purpose of this Note is to point out a procedural deficiency that could set aside both the oil shale rule amending the twelve resource management plans to allow for commercial oil shale leasing and the regulations creating a procedure for that leasing. The procedural deficiency discussed is the BLM's failure to include both the rule and the regulations in the same National Environmental Policy Act (NEPA) statement.¹¹ NEPA requires the preparation of a statement for all "major Federal actions significantly affecting" the environment.¹² In specific circumstances, NEPA requires a combined statement for multiple federal actions.¹³ The BLM prepared a separate statement for both the rule and the regulations, but it did not prepare a combined statement.¹⁴

some instances the Bush Administration would simply not defend judicial challenges to Clinton's midnight rules in order to hasten the judicial process).

⁹ Ken Salazar, Editorial, *Heedless Rush to Oil Shale*, WASH. POST, July 15, 2008, at A19.

¹⁰ See *id.*

¹¹ National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4370 (2006) [hereinafter NEPA].

¹² See *id.* § 4332(C); *Kleppe v. Sierra Club*, 427 U.S. 390, 409 (1976).

¹³ See 42 U.S.C. § 4332(C); *Kleppe* 427 U.S. at 409.

¹⁴ BUREAU OF LAND MGMT., U.S. DEP'T OF THE INTERIOR, PROPOSED OIL SHALE AND TAR SANDS RESOURCE MANAGEMENT PLAN AMENDMENTS TO ADDRESS LAND USE ALLOCATIONS IN COLORADO, UTAH, AND WYOMING AND FINAL PROGRAMMATIC ENVIRONMENTAL IMPACT STATEMENT (2008) [hereinafter PEIS], available at <http://ostseis.anl.gov/eis/guide/index.cfm>; BUREAU OF LAND MGMT., U.S. DEPT. OF THE INTERIOR, ENVIRONMENTAL ASSESSMENT, WO-300-07-009, FINAL RULE, OIL SHALE MANAGEMENT (2008) (to be codified at 43 C.F.R. pts. 3900, 3910, 3920, 3930) (on file with author) [hereinafter, EA].

This Note will argue that the BLM should have prepared a combined statement; therefore, the rule and the regulations should be set aside for failing NEPA's requirements.¹⁵ The argument will proceed in six parts. Part I contains a discussion of what oil shale is and the potential impacts of a commercial oil shale leasing program.¹⁶ Part II of this Note discusses the Energy Policy Act of 2005's requirements for the BLM's creation of a commercial oil shale leasing program.¹⁷ Parts III and IV discuss NEPA generally and the specific provisions of NEPA that could require a combined NEPA statement for the oil shale rule and regulations.¹⁸ Part V examines how the BLM fulfilled its requirements under the Energy Policy Act of 2005.¹⁹ Part VI argues that the combination of the Energy Policy Act of 2005 and NEPA require a combined NEPA statement.²⁰

I. OIL SHALE AND ITS IMPACTS

The current Interior Secretary, Ken Salazar, is opposed to the oil shale rule and regulations because of the economic uncertainties surrounding the technology for turning oil shale into liquid oil and the potential environmental and socioeconomic impacts of a commercial oil shale program.²¹ At first blush, oil shale development seems tempting because of the potential for creating a vast domestic oil source. Experts estimate that the Green River Basin—the largest known oil shale deposit in the world, located where the borders of Colorado, Utah, and Wyoming meet—contains 500–1100 billion barrels of potentially recoverable oil.²² To put these numbers in perspective, the midpoint of that estimation—800 billion barrels—is more than triple the known oil reserves of Saudi Arabia.²³ At current demand for oil, this would be enough to satisfy the oil demand of the United States for 100 years.²⁴ Moreover, the political excitement over oil shale also stems from the government's role in developing the resource; more than 80% of the

¹⁵ See *infra* Part VI.

¹⁶ See *infra* Part I.

¹⁷ See *infra* Part II.

¹⁸ See *infra* Parts III–IV.

¹⁹ See *infra* Part V.

²⁰ See *infra* Part VI.

²¹ See Salazar, *supra* note 9.

²² JAMES T. BARTIS ET AL., OIL SHALE DEVELOPMENT IN THE UNITED STATES: PROSPECTS AND POLICY ISSUES, at ix (2005).

²³ *Id.*

²⁴ *Id.*

Green River Basin oil shale is located on United States' public land administered by the Bureau of Land Management (BLM).²⁵

However, the excitement surrounding these numbers should be tempered by a simple fact: oil shale is not oil. Rather, it is a solid compound which contains an organic substance known as kerogen that can be extracted and further refined into oil.²⁶ The cost of this energy-intensive process, coupled with a potential oil shale leasing program's effects on the Green River Basin's environment, water resources, and socioeconomics, should create reservations about pursuing the development of this extensive resource.²⁷

A. *The Economics: Oil Shale Makes Expensive Oil*

Converting solid oil shale into liquid oil is much more expensive than recovering conventional liquid oil.²⁸ The economics of recovering oil from oil shale depend on what method is used to extract the kerogen from the shale.²⁹ There are two general methods for extracting kerogen: conventional mining combined with surface retorting and *in situ*—or in-ground—mining.³⁰

Conventional mining combined with surface retorting is the more expensive, but proven, method for extracting kerogen.³¹ This method involves the removal of solid shale from the ground and then the heating of the solid shale in a furnace-like retort to over 900 degrees Fahrenheit, turning the kerogen to gas and separating it from the solid shale.³² This method has proven effective at producing oil from shale at the commercial levels of production in the past, but its high cost hinders

²⁵ James w. Bunger et al., *Is Oil Shale America's Answer to Peak-oil Challenge?*, 102 OIL & GAS J. 16, 20 (2004).

²⁶ Teh Fu Yen & George V. Chilingarian, *Introduction to Oil Shales*, in OIL SHALE: DEVELOPMENTS IN PETROLEUM SCIENCE 5, at 1, 6–7 (Teh Fu Yen & George V. Chilingarian eds., 1976).

²⁷ ANN BORETSKY ET AL., CHOOSING THE RIGHT PATH FOR FUELING NORTH AMERICA'S TRANSPORTATION FUTURE 12–14 (2007), available at <http://www.nrdc.org/energy/drivingithome/drivingithome.pdf>.

²⁸ Rules and Regulations: Oil Shale Management—General, 73 Fed. Reg. 69,414, 69,421 (Nov. 18, 2008) (to be codified at 43 C.F.R. pt. 3900).

²⁹ See OFFICE OF PETROL. RESERVES—STRATEGIC UNCONVENTIONAL RES., U.S. DEP'T OF ENERGY, FACT SHEET: U.S. OIL SHALE ECONOMICS I, http://fossil.energy.gov/programs/reserves/npr/Oil_Shale_Economics_Fact_Sheet1.pdf (last visited Jan. 25, 2010).

³⁰ *Id.*

³¹ See Bunger et al., *supra* note 25, at 20.

³² OFFICE OF NAVAL PETROL. & OIL SHALE RESERVES, U.S. DEP'T OF ENERGY, NATIONAL STRATEGIC UNCONVENTIONAL RESOURCES MODEL 8 (2006), available at http://www.fossil.energy.gov/programs/reserves/npr/NSURM_Documentation.pdf [hereinafter UNCONVENTIONAL RESOURCES MODEL].

its wide-scale implementation.³³ Currently, the cost of producing one barrel of oil from shale using conventional mining combined with re-torting is between \$70 and \$95 per barrel.³⁴ However, these prices could drop to between \$35 and \$48 per barrel after twelve years of experience with the production process.³⁵ In comparison, the cost of producing one barrel of oil from conventional liquid oil resources is \$19.50.³⁶

In situ mining is a potentially less expensive, unproven method for extracting kerogen from oil shale.³⁷ This method heats the oil shale in-ground by turning the kerogen into a liquid or gas form and then pumping the kerogen to the surface.³⁸ Avoiding expensive conventional mining makes the *in situ* method potentially more competitive with the \$19.50 per barrel production cost of conventional liquid oil resources.³⁹ Experts estimate that successful implementation of *in situ* mining could result in production costs ranging from \$23 to \$27 per barrel.⁴⁰ However, these same predictions contain the caveat that the technology is at least twenty years away from large-scale, commercial implementation.⁴¹

B. Oil Shale's Impacts: Effects on the Environment, Water Resources, and Regional Socioeconomics

A large commercial oil shale leasing program on public lands could affect the environment generally, create a sharp increase in demand on limited regional water resources, and cause socioeconomic upheaval.⁴²

1. Environmental Effects

Some environmental impacts of a commercial oil shale industry will be largely the same regardless of what oil shale extraction method is used. Common to both methods are impacts on air quality.⁴³ The heating of shale—whether in-ground or above-ground—not only re-

³³ See BARTIS ET AL., *supra* note 22, at 15–16.

³⁴ *Id.* at 15.

³⁵ *Id.* at 16.

³⁶ Rules and Regulations: Oil Shale Management—General, 73 Fed. Reg. 69,414, 69,421 (Nov. 18, 2008).

³⁷ BARTIS ET AL., *supra* note 22, at 17.

³⁸ UNCONVENTIONAL RESOURCES MODEL, *supra* note 32, at 8.

³⁹ Rules and Regulations: Oil Shale Management—General, 73 Fed. Reg. at 69,421.

⁴⁰ BARTIS ET AL., *supra* note 22, at 20.

⁴¹ *Id.* at 23.

⁴² Bungler et al., *supra* note 25, at 20–21.

