



U.S. ENVIRONMENTAL PROTECTION AGENCY

OFFICE OF INSPECTOR GENERAL

# The EPA's Comments Improve the Environmental Impact Statement Process But Verification of Agreed-Upon Actions Is Needed

Report No. 13-P-0352

August 22, 2013



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**Abbreviations**

EIS	Environmental Impact Statement
EPA	U.S. Environmental Protection Agency
GPRA	Government Performance and Results Act
NEPA	National Environmental Policy Act
OECA	Office of Enforcement and Compliance Assurance

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# At a Glance

## Why We Did This Review

The purpose of this review was to determine the impact the U.S. Environmental Protection Agency has on final federal agency Environmental Impact Statements under the National Environmental Policy Act. As required by NEPA and Section 309 of the Clean Air Act, the EPA reviews EISs that evaluate the anticipated environmental impacts of proposed major federal actions. The EPA reviews hundreds of EISs annually, involving a wide range of federal projects. Projects covered by EISs include renewable energy, major highway, and oil and gas development projects.

## This report addresses the following EPA Goals or Cross-Cutting Strategies:

- *Taking action on climate change and improving air quality.*
- *Protecting America's waters.*
- *Cleaning up communities and advancing sustainable development.*
- *Ensuring the safety of chemicals and preventing pollution.*
- *Expanding the conversation on environmentalism.*
- *Working for environmental justice and children's health.*

For further information, contact our Office of Congressional and Public Affairs at (202) 566-2391.

The full report is at:  
[www.epa.gov/oig/reports/2013/20130822-13-P-0352.pdf](http://www.epa.gov/oig/reports/2013/20130822-13-P-0352.pdf)

## ***The EPA's Comments Improve the Environmental Impact Statement Process But Verification of Agreed-Upon Actions Is Needed***

### What We Found

We found that federal agencies are making changes to their EISs to mitigate or eliminate potential environmental risks based on the EPA's comments. In our review of a sample of EISs and in discussions with federal agencies, we found that the EPA's comments directly resulted in positive changes to final EISs. The eight federal agencies we interviewed all stated that they changed their final EISs based on the EPA's comment on their draft EISs.

The EPA's goal was to mitigate at least 70 percent of the environmental impacts identified in its Section 309 reviews of EISs. The EPA tracks progress on its goal by counting the number of substantive comments it makes on EISs and the responses (mitigation) from the lead federal agency. For 2012, the EPA reported it exceeded its goal and obtained a 75-percent result for substantive comments addressed by the federal agency. This measure captures the prospective impact of the EPA's proposed mitigation measures. It does not measure the federal agency's actual mitigation actions or outcomes (i.e., impacts), nor is there a system in place to do this. The EPA also provided us with "success stories" evidencing changes made by the federal agencies in response to the EPA's comments. However noteworthy, these "success stories" do not measure or track actual mitigation actions implemented or outcomes.

The EPA has the authority to request and obtain information from lead federal agencies about agreed-upon mitigation measures. In addition, the EPA's 1984 *Policy and Procedures for the Review of Federal Actions Impacting the Environment* states that the EPA can conduct follow-up activities on EPA's comments on final EISs in part to ensure that agreed-upon mitigation measures are identified in the Record of Decision and are fully implemented. The EPA can more accurately assess and more completely report its results in mitigating environmental impacts of federal government projects by following up on implementation of agreed-upon mitigation measures.

### Recommendation and Planned Agency Corrective Action

We recommend that the EPA direct its NEPA compliance division to conduct, on a selected basis, follow-up activities on final EISs including contacting lead agencies and documenting the results of these reviews.

The agency concurred with our findings and recommendation. The agency indicated that it will work to develop a plan by December 1, 2013, to conduct these follow-up activities on a selected basis and as limited resources allow. The recommendation is resolved and open with corrective actions ongoing. No further EPA response to this report is required.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

THE INSPECTOR GENERAL

August 22, 2013

**MEMORANDUM**

**SUBJECT:** The EPA's Comments Improve the Environmental Impact Statement Process  
But Verification of Agreed-Upon Actions Is Needed  
Report No. 13-P-0352

**FROM:** Arthur A. Elkins Jr.

A handwritten signature in black ink, appearing to read "Arthur A. Elkins Jr.", is written over the printed name.

