

NATIONAL ENVIRONMENTAL POLICY ACT

Purpose, History, and Evolution of NEPA - at the heart
of American Environmentalism

History of America's Environmental Movement

2

By the 1960's the full effects of the industrial revolution and the post war, post depression engineering boom were making themselves known.

A new movement was forming, called Environmentalism

it drew on both conservationism and preservationist. The population was better educated and more affluent than any group in history. They were enjoying new freedoms and higher levels of disposable income. But the headlines were filled with reminders of the toxic byproducts of our uncontrolled industrial heritage combined with groundbreaking feats in civil engineering. The New Deal sparked a massive public works program that created great feats, a national highway system, hydroelectric dams, etc. But the effects on communities, wildlife and environmental quality were unanticipated and widely felt. Added to that, Pollution from largely unregulated industry was reaching a breaking point and affecting human health in some very visible ways.

DONORA, PA DEADLY SMOG

3

This eerie photograph was taken at noon on Oct. 29, 1948 in Donora, PA, as deadly smog enveloped the town. 20 people were asphyxiated and more than 7,000 became seriously ill during this horrible event.



The incident happened in Donora, Pa., a mill town on the Monongahela River south of Pittsburgh. Donora's economy ran on coal. Donora made its living from a steel mill that burned coal to fire coke ovens, melt iron ore in blast furnaces, and produce finished steel in open hearths.

In those days, mill emissions were unregulated and uncontrolled. Smoky, smelly air that killed the grass and ruined the paint was thought to be an unavoidable part of living with industries that employed thousands.

On Tuesday, October 26, 1948, an atmospheric inversion slammed a lid on Donora. Inversions prevent the air from mixing and dispersing pollution. All the airborne detritus from uncontrolled furnaces, ovens, stoves, and locomotives stayed put in the valley. The foul mixture—carbon monoxide, sulfur dioxide, metal dust, fluoride compounds—mixed with fog.

as the sickness and misery spread, the mills kept running. No one in authority had any power to order them off line. On Sunday morning, Halloween, the zinc mill manager grudgingly shut the smelter down for a day under orders from the front office.

On Monday, Nov. 1, the inversion lifted. Rains came and scrubbed the filth from the skies. By the time blue skies returned, 20 Donorans had died. Nearly half the town of 14,000 had fallen sick.

CUYAHOGA RIVER ON FIRE

4

Firefighters battle a fire on Ohio's Cuyahoga River in 1952. The polluted river caught fire on several occasions between 1936 and 1969, when debris and oil had concentrated on the water's surface and ignited. A blaze in 1969 came at a time of increasing environmental awareness and symbolized years of environmental neglect.



Former reporter Richard Ellers says he didn't appreciate the thickness of the pollution on Cuyahoga River until he dipped his hand into it. The photo was taken in the 1960s.



Industrial manufacturing plants directly discharged hazardous chemicals into streams, lakes and rivers.

Raw sewage was routinely released as well. The results were predictable, foul odors, fish kills, but none more dramatic than the fires.

Fire

The Cuyahoga River in Cleveland Ohio became a poster child for the nation of just how bad water quality in our nation's rivers and lakes had become. The river had for almost a century been regarded as an open sewer that ran through the heart of the city. Fires on the river dated back as far as 1868. But one that occurred in 1969 triggered a spark of press, and coupled with a dramatic photo of a black, gooey hand coming out of the Cuyahoga like a B-movie swamp monster defined the plight of the Cuyahoga. By association, it indicted all industrial American cities -- and a culture that for a century had generally viewed natural waterways as a means to an end.

Robert Moses' Proposed Lower Manhattan Expressway Project, 1962

5

Proposed project would have cut through a swath of the Iron Bound District of NYC, now known as SoHo.

Plan was for an elevated highspeed Freeway.

Major opposition within City Council resulted in proposal rejection.



The plan was opposed vigorously during a six-hour knock-down-drag-out fight at City Hall in early December 1962, during which Assemblyman Louis DeSalvio famously called [Robert Moses](#) a “cantankerous, stubborn old man” and said the time had come for him to release his grip on the city’s development. The citizens of NYC were getting frustrated with having no input into the decisions being imposed on their neighborhoods.