⁴³ See U.S. DEP'T OF ENERGY, OIL SHALE ENVIRONMENTAL FACT SHEET, 1–2 http://fossil.energy.gov/programs/reserves/npr/Oil_Shale_Environmental_Fact_Sheet.pdf (last visited Jan. 25, 2010) [hereinafter ENVIRONMENTAL FACT SHEET].

leases the kerogen; it also releases sulfur oxide, nitrogen oxide, carbon dioxide, and particulate matter, which are all emissions regulated under the Clean Air Act.⁴⁴ Further, extensive energy will be necessary to heat the oil shale to the 900 degrees Fahrenheit necessary to release the kerogen from the shale.⁴⁵ In the short term, this energy will have to come from sources that burn fossil fuels and will release significant quantities of greenhouse gases.⁴⁶

The physical extraction of solid shale would have environmental impacts unique to that extraction method.⁴⁷ First, the physical extraction of shale through conventional mining—resembling coal mining—could significantly disturb the surface geography.⁴⁸ Commercially viable oil shale operations will extract approximately 25 million tons of shale every year, leaving a byproduct of 1.2 to 1.5 tons of spent shale for every barrel of oil produced.⁴⁹ If the solid shale is removed through strip mining, the result would be some of the largest open-pit mines in the world.⁵⁰ If developers pursued room-and-pillar mining—a method which leaves the surface undisturbed by hollowing out below-ground caverns—instead of strip mining, less surface disturbance would result.⁵¹ However, experts believe that room-and-pillar mining is suboptimal because it results in exceptionally low levels of resource recovery.⁵²

Though it creates much less surface disturbance, *in situ* mining endangers ground water. Ground water coming in contact with the intensely heated oil shale could be contaminated with kerogen, other gases, and/or sediments.⁵³ Further, though surface disturbance would be less significant than with conventional mining, *in situ* mining would still require surface operations that would result in a decade-long displacement at each site of other land uses as well as flora and fauna.⁵⁴

⁴⁴ See *id.* at 2.

⁴⁵ See *id.*

⁴⁶ BARTIS ET AL., *supra* note 22, at 40.

⁴⁷ See *id.* at 11–14.

⁴⁸ See *id.* at 12.

⁴⁹ *Id.* at 12, 36.

⁵⁰ *Id.* at 12.

⁵¹ See *id.*

⁵² See BARTIS ET AL., *supra* note 22, at 12.

⁵³ ENVIRONMENTAL FACT SHEET, *supra* note 43, at 2.

⁵⁴ BARTIS ET AL., *supra* note 22, at 36–37.

2. Water Resources

Other than polluting water, there is also concern that commercial oil shale operations would place an excessive burden on the region's scarce water resources.⁵⁵ Much of the region proposed for commercial oil shale leasing lies within the Colorado River Basin, which supplies the water needs for much of the southwest United States and is currently strained in doing so.⁵⁶ Oil shale mining and processing will add to this strain by requiring between 2.1 and 5.3 barrels of water per barrel of oil produced.⁵⁷ This water will be used for extraction, crushing, transport, dust control and cooling.⁵⁸ Additionally, if coal is used to create the significant electricity necessary for heating the oil shale, these coal-powered electric plants will also require significant water resources, thus exacerbating the problem.⁵⁹

3. Socioeconomic Impacts

The sparsely populated region would also experience socioeconomic upheaval from the influx of investment that a commercial oil shale program would bring to the region.⁶⁰ Oil shale production is labor-intensive and therefore even a small commercial oil shale program could mean an influx of 40,000 to 80,000 people into the region.⁶¹ This influx would be absorbed by an area with a sparse population,⁶² and it will likely resemble the effects of the last oil shale boom in the region in the early 1980s.⁶³ Then, the prospect of a commercial oil shale program introduced \$85 million of payroll into the region, drastically increased property values, caused schools to overflow, rents to double, liquor stores to have empty shelves, and an increase in crime and traffic.⁶⁴ That boom ended quicker than it began when, within a week in 1982, Exxon mothballed its oil shale operation and left unemployment and

⁵⁵ See *id.* at 50–51.

⁵⁶ PEIS, *supra* note 14, at 3-62 to -63.

⁵⁷ BARTIS ET AL., *supra* note 22, at 50.

⁵⁸ *Id.*

⁵⁹ URS CORP., ENERGY DEVELOPMENT WATER NEEDS ASSESSMENT (PHASE 1 REPORT) 3–37 (2008), http://www.crwcd.org/media/uploads/20080925_Energy_Needs_Report.pdf.

⁶⁰ See Bunger et al., *supra* note 25, at 20.

⁶¹ BARTIS ET AL., *supra* note 22, at 43.

⁶² *Id.* (noting that in 2000, Garfield County, Colorado had a population of 43,791; nonetheless, it is one of the most heavily populated counties in the region).

⁶³ See generally ANDREW GULLIFORD, BOOMTOWN BLUES: COLORADO OIL SHALE 1885–1985 (1989) (describing the booms and busts accompanying previous attempts at oil shale development in Colorado).

⁶⁴ *Id.* at 113, 119, 157.

economic havoc in its wake.⁶⁵ The date of Exxon's decision to close its oil shale operation is known by locals as "Black Sunday."⁶⁶

II. THE ENERGY POLICY ACT OF 2005: PROCEDURAL AND SUBSTANTIVE REQUIREMENTS FOR THE CREATION OF A COMMERCIAL OIL SHALE LEASING PROGRAM

The Energy Policy Act of 2005, a piece of comprehensive energy legislation, included a mandate for the Bureau of Land Management (BLM) to create a national commercial oil shale leasing program on public lands.⁶⁷ This mandate included substantive requirements for the BLM's administration of the program as well as procedural requirements for the BLM's creation of the program.⁶⁸

A. *The Energy Policy Act of 2005 Generally*

The Energy Policy Act of 2005 (EPAAct) is meant to reduce the United States' dependence on oil from politically and economically unstable foreign sources in an environmentally sound manner.⁶⁹ The EPAAct is the statutory implementation of 2001 recommendations from the National Energy Policy Development Group—a group formed by President George W. Bush—and led by Vice President Dick Cheney—to study ways to "promote dependable, affordable and environmentally sound energy for the future."⁷⁰ The Act includes provisions for increasing energy efficiency, developing renewable energy sources, increasing production of domestic energy sources, increasing vehicle efficiency, and researching and developing new energy sources and efficiency-saving technology.⁷¹ Included in the EPAAct's provisions for increasing domestic energy production are substantive and procedural mandates for the Department of the Interior to create a commercial oil shale leasing program.⁷²

⁶⁵ *Id.* at 151–52.

⁶⁶ BARTIS ET AL., *supra* note 22, at 43.

⁶⁷ See Energy Policy Act of 2005, 42 U.S.C. § 15927 (2006) [hereinafter EPAAct].

⁶⁸ See *id.*

⁶⁹ See Sameh I. Mobarek, *Energy Efficiency*, in ENERGY POLICY ACT OF 2005: SUMMARY AND ANALYSIS OF THE ACT'S MAJOR PROVISIONS 1, 1 (Kevin J. McIntyre et al. eds., 2006).

⁷⁰ NAT'L ENERGY POLICY DEV. GROUP, NATIONAL ENERGY POLICY, at viii (2001), available at <http://www.wtrg.com/EnergyReport/National-Energy-Policy.pdf>.

⁷¹ See EPAAct, 42 U.S.C. §§ 15801–16524 (2006).

⁷² See *id.* § 15927.

B. *The Energy Policy Act's Substantive Requirements for a Commercial Oil Shale Leasing Program*

The EAct contains substantive requirements for the Interior Secretary's issuance of oil shale leases, restricting the near complete discretion the Interior Secretary previously enjoyed under the Mineral Leasing Act of 1920 (MLA).⁷³ The only real limitations on the Secretary's authority to grant a lease under the MLA were that a lessee must be an American citizen and that each lease be limited to one tract of 5120 acres.⁷⁴ The MLA included provisions for rental and royalty rates, but these had little binding effect because the Secretary was also given discretion to waive the fees to allow an oil shale operation to "successfully operate" or for the purpose of encouraging oil shale production.⁷⁵

The EAct took away some of the Interior Secretary's discretion by adding three new substantive requirements for the issuance of oil shale leases.⁷⁶ First, rather than setting royalty rates and rental fees at a level meant to encourage the growth of the oil shale industry, the EAct requires the Interior Secretary to ensure a "fair" rate of return to the United States for every lease.⁷⁷ Second, regulations implemented for the issuance of oil shale leases now must contain work requirements and milestones "to ensure the diligent development of the lease."⁷⁸ Finally, the EAct includes a consultation requirement: before a commercial oil shale lease can be issued in a state, the BLM must consult the governor, representatives of the affected local government, "interested Indian tribes," and "other interested persons" in that state.⁷⁹ If the BLM finds that there is a "sufficient" level of support from these parties, it "may" issue commercial leases.⁸⁰ This final provision could create a substantial roadblock for the BLM, as the governors of Colorado and Wyoming do not currently support moving forward with a commercial oil shale leasing program.⁸¹

⁷³ See Mineral Leasing Act, 30 U.S.C. § 241 (2006); Robert W. Randall, *The Changing Landscape for the Disposition of Federal Oil Shale Resources*, COLORADO ENERGY RESEARCH INSTITUTE, 26TH OIL SHALE SYMPOSIUM PROCEEDINGS Oct. 16, 2006, at 1, 3, <http://www.ceri-mines.org/documents/A13c-BobRandall-paper.pdf>.

⁷⁴ See 30 U.S.C. § 181; Randall, *supra* note 73, at 3.

⁷⁵ See Randall, *supra* note 73, at 3.

⁷⁶ *Id.* at 6–7.

⁷⁷ 42 U.S.C. § 15927(o).

⁷⁸ *Id.* § 15927(f).

⁷⁹ *Id.* § 15927(e).

