



# **A “Hard Look” Before You Leap: National Environmental Policy Act**

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# Remember When...



# ...Congress Used to Do Stuff?

- NEPA – 1969
- EPA created – 1970
- First Earth Day – 1970
- Clean Air Act – 1970
- Clean Water Act – 1972
- Endangered Species Act – 1973
- RCRA – 1976
- CERCLA/Superfund – 1980

# Rules? What Rules?

- U.S. Constitution
- Statutes (enacted by Congress)
- Regulations (promulgated by Federal Executive Agencies)
- Case law (issued by courts)
- Agency guidance/Executive Orders/other “non-binding” pronouncements

# National Environmental Policy Act

- Statute: 42 U.S.C. §§ 4321 to 4370h
- Regulations implementing NEPA
  - Council on Environmental Quality (“CEQ”)
    - 40 C.F.R. – Parts 1500-1508
  - Departments and agencies also have own NEPA regs
  - Various CEQ and agency guidance, e.g.:
    - NEPA.GOV – CEQ’s NEPA website, <https://ceq.doe.gov/>
    - EPA’s NEPA Policies and Guidance – <http://www.epa.gov/compliance/resources/policies/nepa>
    - CEQ, NEPA’s Most 40 Asked Questions – <http://ceq.hss.doe.gov/nepa/regs/40/40p3.htm>
- State “little NEPA” laws, too (esp. CA CEQA)

# NEPA at a Glance

- NEPA recently celebrated 40<sup>th</sup> anniversary
- Basic NEPA Goals:
  - Environmentally informed decisions – “Policy” not Protection
  - Public transparency
  - No surprises/no regrets
  - Not gigantic documents or massive delays
- NEPA does not require adoption of least environmentally harmful alternative (but other statutes might)

# Does NEPA Apply?

## (Wait, so I can go home now?)

- Broad trigger for EIS: proposals for “major Federal actions significantly affecting the quality of the human environment”
- In practice, unless specifically exempted by statute or rule, NEPA applies to every federal agency discretionary action, including approving, financing, assisting, or conducting plans, projects, or programs, whether regional or site-specific

