Order Code RS20621
Updated April 19, 2005

Overview of NEPA Requirements

Pamela Baldwin
Legislative Attorney
American Law Division

Summary

The National Environmental Policy Act (NEPA) establishes national environmental policies that apply to the federal government and also prescribes certain procedural requirements for federal agency actions. Except as otherwise provided by Congress, NEPA applies to *all* federal agency actions, although its requirements may vary depending on the nature of the action involved. This report provides an overview of NEPA's requirements. This report will be updated as warranted.

General

The National Environmental Policy Act of 1969 (NEPA)[1] establishes national environmental policies that apply to the federal government as a whole and prescribes certain procedural requirements for federal agency actions. Except as otherwise provided by Congress, the act applies to *all* federal agency actions,[2] including those that intersect with private activities, e.g. through a federal permit or funding, although its requirements may vary depending on the nature of the action involved. NEPA imposes several obligations on federal agencies in addition to the familiar requirement to prepare Environmental Impact Statements (EISs) in certain circumstances.[3]

NEPA establishes a national environmental policy that makes it the:

> continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of

[1] Act of January 1, 1970, Pub. L. No. 91-190, 83 Stat. 852, 42 U.S.C. §§4321 *et seq.*

[2] 40 C.F.R. 1508.12 defines "Federal agency" as not meaning the Congress, the Judiciary, or the President. Attention focuses on this regulation from time to time, e.g. when the President established several national monuments without preparation of NEPA documents.

[3] It is sometimes said that NEPA "doesn't apply" to federal actions unless they are "significant," a reference to the requirement in § 102(2)(C) that an agency prepare an environmental impact statement (EIS) for a proposed "major federal action significantly affecting the quality of the human environment."

> national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may – . . .
> (2) assure for all Americans safe, healthful, productive, and aesthetically and culturally pleasing surroundings;
> (3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences; ....[4]

In addition to these general policies, NEPA requires all federal agencies to do certain specific things, only one of which is the preparation of an EIS for any major federal action significantly affecting the quality of the human environment. Among other things, §102(2) of NEPA (42 U.S.C. §4332(2)) requires agencies to:

> (A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment; ...
> (C) include in every recommendation or report on proposals for legislation and other major Federal Actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on --
>
> (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; ...
>
> (E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources; ...

NEPA also created the Council on Environmental Quality (CEQ), which promulgated regulations implementing NEPA.[5] Each agency is expected to elaborate on how to comply with NEPA in the context of its own duties. The CEQ regulations emphasize communicating with the public, reducing delays, and making better decisions, rather than producing unnecessary paperwork.[6] Agencies are to integrate the NEPA

---

[4] 42 U.S.C. §4331(b). Although the enforceable requirements of NEPA are those that are "essentially procedural" (Robertson v. Methow Valley Citizens' Council, 490 U.S. 332, 350 (1989)), such as the preparation of environmental documents, the NEPA policy establishes goals for agency actions.

[5] 40 C.F.R. §§ 1500 *et seq.*

[6] 40 C.F.R. §§ 1500.1 through 1500.5.

reviews with other agency planning and review processes,[7] and coordinate with other federal agencies and with similar state processes when appropriate.[8]

NEPA Documents

The regulations require various levels of analysis of possible environmental effects, depending on the circumstances and the likely degree of environmental impacts. At one end of the spectrum are major federal actions that significantly affect the environment,[9] regarding which EISs generally must be prepared.[10] Most court cases relate to when an EIS needs to be prepared and to the adequacy of EIS coverage.[11] An EIS must discuss an adequate range of proposed alternatives, and the direct, indirect, and cumulative effects or impacts of each. The thoroughness with which an agency must study environmental effects and consider alternatives is greatest if an EIS is required.[12]

An EIS may either be a "programmatic" EIS, which addresses the "adoption of programs, such as a group of concerted actions to implement a specific policy or plan,"[13] or a "site-specific" EIS, which analyzes the environmental impacts of a particular project. More focused environmental documents should be "tiered" to broader ones to avoid repeating more general analysis in the more specific documents.[14]

At the other end of the spectrum are categories of activities that either separately or cumulatively are known to have no or only minor environmental effects. An agency need not prepare formal NEPA environmental analyses with respect to these types of actions, which are known as "categorical exclusions."[15] Many departments and agencies, especially those with land management responsibilities such as the Bureau of Land Management in the Department of the Interior and the Forest Service in the Department of Agriculture, have established criteria for determining categories of actions or decisions

---

[7] 40 C.F.R. § 1500.2(c).

