The National Environmental Policy Act (NEPA): Background and Implementation

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Summary

Beginning in the late 1950s and through the 1960s, Congress reacted to increasing public concern about the impact that human activity could have on the environment. A key legislative option to address this concern was the declaration of a national environmental policy. Advocates of this approach argued that without a specific policy, federal agencies were neither able nor inclined to consider the environmental impacts of their actions in fulfilling the agency's mission. The statute that ultimately addressed this issue was the National Environmental Policy Act of 1969 (NEPA, 42 U.S.C. §§ 4321-4347).

Signed into law by President Nixon on January 1, 1970, NEPA was the first of several major environmental laws passed in the 1970s. It declared a national policy to protect the environment and created a Council on Environmental Quality (CEQ) in the Executive Office of the President. To implement the national policy, NEPA required that a detailed statement of environmental impacts be prepared for all major federal actions significantly affecting the environment. The "detailed statement" would ultimately be referred to as an environmental impact statement (EIS).

With an initial absence of regulations specifying implementation procedures and no agency authorized to enforce the law, federal agencies reacted in different ways to NEPA's requirements. Some had difficulty complying with the law's EIS requirements. As a result, litigation that served to interpret NEPA's requirements and enforce agency compliance began almost immediately. In addition to questions of procedure (e.g., how, when, or why an EIS must be prepared), another question was how the environmental policy goals of the act should be implemented or enforced. The courts ultimately decided that NEPA is a procedural statute with twin aims requiring agencies to (1) consider the environmental impacts of their proposed actions and (2) inform the public that they (the agencies) considered environmental concerns in their decision-making process. In that capacity, NEPA has become a primary mechanism for public participation in the federal decision-making process.

As it has been implemented, most agencies use NEPA as an "umbrella" statute. As such, NEPA forms a framework to coordinate or demonstrate compliance with any study, review, or consultation required by other environmental laws. The use of NEPA in this capacity can lead to confusion. The need to comply with another environmental law, such as the Clean Water Act, may be identified within the framework of the NEPA process, but NEPA itself is not the source of the obligation. Theoretically, if the requirement to comply with NEPA were removed, compliance with each applicable law would still be required.

Contents

Figures

Tables

Contacts

Introduction

Prior to the 1960s, little formal consideration was given to the potential impact of human activity on the environment. Beginning in the late 1950s and into the 1960s, the public became increasingly aware of and concerned about those impacts. During that time, members of Congress debated the need for a national policy on the environment and for an Executive-level council or committee that could provide advice to the President on environmental policy issues. The statute that ultimately addressed these needs was the National Environmental Policy Act of 1969 (NEPA, 42 U.S.C. §§ 4321-4347).

Signed into law by President Nixon on January 1, 1970, NEPA was the first of several major environmental laws passed in the 1970s. It declared a national policy to protect the environment. To implement its policy, NEPA requires federal agencies to provide a detailed statement of environmental impacts, subsequently referred to as an environmental impact statement (EIS), for every recommendation or report on proposals for legislation and other major federal action *significantly* affecting the quality of the human environment.

The act also created the Council on Environmental Quality (CEQ) in the Executive Office of the President. Among other duties, CEQ provides oversight of NEPA's implementation. In 1978, CEQ was authorized by executive order to issue regulations applicable to all federal agencies regarding the preparation of EISs. However, CEQ was not authorized to enforce those regulations.

As it was subsequently interpreted, NEPA is a procedural statute with two primary aims. First, it obligates federal agencies to consider every significant aspect of the environmental impact of an action *before* proceeding with it. Second, it ensures that the agency responsible for the action will inform the public what the action is and that it has considered environmental concerns in its decision-making process. In this capacity, NEPA has become one of the primary mechanisms through which the public is able to participate in the federal decision-making process.

As a procedural statute, NEPA does not require agencies to elevate environmental concerns above others. Instead, NEPA requires only that the agency assess the environmental consequences of an action and its alternatives before proceeding. If the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other benefits outweigh the environmental costs and moving forward with the action.

Most agencies use NEPA as an umbrella statute—that is, a framework to coordinate or demonstrate compliance with any studies, reviews, or consultations required by any other environmental laws. The use of NEPA in this capacity can lead to confusion. The need to comply with another environmental law, such as the Clean Water Act or Endangered Species Act, may be identified within the framework of the NEPA process, but NEPA itself is not the source of the obligation. Theoretically, if the requirement to comply with NEPA were removed, compliance with each applicable law would still be required.