⁸⁰ *Id.*

⁸¹ See Letter from Dave Freudenthal, Governor of Wyo., to Jim Caswell, Dir., Dep't of Interior, Bureau of Land Mgmt. (Sept. 17, 2008), available at <http://governor.wy.gov/press>

C. *The Energy Policy Act's Procedural Requirements for the Creation of a Commercial Oil Shale Leasing Program*

The EAct set out a three-step process for the creation of a commercial leasing program for oil shale. The three steps are the issuance of research, development, and demonstration (RDD) leases; the creation of a programmatic environmental impact statement (PEIS) for a commercial oil shale leasing program; and the publication of regulations implementing a commercial oil shale leasing program.⁸²

The first requirement, the issuance of RDD leases, is meant to allow private lessees to test known technologies and research new technologies for recovering and converting oil shale into oil.⁸³ This goal would be accomplished through leasing small tracts to private entities whose testing results the BLM could utilize in developing the larger commercial leasing program.⁸⁴

EAct's second requirement for the BLM is the completion of a PEIS.⁸⁵ This requirement is meant to ensure that the BLM considers the environmental impacts of the leasing program it decides to create.⁸⁶ By specifically requiring the preparation of a PEIS, Congress is mandating how the BLM will comply with the National Environmental Policy Act (NEPA). Generally, NEPA only requires the preparation of a PEIS if the program is a "major Federal action[] significantly affecting the . . . human environment."⁸⁷ Here, the EAct takes that determination away from the BLM by mandating the creation of a PEIS regardless of the agency's determination of environmental impacts.⁸⁸ Thus, in creating a commercial oil shale leasing program, the BLM must create a PEIS and that PEIS must be adequate according to NEPA.⁸⁹

The EAct's final requirement for the BLM in creating a commercial oil shale leasing program is the promulgation of oil shale leasing regulations within six months of the completion of the PEIS.⁹⁰ Prior to the EAct, the BLM had the authority through the MLA to issue oil

releases/governor-urges-caution-in-oil-shale-development.html; Letter from Bill Ritter, Governor of Colo., to James L. Caswell, Dir., Bureau of Land Mgmt. (Sept. 22, 2008), *available at* <http://www.colorado.gov/cs/Satellite/GovRitter/GOVR/1222166168078>.

⁸² 42 U.S.C. § 15927(c)-(d).

⁸³ *Id.* § 15927(c).

⁸⁴ *See id.*

⁸⁵ *Id.* § 15927(d)(1).

⁸⁶ *See* NEPA, 42 U.S.C. § 4332(c) (2006); EAct, 42 U.S.C. § 15927(d)(1).

⁸⁷ *See* NEPA, 42 U.S.C. § 4332(c).

⁸⁸ *See* EAct, 42 U.S.C. § 15927(d)(1).

⁸⁹ *See* NEPA 42 U.S.C. § 4332(c), EAct 42 U.S.C. § 15927(d)(1).

⁹⁰ *See* EAct § 15927(d)(2).

shale leases, but it had never promulgated regulations outlining the procedure for the leasing process.⁹¹ The purpose of the regulation requirement is to create such uniform procedures for the BLM's issuance of oil shale leases, and its management of oil shale exploration, development, and production activities.⁹²

III. THE NATIONAL ENVIRONMENTAL POLICY ACT GENERALLY

The Energy Policy Act of 2005's (EPAAct's) procedural requirements for the creation of a commercial oil shale leasing program incorporates the National Environmental Policy Act (NEPA).⁹³ They do so specifically by requiring the preparation of a programmatic environmental impact statement (PEIS), and generally by mandating agency action that may trigger NEPA by "significantly affecting" the environment.⁹⁴ Understanding the implications of incorporating NEPA into EPAAct's mandated procedure for the creation of a commercial oil shale leasing program requires an understanding of NEPA generally, and NEPA's requirement that the analysis of related actions be combined.

A. *The National Environmental Policy Act Generally*

The purpose of NEPA is twofold: to ensure agencies consider the environmental impacts of their proposed actions early in the decision-making process and to alert the public to the environmental impacts of proposed agency action.⁹⁵ By requiring the consideration of environmental impacts early in the agency decision-making process, NEPA ensures that agencies are aware of the environmental impacts of an action before they have committed to that action.⁹⁶ Further, by announcing the environmental impacts of a proposed action early in the agency

⁹¹ See Mineral Leasing Act, 30 U.S.C. § 241 (2006); EA, *supra* note 14, at 1.3.

⁹² See EA, *supra* note 14, at 1.2.

⁹³ See EPAAct 42 U.S.C. § 15927(d)(1).

⁹⁴ See NEPA, 42 U.S.C. § 4332(c); EPAAct, 42 U.S.C. § 15927(d)(1).

⁹⁵ The Supreme Court recently noted in *Winter v. Natural Resources Defense Council* that the purpose of NEPA's environmental impact statement requirement is to ensure that "important [environmental] effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast," and that "an agency has indeed considered environmental concerns . . . provides a springboard for public comment . . . [and] affords other affected governmental bodies notice of the expected consequences and the opportunity to plan and implement corrective measures in a timely manner." 129 S. Ct. 365, 389–90 (2008) (internal quotation marks and citations omitted).

⁹⁶ See *id.* at 389.

decision-making process, the public is able to act on that information through the administrative process before a decision is made.⁹⁷

NEPA's purpose is achieved through its Environmental Impact Statement (EIS) requirement.⁹⁸ NEPA requires the preparation of an EIS for any proposed major federal action that will "significantly affect[] the quality of the human environment."⁹⁹ An EIS is a public document that undertakes a detailed analysis of the following:

- (i) the environmental impact of the proposed action,
- (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
- (iii) alternatives to the proposed action,
- (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
- (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.¹⁰⁰

An agency must follow the Council on Environmental Quality's (CEQ) regulations to determine if an action they are proposing will trigger NEPA's EIS requirement by having a significant effect on the environment.¹⁰¹ The CEQ regulations require the preparation of an Environmental Assessment (EA) to make this determination unless the agency voluntarily decides to prepare an EIS or Congress has explicitly excluded the agency action from the EIS requirement.¹⁰² An EA is a "concise public document" that "[b]riefly provide[s] sufficient evidence and analysis for determining whether to prepare an environmental impact statement."¹⁰³ If an agency determines through an EA that an EIS is not required, it must make a finding of no significant impact (FONSI) to accompany the agency's final record of decision for the action.¹⁰⁴ A

⁹⁷ See *id.* at 389–90.

⁹⁸ See NEPA, 42 U.S.C. § 4332(C); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

⁹⁹ 42 U.S.C. § 4332(C).

¹⁰⁰ *Id.* § 4332(C) (i)–(v).

¹⁰¹ See 40 C.F.R. §§ 1500–18 (2009). Title II of NEPA established the CEQ, an agency responsible for the administration of NEPA. DANIEL R. MANDELKER ET AL., *NEPA LAW AND LITIGATION* § 2:8 (Paulette Simonetta & Nicole D'Alessandro eds., 2008). By executive order, the CEQ is specifically responsible for regulating the preparation of EISs. *Id.*

¹⁰² See 40 C.F.R. §§ 1508.4, .9; MANDELKER ET AL. *supra* note 101, § 7:10.1.

¹⁰³ 40 C.F.R. § 1508.9(a).

¹⁰⁴ *Id.* § 1508.13.

FONSI “briefly present[s] the reasons why an action . . . will not have a significant effect on the human environment and for which an environmental impact statement therefore will not be prepared.”¹⁰⁵

Proposed agency actions requiring an EIS can be discrete individual actions or broad federal actions.¹⁰⁶ An EIS for a broad federal action is called a PEIS.¹⁰⁷ The purpose of a PEIS is to analyze the “cumulative or synergistic environmental impact[s]” of a proposed agency action on a region.¹⁰⁸ The PEIS analyzes the broad environmental impacts of the implementation of a program in general, while more detailed site-specific EISs analyze the implementation of a program in specific locations.¹⁰⁹ The CEQ regulations specifically point to agency programs and regulations as broad federal actions that may require a PEIS.¹¹⁰

Finally, to be useful in making a decision about whether or not an EIS should be prepared, EAs are required to have the same “scope” as the potential EIS.¹¹¹ Scope is simply the range of actions and alternatives considered in either the EIS or the EA.¹¹² The remainder of this Note will deal mostly with inadequacies in the scope of EAs and EISs. Because the scope of EAs and EISs are the same, for the remainder of the Note, they will be referred to under a common name: “NEPA statements.”

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* § 1502.4(b).

¹⁰⁷ MANDELKER ET AL. *supra* note 101, § 9:9 (citing *Nat'l Wildlife Fed'n v. Appalachian Reg'l Comm'n*, 677 F.2d 883, 888 (D.C. Cir. 1981) (citations and footnotes omitted)). One court described a PEIS as follows:

A programmatic EIS reflects the broad environmental consequences attendant upon a wide-ranging federal program. The thesis underlying programmatic EISs is that a systematic program is likely to generate disparate yet related impacts. This relationship is expressed in terms of “cumulation” of impacts or “synergy” among impacts that are caused by or associated with various aspects of one big Federal action. Whereas the programmatic EIS looks ahead and assimilates “broad issues” relevant to one program design, the site-specific EIS addresses more particularized considerations arising once the overall program reaches the “second tier,” or implementation stage of its development.

See Nat'l Wildlife Fed'n, 677 F.2d at 888.

¹⁰⁸ *Kleppe v. Sierra Club*, 427 U.S. 390, 409 (1976).

¹⁰⁹ MANDELKER ET AL. *supra* note 101, § 9:9 (citing *Nat'l Wildlife Fed'n*, 677 F.2d at 888).

¹¹⁰ 40 C.F.R. § 1502.4(b).

¹¹¹ *See id.* § 1508.9(b).

¹¹² *Id.* § 1508.25.

