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# National Environmental Policy Act: An Overview

## Introduction and Background

Since 1970, the National Environmental Policy Act (NEPA, 42 U.S.C. §§ 4321 *et seq.*) has set forth a national policy with respect to environmental quality. For decades, NEPA has required agencies to integrate environmental considerations into planning and decisionmaking. Further, NEPA's "continuing policy" has been that the federal government use "all practicable means and measures" to support humans and nature coexisting and to fulfill the "social, economic, and other requirements" of present and future generations. NEPA envisions a continuing responsibility for the federal government to, *inter alia*, treat each generation as a "trustee of the environment," preserve historical and cultural heritage, and allow for pleasing surroundings and high standards of living.

NEPA is often described as a procedural law that mandates environmental review of many agency actions, including by requiring that agencies consider the environmental impacts of certain federal actions. NEPA also established the Council on Environmental Quality (CEQ), which issues regulations and guidance on NEPA implementation.

To implement NEPA, CEQ issues broadly applicable rules that complement agency-specific statutes and regulations. CEQ regulations require that an agency assess how the NEPA process applies to an action early in its decisionmaking process. In most cases, the NEPA analysis becomes part of the administrative record for the agency's decision or action. Agencies are also encouraged to integrate NEPA reviews with other federal reviews and permitting decisions authorized under separate authorities.

While NEPA prescribes the process for environmental reviews, it does not mandate that federal agencies alter their proposals based on those reviews. Rather, NEPA focuses on ensuring that the agency has the information and analyses it needs to make better informed decisions. In the words of the Supreme Court, NEPA "merely prohibits uninformed—rather than unwise—agency action."

## Scope of Agency Review

NEPA requires agencies, prior to finalizing certain decisions, to identify and evaluate the impacts of "major Federal actions significantly affecting the quality of the human environment." For this requirement to apply, the *major federal actions* must occur within the United States, and the decisions underlying the actions must be subject to agency discretion and a degree of control over the outcome. The range of federal agencies and actions subject to NEPA is broad and commonly includes activities such as issuing permits and funding infrastructure.

Major federal actions do not include nonfederal actions with "no or minimal federal funding," federally funded actions where the agency lacks oversight or control over the subsequent use of the funds, or other circumstances where the federal agency "does not exercise sufficient control" over a project's outcome. An agency also does not need to document relevant impacts until a decision is final. While only domestic actions are subject to the environmental review process, NEPA also requires agencies to recognize the global nature of environmental problems and "maximize international cooperation" to prevent environmental decline.

For some decisions under other laws, agencies have developed review and disclosure processes that are functionally equivalent to the NEPA process. Courts have held that if a statute provides for such a functional equivalence, both procedurally and substantively, then an agency is exempt from producing a separate NEPA statement.

## Consideration of Impacts

One step in the NEPA process is to determine whether the proposed action is likely to have "significant" effects that require an environmental impact statement (EIS). The effects an agency must consider and analyze include social, ecological, and health impacts as well as environmental justice concerns. The depth of analysis and type of documentation required by NEPA depends in large part on the extent to which anticipated impacts are expected to be significant.

## Categorical Exclusion

Many agency activities may be subject to a *categorical exclusion*, which refers to a type of activity undertaken by an agency that "normally does not significantly affect the quality of the human environment." If the agency determines that a categorical exclusion applies, NEPA does not require an environmental assessment or EIS.

Agencies maintain their own categorical exclusions and in some cases may adopt another agency's exclusion. When an agency considers applying one of these categorical exclusions to a proposal, it also decides whether site-specific *extraordinary circumstances* exist that could result in more significant impacts than would typically be anticipated and thus warrant further analysis and documentation. Congress can also mandate a categorical exclusion by statute and specify whether the agency should consider any extraordinary circumstances. Categorical exclusions apply to the vast majority of agency actions that require NEPA compliance.

## Environmental Assessment

A second important way to determine whether an agency's proposed action is likely to have significant impacts that require an EIS is an *Environmental Assessment* (EA). An EA helps an agency document the basis of its determination of whether any impacts are significant. NEPA states that EAs should be completed within a year and limited to 75 pages in length, excluding tables and appendices. An EA results in the agency either conducting an EIS if impacts are significant or issuing a *Finding of No Significant Impact* (FONSI) to conclude the NEPA process.