**TO:** Susan Bromm, Director  
Office of Federal Activities  
Office of Enforcement and Compliance Assurance

This is a report on the subject evaluation conducted by the Office of Inspector General of the U.S. Environmental Protection Agency. This report contains findings that describe the problems the OIG has identified and corrective actions the OIG recommends. This report represents the opinion of the OIG and does not necessarily represent the final EPA position. Final determinations on matters in this report will be made by EPA managers in accordance with established audit resolution procedures.

**Action Required**

You are not required to provide a written response to this final report, because you agreed to the report's recommendation and provided a corrective action and completion date that meets the intent of the recommendation. The recommendation is resolved and open with corrective actions ongoing.

Should you choose to provide a response to this final report, we will post your response on the OIG's public website, along with our memorandum commenting on your response. You should provide your response as an Adobe PDF file that complies with the accessibility requirements of Section 508 of the Rehabilitation Act of 1973, as amended.

We will post this report to our website at <http://www.epa.gov/oig>.

If you or your staff have any questions regarding this report, please contact Assistant Inspector General for Program Evaluation Carolyn Copper at (202) 566-0829 or [copper.carolyn@epa.gov](mailto:copper.carolyn@epa.gov); or Acting Director for Toxics, Chemical Management, and Pollution Prevention Evaluations Jerri Dorsey at (919) 541-3601 or [dorsey.jerri@epa.gov](mailto:dorsey.jerri@epa.gov).

## *Table of Contents*

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<b>Purpose</b> .....	1
<b>Background</b> .....	1
<b>Scope and Methodology</b> .....	2
<b>Results of Review</b> .....	2
The EPA's Positive Impact on EISs .....	3
Improving Demonstration of Program Results .....	3
<b>Conclusions</b> .....	5
<b>Recommendation</b> .....	5
<b>Agency Comments and OIG Evaluation</b> .....	5
<b>Status of Recommendation and Potential Monetary Benefits</b> .....	6

## **Appendices**

<b>A</b> Environmental Impact Statements Reviewed.....	7
<b>B</b> Examples of Lead Agency Response to the EPA's Comments.....	8
<b>C</b> Agency Response .....	10
<b>D</b> Distribution .....	12

## Purpose

The purpose of this review was to determine the impact the U.S. Environmental Protection Agency has on final federal agency Environmental Impact Statements prepared under the National Environmental Policy Act. As required by NEPA and Section 309 of the Clean Air Act, the EPA's Office of Federal Activities reviews EISs that evaluate the anticipated environmental impacts of proposed major federal actions.

## Background

Title I of NEPA contains a Declaration of National Environmental Policy which, in part, requires the federal government to use all practicable means to create and maintain conditions under which man and nature can exist in productive harmony. Two major purposes of the NEPA process are better informed decisions and citizen involvement, both of which should lead to implementation of NEPA's policies. NEPA's procedural requirements apply to all federal agencies in the executive branch.

Section 102 of NEPA requires federal agencies to incorporate environmental considerations in their planning and decision-making through a systematic interdisciplinary approach. Specifically, all federal agencies are to prepare detailed statements including an assessment of the environmental impact of and alternatives to major federal actions significantly affecting the environment. These statements are commonly referred to as environmental impact statements. After the federal agency prepares a draft EIS, a notice of availability is published in the Federal Register. Federal agencies and other outside parties have at least 45 days to comment on draft EISs. The agency then assesses comments received, revises the EIS accordingly, and publishes a final EIS. After a final EIS is prepared and at the time of its decision, the federal agency will prepare a public record of its decision addressing how the findings of the EIS, including consideration of alternatives, were incorporated into the agency's decision-making process.

### ***The EPA's Section 309 NEPA Review Program***

The EPA has a unique responsibility in the NEPA review process. Under Section 309 of the Clean Air Act, EPA is required to review and publicly comment on the environmental impacts of major federal actions, including actions which are the subject of EISs. The EPA is mandated to review and provide comment on draft EISs put forth by other federal agencies.

To achieve this mandate, the EPA has created an environmental review process that uses two scales to evaluate draft EISs. One rates the environmental impact of the proposed action, and the other rates the adequacy of information presented in the draft EIS. The EPA uses these rating scales to comment on the draft EISs from federal agencies. The EPA provides these ratings and comments in the form of a

letter, provided within the required timeframe for review. The EPA's review is intended to help federal agencies identify and ultimately avoid or mitigate potential adverse impacts from their projects.