B. *The Administrative Procedure Act: NEPA's Teeth*

Due to the lack of a citizen-suit provision in NEPA, the Administrative Procedure Act (APA) is the sole method of citizen-enforcement of NEPA.¹¹³ In implementing NEPA, Congress assumed that the President would actively enforce its provisions.¹¹⁴ As a practical matter, however, the sole enforcement of NEPA comes from citizen plaintiffs acting through the APA's citizen-suit provision.¹¹⁵ Under the APA, any final agency action can be set aside if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."¹¹⁶ This standard requires a court to "consider whether [an agency's] decision [is] based on a consideration of the relevant factors and whether there has been a clear error of judgment."¹¹⁷

An agency is arbitrary and capricious in fulfilling its NEPA procedural obligation if that agency fails to take a "hard look" at the environmental consequences of the action it is proposing.¹¹⁸ The hard look must occur in fulfilling NEPA's requirements which are procedural rather than substantive; NEPA mandates how an agency should make a decision rather than what decision an agency should make.¹¹⁹ As such, an agency can move forward with actions that may be environmentally imprudent, as long as they consider the environmental impacts of the action in an adequate NEPA statement.¹²⁰ An agency takes a hard look when it identifies information that allows both the agency and the public to evaluate the environmental impacts of the proposed action.¹²¹ An agency that fails to take a hard look at a proposed agency action is arbitrary and capricious in fulfilling its NEPA procedural requirement, and any action relying on that procedure must be set aside.¹²²

¹¹³ Administrative Procedure Act, 5 U.S.C. § 706 (2006).

¹¹⁴ ZYGMUNT J.B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY 477-78 (3rd ed. 2004).

¹¹⁵ See *id.* at 478.

¹¹⁶ See 5 U.S.C. § 706(2) (A).

¹¹⁷ *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378 (1989) (quoting *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971)).

¹¹⁸ See *Or. Natural Desert Ass'n v. Bureau of Land Mgmt.*, 531 F.3d 1114, 1140 (9th Cir. 2008); MANDELKER ET AL., *supra* note 101, § 3:7.

¹¹⁹ See *Marsh*, 490 U.S. at 371; *Strycker's Bay Neighborhood Council v. Karlen*, 444 U.S. 223, 227 (1980); *Vt. Yankee Nuclear Power v. Natural Res. Def. Council*, 435 U.S. 519, 558 (1978); Conor O'Brien, Note, *I Wish They All Could Be California Environmental Quality Acts: Rethinking NEPA in Light of Climate Change*, 36 B.C. ENVTL. AFF. L. REV. 239, 248 (2009).

¹²⁰ See O'Brien, *supra* note 119, at 250.

¹²¹ *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352 (1989).

¹²² See *Or. Natural Desert Ass'n*, 531 F.3d at 1140.

IV. NEPA REQUIRES A COMBINED ANALYSIS FOR MULTIPLE ACTIONS: THE SEGMENTATION PROBLEM AND THE CEQ REGULATION'S SOLUTION

Segmenting a proposed action into many smaller actions for NEPA review can defeat NEPA's purpose by minimizing the perceived environmental impacts of the action.¹²³ The Council on Environmental Quality (CEQ) regulations prevent segmentation through mandating the combined analysis of smaller actions that are part of a larger proposed action, and proposed actions that are "connected," "similar," and/or have "cumulative impacts."¹²⁴

A. Segmentation Generally

Segmentation is a means of circumventing NEPA's purpose by dividing larger agency actions into several smaller proposed actions for NEPA review.¹²⁵ Segmentation minimizes the environmental consequences of a larger proposed action by dividing it into several proposals for analysis in separate NEPA statements.¹²⁶ Thus, segmentation defeats NEPA's dual purpose of requiring agencies to consider environmental impacts and disseminating information about environmental impacts to the public. This division of the analysis allows agencies to avoid confronting the totality of the environmental impacts of their actions, and the piecemealed presentation of the information prevents the public from having a complete understanding of the action's environmental impacts.¹²⁷

B. The CEQ's Regulatory Solution to the Segmentation Problem

To prevent segmentation, the CEQ regulations define the required "scope" of analysis for NEPA statements.¹²⁸ The regulations require that a NEPA statement analyze the entirety, rather than a segment, of proposed single actions.¹²⁹ Further, the regulations require a single combined analysis for proposed actions that are "similar," "cumulative,"

¹²³ See *Citizens' Comm. to Save Our Canyons v. U.S. Forest Serv.*, 297 F.3d 1012, 1028 (10th Cir. 2002); MANDELKER ET AL., *supra* note 101, § 9:11.

¹²⁴ See *Hirt v. Richardson*, 127 F. Supp. 2d 833, 842 (W.D. Mich. 1999) (describing section 1508.25 of the CEQ Regulations as the regulatory incorporation of a judicially created prohibition on segmentation); 40 C.F.R. § 1508.25 (2009).

¹²⁵ See *Save Our Canyons*, 297 F.3d at 1028; MANDELKER ET AL., *supra* note 101, § 9:11.

¹²⁶ See *Save Our Canyons*, 297 F.3d at 1028; MANDELKER ET AL., *supra* note 101, § 9:11.

¹²⁷ See *Save Our Canyons*, 297 F.3d at 1028.

¹²⁸ See 40 C.F.R. § 1508.25.

¹²⁹ See *Native Ecosystems Council v. Dombek*, 304 F.3d 886, 893–94 (9th Cir. 2002); 40 C.F.R. § 1502.4(a).

and/or “connected.”¹³⁰ Thus, the analysis of whether multiple proposed actions should be included in the same NEPA statement proceeds in two parts: are the actions components of the same proposal and, if not and are the proposed actions similar, cumulative, or connected.¹³¹

1. A NEPA Statement Must Analyze the Entirety of a Proposed Action

If an agency proposes a larger action that consists of many smaller agency actions, then all of the smaller actions must be analyzed in the same NEPA statement.¹³² However, for an action to require a NEPA statement an agency must propose it.¹³³ A proposal for an action can either be made explicitly by an agency or a court can make a finding of fact that a proposed action exists.¹³⁴

In *Kleppe v. Sierra Club*, the Supreme Court required an explicit proposal.¹³⁵ The question in *Kleppe* was whether a series of coal leases issued in the Northern Great Plains constituted a single proposed action for a regional leasing program, thus requiring a single NEPA statement.¹³⁶ The Court found that because the Department of the Interior had never explicitly made a “report or recommendation” for a regional leasing program, no proposal for such a program existed, and thus no combined NEPA statement was required.¹³⁷

However, the explicit proposal requirement announced in *Kleppe* has been tempered by the subsequent CEQ regulations.¹³⁸ These regulations state that a proposal for an action can exist “in fact,” even if the agency has not made an explicit proposal.¹³⁹ For a proposed action to exist under this standard, an agency must have a “goal” and be “actively preparing to make a decision on one or more alternative means of ac-

¹³⁰ See *Dombeck*, 304 F.3d at 893–94; *Hirt v. Richardson*, 127 F. Supp. 2d 833, 842 (W.D. Mich. 1999) (describing 40 C.F.R. § 1508.25 as defining the “scope” of impact statements as the regulatory incorporation of a judicially created prohibition on segmentation); 40 C.F.R. §§ 1502.4(a), .25.

¹³¹ See *Dombeck*, 304 F.3d at 893 (citing *Kleppe v. Sierra Club*, 427 U.S. 390, 399 (1976)); 40 C.F.R. § 1508.25.

¹³² 40 C.F.R. § 1502.4(a) (“Proposals or parts of proposals which are related to each other closely enough to be, in effect, a single course of action shall be evaluated in a single impact statement.”).

¹³³ *Dombeck*, 304 F.3d at 893 (citing *Kleppe*, 427 U.S. at 399).

¹³⁴ See *Kleppe*, 427 U.S. at 405–06; 40 C.F.R. § 1508.23.

¹³⁵ *Kleppe*, 427 U.S. at 399.

¹³⁶ See *id.* at 395–96.

¹³⁷ *Id.* at 399.

¹³⁸ See 40 C.F.R. § 1508.23.

¹³⁹ See *id.*

completing that goal.”¹⁴⁰ Thus, in *Blue Ocean Preservation Society v. Watkins*, the court looked to facts to determine whether the four stages of a geothermal energy project were a “single, integrated, action with a solitary purpose[,] the construction of a 500 megawatt [power] plant,” or a series of discrete federal actions.¹⁴¹ Though each stage had been individually proposed as a separate action for NEPA purposes, the court was willing to examine evidence to determine whether the separate actions were in fact a single action with a single goal.¹⁴²

2. Actions in Separate Proposals Requiring a Single NEPA Statement

The CEQ regulations require actions that are part of separate, concurrently pending proposals to be considered in the same NEPA statement if they are similar, cumulative, or connected.¹⁴³

a. *Similar Actions*

Multiple proposed actions that are similar must be analyzed in a combined NEPA statement.¹⁴⁴ Similar proposed actions “have similarities that provide a basis for evaluating their environmental consequences [sic] together, such as common timing or geography.”¹⁴⁵ However, this requirement is eviscerated by the considerable deference given agencies in determining if proposed actions are similar.¹⁴⁶ The CEQ regulations state that an agency “may wish” to analyze “similar actions” in the same NEPA statement when a combined analysis is “the best way” to analyze the actions’ combined effects.¹⁴⁷ Thus, in *Klamath-Siskiyou Wildlands Center v. Bureau of Land Management*, the court deferred to the agency’s decision that seemingly similar timber sales were

¹⁴⁰ *Id.*

¹⁴¹ *Blue Ocean Pres. Soc’y v. Watkins*, 754 F. Supp. 1450, 1456 (D. Haw. 1991).