SILENT SPRING 1962

Exposes DDT effects

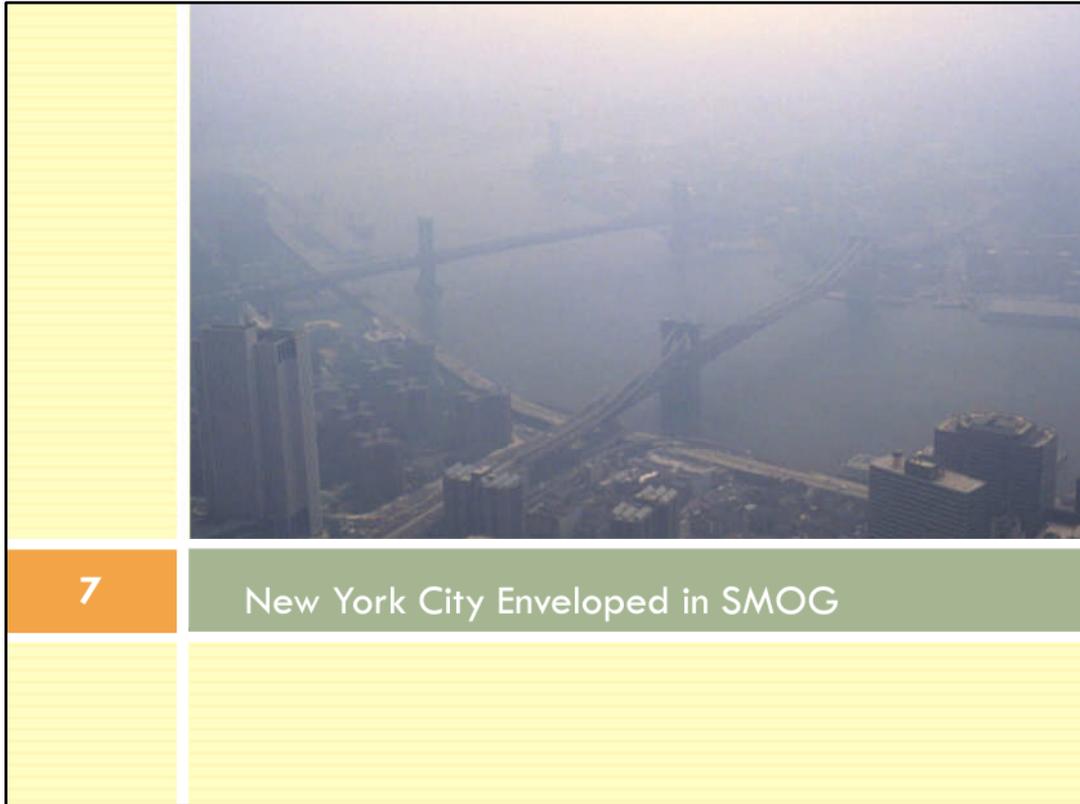
6

Rachel Carson's book ignites controversies, spark environmental movement.

American robins killed by DDT as shown in Michigan State University research in 1961.



Rachel Carson, to bring the pesticide problem to public attention and, incidentally, to launch the modern environmental movement. *Silent Spring*, published in September, 1962, was a brilliant book, but also one that appeared when the time clearly was ripe. The public seemingly had been primed by publicity about radioactive fallout, fears of pesticide residues on cranberries and the thalidomide scandal, the latter enhanced by pictures of infants born with distorted limbs.



Numerous environmental action groups were forming as a reaction to these unfolding events, Environmental Defense Fund, Natural Resources Defense Council, Friend of the Earth. These groups were throwing their weight and funds into politics. A new crop of politicians came to office in the mid 60's with a perceived mandate from their constituents to do something about these problems. The people wanted the advantages of new products, increased food production, easier transportation but they wanted accountability as well and some control over the most offensive impacts.

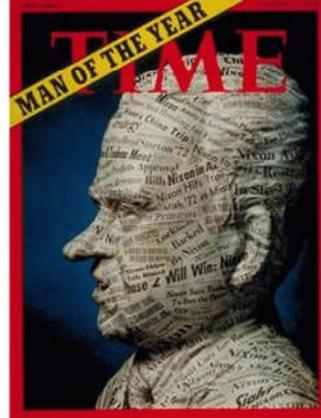
National Environmental Policy Act of 1969

8

Signed into law, January 1, 1970



Nixon named Man of the Year in 1972, environmental policy cited.



Signed by President Nixon as his first act of 1970, in response to an overwhelming national sentiment that federal agencies should take the lead in providing greater protection for the environment. Nixon proclaimed the 1970s as “the environmental decade.”

NEPA established a first ever National Policy statement on the environment “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.”

, provides an interdisciplinary framework for federal agencies to assess and disclose environmental impacts. Nation’s broadest environmental law. It applies to all federal agencies and most of the activities they manage, regulate of fund.

It was followed by a cascade of additional environmental protection laws, the Clean Water Act and the Clean Air Act in 1972, and then the Endangered Species Act in 1973.

What is NEPA?

The Purpose of the Act

9

- The purposes of this Act are:
 - To declare a national policy which will encourage productive and enjoyable harmony between man and his environment;
 - To promote efforts which will prevent or eliminate damage to the environments and biosphere and stimulate the health and welfare of man;
 - To enrich the understanding of the ecological systems and natural resources important to the Nation;
 - And to establish a Council on Environmental Quality

Purpose. Sec 2 [42 USC 4321]

The purpose of NEPA according to the Supreme Court to “place upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action.” and to “ensure that the agency will inform the public that it has considered environmental consequences in its decision making process.”