Unlike other environment-related statutes, no individual agency has enforcement authority with regard to NEPA's environmental review requirements.[1] This absence of enforcement authority is

[1] CEQ is charged with providing oversight and guidance to agencies with regard to EIS preparation. The Environmental (continued...)

sometimes cited as the reason that litigation has been chosen as an avenue by individuals and groups that disagree with how an agency meets NEPA's mandate or EIS requirements for a given project. (For example, a group may charge that an EIS is inadequate or that the environmental impacts of an action will in fact be significant when an agency claims they are not). Critics of NEPA charge that those who disapprove of a federal project will use NEPA as the basis for litigation to delay or halt that project. Others argue that litigation only results when agencies do not comply with NEPA's procedural requirements.

Environmental groups often refer to NEPA as the "Magna Carta" of environmental law. They view it as an essential tool to help agencies plan and manage federal actions in a responsible way by requiring policymakers and project sponsors to consider the environmental implications of their actions before decisions are made. Environmental groups also view the NEPA process as an important mechanism in providing the public with an opportunity to be involved in agency planning efforts. Critics charge that the law creates a complicated array of regulations and logistical delays that stall agency action.

This report provides information about NEPA's background and legislative history, provisions of the law, the role of the courts and CEQ in its implementation, how agencies implement NEPA's requirements, how the public is involved in the NEPA process, the means by which NEPA is used as an umbrella statute to coordinate or demonstrate compliance with other environmental requirements, and claims by some stakeholders that NEPA causes delays in some federal actions. (For a legally oriented overview of NEPA requirements, see CRS Report RS20621, *Overview of National Environmental Policy Act (NEPA) Requirements*, by (name redacted).)

NEPA and Its History

In the 1950s and 1960s, Congress began to react to increasing public concern about the environment. In the congressional debates that ensued, a key legislative option considered was the declaration of a national environmental policy. Such a policy would require all federal agencies, whose actions were often seen as significant sources of pollution, to adhere to certain environmental values and goals. Advocates of a national policy argued that without a specific environmental policy, federal agencies were neither able nor inclined to consider the environmental impacts of their actions in fulfilling the agency's mission. Debate also existed regarding the creation of an Executive-level board or council that would gather information regarding the state of the environment and provide environmental policy advice to the President.

Background and Legislative History

For at least 10 years before NEPA was enacted, Congress debated issues that the act would ultimately address. The act was modeled on the Resources and Conservation Act of 1959, introduced by Senator James E. Murray in the 86th Congress. That bill would have established an

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Protection Agency (EPA) is required to review and comment publicly on the environmental impacts of proposed federal activities, including those for which an EIS is prepared. EPA is also the official recipient of all EISs prepared by federal agencies. However, neither agency has enforcement authority with regard to an agency's environmental review requirements.

environmental advisory counsel in the office of the President, declared a national environmental policy, and required the preparation of an annual environmental report.[2]

In the years following the introduction of Senator Murray's bill, similar bills were introduced and hearings were held to discuss the state of the environment and Congress's potential responses to perceived problems. In 1968, a joint House-Senate colloquium was convened by the chairmen of the Senate Committee on Interior and Insular Affairs (Senator Henry Jackson) and the House Committee on Science and Astronautics (Representative George Miller) to discuss the need for and potential means of implementing a national environmental policy. In the colloquium, some members of Congress expressed a continuing concern over federal agency actions affecting the environment. Governor Laurence Rockefeller, a participant in the colloquium, stated before the joint committee:

> [W]e do not have a clearly stated national attitude toward the environment. In the areas of civil rights, education, full employment, and a number of others, the Congress of the United States has set forth a clearly understood national policy. This lack of overall national policy has been reflected in recent action of the courts in reversing decisions of administrative agencies on the grounds that they did not give sufficient consideration to environmental factors. Clearly, these agencies need better guidelines.[3]

Many of the concepts and ideas drawn from this colloquium would ultimately form the basis for the bills that would become NEPA. For example, in discussing new approaches to government, Senator Jackson argued that new approaches to environmental management were required, and he urged the colloquium to provide thoughts on possible "action-forcing" processes that could be put into operation.[4] The discussion of action-forcing processes to implement a national policy provided the seeds of the idea that would eventually become the requirement to prepare an environmental impact statement.

The bills that would become NEPA were introduced in the Senate and House in 1969 by Senator Jackson and Representative John Dingell.[5] In introducing the Senate bill, Senator Jackson stated that its purpose was to "lay the framework for a continuing program of research and study which will insure that present and future generations of Americans will be able to live in and enjoy an environment free of hazards to mental and physical well-being."[6] To accomplish this end, the Senate bill authorized federal agencies to conduct investigations and gather data on environmental issues. The bill also established a Council on Environmental Quality to analyze

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[2] S.Rept. 91-296, 91st Cong., 1st sess., July 9, 1969, pp. 11-12, and Lynton Caldwell, *The National Environmental Policy Act: An Agenda for the Future*, Indiana University Press, 1998, pp. 26-27.