¹⁴² *See id.*

¹⁴³ *See* Native Ecosystems Council v. Dombeck, 304 F.3d 886, 895 (9th Cir. 2002) (citing *Kleppe v. Sierra Club*, 427 U.S. 390, 410 (1976)); 40 C.F.R. § 1508.25; U.S. DEP’T OF THE INTERIOR, BUREAU OF LAND MGMT., BLM NATIONAL ENVIRONMENTAL POLICY ACT HANDBOOK H-1790-1 § 6.5.2.1 to .3 (2008), available at http://www.blm.gov/pgdata/etc/medialib/blm/wo/Information_Resources_Management/policy/blm_handbook.Par.24487.File.dat/h1790-1-2008-1.pdf [hereinafter BLM NEPA HANDBOOK].

¹⁴⁴ *See* 40 C.F.R. § 1508.25(a)(3); BLM NEPA HANDBOOK, *supra* note 143, § 6.5.2.3.

¹⁴⁵ 40 C.F.R. § 1508.25(a)(3).

¹⁴⁶ *See* *Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989, 1000-01 (9th Cir. 2004) (citing *Earth Island Inst. v. U.S. Forest Serv.*, 351 F.3d 1291, 1305 (9th Cir. 2003)); 40 C.F.R. § 1508.25(a)(3).

¹⁴⁷ 40 C.F.R. § 1508.25(a)(3).

not similar.¹⁴⁸ The timber sales were to be adjacent, located in the same watershed, harvested with identical methods, and supervised by the same personnel.¹⁴⁹ Despite seemingly fitting the similar actions definition, the court found that it could not overturn the agency's decision to analyze the sales in separate NEPA statements because it was up to the agency to determine the "best way" to evaluate the sales.¹⁵⁰

b. *Cumulative Actions—Not Cumulative Impacts*

Concurrently pending proposed actions that together have cumulative environmental impacts must be evaluated in the same NEPA statement.¹⁵¹ A cumulative environmental impact is "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions."¹⁵² In *North Cascades Conservation Council v. U.S. Forest Service*, several concurrent proposals for off-road vehicle trails were cumulative actions.¹⁵³ This finding was based on each individual trail providing access to a larger regional trail system and all of the proposals thus incrementally having combined environmental impacts on the region.¹⁵⁴

c. *Connected Actions*

The CEQ regulations give three definitions of connected actions that require combined NEPA statements: an action that "[a]utomatically trigger[s] other actions which may require environmental impact statements"; an action that "[c]annot or will not proceed unless other actions are taken previously or simultaneously"; and actions that "[a]re

¹⁴⁸ See *Klamath-Siskiyou*, 387 F.3d at 1000–01.

¹⁴⁹ *Id.* at 1001.

¹⁵⁰ See *id.*

¹⁵¹ See 40 C.F.R. § 1508.25(a)(1)(ii); BLM NEPA HANDBOOK, *supra* note 143, § 6.5.2.2. Though decided before the promulgation of the superseding CEQ regulations, in *Kleppe v. Sierra Club*, the Supreme Court similarly expressed the need for cumulative actions to be considered in the same NEPA statement: "when several proposals for . . . actions that will have cumulative or synergistic environmental impact upon a region are pending concurrently before an agency, their environmental consequences must be considered together. Only through comprehensive consideration of pending proposals can the agency evaluate different courses of action." 427 U.S. 390, 410 (1976) (footnotes omitted).

¹⁵² 40 C.F.R. § 1508.7, .25(c)(3).

¹⁵³ See *N. Cascades Conservation Council v. U.S. Forest Serv.*, 98 F. Supp. 2d 1193, 1197, 1199 (W.D. Wash. 1999).

¹⁵⁴ See *id.* at 1199.

interdependent parts of a larger action and depend on the larger action for their justification.”¹⁵⁵

The first definition of connected action requires a combined NEPA analysis for concurrently pending proposed actions when one action “automatically trigger[s]” the other.¹⁵⁶ For one action to automatically trigger a second action, an agency must have no choice but to complete the second action after undertaking the first.¹⁵⁷ Courts rarely find that a proposed action will automatically trigger a second action because agencies usually have some choice about undertaking the second action, regardless of how limited or irrational that choice may seem. For example, in *Piedmont Environmental Council v. Federal Energy Regulatory Commission*, regulations allowing an agency to issue permits to build electric transmission lines did not automatically trigger the issuance of the permits themselves.¹⁵⁸ The permits were not connected to the regulations because despite having the power to issue permits, the agency still could choose to reject each permit application.¹⁵⁹

The second definition of connected action is less stringent, requiring that proposed actions be considered in the same NEPA statement if one action “cannot or will not proceed” without the second action.¹⁶⁰ In a sense, the relationship between these actions is the reversal of the first definition: rather than one action having no choice but to proceed after the other, here one action cannot proceed without the other.¹⁶¹ A series of timber sale cases illustrate this requirement. In these cases, building a road to access timber and the actual timber sales were connected actions requiring a single NEPA statement.¹⁶² The timber could not be removed without the roads, and the roads would not exist without the need to access the timber.¹⁶³

However, if one action can exist without the other, courts will not find that one action cannot or will not proceed without the other. In

¹⁵⁵ 40 C.F.R. § 1508.25(a)(1)(i)–(iii).

¹⁵⁶ *See id.* § 1508.25(a)(1)(i).

¹⁵⁷ *See Piedmont Envtl. Council v. Fed. Energy Regulatory Comm’n*, 558 F.3d 304, 316–17 (4th Cir. 2009).

¹⁵⁸ *See id.*

¹⁵⁹ *See id.*

¹⁶⁰ *Citizens’ Comm. to Save Our Canyons v. U.S. Forest Serv.*, 297 F.3d 1012, 1029 (10th Cir. 2002); 40 C.F.R. § 1508.25(a)(1)(ii).

¹⁶¹ *See Save Our Canyons*, 297 F.3d at 1029.

¹⁶² *See Save the Yaak Comm. v. Block*, 840 F.2d 714, 719–29 (9th Cir. 1988); *Thomas v. Peterson*, 753 F.2d 754, 758 (9th Cir. 1985); *Big Hole Ranchers Ass’n v. U.S. Forest Serv.*, 686 F. Supp. 256, 261–63 (D. Mont. 1988).

¹⁶³ *See Save the Yaak*, 840 F.2d at 719–20; *Thomas*, 753 F.2d at 758–59; *Big Hole Ranchers*, 686 F. Supp. at 261–63.

Western Radio Services Co., Inc. v. Glickman, a radio antenna could exist without its access road.¹⁶⁴ Despite facts seemingly similar to the timber cases, because the antenna could, and had for two years, existed without the road, the antenna project could proceed without the road; therefore, it was not a connected action requiring a combined NEPA statement.¹⁶⁵ Similarly, in *Wilderness Workshop v. Bureau of Land Management*, a gas pipeline and proposed gas wells at the feeding end of the pipeline were not “connected actions.”¹⁶⁶ Critical to the court’s decision was the fact that though the pipeline had far more capacity than the existing wells required, it could proceed without the construction of the proposed wells by servicing the existing wells.¹⁶⁷

The third definition of connected action is the least restrictive. It requires multiple actions to be considered in the same NEPA statement if they are interdependent and justified by the same larger action.¹⁶⁸ For a larger action to justify a smaller action, the latter must simply be meant to facilitate the former: for example, a larger action may justify a stage in or segment of development.¹⁶⁹ More frequently at controversy is the question of whether multiple actions are interdependent.¹⁷⁰ Unlike the second definition of a connected action, actions that are interdependent could exist without each other, but it would not be *reasonable or rational* for an agency to undertake one action without the other.¹⁷¹ In *Blue Ocean Preservation Society v. Watkins* the assessment and testing stages that preceded the construction of a geothermal energy project met this third definition of connected action.¹⁷² Each stage laid the groundwork for the next, making all of the stages interdependent, while all of the stages relied on the construction of the final geothermal plant for their justification.¹⁷³

This third definition of a connected action does not include multiple proposed actions that are justified by the same larger project, but

¹⁶⁴ 123 F.3d 1189, 1195 (9th Cir. 1997).

¹⁶⁵ *Id.*

¹⁶⁶ 531 F.3d 1220, 1229–30 (10th Cir. 2008).

¹⁶⁷ *See id.*

¹⁶⁸ *See* 40 C.F.R. § 1508.25(a)(1)(iii) (2009); BLM NEPA HANDBOOK, *supra* note 143, § 6.5.2.1.

¹⁶⁹ *See* *Thomas v. Peterson*, 753 F.2d 754, 759 (9th Cir. 1985) (citing *Trout Unlimited v. Morton*, 509 F.2d 1276 (9th Cir. 1974)); *Fla. Wildlife Fed’n v. U.S. Army Corps of Eng’rs*, 401 F. Supp. 2d 1298, 1313–17 (S.D. Fla. 2005); *Shoshone-Paiute Tribe v. U.S.*, 889 F. Supp. 1297, 1298 (D. Idaho 1994).

¹⁷⁰ *See* 40 C.F.R. § 1508.25(a)(1)(iii).

¹⁷¹ *See* *Blue Ocean Pres. Soc’y v. Watkins*, 754 F. Supp. 1450, 1458–59 (D. Haw. 1991).

¹⁷² *See id.* at 1452–53, 1458–59.

