

# NEPA Basics

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Jim McElfish, ELI Senior Attorney

# National Environmental Policy Act of 1969

- 42 U.S.C. 4321 et seq (statute)
- 40 C.F.R. Parts 1500-1508 (regulations)
- Statute signed into law January 1, 1970
- Council on Environmental Quality regulations adopted 1978
- Trump Administration proposal to revise regulations January 10, 2020  
– likely to be final June 2020.

# NEPA history

- First statute of the “environmental decade” of the 1970s that put most of US federal environmental laws into place.
- Clean Air Act enacted 1970
- Clean Water Act (amending prior law) enacted 1972
- Endangered Species Act 1973
- Safe Drinking Water Act 1974
- Resource Conservation and Recovery Act 1976

# Background of NEPA

U.S. Senator Henry M. Jackson (Washington) – April 16, 1969

“I introduced this measure because it is my view that our present knowledge, our established policies, and our existing institutions are not adequate to deal with the growing environmental problems and crises the nation faces ... As a nation we have failed to design and implement a national environmental policy which would enable us to weigh alternatives, and to anticipate the undesirable side effects which often result from our ongoing policies, programs and actions.”

# What does NEPA do?

- Declares a national policy
- Establishes an action forcing mechanism to ensure consideration of alternatives and impacts
- Provides for public accountability and participation
- Creates a Council on Environmental Quality in the executive office of the President
- Required an annual report on the status of the environment (subsequently discontinued)

# What actions does NEPA apply to?

- NEPA applies to all federal agencies.
- 42 USC 4332 --The Congress authorizes and directs that, to the fullest extent possible--
  - (1) The policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act, and
  - (2) All agencies of the Federal Government shall – (A) utilize a systemic, 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 for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on [the environmental impact of the proposed action, any adverse environmental effects which cannot be avoided, alternatives to the proposed action, the relationship between local short-term uses and long term productivity, and any irreversible and irretrievable commitments of resources shouldthe proposal be implementd]...

# Agency roles

- NEPA directly applies to every federal agency. Each agency administers its own compliance in accordance with CEQ regulations and its own NEPA procedures, regulations, and guidelines.
- Council on Environmental Quality issued government-wide Guidelines/Regulations under Presidential Executive Order. CEQ also reviews and approves federal agency NEPA procedures and regulations, approves agency “categorical exclusions” from EIS requirements, issues guidance documents, conducts dispute resolution, provides advice to federal agencies.
- Environmental Protection Agency (EPA) under a provision enacted as part of the Clean Air Act in 1970 reviews all Environmental Impact Statements(EISs), files notices of availability of EISs, rates EISs, maintains list of EISs.

# Role of courts

- Federal courts enforce agency compliance with procedural requirements of NEPA and NEPA regulations under the Administrative Procedure Act.
- Federal courts do not enforce substantive compliance with the policies of NEPA.
- Federal courts in the 1970s identified their approach to review as taking a “hard look” at agency compliance with NEPA procedures.
- Supreme Court has said that NEPA does not require a particular decisional outcome by agencies. It does not bar unwise decisions, only uninformed decisions.



# Types of NEPA documents

- Categorical Exclusion (CATEX) – where an agency has determined (in advance, in its adopted procedures) that a listed type of action does not “individually or cumulatively have a significant effect on the human environment.” 40 CFR 1508.4. But still some review may be required to determine if there are “extraordinary circumstances”.
- Environmental Assessment (EA) – a concise public document that serves to briefly provide sufficient evidence and analysis for determining whether to prepare an EIS, aids in any agency’s compliance with NEPA when no EIS is necessary. 40 CFR 1508.9. Leads to Finding of No Significant Impact (FONSI) or to decision to prepare EIS.
- Environmental Impact Statement (EIS) – the detailed statement, including consideration of alternatives, impacts, mitigation. Required for major federal actions significantly affecting the human environment. 40 CFR 1508.11. Leads to Record of Decision (ROD) reflecting the federal decision.

# Key EA and EIS elements

- Scoping (required for EIS, often used for EA)
- Identification of alternatives to the proposed action (both)
- Public participation – agency duty to deal with public comments (EIS has draft and final EIS reflecting disposition of public comments; EA may have draft and final, and may receive public comments even if issued as final)
- Mitigation – identified in each (not directly enforceable in EIS – but must be identified). If used in EA to bring impacts below the level of significance, this is “mitigated FONSI” Interesting enforceability issue there.

# Key issues

- Cumulative impacts and indirect impacts
- Alternatives not within authority of lead agency
- Expansion of CATEXs – including legislative CATEXs
- Public participation
- Environmental Justice (EJ)
- Climate change impacts

# Proposed Rule – 84 Fed. Reg. 1684 (Jan. 10, 2020)

- Completely overhauls 1978 regulations, issued pursuant to EO 13807 “infrastructure” order but applies to all of NEPA decisionmaking
- Fast-tracked to try to finalize this summer.
- Will preempt all existing agency NEPA regulations, guidance, and procedures and will require all agencies to conform within 12 months of final regulations.
- Proposal eliminates cumulative impacts, indirect impacts, consideration of alternatives and impacts not within jurisdiction of lead agency, removes significance definitions. Creates new presumptions; seems to overrule federal court decisions reliant on existing regulations.
- Will be litigated in numerous federal courts, with likely differing outcomes.

# ELI Guide to Proposed Regulations

- <https://www.eli.org/research-report/practitioners-guide-proposed-nepa-regulations>
- Thanks – questions welcome