## **Scope and Methodology**

We conducted our work from November 2012 through July 2013 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform our work to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our objectives.

Our review focused on assessing the impact of the EPA's review and comment on federal agency EISs. The team held a series of meetings with the EPA's Office of Federal Activities to gain an understanding of the NEPA process and the EPA's role. We received database access for the agency's internal EIS tracking system, and learned how to use the NEPAassist geographic information system tool. We reviewed documents from both the EPA and the Council on Environmental Quality, as well as academic literature on the NEPA process.

To assess the process in practice, we selected 10 of 218 final EISs received by the EPA in 2012 (see appendix A). We then reviewed the draft and final comment letters to document the ratings, the EPA's comments, and the lead agency's response to these comments. We documented how potential environmental impacts were avoided between draft and final and how/if those can be connected back to EPA comment and involvement. As part of this review, we spoke to both the EPA lead reviewer and the lead federal agency contact for each sampled EIS.

We interviewed staff in EPA Regions 3, 4, 6, 8 and 9. We also spoke with representatives from the following federal agencies: U.S. Army Corps of Engineers, U.S. Marine Corps, Nuclear Regulatory Commission, U.S. National Park Service, Bureau of Land Management (two sites), U.S. Forest Service, and Bureau of Reclamation.

## **Results of Review**

The EPA is having a positive impact on final EISs. Federal agencies are generally responsive to the EPA's comments on the draft EIS and make changes to their final EISs based on the EPA's comments and recommendations. The EPA staff analyze final EISs and compute the percentage of impacts mitigated as a result of the EPA reviews. However, the EPA currently only measures the prospective impact of mitigation. The EPA has no formal or systematic process in place to determine actual mitigation outcomes and therefore does not conduct follow-up actions designed to examine these impacts. The EPA's Policy and Procedures Manual identifies that EPA can conduct, on a selected basis, follow-up on the

comments and mitigation measures proposed in final EISs. The agency cited limited resources as the barrier to follow-up.

### ***The EPA's Positive Impact on EISs***

We found that lead federal agencies are making changes to their EISs based on the EPA's comments on draft EISs. In our review of the EISs and in discussions with lead federal agencies, we found that the EPA's comments directly resulted in changes to the majority of the final EISs we reviewed. The method by which lead agencies responded varied across project type and agency. For one of our sampled items, there were two substantive changes from the draft to the final based on the EPA's comment. These included the disclosure of \$4.2 million in mitigation funds that will be spent to reduce health impacts in low-income and minority communities and a commitment to a reduced review timeframe for air quality issues. For additional examples of the final EIS changes, see appendix B.

The eight federal agencies we interviewed all stated that they changed their final EISs based on the EPA's comment on their draft EISs. We found a range of changes, from minor enhancements to major project modifications. One lead federal agency indicated a significant change, noting that the project originally proposed would have used large amounts of water. Based on comments from the EPA regarding water use, the project changed to utilizing a process which reduced water need. Interviews with the five regional NEPA offices' staff found that lead federal agencies use the EPA's comments effectively to change and improve their EISs. One region provided an example of a new federal facility<sup>1</sup> which would have encompassed 1,500 acres. In that case, the lead agency's first choice was undeveloped farm land. According to regional staff, the EPA engaged the agency and had them do an EIS. They ultimately picked the productive reuse of an existing federal facility.

### ***Improving Demonstration of Program Results***

The EPA's Government Performance and Results Act goal for the NEPA review program is a "... percent of significant impacts identified by EPA during the NEPA review of all major proposed federal actions that will be mitigated." The EPA's target was to have 70 percent of the impacts identified in the EPA's comment letters on the draft EIS mitigated in the agency's response in the final EIS. Project impacts on human health and the environment, and mitigation measures, include:

- Choosing a less environmentally damaging alternative.
- Putting in wetlands mitigation measures.
- Working with environmental justice communities.<sup>2</sup>

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<sup>1</sup> This case was further outlined in the success story document provided to us by the agency.

