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Statutory Modifications of the Application of NEPA

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Summary

From time to time, Congress has considered the operation of the National Environmental Policy Act. While Congress has amended the statute itself only twice since its enactment, Congress has often enacted provisions that modify the application of the Act or specify the extent of the documents that need be prepared in particular instances or contexts. This report collects and lists examples of such provisions and will be updated as legislative action warrants.

The National Environmental Policy Act of 1969 (NEPA),¹ enacted January 1, 1970, establishes a national environmental policy and requires federal agencies to “use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources” so that our nation may carry out the policies and goals stated in § 101 of the Act. Section 102 of the Act requires that a “detailed statement” be prepared in connection with “major Federal actions significantly affecting the quality of the human environment” Under the implementing regulations,² agencies may prepare an “Environmental Assessment” (EA) to determine whether a full “Environmental Impact Statement” (EIS) (the “detailed statement” required by the statute) is required. Some actions that are of a type known to have only minimal environmental effect do not require the preparation even of an EA. These are “categorically excluded” from NEPA document preparation.

Although the courts have interpreted NEPA as essentially a procedural statute,³ it has had a significant impact on federal decision making. Considerable attention has been

¹ Pub. L. No. 91-190, 83 Stat. 852, codified at 42 U.S.C. §§ 4321 *et seq.*

² 40 C.F.R. §§ 1500.1 *et seq.*

³ *Strycker’s Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227 (1980); *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.* 435 U.S. 519, 558 (1978).

focused recently on the functioning of NEPA. The Council on Environmental Quality, the agency charged with its administration, has undertaken a “NEPA Reinvention” effort and Congressional committees have considered possible amendments to the Act. Although Congress has amended NEPA only twice since its enactment in 1970,⁴ Congress has often enacted particular provisions that modify the application of the Act or specify the extent of documents that need be prepared in particular instances or contexts. This report collects and lists examples of such provisions. For example, Congress has:

- exempted certain federal activities from NEPA compliance;⁵
- stated that no EIS need be prepared -- either through direct language so stating (and in some instances by also excusing compliance with other parts of § 102), by deeming certain actions not to be major federal actions significantly affecting the quality of the human environment, or by prohibiting certain actions that might trigger EISs;⁶

⁴ Pub. L. No. 91-190, 83 Stat. 852, codified at 42 U.S.C. §§ 4321 *et seq.* The Act has been amended in 1975 by Pub. L. No 94-83, 89 Stat. 424 to allow states to prepare environmental analyses in some instances and in 1975 by Pub. L. No 94-52, 89 Stat. 258 to make changes regarding administrative matters of CEQ.

⁵ 16 U.S.C. § 3636(a) (regulation of pacific salmon fishing); 43 U.S.C. § 1652(d) (Trans-Alaska Pipeline - after initial EIS); 45 U.S.C. § 917 (Milwaukee Railroad restructuring); 45 U.S.C. § 1010 (Rock Island Railroad employee assistance); and 45 U.S.C. §§ 1207(b), 1212(a) (Alaska Railroad Transfer).

⁶ 15 U.S.C. § 793(c)(1) and (2) (Clean Air Act and certain energy actions) and (d) (importation of hydroelectric energy); 16 U.S.C. § 4976c (reissuance of ski area permits in national forests); 16 U.S.C. § 544o(f) (certain actions related to Columbia River Gorge National Scenic Area); 16 U.S.C. § 1379(g) (transfer of fish management authority to a state); 16 U.S.C. § 1536(k) (exemption decisions by the Endangered Species Committee); 25 U.S.C. § 640d-26 (Navajo and Hopi settlement); 30 U.S.C. § 185(t) (ratification of existing rights of way and permits); 30 U.S.C. § 226(b)(1)(B) (establishment of national minimum bids for federal oil and gas leases); 30 U.S.C. § 1251(a) (interim surface coal mining regulations); 30 U.S.C. § 1292(d) (aspects of surface mining program); 33 U.S.C. § 1371(c)(1) (actions related to sewage treatment works); 42 U.S.C. §§ 2297c-2, 2297h-5(g) (leasing gaseous diffusion facilities)(Supp. 1997); 42 U.S.C. § 5159 (disaster relief/restoring facilities); 42 U.S.C. § 6239(h)(3)(A) (interim storage of petroleum products); 42 U.S.C. § 7274g(b) (adoption of energy/waste plans); 42 U.S.C. § 8473 (listed actions re electric powerplants); 42 U.S.C. § 10133(c)(1) (preliminary decisions on disposal of spent nuclear fuel); 42 U.S.C. § 10134(a)(3)(B) (recommendation of nuclear waste site); 42 U.S.C. § 10141(c) (promulgation of high-level radioactive waste standards); 42 U.S.C. § 10155(a)(1)(A)(ii) (specified use of nuclear fuel storage facilities); 42 U.S.C. § 10161(c)(1) and (2) (proposal to Congress regarding radioactive waste storage); 42 U.S.C. § 10165(d) (radioactive waste site selection); 43 U.S.C. § 1638 (conveyances to Alaska Natives); 45 U.S.C. § 791(c) (railroad reorganization); 45 U.S.C. § 1116(a) (northeast rail service transfers); and 50 U.S.C. § 2096(i) (listed actions re energy supply shortages).