# Do We Really Have to Do NEPA?





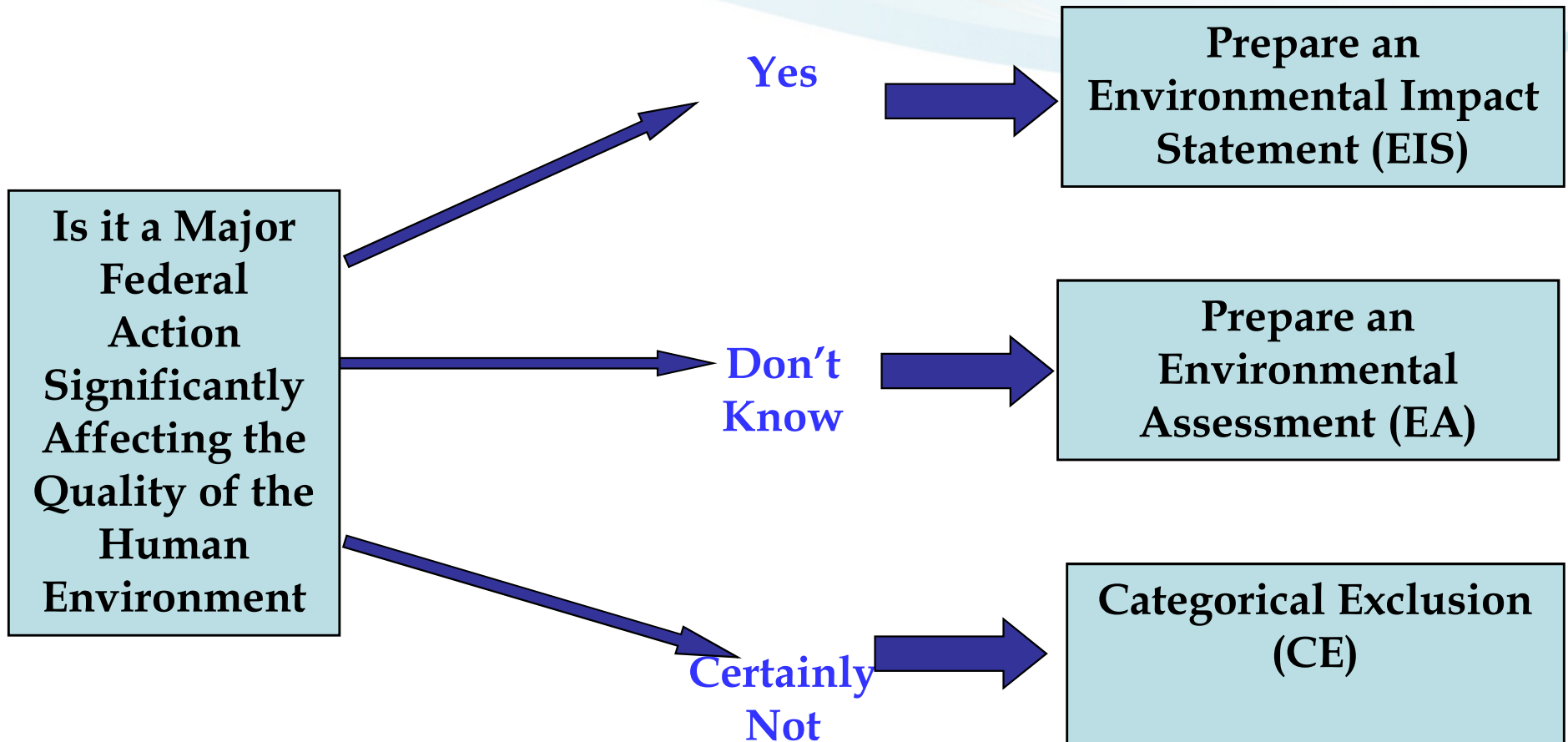
# Beware Segmentation



# The NEPA Players

- Lead agency
- Cooperating or Participating federal, state, tribal, and local agencies with jurisdiction or special expertise
- Hired consultants under agency supervision
- Private project proponent
- Public (through commenting)

# NEPA Applies – Now What?



# “Significant” Effect?

- Determined case-by-case
  - **Context:** Affected environment where proposal is planned
  - **Intensity:** Severity of impacts, considering e.g.:
    - Beneficial and adverse environmental impacts
    - Public health
    - Unique characteristics of affected area
    - Effects on cultural resources
    - Endangered species
    - Violations of federal, state, or local environmental laws
    - Controversy (but not simply public opposition)
    - List not exhaustive; no single factor dispositive

# Which “Effects”?

- Agency must analyze “effects” including: ecological, aesthetic, historic, cultural, economic, social, health
- Agency must consider direct, indirect, and cumulative effects
  - But only those effects that are reasonably foreseeable, not remote and speculative

# Option 1: Categorical Exclusion

- By far, CE most common form of NEPA compliance
- CEQ on CE: “a category of actions which do not individually or cumulatively have a significant effect on the human environment”
- Must be no “unusual circumstances” barring CE
- CEQ Final Guidance for Establishing, Applying, and Revising Categorical Exclusions (75 Fed. Reg. 75628, Dec. 6, 2010)

# Option 2: Environmental Assessment

- Used to determine if EIS is required (in theory, at least)
- Finding of No Significant Impact (FONSI) or EIS
  - Conclusion must be supported by data and analysis in EA
  - Mitigated FONSI possible
- No prescribed format – Must “briefly” describe
  - Purpose and need for proposed action
  - Proposal and feasible alternatives
  - Environmental effects of proposal and alternatives
  - Agencies and persons consulted during preparation
- Though supposed to be “concise,” EAs in recent practice may approximate EISs in length and complexity

# Option 3: Environmental Impact Statement

- Notice of Intent (“NOI”) in Federal Register
- Scoping
- Draft EIS
- Public Comment Period
- Final EIS
- Record of Decision (“ROD”)