¹⁷³ *Id.* at 1458–59.

are not interdependent. In *Utahns for Better Transportation v. U. S. Department of Transportation*, the court refused to find that three components of a plan to relieve urban traffic congestion were connected because they were not interdependent.¹⁷⁴ The three smaller projects—the expansion of a highway, the construction of a new highway, and the improvement of mass transit—were all justified by the larger traffic improvement project, but they were not interdependent because each smaller project did not rely on the others for its existence and each smaller project could relieve some traffic congestion on its own.¹⁷⁵

V. THE BLM'S APPROACH TO ITS NEPA PROCEDURAL REQUIREMENT IN CREATING A COMMERCIAL OIL SHALE LEASING PROGRAM

The Bureau of Land Management (BLM) attempted to fulfill its mandate to create a commercial oil shale leasing program in three stages. First, it issued research, development, and demonstration (RDD) leases.¹⁷⁶ Second, it amended twelve resource management plans (RMPs) for public land in Colorado, Utah, and Wyoming to allow for oil shale leasing, and completed the programmatic environmental impact statement (PEIS) required by the Energy Policy Act of 2005 (EPA) for analyzing that decision.¹⁷⁷ Third, the BLM promulgated regulations for leasing public land for commercial oil shale development.¹⁷⁸

A. *The Research Development and Demonstrations Leases*

The BLM started issuing RDD leases before EPA's passage. No new authority was necessary to commence RDD leasing because the MLA provided the BLM the power to issue these leases, and certain tracts of public land were already available for the leasing.¹⁷⁹ Thus, in anticipation of the August passage of the EPA, the BLM began issuing RDD leases in June 2005.¹⁸⁰ These leases are 160 acres each and give the lessees the option to reserve additional acreage surrounding their leases

¹⁷⁴ 305 F.3d 1152, 1161, 1183–84 (10th Cir. 2002).

¹⁷⁵ *Id.* at 1183–84.

¹⁷⁶ PEIS, *supra* note 14, at 2-14.

¹⁷⁷ *See id.* at 1-3.

¹⁷⁸ Rules and Regulations: Oil Shale Management—General, 73 Fed. Reg. 69,414, 69,414 (Nov. 18, 2008) (to be codified at 43 C.F.R. pt. 3900).

¹⁷⁹ *See* Mineral Leasing Act, 30 U.S.C. § 241 (2006); PEIS, *supra* note 14, at 1-16.

¹⁸⁰ Potential for Oil Shale Development; Call for Nominations—Oil Shale Research, Development and Demonstration (R, D & D) Program, 70 Fed. Reg. 33,753, 33,753 (June 9, 2005).

for later transformation into a commercial lease.¹⁸¹ Ultimately, the BLM issued six RDD leases.¹⁸²

Environmental Assessments (EAs) were prepared for each of the leases, and in each case, the EA resulted in a record of decision including a finding of no significant impact (FONSI).¹⁸³ Because the proposals for RDD leases were not concurrently pending with the proposals for the Resource Management Plan amendments and regulations, the BLM proceeded with separate NEPA statements for the RDD leasing actions.¹⁸⁴

B. *The Resource Management Plan Amendments*

Soon after the passage of the EAct, the BLM published a notice announcing its intention to prepare a PEIS for a commercial leasing program on public lands.¹⁸⁵ The notice was explicit that the PEIS would analyze both the amendment of RMPs necessary to open public land for commercial leasing and the creation of regulations for the new program.¹⁸⁶ However, the draft PEIS that was issued two years later only addressed the amendment of RMPs in Colorado, Utah, and Wyoming.¹⁸⁷

The sole purpose of the PEIS was to analyze the amendment of RMPs to allow commercial oil shale leasing.¹⁸⁸ RMPs are regional comprehensive planning documents for public land administered by the Department of the Interior.¹⁸⁹ They incorporate all plans and proce-

¹⁸¹ *Id.* at 33,754.

¹⁸² PEIS, *supra* note 14, at 2-14.

¹⁸³ See, e.g., BUREAU OF LAND MGMT., U.S. DEP'T OF THE INTERIOR, ENVIRONMENTAL ASSESSMENT CO-11-2006-117-EA: FINDING OF NO SIGNIFICANT IMPACT/DECISION RECORD, SITE 1 COC-69167 OIL SHALE TEST SITE 3 (2006), available at http://www.blm.gov/pgdata/etc/medialib/blm/co/field_offices/white_river_field/oil_shale/shell_frontier_oil.Par.586660.File.dat/ShellSite1FONSIandDR_s.pdf.

¹⁸⁴ See Bureau of Land Mgmt., U.S. Dept of the Interior, Oil Shale and Tar Sands, http://www.blm.gov/wo/st/en/prog/energy/oilshale_2.html (last visited Jan. 25, 2010) (providing links to the RDD EAs). The BLM completed the EAs for the RDD leases in 2006 while the NEPA statements for the RMP Amendments and the regulations were completed concurrently in 2008. See PEIS, *supra* note 14; at ES-2 to -3; EA, *supra* note 14, at 1.

¹⁸⁵ Notice of Intent to Prepare a Programmatic Environmental Impact Statement (EIS) and Plan Amendments, 70 Fed. Reg. 73,791, 73,791-92 (Dec. 13, 2005).

¹⁸⁶ See *id.* at 73,791.

¹⁸⁷ Notice of Availability of Draft Oil Shale and Tar Sands Resource Management Plan Amendments To Address Land Use Allocations in Colorado, Utah, and Wyoming and Programmatic Environmental Impact Statement, 72 Fed. Reg. 72,751, 72,751 (Dec. 21, 2007).

¹⁸⁸ *Id.*

¹⁸⁹ BUREAU OF RECLAMATION, U.S. DEP'T OF THE INTERIOR, RESOURCE MANAGEMENT PLAN GUIDEBOOK, at IV-1 (2003), available at <http://www.usbr.gov/pmts/planning/RMPG/RMPG.pdf>.

dures for public land in a particular region into one planning document.¹⁹⁰ In order for the BLM to undertake a particular action or program on a piece of public land, authorization for that action or program must first be included in the RMP.¹⁹¹ For example, the White River RMP, addressing public land located in Rio Blanco County, Colorado, governs the management of water resources, mineral resources, oil and gas, hazardous waste, vegetation, forestry, livestock, wild horses, cultural resources, wild fires, and more.¹⁹² Because amending an RMP is often considered a proposed federal action that could significantly affect the environment, a NEPA statement will usually be included in the amendment process.¹⁹³ To facilitate this, the RMP amendment process parallels the timeline for preparing a NEPA statement.¹⁹⁴ To open public land for commercial leasing, the RMP covering that public land has to be amended.¹⁹⁵

The final version of the oil shale PEIS amended twelve RMPs.¹⁹⁶ Though encompassing over 1000 pages, the PEIS limits its scope to analyzing the decision to amend the RMPs.¹⁹⁷ The PEIS also states that it does not analyze the oil shale regulations that are also required by the EPA Act because the regulations involve different issues, are on a different schedule, and would be better analyzed through a separate NEPA statement.¹⁹⁸ The BLM published a record of decision for the twelve RMP amendments on November 17, 2008.¹⁹⁹ The RMP amendments

¹⁹⁰ See *id.*

¹⁹¹ BUREAU OF LAND MGMT., U.S. DEP'T OF THE INTERIOR, BLM LAND USE PLANNING HANDBOOK I (2005), available at http://www.blm.gov/pgdata/etc/medialib/blm/wo/Information_Resources_Management/policy/blm_handbook.Par.38665.File.dat/h1601-1.pdf [hereinafter BLM LAND USE PLANNING HANDBOOK].

¹⁹² See BUREAU OF LAND MGMT., U.S. DEP'T OF THE INTERIOR, WHITE RIVER, RECORD OF DECISION AND APPROVED RESOURCE MANAGEMENT PLAN, at a-c, 2-1 to -58 (1997), available at http://www.blm.gov/pgdata/etc/medialib/blm/co/programs/land_use_planning/rmp/archives/white_river/rmp_rod.Par.61250.File.dat/Wrrr.pdf.

¹⁹³ See BLM LAND USE PLANNING HANDBOOK, *supra* note 191, at 16-17.

¹⁹⁴ See *id.* at 17.

¹⁹⁵ See *id.*

¹⁹⁶ Notice of Availability of Proposed Oil Shale and Tar Sands Resource Management Plan Amendments to Address Land Use Allocations in Colorado, Utah, and Wyoming and Final Programmatic Environmental Impact Statement 73 Fed. Reg. 51,838, 51,839 (Sep. 5, 2008).

¹⁹⁷ See PEIS, *supra* note 14, at 1-2 to -3.

¹⁹⁸ *Id.* at 1-3.

¹⁹⁹ Notice of Availability of Approved Resource Management Plan Amendments/Record of Decision (ROD) for Oil Shale and Tar Sands Resources, 73 Fed. Reg. 72,519, 72,520 (Nov. 28, 2008).

were executed sixty days later on January 16, 2009, just four days before Barack Obama took office.²⁰⁰

C. *The Oil Shale Regulations*

No action was taken by the BLM to promulgate the oil shale regulations required by EPAct until July 2008, when it published proposed oil shale regulations in the Federal Register.²⁰¹ The notice proposing the regulations did not mention the EA that the BLM had prepared to analyze whether the regulations triggered NEPA's EIS requirement.²⁰² This EA is limited in scope to only the regulations; it does not include an analysis of RMP amendments.²⁰³ The narrow scope of the EA led to a finding that no EIS was required.²⁰⁴ The BLM justified its finding on its claim that the creation of regulations that mandate leasing procedures does not force the BLM to actually issue leases.²⁰⁵ From the BLM's point of view, the choice to issue leases was retained.²⁰⁶ Thus, according to the BLM, though issuing a lease could have a significant environmental impact, the regulations themselves had no significant impact on the environment.²⁰⁷

The process for creating the EA was not as transparent as the preparation of the other NEPA statements implementing EPAct's Commercial Oil Shale Program. Unlike the other NEPA statements, the EA is not available on the internet. To obtain the EA, it must be specifically requested from the BLM's Washington, DC office.²⁰⁸ The BLM's first mention of the EA is in passing in the November 18, 2008 record of decision that contained the final regulations; one day before the publication of the RMP amendment's record of decision.²⁰⁹ The regu-

²⁰⁰ See Congressional Review Act, 5 U.S.C. § 801(3)(a) (2006) (mandating that a "major rule" can become effective no earlier than sixty days after the rule's record of decision). The RMP amendments were executed on January 16, 2009, sixty days after their record of decision and four days before Barack Obama took office. See *id.*; Hulse, *supra* note 4.