NEPA Section 102(2)(C) “action forcing”

10

- States that “the Federal Government shall... 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...”

“THIS VAGUELY WORDED STATUTE SEEMS DESIGNED TO SERVE AS NO MORE THAN A CATALYST FOR DEVELOPMENT OF A ‘COMMON LAW’ OF NEPA.”
-- JUSTICE THURGOOD MARSHALL

The open endedness of NEPA has led to many interpretations and case-law precedents, as well as a great deal of debate. Implementation of NEPA has as a result relied heavily on case history to define the intention behind the wording.

Calvert Cliffs’ Coordinated Committee v. Atomic Energy Commission, D.C. Cir. 1971 – one of the first court cases to interpret NEPA set the tone for all subsequent cases

1 – The general substantive policy is flexible, “it leaves room for a responsible exercise of discretion and may not require particular substantive results
The procedural provisions are not as flexible

Agencies are compelled to take environmental values into account. NEPA requires agencies to consider environmental issues just as they consider other matters within their mandates.

Mandates a careful and informed decision-making process and creates judicially enforceable duties. Courts will not reverse a substantive decision on the merits but if the decision were made in a capricious fashion without good faith consideration of the environmental factors it is the responsibility of the courts to reverse.

In other words, NEPA doesn’t require agencies to avoid all environmental impacts, it requires them to identify them, consider them, and make an informed decision on how to proceed and to disclose that process to the public.

The NEPA Process

13

- The process is  an evaluation of the environmental effects of a federal undertaking, including its alternatives

- The process is triggered by  a proposal for a major federal action significantly affecting the quality of the human environment

A **proposal** exists when an 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 can be meaningfully evaluated.

In the HUD world, the granting of HUD money is the major federal action.

NEPA Title 2 & the CEQ

14

- Title 2 established the Council on Environmental Quality
 - 3 President-appointed, Senate-approved members
 - Report annually to President
 - Oversee implementation of NEPA by agencies
 - Mediates agency disagreements
- Until 1978 oversight was via guidelines

CEQ Regulations



- Roadmap for federal agencies

- Regulations require agencies to identify classes of actions that require an EIS
 - Categorical Exclusions
 - EA
 - EIS

- Classification of action determines level of review

Thank you, Therese.

The CEQ regulations are essentially a roadmap for federal agencies to follow in determining whether NEPA compliance is required when undertaking agency actions.

The regulations require agencies to identify classes of actions that normally require a full Environmental Impact Statement; those actions that normally require an Environmental Assessment, but not necessarily an EIS, as well as actions that normally do not require an Environmental Impact Statement. That last group of actions are called categorical exclusions. A proposed action that doesn't normally require an Environmental Impact Statement **AND** isn't covered by a categorical exclusion would require preparation of an Environmental Assessment.

So then, the classification of the action determines the level of review, and I'll talk a bit more about this in subsequent slides.

CEQ issues NEPA Regulations

16

- President Carter issued an Executive Order authorizing the CEQ to establish definitive regulations for implementation of NEPA.
- Issued on Nov 29, 1978, effective on Nov 30, 1979
- 40 CFR Part 1500
- 1500.6 Instructed federal agencies to adopt their own specific NEPA implementation regulations. (24 CFR 58 & 50)

Prior to the E.O the CEQ governed the implementation of NEPA via a set of guidelines. These guidelines lacked the weight of official regulations and were often ignored. This contributed to tendency of NEPA implementation being guided by lawsuits.

With the advent of specific regulations, federal agencies were then required to develop their own set of written regulations for implementation.

The general purpose of 1500 is to implement the action-forcing items of NEPA under Title 1, Section 102(2), it is a set of instructions for integrating NEPA into the early planning process, evaluating significance, preparing the detailed statements and involving the public in the decision making process.

CEQ Regulations Require That...

- NEPA be applied **early** in the planning process
- Agencies consult while preparing EIS
- Scoping of issues occur early and be open process

There are some important, fundamental concepts woven into the NEPA process and procedures. One is that NEPA is to be applied early in the planning process. Specifically, agencies are to integrate the NEPA process with other planning at the earliest possible time:

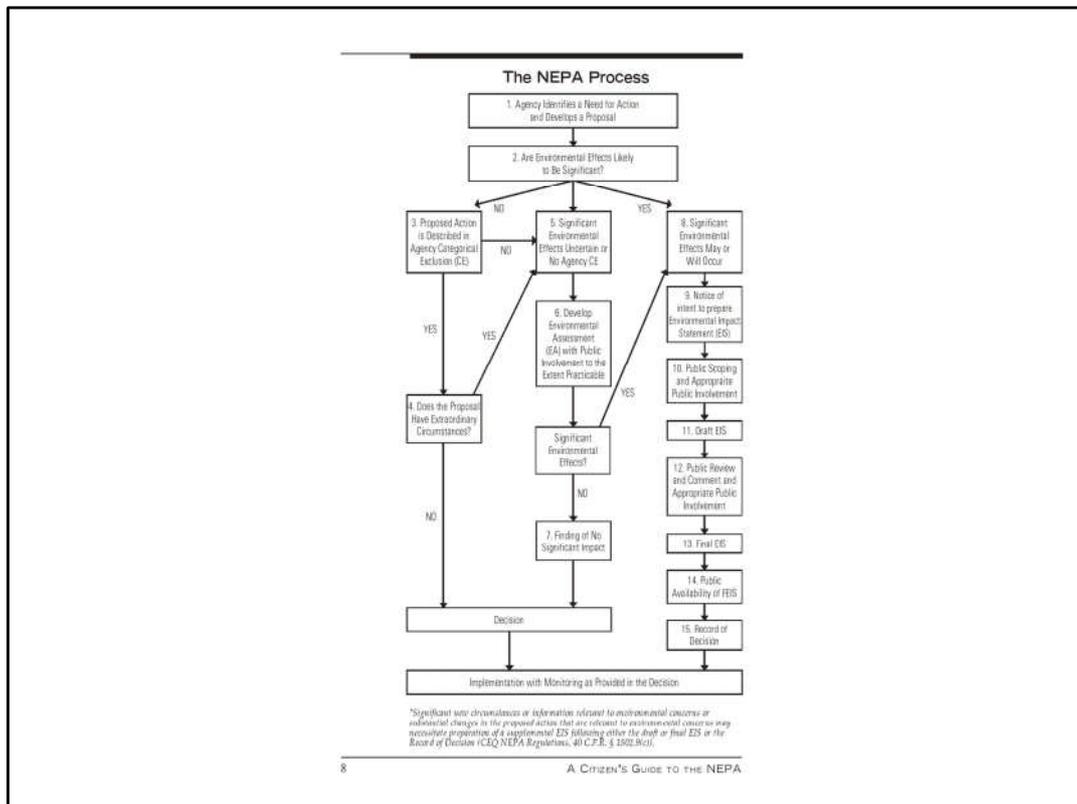
- to insure that planning and decisions reflect environmental issues and values
- to avoid delays later in the process, and
- to head off potential conflicts.

As part of the NEPA process, when agencies are preparing an EIS they must consult with other federal agencies that may have an interest in the action, and with other interested parties, including the public.

Scoping is a process invented and defined by the CEQ regulations. It's designed to assure clear definition of the issues, early public involvement, and to focus on the issues of greatest importance to the agency's decision.

So the scoping process is intended to invite the participation of the groups affected by the decision to help determine the significant issues to be analyzed in the Environmental Impact Statement. Scoping is also supposed to eliminate from detailed study the issues that are not significant, or that might be covered in prior Environmental Impact Statements, and to identify the relevant resources, responsibilities, and timing for the review and decision-making process. The scoping process must involve affected federal, state, and local agencies, Indian tribes, the proponent of the action, and the public.

And scoping is the point when an agency establishes a schedule for the entire NEPA process.



Next we'll go into some of the detail of the NEPA process. This flowchart, which is from the CEQ publication "A Citizen's Guide to the National Environmental Policy Act," is a good overview of the steps of the NEPA process. As you implement NEPA within your organization, or are working with HUD or another federal agency on the NEPA process, I encourage you to refer back to this chart as a good reference to help you navigate through the process, and to get perspective on where you might be in the process.

GO THROUGH CHART

So the fundamental question is "Are the environmental effects of the project or activity likely to be significant?"

If the answer is yes, you go immediately to the column on the right side of the page, which is the Environmental Impact Statement process.

If your answer is no **and** the proposed action is described in a categorical exclusion, then you work your way down through the process on the left side. If the effects are uncertain **OR** there's no specific categorical exclusion, then you're in the middle column which goes through the Environmental Assessment process.

You can also see there's a feedback loop for both the categorical exclusion and the environmental assessment. After initial analysis, in certain circumstances you may need to conduct a more detailed level of review.

Those of you familiar with HUD's Part 58 regulations may notice that exempt activities are not specifically addressed in this flowchart. Additionally, emergency actions aren't addressed in this flowchart. I'll address those activities in the next 2 slides.

Exempt Activities

- No physical impact upon the environment – **by their very nature**
- E.g., Administrative and management activities, engineering and design costs

Exempt activities are considered to have no physical impact upon the environment **by their very nature**. That is to say, by their very nature they will not significantly affect the quality of the human environment. These include activities such as administrative and management activities, and engineering and design costs.

In HUD's regulations specific activities that are exempt are delineated in section 58.34.

Emergency Actions

- Temporary forbearance
- Agency must consult with CEQ
- Actions necessary to control the immediate impacts of the emergency
- HUD Guidance: Exemptions for Disasters and Imminent Threats (May 16, 2008)

1506.11

Another category of action not addressed in the flowchart is emergency actions. The CEQ NEPA regulations recognize that in some instances an emergency may make compliance with NEPA temporarily infeasible.