[8] 40 C.F.R. § 1506.2.

[9] 40 C.F.R. §1501.4, and parts 1502 and 1503. Under §1508.18, the concept of "major" federal action may be determined largely by the significance of the effects of a proposed action on the environment: "*Major Federal action* includes actions with effects that may be major and which are potentially subject to Federal control and responsibility. Major reinforces but does not have a meaning independent of significantly (§1508.27)."

[10] In some circumstances, an agency may be excused from preparing an EIS. For example, an agency may be excused from preparing an EIS if Congress has imposed a deadline that makes preparation of an EIS impossible. Flint Ridge Development Co. v. Scenic Rivers Ass'n. of Oklahoma, 426 U.S. 776 (1976). Sometimes too, other agency processes may be the "functional equivalent" of the NEPA process such that preparation of an EIS is obviated. International Harvester Co. v. Ruckelshaus, 478 F. 2d 615, 650, n. 130 (D.C. Cir. 1973).

[11] See THE NEPA LITIGATION GUIDE, Karin Sheldon and Mark Squillace, editors; American Bar Association, 1998.

[12] Mt. Lookout - Mt. Nebo Property Protection Ass'n. v. FERC, 143 F. 3d 165 (4th Cir. 1998).

[13] 40 C.F.R. § 1508.18(b)(3).

[14] 40 C.F.R. §§ 1502.20 and 1508.28.

[15] 40 C.F.R. §1508.4.

that are categorical exclusions, and maintain lists of same. However, an action may nonetheless require analysis if particular listed "extraordinary circumstances" (such as the presence of wetlands or species listed as threatened or endangered under the Endangered Species Act) are present, or are deemed to be so by the acting official.

An Environmental Assessment (EA), is prepared for an action that is not clearly categorically excluded, but does not clearly require an EIS. Based on the EA, the agency either prepares an EIS, if one appears warranted, or issues a "Finding of No Significant Impact" (FONSI), which finding obviates further NEPA document preparation. Although an EA is typically prepared to determine whether an EIS is necessary and the CEQ regulations state that an assessment is not necessary if the agency has decided initially to prepare an environmental impact statement,[16] the CEQ regulations also recognize that agencies may prepare an EA on any action at any time in order to assist agency planning and decision-making.[17]

Environmental analyses are to be prepared early in the decision making process so that they can make an important contribution to the decision making process.[18] "Ultimately, of course it is not better documents but better decisions that count. NEPA's purpose is not to generate paper work– even excellent paperwork – but to foster excellent action."[19]

When more than one federal agency is involved in an action, the regulations provide for the responsibilities of a "lead agency"[20] and "cooperating agencies,"[21] and for referral to CEQ of disagreements among federal agencies on how to proceed with certain decisions.[22]

Congress has at times directed some particular level of NEPA document preparation – e.g., by specifying either that an EIS be or not be prepared.[23] No CEQ regulation specifically addresses NEPA compliance when Congress has precluded preparation of an EIS. As noted, an agency may always prepare an EA to aid in decision-making and to comply with general NEPA duties. But since an EA is principally prepared to ascertain whether an EIS is necessary, it is not clear whether preparation of an EA would ever be an enforceable duty if Congress precluded preparation of an EIS.

The duty under §102(2)(E) (42 U.S.C. § 4332(2)(E)) to study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves

---

[16] 40 C.F.R. §1501.3.

[17] 40 C.F.R. §1501.3(a) and (b); 1508.9.

[18] 40 C.F.R. § 1502.5.

[19] 40 C.F.R. § 1500.1(b).

[20] 40 C.F.R. § 1501.5.

[21] 40 C.F.R. § 1508.5.

[22] 40 C.F.R. § 1504.3.

[23] See P. Baldwin, STATUTORY MODIFICATIONS OF THE APPLICATION OF NEPA, CRS Report 98-417 A.

"unresolved conflicts concerning alternative uses of available resources," may be relevant to possible agency duties aside from the EIS context.