## Environmental Impact Statement

Unless Congress provides otherwise, an agency must prepare an *Environmental Impact Statement* (EIS) for a proposed action that is reasonably anticipated to result in significant environmental effects. The EIS is a detailed statement that must assess reasonably foreseeable effects of a proposed action, identify "irreversible and irretrievable" resource commitments, and consider a reasonable range of alternatives to the proposed action, among other criteria. NEPA states that an EIS should generally be completed within two years and limited to 150-300 pages, excluding tables and appendices. While nonfederal actors, including the project sponsor and state or local governments, may prepare documentation, the lead federal agency remains responsible for the content.

When an agency has completed a final EIS, including any associated inter-agency coordination and public comment period, it issues a Record of Decision, which constitutes final agency action for purposes of judicial review. EPA maintains an online database of all agencies' EISs.

## Tiering

Agencies have the option of undertaking NEPA in stages through a process known as *tiering*. An agency may elect to first consider the overall impacts of a broad program or large geographic area by issuing a *programmatic* environmental document, which could be an EA or an EIS. For individual projects that are implemented under that program, NEPA review may refer back to the programmatic analysis and focus instead on any project-specific impacts.

## Process Considerations

NEPA requires agencies to follow certain processes in the preparation of EAs and EISs.

## Interagency Coordination

When more than one agency is involved, a *lead agency* oversees the environmental review process and develops a schedule for completing the environmental review process as well as any associated permits or other authorization. Lead agencies may extend NEPA deadlines as circumstances warrant. In addition to other federal agencies, state, tribal, and local agencies may serve alongside a federal agency as joint lead agencies. Prior to preparing NEPA documentation, the lead agency must consult with and obtain comments from other agencies with jurisdiction or special expertise regarding associated impacts. Comments received from states, tribes, and local agencies should accompany an EIS. To the extent

"practicable," an agency should issue a single document to evaluate a proposal.

For certain larger-scale projects likely to require both an EIS and at least one federal permit, agencies undertake additional coordination through a process known as FAST-41. For a FAST-41 covered project, a lead agency tracks the development of each EIS and individual permit applications on an online Permitting Dashboard.

## Public Comment

During the scoping phase, a notice of intent to prepare an EIS must include a request for public comment on impacts, alternatives, and information relevant to the proposed action. Pursuant to Executive Order 14096, agencies should also consult with communities that have expressed environmental justice concerns and provide opportunities for "early and meaningful community involvement."

Further, agencies generally offer draft EISs and sometimes draft EAs for public comment. While agencies generally receive public comments when establishing a categorical exclusion, agencies typically do not solicit public comments when applying a categorical exclusion to an individual project. While agencies are required to consider and respond to substantive comments prior to publishing a final EIS, they are not required to change an EIS to address a comment if they disagree with the comment received.

## Judicial Review

Under NEPA, a project sponsor may seek judicial review if an agency fails to complete its environmental review process in a timely manner.

A judicial challenge to a NEPA document, or the failure to prepare one, on any other basis must be brought under the Administrative Procedure Act. Under this law, a reviewing court evaluates whether the agency acted arbitrarily or capriciously or abused its discretion, among other things, when conducting an environmental review under NEPA. As the courts apply this standard, they consider on a case-by-case basis whether the agency has followed the appropriate NEPA procedure and adequately considered impacts. For example, plaintiffs may allege that an agency has failed to take a hard look at a particular impact, failed to conduct the appropriate level of review, or failed to act in a timely manner. Courts have generally not dictated the substance of the agency's decision. Instead, they have enforced NEPA processes, such as by requiring agencies to take a "hard look" at the consequences of proposed actions, consider alternatives, identify unavoidable adverse impacts, and consult with other agencies and the public before making final decisions. Plaintiffs may also combine NEPA challenges with claims under statutes such as the Clean Water Act or Endangered Species Act.

While only a small percentage of agency actions require EISs, a higher percentage of EISs get challenged in court compared to other environmental review documents. For more information on judicial review and NEPA, see CRS In Focus IF11932, *National Environmental Policy Act: Judicial Review and Remedies*.

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