

Overview of the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 *et seq.*

The Statute

NEPA was enacted in December 1969 and signed into law on January 1, 1970. NEPA declares a national policy “to use all practicable means and measures... to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.” NEPA, Section 101(a); 42 U.S.C. § 4331(a). The method by which federal agencies are to promote this policy and consider environmental values in decisionmaking is the requirement that federal agencies prepare a “detailed statement” on “every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment.” NEPA, Section 102(2)(C); 42 U.S.C. § 4332(2)(C). Among other things, the detailed statement – which is referred to as an environmental impact statement (EIS) – describes the environmental impacts of the proposed action and alternatives to the proposed action. NEPA also created the Council on Environmental Quality (CEQ) to serve as an environmental advisor to the President. NEPA, Sections 201-209; 42 U.S.C. §§ 4341-47.

The CEQ NEPA Implementing Regulations

Executive Order No. 11514 (March 5, 1970) issued after the enactment of NEPA gave CEQ authority to oversee federal agency compliance with NEPA and to issue guidelines implementing the procedural provisions of the statute. CEQ issued Interim Guidelines in April 1970 (35 Fed. Reg. 7391 (1970)). The Interim Guidelines were replaced by Guidelines in April 1971 (36 Fed. Reg. 7724 (1971)). Then, in 1973, CEQ substantially expanded the Guidelines to reflect the experience federal agencies had in preparing and utilizing EISs. CEQ first published these Guidelines in draft form and sought public comment on them (38 Fed. Reg. 10856 (1973)). In response to comments, the final Guidelines, issued in August 1973 (38 Fed. Reg. 20550 (1973)), increased opportunities for public comment in the EIS process and tried to provide more detailed guidance to federal agencies on their responsibilities in light of court cases interpreting NEPA.

The Guidelines, however, were not directives. Some courts cited the CEQ Guidelines as persuasive, while others ignored them. Inconsistent agency practices resulted, making it difficult for those outside of government to understand and to participate in the environmental review process. Thus, in 1977, President Carter issued Executive Order No. 11991 (May 24, 1977) giving CEQ authority to issue regulations that would be binding on all federal agencies. CEQ issued such regulations in 1978 and they became effective in 1979 (43 Fed. Reg. 55990 (1978)); they are codified at 40 CFR Parts 1500 – 1508. The regulations were amended once in 1986 (51 Fed. Reg. 15625 (1986)). It is these regulations, which have as their basis the earlier guidelines, that specify the procedural requirements outlined in NEPA Section 102(2)(C).

The NEPA Process

The NEPA process refers to the procedures a federal agency follows to analyze the environmental impacts of a proposal and alternatives, and to document that analysis and its results. This process is

generally outlined in NEPA's Section 102(2)(C) (42 U.S.C. §4332(2)(C)) and is fully described in the CEQ NEPA implementing regulations (40 CFR Parts 1500-1508). The NEPA process includes efforts to inform and seek comments from the public, state and local agencies, Native American tribes, and other federal agencies.

NEPA requires an evaluation of the environmental impacts of a proposed action, that is when the agency has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the effects may be meaningfully evaluated. Further, NEPA applies to "major Federal actions significantly affecting the quality of the human environment." This means that the proposal has to be a federal action (including federal approval of a permit or involving federal funding for all or a significant portion of a proposal) and has to have significant environmental impacts. Whether a proposal "significantly" affects the environment requires the agency to look at both the context (the significance of the action as a whole, the affected region, and the affected interests) and intensity (severity of the impacts).

Thus, at the beginning of the NEPA process, a federal agency must ask itself whether a particular proposal is a "major federal action significantly affecting the quality of the human environment." The possible answers are:

- **Clearly yes:** the agency proceeds to prepare an environmental impact statement (EIS)
- **Maybe:** the agency begins to prepare an environmental assessment (EA) to determine whether the impacts could be significant
- **Clearly no:** the proposed action has been categorically excluded from NEPA documentation (a categorical exclusion is a category of actions that the agency determines by regulation in advance have no significant environmental impact)

Preparing an Environmental Impact Statement

The agency prepares and publishes a notice of intent to prepare an EIS and invites public comment on the scope of the issues and alternatives to be addressed in the document. Where more than one federal agency, or a federal and state or local agency, have jurisdiction over the proposed action, the federal agencies determine which should have primary jurisdiction and therefore lead responsibility for preparing the EIS (the lead agency). Other agencies with interest or special expertise can be invited to participate as cooperating agencies.

An EIS generally contains the following:

- **Purpose and Need:** identifying the purpose and need to which the agency is responding in proposing the action and alternatives
- **Alternatives:** exploring and evaluating all reasonable alternatives, including alternatives that are not within the jurisdiction of the lead agency and the no action alternative

- **Affected Environment:** describing the existing environment of the area that would be affected by the proposed action and alternatives
- **Environmental Consequences:** describing the environmental impacts of the proposed action and alternatives and possible mitigation measures that could be taken to avoid or reduce potential impacts

The EIS is prepared in two stages, draft and final. The draft EIS is filed with the Environmental Protection Agency and is publicly circulated for a minimum of 45 days. The lead agency obtains the comments of federal agencies with jurisdiction by law or special expertise, state and local agencies, affected Native American tribes, and the public. After receiving and considering the comments received on the draft EIS, the agency prepares a final EIS. The final EIS is also filed with the Environmental Protection Agency.

At least 30 days following publication of the final EIS, the agency may issue a record of decision (ROD). The ROD is a concise public record that states what the decision is, identifies the alternatives considered by the agency, specifies which alternative is the most environmentally preferable, and states whether all practical means to avoid or minimize environmental harm were adopted.

Preparing an Environmental Assessment

An EA is a concise (preferably 10-15 pages) public document that serves to provide sufficient evidence and analysis for determining whether to prepare an EIS, that is whether the impacts of the proposal are expected to be significant. An agency must involve environmental agencies, applicants, and the public to the extent practicable in preparing an EA. If, after completion of the EA, the agency concludes that the impacts will not be significant, it issues a finding of no significant impact and, in most cases, can proceed to implement its proposal. If, after completion of the EA, the agency concludes that there may be significant impacts, then the agency proceeds to issue a notice of intent to prepare an EIS.

Categorical Exclusions

“Categorical exclusion” means a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a federal agency in its own NEPA implementing regulations. These regulations must provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect. Examples of extraordinary circumstances include situations where wetlands, protected plants or animals, or historic resources may be present and potentially affected by the proposed action. An agency proposing to undertake an action that is included in its list of categorical exclusions is not required to prepare an EA or an EIS, unless there are extraordinary circumstances. Case law suggests that agencies should briefly document the application of a categorical exclusion prior to implementing the decision in order to demonstrate that the agency did consider environmental impacts before acting.