[3] Statement by Governor Rockefeller in *Joint House-Senate Colloquium to Discuss a National Policy for the Environment, Hearing before the Committee on Interior and Insular Affairs, United States Senate, and the Committee on Science and Astronautics, U.S. House of Representatives*, July 17, 1968, p. 5.

[4] "Congressional White Paper on a National Policy for the Environment," issued jointly by the Committee on Interior and Insular Affairs, United States Senate, and the Committee on Science and Astronautics, U.S. House of Representatives, summarizing key points raised in the dialog, October 1968, Committee Print, p. 9.

[5] S. 1075 was introduced by Senator Jackson on February 18, 1969. H.R. 12549 was introduced by Representative John Dingell, and others, on July 1, 1969.

[6] Senator Jackson's remarks regarding "S. 1075—Introduction of Bill to Establish a National Strategy for the Management of the Human Environment," vol. 115, *Congressional Record*, p. S1780, February 18, 1969 (reprinted in *National Environmental Policy Act of 1969: Legislative History, Senate bill 1075, Public law 91-190, 91st Congress, 1st session*, James D. Nuse, compiler, for the U.S. Atomic Energy Commission, September 1970).

and study the information gathered and to advise and assist the President in the formulation of national policies.

The Senate Committee on Interior and Insular Affairs held a hearing on the proposed bills[7] in April 1969. During the hearing, the concept of creating some action-forcing mechanism, as a means of implementing a national environmental policy, was again discussed. One of the witnesses to provide testimony at the hearing was Dr. Lynton Caldwell.[8] An interchange during the hearing between Dr. Caldwell and Senator Jackson is considered by some as the point at which the provision behind the environmental impact statement requirement was introduced. Following are relevant excerpts from that testimony:

> Dr. Caldwell: I would urge that in shaping [an environmental] policy, it have an action-forcing, operational aspect ... For example, it seems that a statement of policy by the Congress should at least consider measures to require Federal agencies, in submitting proposals, to contain within the proposals an evaluation of the effect of those proposals upon the state of the environment...
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> Senator Jackson: I have been concerned with the inadequacy of the policy declaration in the bill I have introduced. Obviously this is not enough. It does, however, provide a predicate from which to launch at a discussion as to what is required and how we should proceed ... [W]hat is needed in restructuring the governmental side of this problem is to legislatively create those situations that will bring about an action-forcing procedure the departments must comply with. Otherwise, these lofty declarations are nothing more than that.[9]

Senator Jackson further discussed the potential of broadening the policy provision in the bill to stipulate a general requirement applicable to all agencies that have responsibilities that affect the environment. In doing so, the Senator stated that he was "trying to avoid recodification of all the statutes."[10]

After the Senate hearing, Senator Jackson introduced amendments to the Senate bill.[11] Included in the amendments was a declaration of national environmental policy. Another amendment included a requirement that "all agencies of the Federal Government ... include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a *finding* by the responsible official that ... the environmental impact of the proposed action has been studied and considered."[12] [Emphasis added.]

In July 1969, the Senate passed its version of NEPA (S. 1075) without debate and no amendments offered. In September 1969, the House passed its version (H.R. 12549) by 372 to 15. The following December, the conference committee subsequently reported out a version containing

[7] Although several similar bills were introduced in the Senate that session, those that ultimately received consideration by the Committee were S. 1075, S. 237 (which included a declaration of environmental policy) and S. 1752.

[8] Dr. Caldwell is a Professor of Public and Environmental Affairs at Indiana University and was a staff consultant to the Senate Committee on Interior and Insular Affairs on a National Policy for the Environment, 1968-1970.

[9] *Hearing before the Committee on Interior and Insular Affairs, United States Senate, 91st Congress, 1st Session, on S. 1075, S. 237, and S. 1752*, April 16, 1969, p. 116.

[10] Ibid., p. 117.

[11] S. 1075 Amendments, referred to Senate Committee on Interior and Insular Affairs, May 29, 1969.

[12] Section 102(C), S. 1075 Amendments, May 29, 1969.

various additions and compromises. In particular, in conference, the requirement for all major federal actions to be preceded by a "finding" on environmental impacts was changed to the requirement that a "detailed statement" on environmental impacts be prepared. The detailed statement would later be referred to as an environmental impact statement (EIS). Also included in conference was the requirement that certain federal agencies, other than the one preparing the EIS, be required to review the detailed statement.