Various uncodified statutes also have affected NEPA application. *See, e.g.*, language in various uncodified acts (such as § 111(b) of Pub. L. No. 98-425, The California Wilderness Act of 1984), designating wilderness areas that precludes additional state-wide wilderness suitability reviews and hence accompanying EISs.

- directed expressly that no EIS or EA be prepared;⁷
- directed that an EIS be prepared;⁸
- directed that at least an EA be prepared;⁹
- directed that an EA be the extent of NEPA documentation that is prepared;¹⁰
- pronounced certain analyses to be sufficient or adequate consideration under NEPA;¹¹
- pronounced certain substitute processes sufficient under NEPA;¹²
- limited the scope of NEPA analysis;¹³ or

⁷ 16 U.S.C. § 544o (Columbia River Gorge National Scenic Area). See also §504 of Pub. L. No. 104-19, 109 Stat. 212 directing reissuance of grazing permits pending completion of NEPA analyses.

⁸ 16 U.S.C. § 460qq (plans for Allegheny National Recreation Area); 16 U.S.C. § 1434(a)(2) (designation of marine sanctuaries); 30 U.S.C. § 1292(d) (adoption of surface mining regulations); 30 U.S.C. § 1419(d) (issuance of deep sea mining license or permit); 33 U.S.C. § 701b-13(d)(1) (EIS necessary for construction of flood control projects to go forward); 33 U.S.C. § 1344(r) (certain discharge programs); 33 U.S.C. § 1504(f) (deepwater ports); 42 U.S.C. § 2242(a) (temporary nuclear operating license); 42 U.S.C. § 2243(a)(1) (licensing of uranium enrichment facilities); 42 U.S.C. § 9117(e) (license for ocean thermal energy conversion facility); 42 U.S.C. § 10134(f)(1) (recommendation of radioactive waste site by Secretary); 42 U.S.C. § 10155(c) (provision of larger nuclear storage capacity); 42 U.S.C. § 10197(g) (test disposal of radioactive materials); and 42 U.S.C. § 10247(b) (construction authorization for nuclear water storage).

⁹ 16 U.S.C. § 4404(b) approval of wetlands projects.

¹⁰ 42 U.S.C. § 10155(c)(2)(A) (storage of certain nuclear wastes); 42 U.S.C. § 10161(c)(1) (proposal for Congress on retrievable radioactive waste storage); and 42 U.S.C. § 10165(d) (selection of radioactive waste storage site). See also uncodified § 2001 of Pub. L. No. 104-19, (salvage timber rider.)

¹¹ 43 U.S.C. § 1652 (single EIS on Trans-Alaska Pipeline). See also uncodified acts designating wilderness areas and in various ways stating that the RARE state-wide wilderness reviews were adequate and § 318 of Pub. L. 101-121 that stated the Final Supplemental EIS for an amendment to Pacific forest guidance was adequate consideration under NEPA.

¹² 15 U.S.C. § 793(c)(2) (analyses of energy actions, similar to NEPA, if practicable); 16 U.S.C. § 410hh(d) (park rights of way routes); 25 U.S.C. § 4115(a) (tribal certification); 42 U.S.C. § 1437(b) (state or local government certification); 42 U.S.C. § 3547(2) (state or local government certification); 42 U.S.C. § 5304(g) (community recipient certification); and 42 U.S.C. § 12838(a) (certification of jurisdictions, tribes, and insular areas).

¹³ 10 U.S.C. § 2667 (interim leasing of military property); 42 U.S.C. § 10134(a)(1)(D) and (f)(2) and (3) (radioactive waste repository); 42 U.S.C. § 10161(c)(2) (construction of monitored retrievable storage facility); and 42 U.S.C. § 10168(a)(1) (construction authorization for radioactive waste facility).

- required approval of Congressional committees before EIS prepared.¹⁴

Some of these statutes appear simply to address the timing and extent of NEPA compliance, especially with respect to preparation of environmental documents. Such provisions may be intended to control expenditures of time and money, but may also in some instances be aimed at controlling litigation and judicial review of aspects of NEPA compliance.

¹⁴ 42 U.S.C. 7274(1) (preparation of certain DOE EISs).

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