There are 2 general categories of circumstances in which an agency may use the emergency exemption.

In the first, if a statute or regulation imposes a time schedule on an agency's action, either expressly or impliedly, and that schedule does not allow an agency to fulfill NEPA's requirements before taking the action, the courts have found that the statute or regulation takes precedence over NEPA. As an example, the Natural Gas Act imposed a statutory duty on the Federal Power Commission to "take effective interim curtailment action on the demands presented by gas shortages." In a court case interpreting the applicability of NEPA to the situation (*Gulf Oil Corporation v. Simon*) the court stated, "Congress underscored the need for immediate action by specifying that the President should promulgate regulations within 15 days after the enactment of the Emergency Petroleum Allocation Act. The Court also stated that Congress must have *intended* that the President proceed to quickly allocate oil supplies without the elaborate formal determination of environmental impact.

In the second category, the circumstances surrounding the agency's action make compliance with NEPA prior to the action impracticable. Such a situation may result, for example, when certain national security concerns are present. In a case called *Valley Citizens for a Safe Environment v. Vest*, the Air Force was permitted to bring flights into Westover Air Force Base to serve Persian Gulf operations based on the CEQ's certification of an emergency, as well as the Air Force's commitment to prepare an Environmental Assessment as soon as possible. Another possible example is when an agency must act immediately to protect public health or safety.

So the keys with respect to exemption of emergency actions from the NEPA process is that it's temporary forbearance from NEPA. The regulations (1506.11) specify that the federal agency taking the action consult with CEQ about alternative arrangements. And it must only be actions necessarily to control the immediate impacts of the emergency.

I also want to note here that HUD has guidance on exemptions for disasters and imminent threats for purposes of the HUD Part 50 and Part 58 environmental reviews. The guidance is referenced on the resource page at the end of the presentation.

Categorical Exclusions

- Category of actions which do not individually or cumulatively have significant effect on human environment
- Intended to facilitate agency compliance with NEPA by identifying common actions
- Identification of categorical exclusions largely left to discretion of agencies
- Recapture provision – extraordinary circumstances
- 2010 Guidance

Definition 1508.4

Categorical exclusions are intended to facilitate agency compliance with NEPA by identifying common actions that will rarely, if ever, be major federal actions with potentially significant impacts on the human environment. In other words, they do not individually or cumulatively have a significant effect on the human environment.

While the identification of specific categorical exclusions is largely left to the discretion of the agencies, that discretion is constrained by the CEQ regulations that define the purpose of categorical exclusions and require agencies to adopt exceptions to the CatExes. The regulations state that agencies “shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect.” That’s basically considered a “recapture provision” – so that an action that would otherwise be categorically excluded would require an EA or an EIS. The HUD regulations define “extraordinary circumstances” at 58.2(a)(3), where it states that indicators of unusual conditions are:

- Actions that are unique or without precedent
- Actions that are substantially similar to those that normally require an EIS
- Actions that are likely to alter existing HUD policy or HUD mandates, or
- Actions that, due to unusual physical conditions on the site or in the vicinity have the potential for a significant impact on the environment or in which the environment could have a significant impact on the users of the facility.

In recent years, the CEQ has encouraged agencies to make greater use of their authority to define CatExes. In 2010 CEQ issued final guidance setting forth an approach for adoption and administration of CatExes going forward.

- Agencies must consult with CEQ when developing a CatEx
- They must summarize the information in the agency’s record that supports the proposed exclusion
- They must identify how extraordinary circumstances may “limit the use of the categorical exclusion:
- And they must provide for public comment.

Environmental Assessment

- Originates in CEQ Regulations
- Concise public document
 - Sufficient evidence and analysis to determine whether to prepare EIS or FONSI
 - Aid agency compliance with NEPA when no EIS necessary
 - Facilitate preparation of EIS when necessary
- Has become dominant form of environmental analysis under NEPA

1508.9

An Environmental Assessment is not the “detailed statement” required by NEPA section 102(2)(C) – the “action forcing” clause that Therese described – it’s an administrative creation originating in the CEQ regulations.

The regulations define an EA as a concise public document

- That contains sufficient evidence and analysis to determine whether to prepare an Environmental Impact Statement or a Finding of No Significant Impact
- That aids agency compliance with NEPA when no Environmental Impact Statement is necessary
- And that facilitates preparation of an Environmental Impact Statement when necessary

The Environmental Assessment has evolved to be the dominant form of environmental analysis under NEPA. A CEQ report from 1997 states that over 50,000 Environmental Assessments are prepared annually, with an average of fewer than 500 Environmental Impact Statements. While that statistic is a bit outdated, nevertheless the disparity between Environmental Assessment preparation and EIS preparation is likely similar today.