It is unclear from the legislative history whether Congress intended for the EIS requirement to become the central element of NEPA compliance that it has. However, in addition to discussions regarding the need for action-forcing provisions to enforce the environmental policy, the legislative history includes statements regarding the need for federal agencies to consider the impacts of their actions. In discussing the relationship of the proposed legislation to existing policies and institutions, the Senate report states: "Many older operating agencies of the Federal Government ... do not at present have a mandate within the body of their enabling laws to allow them to give adequate attention to environmental values ... [The Senate bill] would provide all agencies and all Federal officials with a legislative mandate and a responsibility to consider the consequences of their actions on the environment."[13]

In late December, after minimal debate, both the House and Senate agreed to the conference report. On January 1, 1970, President Nixon signed NEPA into law.

In the more than 30 years since passage of NEPA, Congress has amended the law only to include minor technical changes.[14] However, within a year after NEPA's passage, a section was added to the Clean Air Act (42 U.S.C. 7401 et seq.) that affected the way NEPA is implemented. To further clarify agencies' responsibilities with regard to public involvement in the NEPA process, in December 1970, Congress added § 309 to the Clean Air Act.[15] Provisions of § 309 made explicit that the Administrator of the newly formed Environmental Protection Agency (EPA) has a duty to examine and comment on all EISs. After that review, the Administrator was directed to make those comments public and, if the proposal was environmentally "unsatisfactory," to publish this finding and refer the matter to the CEQ. EPA subsequently developed a program for reviewing and rating federal agency projects (see "EPA's Unique Role in the NEPA Process" section, below).

Overview of NEPA's Provisions

The goals of NEPA are to declare a national environmental policy, provide federal agencies with action-forcing provisions intended to ensure that the goals of the policy are implemented, establish the Council on Environmental Quality (CEQ) to provide advice to the President on environmental matters and to monitor the state of the environment, and require the President to submit to Congress an annual report on the state of the environment. These provisions are contained within NEPA's two titles. Title I declares a national environmental policy that states, in part:

[13] S.Rept. 91-296, p. 14.

[14] NEPA was amended by P.L. 94-52, July 3, 1975, regarding how CEQ may spend appropriated funds; P.L. 94-83, August 9, 1975, specifying parameters under which states may prepare an EIS; and P.L. 97-258, § 4(b), September 13, 1982, regarding budget and accounting procedures.

[15] 42 U.S.C. § 7609.

> [I]t is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures ... to create and maintain conditions under which man and nature can exist in productive harmony ... [16]

The act also specifies broad national goals. NEPA declares that it is the "continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans ... [so] that the Nation may—

- Fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
- Assure for all Americans safe, healthful, productive, and aesthetically and culturally pleasing surroundings;
- Attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;
- Preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity, and variety of individual choice;
- Achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and
- Enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources."[17]

Title I also includes the action-forcing, procedural requirements intended to ensure that federal agencies adhere to NEPA's goals. Section 102 forms the basic framework for federal decision making under the "NEPA process." This section includes several provisions and requires that policies, regulations, and public laws of the United States be interpreted and administered according to NEPA's policies. Among other things, Section 102 requires federal agencies to use a "systematic, interdisciplinary approach" in planning and decision making that may have an impact on the environment.

To ensure that environmental impacts are considered, Section 102(2)(C) of NEPA requires all federal agencies to 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 on the environmental impact of the proposed action."[18] In addition to environmental impacts, federal agencies are required to provide an analysis of

- any adverse environmental effects that cannot be avoided should the proposal be implemented,
- alternatives to the proposed action,

[16] 42 U.S.C. § 4331.

[17] 42 U.S.C. § 4331(b).

[18] 42 U.S.C. § 4332(2)(C).

- the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
- any irreversible and irretrievable commitments of resources that would be involved in the proposed action should it be implemented.[19]

NEPA also requires federal agencies to study and develop appropriate alternatives to the recommended action for any project involving "unresolved conflicts concerning alternative uses of available resources."[20] This requirement is not limited to actions that require an environmental impact statement.

Section 103 of NEPA directs all federal agencies to review their existing statutory authority, administrative regulations, and policies and procedures to determine whether any deficiencies or inconsistencies would "prohibit full compliance with the purposes and provisions" of the act.[21] After conducting this review, the agencies are directed to take necessary measures to make their policies conform with NEPA's intent. NEPA also states that its policies and goals are supplementary to existing law.[22]

Title II of NEPA establishes the CEQ in the Executive Office of the President and specifies its responsibilities. It requires CEQ to submit to Congress an annual Environmental Quality Report on such topics as the condition of the environment, trends in the quality of the environment, and a review of federal, state and local programs to address environmental concerns.[23] Also, the act specifies a list of duties and functions that allow CEQ to support the President in information gathering and policy making with regard to environmental issues.