²⁰¹ Oil Shale Management—General, 73 Fed. Reg. 42,926, 42,926–75 (July 23, 2008) (to be codified at 43 C.F.R. pt. 3900).

²⁰² See *id.*

²⁰³ See EA, *supra* note 13, at 1.

²⁰⁴ See *id.* at 6.0 (responding to Comment EA-9).

²⁰⁵ *Id.* (responding to Comment EA-8).

²⁰⁶ *Id.* (responding to Comment EA-8).

²⁰⁷ *Id.* (responding to comments EA-8 and EA-9).

²⁰⁸ *Id.* (responding to Comment EA-11).

²⁰⁹ Rules and Regulations: Oil Shale Management—General, 73 Fed. Reg. 69,414, 69,450 (Nov. 18, 2008) (to be codified at 43 C.F.R. pt. 3900).

lations became final—also similar to the RMP amendments—just three days before Barack Obama took office.²¹⁰

VI. A SINGLE NEPA STATEMENT IS REQUIRED

A court would likely find that the BLM's failure to prepare a single NEPA statement for the resource management plan (RMP) amendments and the oil shale regulations is arbitrary and capricious; therefore, both decisions should be set aside. The BLM failed to take a hard look at the environmental consequences of either action by too narrowly defining the scope of each action to not include the other.²¹¹ The failure to take a hard look should be sufficient to find that both actions were arbitrary and capricious; therefore, a reviewing court should set aside the NEPA statements for the RMP amendments and the oil shale regulations.²¹²

A single NEPA statement could be required for two reasons: First, the RMP amendments and the regulations should have been considered as parts of a single proposed federal action—the creation of a commercial oil shale leasing program.²¹³ Second, if the RMP amendments and the regulations are separate proposed actions, they could still be similar, cumulative, or connected actions.²¹⁴

A. A Single Proposed Action

The RMP amendments and regulations could be considered part of a single proposal for a major federal action. A single proposal could occur in two ways: if the BLM explicitly proposed a larger action that included both the RMP amendments and the regulations; or if a fact determination can be made that the BLM, though not explicitly, has a goal for completing an action that includes the RMP amendments and regulations and the BLM is actively pursuing that goal.²¹⁵

The BLM has not explicitly proposed an action that includes both the RMP amendments and the regulations.²¹⁶ Under *Kleppe's* strict formulation, the BLM would have to explicitly propose a single program

²¹⁰ See *id.* at 69,414. The record of decision for the regulations states that the regulations become effective January 17, 2009, three days before President Obama was to take office on January 20, 2009. See *id.*; Hulse, *supra* note 4.

²¹¹ See *supra* Part III.B.

²¹² See *supra* Part III.B.

²¹³ See *supra* Part IV.B.1.

²¹⁴ See *supra* Part IV.B.2.

²¹⁵ See *Kleppe v. Sierra Club*, 427 U.S. 390, 405–06 (1976); 40 C.F.R. § 1508.23 (2009).

²¹⁶ See *Kleppe*, 427 U.S. at 405–06.

of which both smaller actions are a part.²¹⁷ To the contrary, in both the EA for the regulations and the PEIS for the RMP amendments, the BLM is explicit that it is recommending only a single action; neither document claims to be implementing a program that includes both actions.²¹⁸ For example, in the EA, the BLM states:

[T]he BLM concurrently proposed regulations for public review and comment while the requisite PEIS [for the RMP amendments] was being prepared. However, the BLM rule-making process is separate and apart from the preparation of the PEIS with its own environmental documentation. The PEIS analyzes the environmental consequences of an allocation decision, while this EA analyzes the regulatory framework for the administration of an oil shale program.²¹⁹

However, a court could consider the RMP amendments and the regulations to be part of the same proposed action under the Council on Environmental Quality (CEQ) regulations' less restrictive definition.²²⁰ This definition requires that the BLM has a goal including both actions and is actively pursuing that goal.²²¹ As in *Blue Ocean Preservation Society v. Watkins*, a fact determination could show the existence of a proposed action, despite the absence of an explicit proposal for that action by the BLM.²²² There, the court was willing to look to evidence to determine whether the stages of a power plant project were in fact all part of a single project, the planning and construction of the power plant.²²³

Similarly, here the BLM has the goal of creating a commercial oil shale leasing program. The most obvious evidence of this is the EAct's statutory mandate.²²⁴ The EAct requires the creation of a commercial leasing program occur through the creation of a PEIS and the promulgation of regulations.²²⁵ The BLM created the PEIS and promulgated the regulations, and in both instances was explicit that it was adhering to the EAct's statutory mandate: In the EA, the BLM states that "it prepared regulations to implement Section 369 of the [EAct]."²²⁶ In the

²¹⁷ See *id.*

²¹⁸ See PEIS, *supra* note 14, at 1-2 to -3; EA *supra* note 14, at 1.

²¹⁹ See EA, *supra* note 14, at 1.

²²⁰ See 40 C.F.R. § 1508.23 (2009).

²²¹ See *id.*

²²² See 754 F. Supp. 1450, 1456 (D. Haw. 1991).

²²³ See *id.*

²²⁴ EAct, 42 U.S.C. § 15927(d) (2006).

²²⁵ See *id.*

²²⁶ EA, *supra* note 14, at 1.

PEIS, the BLM states that its purpose is to fulfill the EPA's mandate to "complete a programmatic environmental impact statement for commercial leasing on public lands."²²⁷

Furthermore, the BLM is explicit that the RMP amendments and the regulations are integral parts of achieving the goal of creating a commercial oil shale leasing program stating, "[I]n order for a commercial leasing program to occur on public lands, the [RMPs] for the areas where the leasing could occur must be amended."²²⁸ Similarly, the BLM states that the regulations "will implement the [EPA's] statutory requirement for establishing a program to support oil shale production."²²⁹

B. *Similar, Cumulative, or Connected Actions*

If the RMP amendments and the regulations are not part of the same proposed action, they would not be similar or cumulative actions, but should be considered connected actions under the CEQ regulations, thus requiring analysis in the same NEPA statement.

1. Similar Actions

The RMP amendments and regulations are not similar actions. Similar actions "have similarities that provide a basis for evaluating their environmental consequences [sic] together, such as common timing or geography."²³⁰ The RMP amendments and regulations accomplish two very different objectives. The RMP amendments open public land for commercial oil shale leasing, and the regulations establish the procedures for commercial oil shale leasing.²³¹ Alternatively, in defining similar actions, the CEQ regulations contemplate actions that accomplish similar goals through similar actions.²³²

Even if there were a finding that the RMP amendments and the regulations are similar actions, that would not be enough to require a combined statement. The CEQ regulations give the BLM discretion to analyze similar actions in separate NEPA statements if that is the "best

²²⁷ PEIS, *supra* note 14, at 1-2.

²²⁸ *Id.* at 1-1.

²²⁹ EA, *supra* note 14, at 1.2.

²³⁰ See 40 C.F.R. § 1502.25(a)(3) (2009).

²³¹ EA, *supra* note 14, at 1., 4.1.

²³² See 40 C.F.R. § 1508.25(a)(3).

way” to undertake the analysis.²³³ Because of this discretion, as with the seemingly similar actions in *Klamath-Siskiyou*, a court would likely defer to the agency in its decision of whether to prepare a combined NEPA analysis.²³⁴ The lack of similarity in fact, and the discretion afforded the BLM, make it unlikely that the RMP amendments and the regulations would be required to be analyzed in the same NEPA statement as similar actions.²³⁵

2. Cumulative Actions

The RMP amendments and the regulations are also likely not cumulative actions requiring a single NEPA statement.²³⁶ In order to be cumulative actions, the RMP amendments and the regulations would have to have cumulative impacts.²³⁷ To have cumulative impacts, separate actions must have a minimal incremental effect, but when combined have a significant impact on the environment.²³⁸ For example, in *Northern Cascades Conservation Council v. U.S. Forest Service*, off-road vehicle trails had a much smaller impact when analyzed in isolation than when analyzed with the other proposed trails that were all connected to the same regional network.²³⁹ Unlike off-road vehicle trails, here the RMP amendments and the regulations do not share cumulative impacts.²⁴⁰ The regulations will be applied to the land opened for leasing by the RMP amendments, but the environmental impacts of each do not incrementally add to the other action’s impacts.²⁴¹ This lack of shared cumulative impacts will prevent the two actions from being considered cumulative actions requiring a combined NEPA statement.²⁴²

²³³ See *Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989, 1000–01 (9th Cir. 2004); 40 C.F.R. § 1508.25(a)(3).

²³⁴ See *Klamath-Siskiyou*, 387 F.3d at 1000–01.

²³⁵ See *id.*

²³⁶ See *Kleppe v. Sierra Club*, 427 U.S. 390, 410 (1976); 40 C.F.R. § 1508.25(a)(1)(ii) (2009).

²³⁷ See 40 C.F.R. §§ 1508.7, .25(a)(2).

²³⁸ See *id.* § 1508.7.

²³⁹ See 98 F. Supp. 2d 1193, 1197, 1199 (W.D. Wash. 1999).

²⁴⁰ See *id.*; 40 C.F.R. § 1508.25(a)(1)(ii).

²⁴¹ See *N. Cascades*, F. Supp. 2d at 1197, 1199. Not only do the regulations not share cumulative impacts with the RMP amendments, the EA claims the regulations do not even have any cumulative impacts. See EA, *supra* note 14, at 4.2, 6.0.