Environmental Assessment - Content

- Statement of need for proposal
- Alternatives to proposal
- Environmental impacts of proposal and alternatives
 - Essentially incorporates all other environmental laws
- List of agencies and persons consulted

1508.9(b)

As for the content of the Environmental Assessment, the EA requires only brief discussions of:

- The need for the proposal
- Alternatives to the proposal, including the no action alternative
- The environmental impacts of the proposed action and its alternatives
And it's really here – in the discussion of the environmental impacts of the proposed action and its alternatives -- where NEPA incorporates all other environmental laws
- And it also requires a list of agencies and persons consulted in developing the EA

I'd also like to note that as reliance on Environmental Assessments has increased, they have in many cases expanded beyond the concise, brief document described in the CEQ regulations

Significance Determination

- Context – society as a whole, affected region, affected interests and locality

- Intensity – severity of impact

1508.27

The Significance Determination is a crucial aspect of the Environmental Assessment. The significance determination establishes whether there is a “Finding of No Significant Impact” and thus no further action required under NEPA, or a finding of significance, which would then require the preparation of an EIS.

Whereas the “major federal action” is not usually too difficult for agencies or courts to determine, what constitutes “significantly affecting the quality of the human environment”, is often more problematic.

So the significance determination takes into consideration context, including society as a whole, the affected region, affected interests and the locality of the action.

And it also takes into consideration the intensity or severity of the impact. The CEQ regulations outline 10 factors that should be considered when evaluating the severity of the impact.

- (1) Both **beneficial and adverse effects**. A significant effect may exist even if on balance the effect will be beneficial.
- (2) The degree to which the proposed action **affects public health or safety**.
- (3) The **unique characteristics of the geographic area such as proximity to historic or cultural resources** (park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas).
- (4) The degree to which the effects on the quality of the human environment are likely to be **highly controversial**.
- (5) The degree to which the possible effects are **either highly uncertain or involve unique or unknown risks**.
- (6) The degree to which the action may establish a **precedent for future actions with significant effects or represents a decision in principle about a future consideration**.
- (7) Whether the action is **related to other actions with individually insignificant but cumulatively significant impacts**. The regulations here state that significance exists if it’s reasonable to anticipate a cumulatively significant impact on the environment and also that significance cannot be avoided by saying an action is temporary or by breaking it down into small component parts.
- (8) Another consideration for severity is the degree to which the action **may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources**.
- (9) Also the degree to which the action **may adversely affect an endangered or threatened species or its habitat** that has been determined to be critical under the Endangered Species Act of 1973.
- (10) And finally whether the action threatens a **violation of Federal, State, or local law or requirements imposed for the protection of the environment**.

Mitigated FONSI

- Approach to stay below threshold of significance
- Agency relies on mitigation measures to offset impacts of proposed action and support FONSI
- CEQ Guidance on Mitigated FONSI

Given the importance of the significance determination resulting from preparation of an EA, federal agencies have in many instances adjusted the proposed action with mitigation measures in order to stay below the threshold of significance and so justify issuance of a FONSI rather than trigger preparation of an EIS.

The CEQ regs don't speak directly to a mitigated FONSI, but CEQ issued guidance in January of 2011 that outlines best practices for agencies when making mitigation commitments and sets forth guidelines for agencies when adopting a mitigated Finding of No Significant Impact.

The guidance emphasizes that when agencies commit to mitigate the environmental impacts of a proposed action (and thus reach a Finding of No Significant Impact), they must adhere to the commitments, monitor how the commitments are implemented, and monitor the effectiveness of the commitments.

Specifically, the guidance affirms that agencies should:

1. Commit to mitigation in decision documents (for example, by including appropriate conditions in grants, permits, or other agency approvals, and making funding or approvals for implementing the proposed action contingent on implementation of the mitigation commitments)
2. Agencies should monitor the implementation and effectiveness of mitigation commitments
3. They should make information on mitigation monitoring available to the public (preferably through web sites)
4. And they should remedy mitigation efforts that are proving to be ineffective.

Mitigation Measures in Practice



This slide addresses some examples of mitigation measures in practice.

Grizzly Bear –

Cabinet Mountains Wilderness/Scotchman’s Peak Grizzly Bears v. Peterson

The Grizzly bear pictures refers to a case in which the court upheld Forest Service’s approval of mineral exploration in a designated wilderness area, based on an EA that included recommendations for mitigation measures to minimize or avoid impacts on grizzly bears

The court stated that “If ... the proposal is modified prior to implementation by adding specific mitigation measures which completely compensate for any possible adverse environmental impacts stemming from the original proposal, the statutory threshold of significant environmental effects is not crossed and an EIS is not required. The court also stated that to require an EIS in such circumstances would trivialize NEPA and would “diminish its utility in providing useful environmental analysis for major federal actions that truly affect the environment.”