The Evolution of NEPA's Implementation

NEPA is a declaration of policy with action-forcing provisions, not a regulatory statute comparable to other environmental laws intended to protect air, water, wetlands, or endangered species.[24] It establishes the basic framework for integrating environmental considerations into federal decision making. However, the law itself does not provide details on how this process should be accomplished.

With an initial absence of regulations specifying implementation procedures and no agency authorized to enforce its requirements, federal agencies have reacted in different ways to NEPA's requirements. Some initially had difficulty complying with NEPA. Others believed that they were not required to comply with NEPA's provisions at all. As a result, litigation to enforce agency compliance with NEPA's mandate began almost immediately.

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[19] Ibid.

[20] 42 U.S.C. § 4332(2)(E).

[21] 42 U.S.C. § 4333.

[22] 42 U.S.C. § 4335.

[23] 42 U.S.C. § 4341. The 1997 Environmental Quality Report was the last one prepared by CEQ. The Federal Reports Elimination and Sunset Act of 1995 (P.L. 104-66) eliminated many congressionally mandated reports, including the annual CEQ Environmental Quality Report, unless explicitly requested by Congress.

[24] Lynton Caldwell, *The National Environmental Policy Act: An Agenda for the Future*, Indiana University Press, 1998, p. 2.

In addition to questions of procedure (e.g., how, when, or why an EIS must be prepared), another question ultimately to be determined was how the environmental policy goals of the act should be implemented or enforced. The courts and CEQ played significant roles in determining how those questions were answered and, consequently, how NEPA was ultimately implemented.

The Role of the Courts in Implementing NEPA

Almost since NEPA's enactment, the courts have played a prominent role in interpreting and, in effect, enforcing NEPA's requirements.[25] Beginning almost immediately and continuing into the early 1980s, the courts emphasized agency compliance with NEPA's procedural EIS requirements but did little to delineate specific compliance requirements connected to the substantive environmental policy goals. In 1983, the U.S. Supreme Court clarified that

> NEPA has twin aims. First, it places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action. Second, it ensures that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process. Congress in enacting NEPA, however, did not require agencies to elevate environmental concerns over other appropriate considerations. Rather, it required only that the agency take a "hard look" at the environmental consequences before taking a major action ... Congress did not enact NEPA, of course, so that an agency would contemplate the environmental impact of an action as an abstract exercise. Rather, Congress intended that the "hard look" be incorporated as part of the agency's process of deciding whether to pursue a particular federal action.[26]

This specification of NEPA's "twin aims" and the "hard look" requirement are often cited by both federal agencies and environmental advocates to articulate NEPA's mandate. In 1989, the U.S. Supreme Court reiterated that NEPA does not mandate particular results, but simply prescribes a process.[27] If the adverse environmental effects of a proposed action are adequately identified and evaluated, NEPA does not constrain an agency from deciding that other values outweigh the environmental costs. The Court further clarified that "other statutes may impose substantive environmental obligations on federal agencies, but NEPA merely prohibits uninformed, rather than unwise, agency action."[28]

In addition to determining the substantive versus procedural question, the courts have determined many specific procedural elements of NEPA compliance. For example, for individual actions, courts have ruled on agency interpretation of the meaning of the phrases "federal action," "significantly affecting," and "human environment." Also, the courts played a significant role in determining how and when federal agencies were required to prepare EISs. Some questions decided by the courts involved such issues as the adequacy of individual EISs, who must prepare an EIS, at what point an EIS must be prepared, and how adverse comments from agencies should be handled. Such decisions were, at least in part, the basis of CEQ guidelines released during the 1970s and were subsequently considered when CEQ promulgated its regulations (see "The Role of CEQ in Implementing NEPA" section, below).

[25] For an analysis of legal issues, consult the American Law Division of CRS.

[26] *Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 97, 100 (1983).

[27] *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989).

[28] Ibid., at 351.

The role of the courts in implementing the NEPA process has sometimes been controversial. Critics of NEPA charge that opponents of a given federal project will use litigation related to the NEPA process to delay or halt a project. Others assert that litigation is used primarily when an agency does not comply with its own NEPA procedures (see "NEPA Implementation and Project Delays" section, below).