# Anatomy of an EIS

- Statement of “Purpose and Need”
  - Project’s purpose (goals/objectives)
  - Need to which agency is responding
- Alternatives to proposal
  - “Heart” of the EIS
  - Proposed action + “no action” + “reasonable range” of alternatives
- Description of baseline affected environment
- Analysis of environmental effects for each alternative
  - Direct, indirect, and cumulative effects
  - Any mitigation measures

# Draft EIS

## Purpose and Need Statement

- Foundation of EIS
- Brief statement by lead agency
  - Project's purpose (goal/objectives)
  - Need agency is responding to with project
- Reasonable scope; not artificially constrained

# Draft EIS (cont.)

## Alternatives Analysis

- Heart of the EIS
- Proposed action + no action alt + “reasonable range” of alts.
  - Alternatives that are practical and feasible technically, economically, and logistically
  - Identify preferred alternative & environmentally preferable alternative
  - Explain eliminated alternatives

# Draft EIS (cont.)

- Description of Affected Environment
  - Baseline conditions
- Analysis of Environmental Effects
  - Summary of impacts of each alt.
  - Comparison of each alt's effects
    - Direct, indirect, cumulative effects
    - Mitigation measures

# DEIS Review

- Request comments
- File DEIS with EPA
  - EPA publishes notice in Fed. Reg.
- 45 day (min.) public comment period
- Review/address comments
  - Modify proposal/alts or develop new alts
  - Supplement/modify analysis
  - Make factual corrections
  - Explain inaction

# Final EIS

Final EIS = Draft EIS +:

- Responses to comments on DEIS
- Revisions or additions to DEIS

File with EPA, publish in Fed. Reg.

30+ day cooling off period (not always!)

Final decision on proposed action

# Record of Decision (ROD)

ROD = explanation of decision and process

- Selected alternative
- Alternatives considered (incl. env. preferable)
- Bases for choosing selected alt. over others
- Factors considered (incl. minimizing harm)
- Mitigation adopted/rejected

Filing ROD = final agency action, subject to administrative or judicial review

# Supplemental EIS

(We're still not done?)

- Required when agency makes relevant “substantial changes” to proposed action, or when there are “significant new circumstances or information”
- Mere passage of time does not automatically trigger supplemental EIS
- Addition of new alternative or new mitigation measures not described in the Draft EIS may trigger SEIS



# DE--FENSE!!

- Though a procedural statute, NEPA is a favorite tool for project opponents
- Claims brought under Administrative Procedure Act
- Usually resolved on summary judgment
- Claims generally involve:
  - Level of NEPA review
  - Factors considered
  - Scope of action/analysis
- On the merits, courts apply a “rule of reason” and usually defer to agency’s “hard look”

# Looking Forward: Addressing Modern NEPA Hurdles

- “Hard look” has become herculean
- Common roadblocks:
  - Failure by lead and resource agencies to act timely
  - Adversarial agencies with overlapping jurisdiction pursuing different agendas
  - Lack of federal/state coordination
  - Duplication of effort
  - Strategically timed litigation by project opponents
- Not uncommon for project to consume thousands of pages of analysis and over a decade

# Signs of Progress

- New Categorical Exclusions
- Integration of planning and NEPA
- Concurrent, not consecutive, reviews
- Deadlines and penalties
- Abbreviated FEIS, and combination of FEIS and ROD
- Early interagency consultation and dispute resolution
- Greater role available to states
- Alternatives to project-by-project review
- Expedited and reduced litigation
- Accountability (including Dashboards)

# If It Ain't Broke...

- Adoption/Incorporation by Reference
- Tiering



# Best Practices for NEPA

- Recall NEPA requires agencies to “stop and think,” not any specific outcome or more paper
- Affirmatively build a robust administrative record
- Each NEPA analysis is project/plan-specific, but need not consider in a vacuum—utilize existing analyses
- Acknowledge and resolve issues and information gaps, rather than ignoring or hiding them
- Continue to follow and encourage agency efforts to streamline efforts and involve applicant expertise

# NEPA/ESA/Other Questions?



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