Speed Limit

Audubon Society of Central Arkansas v. Dailey (road in wilderness area)

The speed limit picture refers to a case in which the courts emphasized the need for an agency to examine in the Environmental Assessment the possible impacts if, for some foreseeable reason, the identified mitigation measures are not carried out. In this case, the court said that they were emphasizing the requirement that mitigation measures be supported by substantial evidence “in order to avoid creating a temptation for federal agencies to rely on mitigation proposals as a way to avoid preparation of an EIS.” The court said that in this case the Environmental Assessment itself comes very close to explicitly acknowledging that without the enforcement of the 35 mph speed limit the project would have significant impact on the environment, yet the administrative record shows that the entity responsible for enforcing the speed limit has not enforced it on the existing road.”

Wetlands – Abenaki Nation of Mississquoi v. Hughes

The wetlands picture is to acknowledge that the courts have several times affirmed that compensatory wetlands mitigation satisfactorily brought a hydroelectric project below the threshold of significance for an EIS. In other words, that the FONSI was supported by the mitigation measures.

(Also, Friends of the Payette v. Horseshoe Bend Hydroelectric Co. – compensatory wetland replacement mitigation, incorporation of mitigation measures for bald eagles and fishery protection in permit, and mitigation for recreation and other impacts sufficient to support FONSI.)

Preparing the EIS

- Lead Agency
- Issues Scoping
- Site specific v. Programmatic EIS
- Tiering
- Alternatives Analysis
 - Lynchpin of EIS
 - Environmental impacts
- Draft EIS

IF the initial determination about the proposed action is that the environmental effects are likely to be significant OR the Environmental Assessment results in a Finding of Significant Effects, then an EIS must be prepared.

Applicants can't prepare an EIS – it has to be a federal agency. I'd also like to acknowledge that in the case of HUD's NEPA statutes and regulations, in certain instances authority has been delegated to recipients or other responsible entities to assume the federal role in conducting the environmental review.

In some cases, there may be more than one federal agency involved in an undertaking. In this situation, a **lead agency** is designated to supervise preparation of the environmental analysis. Federal agencies, together with state, tribal or local agencies, may act as joint lead agencies.

The first steps in the preparation of an EIS is the publication of a Notice of Intent in the Federal Register. The NOI provides some basic information on the proposed action in preparation for the scoping process. The scoping process is an early and open process for determining the scope of issues to be addressed and for identifying the significant issues related to a proposed action. Scoping is to begin as soon as practicable after agency has decided to prepare an EIS and it must involve affected federal, state and local agencies, Indian tribes, the proponent of the action and the public. It's also the point where agency establishes a schedule for the entire NEPA process.

There are two basic types of Environmental Impact Statement. Most common is the site-specific EIS, which analyzes the environmental impacts of a particular project. The second is a programmatic EIS which addresses a group of concerted actions to implement a specific policy or plan. An example might be a plan by the Secretary of the Interior to implement a new national coal leasing plan, the environmental impacts of which would be addressed on a national basis. Tiering is the procedure to take that programmatic EIS and develop a narrower analysis – a site specific EIS – of an action that's included in the broader program. So, for example, it may be an EIS for a coal lease at a specific location.

The Alternatives Analysis is often called the lynchpin of the EIS. The CEQ regs require that the alternatives section of EIS include:

- An objective evaluation of all reasonable alternatives and a discussion about why alternatives were eliminated from detailed study
- Enough detail on each alternative so that reviewers may compare the various merits
- Reasonable alternatives outside the jurisdiction of the lead agency
- The alternative of no action
- The agency's preferred alternative or alternatives, and
- Appropriate mitigation measures not included in the proposed action or alternatives

Ultimately the Draft EIS is issued for public comment. While it is a draft and changes are expected, the Draft EIS is supposed to satisfy, to the fullest extent possible, NEPA's requirements for a final EIS.

Comment Process

- Public comment
- Draft to EPA
- Draft to other relevant federal agencies

The comment process and public involvement is a key aspect of NEPA.

There's a 45 day minimum public comment period on the Draft EIS. There may also be public hearings, depending on the level of interest in and controversy about the project.

Comments are also to be solicited from federal agencies that have jurisdiction by law or special expertise with respect to any environmental impact involved.

Final EIS

- Response to comments
- Post EIS comment period and/or Supplemental EIS
- Identify preferred alternative
- Final EIS
- Record of Decision (ROD)

The Final EIS includes the agency's response to comments, which could be:
Modifying the alternatives evaluated
Developing and evaluating new alternatives
Improving or modifying the analysis
Making factual corrections
Or explaining why the comments don't warrant further response.

There's a post-EIS comment period – after the Final EIS is published in the Federal Register – of 30 days. The agency can't make its final decision until the 30 day period has elapsed.

Following the Final EIS, the agency prepares a Record of Decision (ROD) that

- States what the decision is,
- Identifies alternatives considered, and specifies those alternatives that are environmentally preferable,
- States whether all practicable mitigation measures were adopted, and if not, explain why, and
- Commits to a monitoring and enforcement program to insure implementation of mitigation measures.