The Role of CEQ in Implementing NEPA

Authority to promulgate regulations to implement NEPA's provisions was not expressly included among the duties and responsibilities given to CEQ under NEPA. However, shortly after signing NEPA, President Nixon issued an executive order authorizing CEQ to issue "regulations" for the implementation of the procedural provisions of the act.[29] The executive order directed CEQ to develop regulations that would be

> [D]esigned to make the environmental impact statement process more useful to decision makers and the public; and to reduce paperwork and the accumulation of extraneous background data, in order to emphasize the need to focus on real environmental issues and alternatives ... [and] require impact statements to be concise, clear, and to the point, and supported by evidence that agencies have made the necessary environmental analyses.

The executive order also directed federal agencies to hold public meetings and promote public involvement in the NEPA process. The executive order did not extend to CEQ the authority to make these regulations legally binding on federal agencies. Therefore, they would serve as only guidance for compliance.

During the 1970s, CEQ continued to issue guidelines that addressed the basic requirements of EIS preparation. CEQ left NEPA implementation largely to the discretion of federal agencies, which were to use the CEQ guidelines to prepare their own procedures. Still, many agencies were slow to do so, with many initially arguing that NEPA did not apply to them.[30]

During the mid-1970s, frequent complaints were raised regarding the delays that the NEPA process was perceived to cause in the decision-making process. Some observers attributed these problems to a lack of uniformity in NEPA implementation and uncertainty regarding what was required of federal agencies.[31] Also, in response to increasing NEPA-related litigation, agencies often produced overly lengthy, unreadable, and unused EISs.[32] In an effort to standardize an increasingly complicated NEPA process, President Carter amended President Nixon's executive order, directing CEQ to issue regulations that would be legally binding on federal agencies.[33] Final regulations replacing the previous guidelines were issued in the fall of 1978 and became effective on July 30, 1979.[34] CEQ's regulations were intended to foster better decision making

[29] Executive Order 11514, Protection and Enhancement of Environmental Quality, signed by President Nixon, March 5, 1970, 35 *Federal Register* 4247.

[30] H.Rept. 92-316, "Administration of the National Environmental Policy Act," June 1971.

[31] Dinah Bear (CEQ General Counsel), "NEPA at 19: A Primer on an 'Old' Law with Solutions to New Problems," 19 *Environmental Law Reporter* 10060, p. 10062, February 1989.

[32] Dinah Bear, "The National Environmental Policy Act: Its Origins and Evolutions," *Natural Resources & Environment*, vol. 10, no. 2, fall 1995, p. 70.

[33] Executive Order 11991, Relating to Protection and Enhancement of Environmental Quality, signed by President Carter, May 24, 1977, 42 *Federal Register* 26967.

[34] 43 *Federal Register* 55978, November 28, 1978; 40 C.F.R. §§ 1500-1508.

and reduce the paperwork and delays associated with NEPA compliance.[35] CEQ's regulations also specified that the purpose of the NEPA process was to

- inform federal agencies of what they must do to comply with the procedures and achieve the goals of NEPA;
- ensure that the environmental information made available to public officials and citizens is of high quality (i.e., includes accurate scientific analysis, expert agency comments, and public scrutiny);
- foster better decision making by helping public officials make decisions based on an understanding of the environmental consequences of their actions; and
- facilitate public involvement in the federal decision-making process.[36]

CEQ's regulations, drawn in large part from its guidelines, included several noteworthy clarifications and amplifications to requirements specified in the law. For example, the regulations

- required agencies to include a project-"scoping" process to identify important environmental issues and related review requirements before writing the EIS;
- required EISs to be prepared in multiple stages (draft and final), with supplemental EISs required under specific circumstances;
- provided criteria for determining the significance of impacts and what constituted a "major federal action";
- defined and specified the roles of "lead agencies" (those responsible for preparing the NEPA documentation) and "cooperating agencies" (agencies that participate in or contribute to the preparation of the NEPA documentation);
- allowed lead agencies to set time limits on milestones in the NEPA process and page limits on documentation;
- specified a dispute resolution process between lead agencies and EPA (required originally under § 309 of the Clean Air Act), if EPA determined the EIS to be "unsatisfactory";
- specified environmental review procedures and documents applicable to projects that had uncertain or insignificant environmental impacts;
- specified how an agency was to involve the public in the NEPA process;
- required, for actions involving an EIS, that a public record of decision be published when a final agency decision is made; and
- provided for alternative compliance procedures in the event of an emergency.

The CEQ regulations were intended to be generic in nature. Each federal agency was required to develop its own NEPA procedures that would be specific to typical classes of actions undertaken

[35] Council on Environmental Quality, *Ninth Annual Report of the Council on Environmental Quality*, December 1978, pp. 396-399; and at 40 C.F.R. §§ 1500.4 and 1500.5.