Some courts have looked at the § 102(2)(E) requirement to study alternatives and analyzed this duty as separate from (if usually coincidental with) the duty to prepare an EIS, but the scope of possible duties under § 102(2)(E) is not clear. The definition of an EA states that an EA shall include brief discussions of the need for the proposal, *of alternatives as required by section 102(2)(E),* of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.[24] One court has found that even when an agency determines that an EIS is not required, an agency must do more to meet its duty under § 102(2)(E) than provide a perfunctory and conclusory statement.[25] However, exactly what level and form of documentation might be required is still uncertain. At least one case questioned whether any duty to consider alternatives existed once an agency had correctly decided that an EIS was not necessary.[26] Also, it is not clear what agency "proposals" trigger the duty to consider alternatives.[27]

In a case interpreting § 511 of the Clean Water Act, which eliminates the duty to prepare an EIS, plaintiffs argued that the Environmental Protection Agency (EPA) had other duties under NEPA, such as those under §102(2)(E) to study and develop alternatives to the proposed action, but the court held that §511 completely exempted the relevant activities of EPA from all NEPA obligations, including those under § 102(2)(E). However, in reaching this conclusion, the court looked to the special role of the EPA in assisting and protecting the environment, the intent of Congress, the fact that the processes in setting water standards were the "functional equivalent" of the NEPA

---

[24] 50 C.F.R. § 1508.9 (emphasis added).

[25] Trinity Episcopal School Corp. v. Romney, 523 F.2d 88 (2d Cir. 1975), subsequently relitigated after a new document was prepared, in Trinity Episcopal School Corp. v. Harris, 445 F. Supp. 204 (1978), Karlen v. Harris, 590 F. 2d 39 (1978) and *rev'd on other grounds sub nom.* Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223 (1980). See 40 C.F.R. § 1508.9, which states that an EA must discuss alternatives "as required by section 102(2)(E)." In Van Abbema v. Fornell, 807 F. 2d 633 (7th Cir. 1986), in which the Army Corps of Engineers had completed an EA and decided that an EIS was not necessary, the court looked separately at the adequacy of the Corps' consideration of alternatives under § 102(2)(E). Although the Corps did undertake "a serious review of alternatives," it also had received comments specifically challenging the information on which it had relied. The court, at 642, found that the Corps had not taken "a hard look" at alternatives, but rather evidenced "a blind reliance on material prepared by the applicant in the face of specific challenges raised by opponents." Therefore, the court vacated the §404 permit and remanded. In other words, in this instance the consideration of alternatives even in an EA when no EIS was necessary was found to be inadequate. One could argue that this indicates that the duty to consider alternatives might exist even when an EIS is not necessary.

[26] Webb v. Gorsuch, 699 F.2d 157, 161 (4th Cir. 1983). Note, however, that the court cited only 42 U.S.C.A. §4332(C) and not (E), and hence did not discuss the definition of EA that requires discussion of alternatives.

[27] *See* Aertsen v. Landrieu, 637 F.2d 12 (1st Cir. 1980); Environmental Defense Fund v. Costle, 657 F.2d 275 (D.C. Cir. 1981).

safeguards, and that an EIS would be prepared for implementing permits.[28] A court might not apply the same reasoning to statutory language eliminating an EIS in another context.

Public Participation

Although NEPA refers only to consultative and cooperative processes and to making available the "comments" and views of federal, state, and local environmental agencies, the NEPA regulations elaborate on and require public participation. The public participation aspects of the NEPA process are regarded by many as a valuable aspect of the law. Agencies must:

> Provide public notice of NEPA-related hearings, public meetings, and the availability of environmental documents so as to inform those persons and agencies who may be interested or affected.[29]

The CEQ regulations specify levels of notice to the public depending on whether an action is of national or local interest, and state that in all cases the agency must mail notice to those who requested it regarding a particular action.[30] In addition, an agency must seek comments on draft or final EISs from certain entities and from the public,[31] and must respond to comments received.[32] Other statutes and the regulations of various departments and agencies typically elaborate on agency processes and when public comments must be sought. The extent to which an agency eliminates NEPA document preparation may affect opportunities for public participation in the decisions and actions in question.

---

[28] Municipality of Anchorage v. United States, 980 F. 2d 1320, 1329 (9th Cir. 1992). Section 511(c) states that with certain exceptions, no action of the Administrator of EPA taken under that act "shall be deemed a major Federal action significantly affecting the quality of the human environment within the meaning of the [NEPA]." This is language that Congress has enacted many times.

[29] 40 C.F.R. §1506.6(b).

[30] *Ibid.*

[31] 40 C.F.R. § 1503.1.

[32] 40 C.F.R. § 1503.4.