Although the ROD is a public document, it need not be circulated for review.

Under the Administrative Procedure Act, a person asserting a NEPA claim must challenge the agency's final decision.

In the case of an EIS, that would be the ROD.

In the case of an Environmental Assessment, that would be the Finding of No Significant Impact.

An agency may also delineate by regulation an administrative appeal process before the challenge gets judicial review.

Additionally, an agency's FAILURE to prepare an EIS or EA may be considered final agency action when the agency takes action that will result in irreparable injury to the potential plaintiff. In other words, the potential plaintiff must couple the agency's FAILURE to go through the NEPA process with some ACTION that triggers the NEPA requirements.

East River Waterfront Esplanade and Piers Final Environmental Impact Statement



Executive Summary	10 - Hazardous Materials	Appendix A - Programmatic Agreement
Cover	11 - Waterfront Revitalization Program	Appendix B - Hazardous Materials
Foreword	12 - Infrastructure 13 - Traffic and Transportation	Appendix C - Coastal Zone Consistency Form
Table of Contents	14 - Air Quality	Appendix D1
1 - Project Description	15 - Noise	Appendix D2
2 - Methodology	16 - Construction	Appendix E
3 - Land Use	17 - Environmental Justice	Appendix F
4 - Socioeconomic Conditions	18 - Mitigation	Appendix G
5 - Open Space	19 - Alternatives	List of Acronyms
6 - Historic Resources	20 - Unavoidable Adverse Impacts	List of Preparers
7 - Urban Design	21 - Growth-Inducing Aspects	Distribution List
8 - Neighborhood Character	22 - Irreversible Commitment of Resources	Errata Sheet
9 - Natural Resources	23 - Response to Comments	

I recognize this is busy slide – it’s meant to show that EIS’s are very involved documents.

You can see by looking through the table of contents for the EIS the many different issues that were addressed here – socioeconomic conditions, historic resources, neighborhood character, air quality, noise, etc., as well as mitigation, alternatives and unavoidable adverse impacts.

The CEQ regulations tried to address the fact that EISs were often voluminous documents. The CEQ regs (1502.7) state that EISs normally shall be less than 150 pages, and for proposals of unusual scope or complexity less than 300 pages. What that has sometime resulted in is forcing things into appendices, while not necessarily shortening the length of the overall document.

NEPA – A Fundamental Shift in the Landscape

- 20 States have implemented NEPA like laws at the State level
- Over 75 other countries have since developed similar laws
- International lending agency EIA requirements
- Implementation still evolving
 - In first 10 years, there was an average of 116 cases annually
 - 2005 saw only 20 substantive court decisions

That is a summary, perhaps a whirlwind summary, of the NEPA process. A key message to take away is that enactment of the National Environmental Policy Act really caused a fundamental shift in environmental law, and not just at the national level in the United States.

17 States, plus the District of Columbia, Guam and Puerto Rico have implemented NEPA style laws.

The World Bank has initiated Environmental Impact Assessment procedures. As they state on their website, the purpose of Environmental Assessment is to improve decision making, to ensure that project options under consideration are sound and sustainable, and that potentially affected people have been properly consulted.

NEPA-like requirements have created a global environmental policy fashioned after NEPA, affecting over 100 countries around the world. It has fundamentally changed the way we approach planning our actions and puts consideration for environmental issues on a par with consideration of economic concerns.

Every federal agency in existence now has staff dedicated to environmental considerations.

This single piece of legislation has greatly affected the entire world. In America in particular, our young people simply can't imagine a landscape that would allow for the possibility of rivers of fire or the willful obliteration of sensitive resources. It changed the way we act by changing the way we think.

Resources

- **Council on Environmental Quality Website:**
<http://ceq.hss.doe.gov/>
- **Council on Environmental Quality Regulations And Guidance**
 - Regulations: 40 CFR 1500-1599
 - Regulations and guidance may be accessed through:
http://ceq.hss.doe.gov/ceq_regulations/regulations.html
- **CEQ Guidance on Mitigation and Monitoring (2011):**
http://ceq.hss.doe.gov/current_developments/docs/Mitigation_and_Monitoring_Guidance_14Jan2011.pdf
- **HUD Memorandum: Exemptions for Disasters and Imminent Threats; May 16, 2008**
- **CEQ LINKS to State & International NEPA influenced laws**
 - <http://ceq.hss.doe.gov/nepa/regs/states/states.cfm>
 - http://ceq.hss.doe.gov/nepa_information/international_impact_assessment.html

Questions?

Therese Fretwell

Regional Environmental Officer, Regions 1 & 2

therese.j.fretwell@hud.gov

212-543-7455

Martha Curran

Field Environmental Officer, Region 1

martha.a.curran@hud.gov

617-994-8363