<sup>2</sup> According to the Council on Environmental Quality regulations, "Mitigation" includes: (a) avoiding the impact altogether by not taking a certain action or parts of an action; (b) minimizing impacts by limiting the degree or

The program's GPRA measure is documented with a count of substantive comments (impacts) by the EPA and responses (mitigation) from the lead agency. In assessing its success, the EPA completes a "GPRA Form" for each final EIS reviewed. The EPA's GPRA measure form outlines EPA's comments on the draft EIS and final EIS. In addition to the comments, it provides the EPA's assessment as to actions taken by the lead agency based on EPA comment. For fiscal year 2012, EPA reported that it met its performance goals for the NEPA program: "75% of the significant impacts identified in EPA's comment letters on Draft EISs were avoided, minimized, or compensated for ("mitigated") by the lead agencies in the final EISs published in FY 2012."

The lead federal agency responses to assure mitigation are not validated by EPA. Agency EISs outline the expected benefits and consequences of a proposed project. The mitigation measures included in these documents based on the EPA comment are prospective improvements. The EPA currently has no system in place to determine actual mitigation outcomes (i.e., impacts) based on the EIS comments it provides.

According to EPA program staff, they consider their involvement in the EIS process to end with the final EIS. There is only limited assessment of the Record of Decision for these projects, and no verification that the agreed upon mitigation measures occur when the projects go to construction. As a result, the EPA can only project environmental effect from its review and comment. Three of the five regional NEPA leads from our sample said that follow-up on selected projects is needed. They indicated a need for follow-up to ensure that agreed upon mitigation measures are actually put into place.

Council on Environmental Quality regulations implementing NEPA provide authority under which EPA can request and obtain information from lead agencies about agreed upon mitigation measures. The regulation states that, upon request, the lead agency shall inform cooperating or commenting agencies on progress in carrying out mitigation measures which they have proposed and which were adopted by the agency making the decision.

In addition, the EPA's 1984 *Policy and Procedures for the Review of Federal Actions Impacting the Environment* states that the EPA can conduct on a selected basis follow-up activities on comments on final EISs in part to ensure that agreed-upon mitigation measures are identified in the Record of Decision, and that the agreed-upon mitigation measures are fully implemented. The policy also notes that, where resources allow, the EPA is encouraged to assess the level of compliance and effectiveness of federal agency mitigation measures. The lack of

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magnitude of the action and its implementation; (c) rectifying the impact by repairing, rehabilitating, or restoring the affected environment; (d) reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action; and (e) compensating for the impact by replacing or providing substitute resources or environments.

a follow-up system to assess whether mitigation actions were implemented could misinform the EPA program performance decisions, and public stakeholder assessments about the EPA's actual impact and outcomes on the NEPA review process.

## **Conclusions**

Although the lead federal agencies' have responsibility for implementing and monitoring agreed-upon mitigation measures, the EPA has the authority to request actual data on mitigation progress from lead federal agencies and follow up on the results of actions EPA has recommended. The agency cited limited resources as a barrier to follow-up. However, resources could be selectively applied to follow up on high priority or high impact federal projects to ensure that the agreed-upon mitigation measures are actually implemented. As many federal agencies resources are constrained at this time, it becomes more vital to ensure that commitments made in the NEPA process were acted on. Moreover, the EPA can more accurately assess and more completely report its results in mitigating environmental impacts of federal government projects by following up on the implementation of agreed upon mitigation measures.

## **Recommendation**

We recommend that the director, Office of Federal Activities, Office of Enforcement and Compliance Assurance:

1. Direct the NEPA Compliance Division to conduct, on a selected basis, follow-up activities on EPA's proposed mitigation measures adopted by agencies in final EISs, including contacting lead agencies and documenting the results of these reviews.

## **Agency Comments and OIG Evaluation**

The agency concurred with our findings and recommendation. The agency provided a corrective action and estimated completion date that meets the intent of the recommendation. The recommendation is resolved and open with corrective actions ongoing. No further EPA response to this report is required. The agency's detailed response is provided in Appendix C.