²⁴² See 40 C.F.R. § 1508.7, .25(a)(2).

3. Connected Actions

The RMP amendments and the regulations are likely connected actions requiring the preparation of a single NEPA statement.²⁴³ The two actions could fit all three of the CEQ's definitions for a connected action: (1) an action that "[a]utomatically trigger[s] other actions which may require environmental impact statements"; (2) an action that "[c]annot or will not proceed unless other actions are taken previously or simultaneously"; and (3) actions that "[a]re interdependent parts of a larger action and depend on the larger action for their justification."²⁴⁴

At first blush, the two actions do not appear to meet the first definition of a connected action, but an action-forcing mandate in the EAct changes this.²⁴⁵ To fit the first definition, the decision to amend the RMPs would have to "automatically trigger" the decision to promulgate the regulations or vice versa.²⁴⁶ Generally speaking, the RMP amendment decision to open public land for lease applications could not be considered as "automatically triggering" the decision to create regulations for leasing. The situation is analogous to *Piedmont Environmental Council v. Federal Energy Regulatory Commission*, where the decision to create permitting procedures did not automatically trigger the issuance of the permits because the Federal Energy Regulatory Commission retained the choice to grant or deny any permit applications.²⁴⁷ Similarly here, the BLM generally does not have to create leasing regulations just because it opens public lands for potential leasing.²⁴⁸

However, the added statutory obligation of the EAct creates a unique set of circumstances where the RMP amendments automatically trigger the leasing regulations.²⁴⁹ The EAct requires that the BLM issue the oil shale regulations six months after the completion of the PEIS.²⁵⁰ According to the BLM, the purpose of the PEIS is to analyze the decision to amend the RMP amendments.²⁵¹ Once the BLM decided to amend the twelve RMPs, Congress required the BLM to promulgate the leasing regulations within six months.²⁵² The BLM's decision to amend

²⁴³ See *id.* § 1508.25(a)(1)(i)–(iii).

²⁴⁴ *Id.*

²⁴⁵ See EAct, 42 U.S.C. § 15927(d) (2006); 40 CFR 1508.25(a)(1)(i).

²⁴⁶ 40 C.F.R. § 1508.25(a)(1)(i).

²⁴⁷ See 558 F.3d 304, 316–17 (4th Cir. 2009).

²⁴⁸ See EA, *supra* note 14, at 4.6.

²⁴⁹ 40 C.F.R. § 1508(a)(1)(i); see 42 U.S.C. § 15927(d)(2).

²⁵⁰ 42 U.S.C. § 15927(d)(2).

²⁵¹ PEIS, *supra* note 14, at 1-2.

²⁵² 42 U.S.C. § 15927(d)(2).

the RMPs required it to subsequently promulgate regulations; therefore, the two actions should be considered connected, requiring a single NEPA statement.²⁵³

The RMP amendments and the regulations also likely fit the second definition of a connected action.²⁵⁴ This definition requires that if one proposed action cannot or will not proceed without another action, the two actions must be considered together in the same NEPA statement.²⁵⁵ Here, if the completion of one action requires the completion of the other, then the two actions are connected and must be examined in the same NEPA statement.²⁵⁶ For example, in *Thomas v. Peterson*, timber sales were awaiting approval to build a logging road to access the sales.²⁵⁷ The timber sales could not occur without the approval of the logging road and therefore the two actions were connected.²⁵⁸

Similar to the previous definition of connected, the EAct provides context that fulfills this definition, thus requiring a combined NEPA statement for the RMP amendments and the regulations.²⁵⁹ Absent the EAct, the BLM could proceed with either action without the other. Promulgating regulations for leasing does not require that land be available for leasing and making land available for leasing does not require regulations to undertake the leasing. However, the structure of the EAct appears to create this relationship.²⁶⁰ The EAct requires that the BLM examine a commercial leasing program in the PEIS and then implement the program with the regulations.²⁶¹ If the regulations are implementing what is analyzed in the PEIS—the RMP amendments—then the regulations could not proceed before the completion of the PEIS. The reliance of one action on the other for its existence makes the two actions connected, requiring the preparation of a single NEPA statement.²⁶²

Finally, the RMP amendments likely fit the third definition of a connected action.²⁶³ For two actions to be connected under this definition, they must be both justified by the same larger action and be inter-

²⁵³ See *id.*; 40 C.F.R. § 1508.25(a)(1)(i).

²⁵⁴ See 40 C.F.R. § 1508.25(a)(1)(ii).

²⁵⁵ See *id.*

²⁵⁶ See *id.*

²⁵⁷ See 753 F.2d 754, 759 (9th Cir. 1985).

²⁵⁸ See *id.*

²⁵⁹ EAct, 42 U.S.C. § 15927(d)(2) (2006).

²⁶⁰ See *id.*

²⁶¹ See *id.* § 15927(d).

²⁶² See *Thomas* 753 F.2d at 759.

²⁶³ See 40 C.F.R. § 1508.25(a)(1)(iii) (2009).

dependent parts of that larger action.²⁶⁴ To be interdependent, it must not be reasonable to consider undertaking one action without the other.²⁶⁵ In *Blue Ocean Society v. Watkins*, the assessment and testing stages that preceded the construction of a geothermal energy project satisfied both regulatory conditions.²⁶⁶ Each stage laid the groundwork for the next, making them interdependent, while all of the stages relied on the construction of the final geothermal plant for their justification.²⁶⁷

The RMP amendments and the regulations are both justified by the creation of a commercial oil shale leasing program.²⁶⁸ Like the stages in creating the geothermal energy project in *Blue Ocean Society*, the EPAct is explicit that the RMP amendments and the regulations are steps toward creating a commercial oil shale leasing program;²⁶⁹ the RMP amendments open land for leasing and the regulations create the procedure for that leasing.²⁷⁰ The BLM frames the actions similarly: It frames the RMP amendments as the allocation decision for what land can be used in an oil shale program.²⁷¹ It frames the regulations as the “framework for the administration of an oil shale program.”²⁷²

The two actions are also interdependent. The requirements of the EPAct make it irrational and unreasonable to pursue the regulations without the RMP amendments.²⁷³ The EPAct requires the BLM to analyze the commercial leasing program in the PEIS and then implement that program through regulations.²⁷⁴ The regulations are thus meant to implement what the BLM analyzed in the PEIS: the RMP amendments. It would be unreasonable or irrational for the BLM to violate the EPAct

²⁶⁴ See *id.*

²⁶⁵ See *Thomas*, 753 F.2d at 759 (citing *Trout Unlimited v. Morton*, 509 F.2d 1276 (9th Cir. 1974)) (holding that timber sales and timber road construction were connected actions); *Fla. Wildlife Fed'n v. U.S. Army Corps of Eng'rs* 401 F. Supp. 2d 1298, 1313–17 (S.D. Fla. 2005) (holding that the construction of one building was not reasonable or rational absent the construction of a planned research park); *Shoshone-Paiute Tribe v. United States*, 889 F. Supp. 1297, 1298 (D. Idaho 1994) (holding that a U.S. Air Force training range and a beddown for a composite wing aircraft were cumulative actions that must be considered together in a single EIS).

²⁶⁶ 754 F. Supp. 1450, 1450–51 (D. Haw. 1991).

²⁶⁷ *Id.* at 1458–59.

²⁶⁸ See EPAct, 42 U.S.C. § 15927(d) (2006); 40 C.F.R. § 1508.25(a)(1)(iii) (2009).

²⁶⁹ 754 F. Supp. at 1450–51.

²⁷⁰ See 42 U.S.C. § 15927(d).

²⁷¹ EA, *supra* note 14, at 1.

²⁷² *Id.* at 1., 4.1.

²⁷³ See 42 U.S.C. § 15927(d); *Fla. Wildlife Fed'n v. U.S. Army Corps of Eng'rs* 401 F. Supp. 2d 1298, 1313–17 (S.D. Fla. 2005) (holding that the construction of one building was not reasonable or rational absent the construction of a planned research park).

²⁷⁴ See 42 U.S.C. § 15927(d).

by creating regulations for a commercial oil shale program before it analyzed the program in the PEIS.²⁷⁵ Because the RMP amendments are interdependent parts of, and justified by, the larger commercial leasing program, the two actions are connected and must be analyzed in the same NEPA statement.²⁷⁶

CONCLUSION

A commercial oil shale leasing program on public lands may or may not be a good idea. However, the BLM should not rush forward with a commercial oil shale leasing program without a better understanding of its potential environmental impacts. The current Interior Secretary and the governors of Colorado and Wyoming have been explicit to that effect.²⁷⁷ In order to ensure that a responsible leasing program is put in place, the program rushed into effect by the Bush Administration must first be repealed.

A finding by a court that the RMP amendments and the regulations governing the lease program should have been considered in the same NEPA statement would have this effect. Such a finding would mean that the BLM failed in its NEPA procedural obligation and that the two actions taken must be set aside until that obligation is met. This would remove the rule and regulations without counting on the unlikely prospect of Secretary Salazar undertaking the time and resource-consuming administrative repeal process. Once the rule and regulations are set aside, the Secretary can focus on moving forward cautiously in examining the merits of a potential commercial oil shale leasing program.

²⁷⁵ See *Fla. Wildlife Fed'n*, 401 F. Supp 2d at 1313–17.

²⁷⁶ See 42 U.S.C. § 15927(d); *Blue Ocean Pres. Soc'y* 754 F. Supp. at 1450–51; 40 C.F.R. § 1508.25(a)(1)(iii) (2009).

²⁷⁷ See Salazar, *supra* note 9; Letter from Dave Freudenthal, *supra* note 81; Letter from Bill Ritter, *supra* note 81.