[36] 40 C.F.R. § 1500.1.

by that agency.[37] Separately, CEQ regulations directed federal agencies to review their existing policies, procedures, and regulations to ensure that they were in full compliance with the intent of NEPA.[38]

CEQ's regulations are unique in several aspects. For example, they were issued eight years after enactment of the law they implement. As a result, they reflect not only CEQ's interpretation of NEPA, but also the initial interpretation of the courts and the administrative experiences of other agencies. Also, the CEQ regulations incorporated provisions of another law—§ 309 of the Clean Air Act (i.e., procedures for referring projects to CEQ for dispute resolution when EPA has found them to be environmentally unsatisfactory). Finally, although CEQ has oversight of the implementation of its regulations, it is not authorized to *enforce* them.

In addition to promulgating regulations in 1978, CEQ has provided support and informal guidance to federal agencies implementing NEPA's requirements.[39] For example, in 1981, CEQ issued its "Forty Most Asked Questions Concerning CEQ's NEPA Regulations." Answers to those questions deal with topics such as how to determine the range of alternatives considered in an EIS, how environmental documents should be made public, and the scope of mitigation measures required to be discussed. Also, in 2010, after NEPA's 40th birthday, CEQ proposed guidance intended to "Modernize and Reinvigorate NEPA."[40] Included was draft guidance for public comment on when and how federal agencies must consider greenhouse gas emissions and climate change in their proposed actions. CEQ had been asked to provide guidance on this subject informally by federal agencies and formally by a petition under the Administrative Procedure Act. The draft guidance was intended to explain how federal agencies should analyze the environmental impacts of greenhouse gas emissions and climate change when they describe the environmental impacts of a proposed action under NEPA.

Determining When NEPA Applies

Under NEPA, an environmental impact statement must be prepared for "every recommendation or report on proposals for legislation and other major federal actions significantly affecting the quality of the human environment." Interpretation of each element of this phrase has been the subject of myriad court decisions and guidance from CEQ. Two terms of particular relevance are "federal action" and "significantly." In determining whether and how NEPA will apply to an action, it is necessary to determine whether an action is in fact a federal one and, if so, whether its environmental impacts will be significant.

Federal Actions Subject to NEPA

To determine whether NEPA applies to an action, it is first necessary to determine whether it is a federal one.[41] "Federal" actions include those that are potentially subject to federal control and

[37] 40 C.F.R. § 1507.3.

[38] 40 C.F.R. § 1500.6.

[39] The "Forty Most Asked Questions" and other CEQ guidance are available at http://ceq.hss.doe.gov/nepa/regs/guidance.html

[40] The guidance is available at http://www.whitehouse.gov/administration/eop/ceq/initiatives/nepa.

[41] The CEQ regulations, at 40 C.F.R. § 1508.18, specify that the term "major" in the phrase "major federal action" (continued...)

responsibility. Such actions include "projects and programs entirely or partly funded, assisted, conducted, regulated, or approved by federal agencies."[42] Specifically, federal agency compliance with NEPA may be required for actions that require a federal permit or other regulatory decision to proceed.[43]

In many cases, it is immediately apparent that a project or program is federal (as opposed to a strictly private or state action).[44] However, in some instances, such as private actions in which a federal agency has some small involvement, a determination is not as clear.[45] CEQ regulations specify categories of actions within which NEPA-covered federal actions tend to fall (see **Table 1**).

Table 1. Typical Categories of "Federal Actions" Subject to NEPA

Category of action	Examples
Site-specific projects	Construction or management activities located in a defined geographic area; actions requiring federal licensing, permitting, or other regulatory decision; activity requiring federal assistance or funding.
Adoption of programs	Projects that may include groups of concerted actions to implement a specific policy or plan; systematic and connected agency decisions allocating agency resources to implement a specific statutory program or executive directive.
Adoption of plans	May include official documents prepared or approved by federal agencies which guide or prescribe alternative uses of federal resources, upon which future agency actions will be based (agencies may argue that certain plans do not fit the definition of an "action" in accordance with NEPA).
Adoption of policy	May include the adoption of official policy, such as rules, regulations, and interpretations adopted pursuant to the Administrative Procedure Act (5 U.S.C. § 551 et seq.); treaties and international conventions or agreements (also, Executive Order 12114, Environmental Effects Abroad of Major Federal Actions, specifies environmental review requirements for actions taken outside the United States); or formal documents establishing an agency's policies that will result in or substantially alter agency programs.

Source: 40 C.F.R. § 1508.18(b).

