



Making NEPA Great Again

Environmental Law Institute

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Ah, the '70s...

When Congress Did Things

- 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 approaching its 50th 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
 - Recent guidance on mitigation might as well

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?



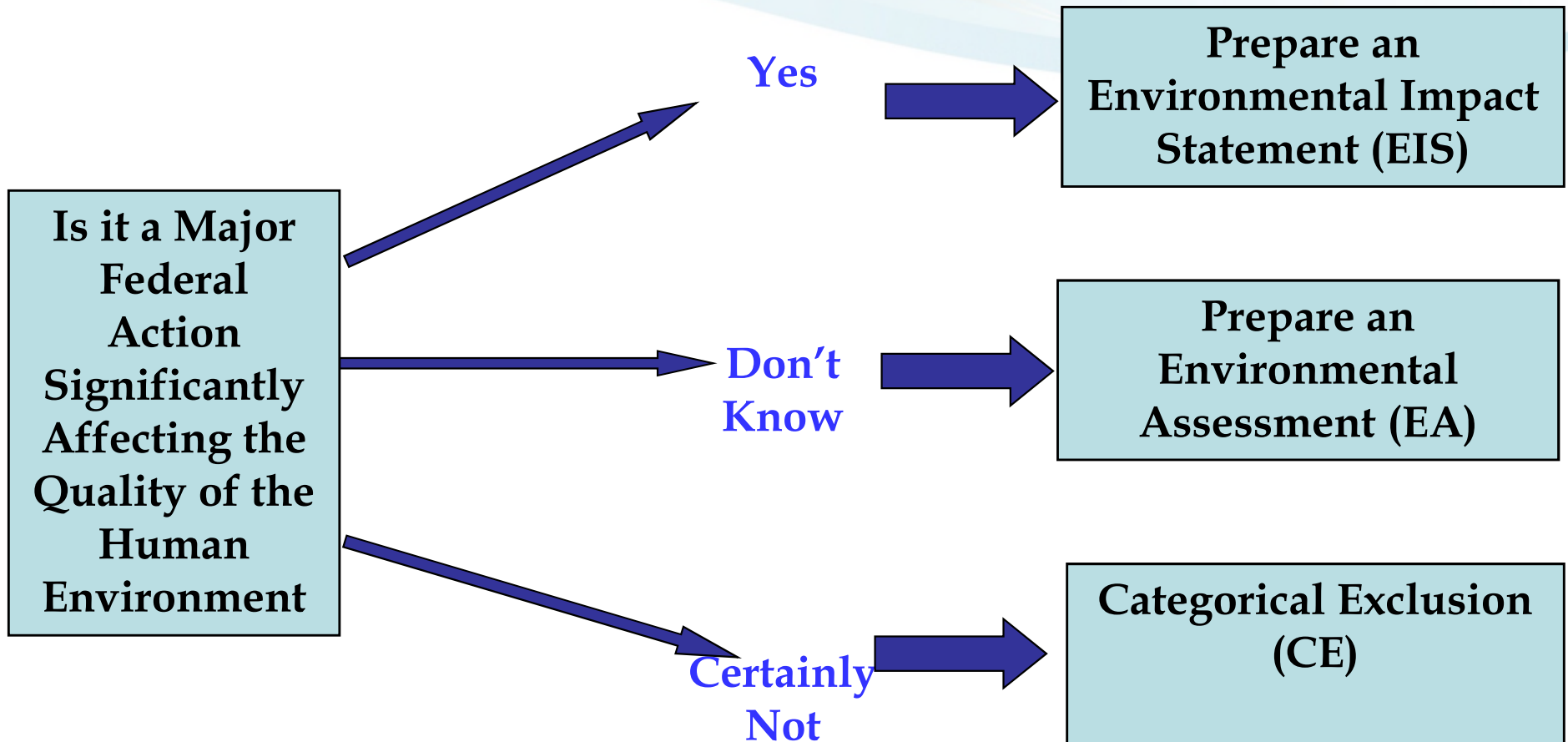
Beware Segmentation



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

We Have Been at Work on Improving NEPA Reviews for Awhile...

- Energy Policy Act of 2005 Pilot Projects
- President Bush Executive Order 13274 (Sept. 18, 2002)
- Section 6002 of SAFETEA-LU (2005)
- ARRA stimulus (2009)
- DOT/CEQ NEPA 40th anniversary guidance (2010-11)
- CEQ NEPA Pilot Program (March 2011)
- Presidential Memo on high-priority projects (Aug. 31, 2011)
- President Obama Executive Order 13604 “Improving Performance of Federal Permitting and Review of Infrastructure Projects (March 22, 2012)”
- CEQ guidance on NEPA efficiency (March 2012)
- MAP-21 (2012)
- Presidential Memo “Modernizing Federal Infrastructure Review and Permitting Regulations, Policies, and Procedures” (2013)
- Implementation Plan for 2013 Pres Memo (2014)
- FAST Act (2015)

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)

The Latest and “Greatest”



- Executive Order “Expediting Environmental Reviews and Approvals for High-Priority Infrastructure Projects” (1/24/2017)
- Executive Order “Promoting Energy Independence and Economic Growth (3/28/2017)
- “Yuge” New Infrastructure Bill?

GHGs: A Newer Game in NEPA

- Past: Projects fighting against performing any meaningful GHG analysis.
- Now: Projects must fight to define and win the GHG component of the project.



NEPA Assignment



Don't Lose It, Reuse It!

- Adoption/Incorporation by Reference
- Tiering



Other Challenges/Opportunities

- Defining scope of project to avoid issues of segmentation and cumulative impacts
- Setting of and adherence to deadlines
- Coping with fewer agency staff and resources, including use of third parties
- NEPA compliance for deregulatory actions
- P3s, including defining relationship of federal and non-federal components

Best Practices for NEPA

- Remember that 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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