## **Status of Recommendation and Potential Monetary Benefits**

RECOMMENDATIONS						POTENTIAL MONETARY BENEFITS (in \$000s)	
Rec. No.	Page No.	Subject	Status <sup>1</sup>	Action Official	Planned Completion Date	Claimed Amount	Agreed-To Amount
1	5	Direct the NEPA Compliance Division to conduct, on a selected basis, follow-up activities on EPA's proposed mitigation measures adopted by agencies in final EISs, including contacting lead agencies and documenting the results of these reviews.	O	Director, Office of Federal Activities, Office of Enforcement and Compliance Assurance	12/1/13		

<sup>1</sup> O = recommendation is open with agreed-to corrective actions pending  
 C = recommendation is closed with all agreed-to actions completed  
 U = recommendation is unresolved with resolution efforts in progress

## ***Environmental Impact Statements Reviewed***

<b>Lead Agency</b>	<b>Title</b>	<b>Status of Action</b>
National Park Service	Hampton National Historic Site, General Management Plan, Implementation, Baltimore County, Maryland	Underway
Department of Transportation	US-1 Transportation Improvements, Updated Information, from Sandhill Road (NC 1971) to just North of Fox Road (NC 1606) to Martson Road (NC 1001) , Funding, and COE Section 404 Permit, City of Rockingham, Richmond County, North Carolina	No Information
Nuclear Regulatory Commission	Levy Nuclear Plant Units 1 and 2, Application for Combined Licenses (COLs) for Construction Permits and Operating Licenses, (NUREG-1941), Levy County, Florida	On Hold (expected to begin in 2015 or later)
Bureau of Land Management	HB In-Situ Solution Mining Project, Proposal to Extract the Potash Remaining in Inactive Underground Mine, NPDES Permit, Eddy County, New Mexico	Underway
U.S. Forest Service	Black Fork Salvage Project, Proposal to Treat Timer Harvest, Prescribe Fire, and Mechanical Thinning, Uinta-Wasatch-Cache National Forest, Summit County, Utah	Not Started
Bureau of Land Management	Sonoran Solar Energy Project, Construction and Operation of a 3756-megawatt (MW) Concentrated Solar Thermal Power Plant and Ancillary Facilities on 3,702 Areas, Right-of-Way Granting, Maricopa County, Arizona	Not Started
Bureau of Reclamation	Upper Truckee River Restoration and Golf Course Reconfiguration Project, to Restore Natural Geomorphic Ecological Process, Lake Tahoe, EL Dorado County, California	Currently in Litigation
Federal Energy Regulatory Commission	Eagle Mountain Pumped Storage Hydroelectric Project, Licensing Application for Eagle Mountain Mine, Near the Town of Desert Center, Riverside County, California	Currently in Litigation
U.S. Army Corps of Engineers	Berths 302-306 American Presidents Line (APL) Container Terminal Project, Construction and Operation, US Army COE Section 10 and Section 103 of the Marine Protection Research and Sanctuaries Act, Los Angeles County, California	Unknown
Department of the Navy	Marine Corps Air Ground Combat Center Project, Land Acquisition and Airspace Establishment to Support Large-Scale MAGTF Live-Fire and Maneuver Training Facility, Twentynine Palms, San Bernardino County, California	ROD signed February 2013. Request FAA to commence air space proposal review. Goal for FAA to complete by 2014.

Sources: EPA's internal EIS tracking database and interviews.

## ***Examples of Lead Agency Response to the EPA's Comments***

<b>Project</b>	<b>Draft EIS Impact</b>	<b>EPA Comment</b>	<b>Final EIS</b>
Berths 302-306 American Presidents Line (APL) Container Terminal Project, Construction and Operation, US Army Corps of Engineers	The EJ analysis and conclusions in the DEIS state that there will be disproportionately high and adverse effects on minority and low-income populations due to air quality impacts.	We recognize the considerable level of analysis in the DEIS, but we note that the proposed mitigation does not fully offset the significant project-related impacts to the local community. The local community is already heavily impacted, a condition likely to be exacerbated by the many projects currently planned at and around the Port, such as the Corps of Engineers Pier S project, the Southern California International Gateway, and perhaps the expansion of Interstate 710.	The lead agencies have \$4.2 million in mitigation funds that will be spent to reduce health impacts in low-income and minority communities (e.g. schools, housing, health clinics, etc.).
Levy Nuclear Plant (LNP) Units 1 and 2, Application for Combined Licenses (COLs) for Construction Permits and Operating Licenses, (NUREG-1941), Levy County, FL	As many as 2092.9 acres of wetlands could be adversely affected over the course of the 60 years that groundwater is pumped to support the LNP project. The DEIS also states temporary dewatering of wetlands may occur in order to install the blowdown pipelines and other structures. The document also states that this may occur for 2 to 4 year period.	The FEIS should provide a detailed mitigation plan and the UMAM scores for the impact and mitigation sites. EPA also recommends that a "wetland functional analysis" be conducted on the adjacent wetlands and any adverse wetland impacts due to dewatering be mitigated.	In response to EPA's on-going concerns (expressed in several review team meetings, field visits, and in our DEIS comment letter) that sustained groundwater pumping may adversely impact area wetlands, the FEIS provides an analysis of alternative sources of water to support the LNP project in lieu of groundwater pumping. EPA concurs with the State of Florida's approach.
Berths 302-306 American Presidents Line (APL) Container Terminal, Construction and Operation, US Army Corps of Engineers	In the DEIS, the Port of Los Angeles committed to reviewing the terms of APL's lease every 7 years to determine if additional air quality improvements could be made (e.g. lower emitting on-dock diesel equipment).	The FEIS should commit to reviewing new technologies every five years from the date of the most recent facility lease. Additionally, technology reviews and any resulting recommendations should be made available to the public.	The Port of Los Angeles agreed to do this every five years.

Project	Draft EIS Impact	EPA Comment	Final EIS
<p>HB In-Situ Solution Mining Project, Proposal to Extract the Potash Remaining in Inactive Underground Mine, NPDES Permit, Eddy County, NM</p>	<p>The agency indicated that the draft EIS involved significant water use.</p>	<p>If the analysis determines that significant cumulative impacts would occur, a mitigation plan for these impacts should be included in the FEIS. A mitigation plan for impacts to groundwater resources could contain water conservation improvements for the entire potash mining process, including mills, forming partnerships with area residents, farmers, and public water systems, and partnering with city and county governments and the State's water resources administrator, the New Mexico Office of the State Engineer to promulgate new or improved water conservation guidance for mining operations.</p>	<p>A mitigation plan for impacts to groundwater resources for water conservation improvements for the entire potash mining process, including mills, forming partnerships with area residents, farmers, and public water systems, and with city and county governments and the State's water resources administrator, the New Mexico Office of the State Engineer to promulgate new or improved water conservation guidance for mining operations.</p>

Source: OIG EIS tracking database and additional documentation provided by the EPA.

**Abbreviations**

- APL: American Presidents Line
- COL: Combined Licenses
- DEIS: Draft Environmental Impact Statement
- EJ: Environmental Justice
- FEIS: Final Environmental Impact Statement
- LNP: Levy Nuclear Plant
- NPDES: National Pollutant Discharge Elimination System
- UMAM: Uniform Mitigation Assessment Method

## ***Agency Response***

July 31, 2013

### **MEMORANDUM**

**SUBJECT:** Response to Office of Inspector General's (OIG) Draft Report: "The EPA's Comments Improve the Environmental Impact Statement Process But Verification of Agreed-Upon Actions Is Needed" (Project No. OPE-FY13-0002)

**FROM:** Susan E. Bromm  
Director  
Office of Federal Activities

**TO:** Carolyn Copper  
Assistant Inspector General  
Office of Program Evaluation

We reviewed the referenced OIG draft report and appreciate the opportunity to concur on the finding that EPA is having a positive impact on final Environmental Impact Statements (EISs). We are pleased to see that your evaluation confirms that our efforts are helping other federal agencies develop better NEPA analyses.

We also appreciate the opportunity to respond to the recommendation in the draft report:

**We recommend that the director, Office of Federal Activities, Office of Enforcement and Compliance Assurance:**

- **Direct the NEPA Compliance Division to conduct, on a selected basis, follow-up activities on EPA's proposed mitigation measures adopted by agencies in final EISs, including contacting lead agencies and documenting the results of these reviews.**

While we have concerns regarding the time and resources needed to implement this recommendation, particularly in light of recent budget cuts, we concur with the recommendation and will work to develop a plan by December 1, 2013 to conduct these follow-up activities on a selected basis and as limited resources allow.

We would also like to note that while we can follow-up with the Lead Agencies on recommended mitigation measures, it is the obligation of the Lead Agency to ensure the agreed upon mitigation measures are fully implemented. EPA has no special role or authority under NEPA or the Section 309 of the Clean Air Act to ensure that Lead Agencies meet any mitigation

commitments outlined in the agency's NEPA Record of Decision (ROD). In that light, we encourage you to consider working with the Inspector Generals of the Lead Agencies to conduct an evaluation of whether Lead Agencies are implementing the mitigation measures committed to in the RODs.

Thank you again for the opportunity to review the draft report.

## ***Distribution***

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