(...continued)

reinforces but does not have meaning independent of "significantly." This discussion focuses on criteria used to determine whether the level of federal agency involvement in an action is such that the action is federalized and, when it is, the categories of action subject to NEPA. Criteria used to determine if environmental impacts are significant are discussed in "Determining the Significance of a Federal Action" section, below.

[42] 40 C.F.R. § 1508.18(a).

[43] 40 C.F.R. § 1508.18(b)(4). Further, the term "federal agency" is defined as all agencies of the federal government but does not mean the Congress, the Judiciary, or the President (40 C.F.R. § 1508.12).

[44] Sixteen states, the District of Columbia, Puerto Rico, and some municipalities and tribal governments have enacted their own environmental quality acts, sometimes referred to as "little NEPAs." For a list of the 16 states and corresponding citations to relevant state law, see the State Environmental Resource Center (SERC) web page regarding State Environmental Quality Acts at http://www.serconline.org/SEQA/stateactivity.html.

[45] Determining the level of federal involvement that would federalize a private project is becoming more relevant as state and local governments are increasingly turning to public-private partnerships to fill gaps in federal funding for needed projects (e.g., surface transportation projects, school maintenance, and construction projects).

A broad NEPA review may be done for the adoption of programs, plans, or policies. Such a review would most likely be followed by a site-specific review for any subsequently implemented projects. This process of producing a broad statement, followed by a more narrowly focused NEPA analysis, is referred to as "tiering."[46] In such a project, the NEPA documentation need only summarize the issues discussed in the broader document and incorporate previous discussions by reference. Such a process is recommended to avoid repetitive discussion of the same issues. See http://www.serconline.org/SEQA/stateactivity.html.

Table 2 lists examples of projects at selected agencies that may fall into one of the categories of actions that require environmental review under NEPA.

Table 2. Selected Examples of Agency Actions Requiring Environmental Review Under NEPA

Agency	Project types
Department of Agriculture	*Forest Service*—Private timber, grazing, or mining operations on Forest Service land.
Department of Defense	*Army Corps of Engineers*—Flood control projects, ecosystem restoration projects, water resources projects, or projects requiring a federal permit for dredge and fill operations.
Department of Energy	Approval of dam construction, the process of siting of oil and gas pipelines on federal land, the process of siting power transmission lines on federal land, and research operations.
Department of Housing and Urban Development	Construction of affordable housing projects; certain projects that would remove, demolish, convert, or substantially rehabilitate existing housing units; or the extension of urban development grants or block grant programs.
Department of the Interior	*Bureau of Land Management*—Private mining operations on federal land; and oil and gas drilling operations on federal lands.
Department of Transportation	*Federal Highway Administration*—Highway and bridge construction, maintenance, and repair.
	Federal Aviation Administration—Airport construction and expansion.
EPA	Issuance of permits under the National Pollutant Discharge Elimination System (NPDES).

Source: Congressional Research Service (CRS) review of individual agency actions.

Although such application is rare, NEPA also is intended to apply to agency proposals for federal legislation. CEQ's definition of legislation includes "a bill or legislative proposal to Congress developed by or with the significant cooperation and support of a Federal agency."[47] This definition does not include requests for appropriations. The test for "significant cooperation" is whether the proposal is predominantly that of the agency rather than another source. Only the agency with primary responsibility for the subject matter involved is required to prepare a legislative EIS.

[46] The tiering process is discussed at 40 C.F.R. § 1502.20; also, see answers to questions 24a-c regarding EISs required on policies, plans, or programs in CEQ's "Forty Most Asked Questions."

[47] 40 C.F.R. § 1508.17.

Determining the Significance of a Federal Action

The requirement to prepare an EIS depends on whether the federal action will have impacts "significantly affecting the quality of the human environment." In the years after NEPA was enacted, a question that was often disputed between federal agencies and third parties, and ultimately decided by the courts, was whether a given federal action had a "significant" impact. Most federal actions have *some* impact on the environment. Determining the degree of impact is necessary to determine how to comply with NEPA's procedural requirements.

CEQ regulations do not list specific types of projects that have significant environmental impacts or definitively define "significantly." Instead, the regulations require agencies to determine the significance of a project's impacts on a case-by-case basis, based on its context and intensity.[48]

Determining the context of a project involves analyzing the significance of its impacts to society as a whole, an affected region, affected interests, or the locality.[49] A site-specific project may require analysis of the local significance of the project, whereas a programmatic action may have nationwide significance. The degree of significance may depend on factors such as the location and scope of the project. For example, the impacts of a site-specific project on 1 acre of a 2,000-acre wetland may be insignificant compared with a project that affects 1 acre of a 2-acre wetland.

Intensity refers to the severity of a project's impacts. Factors used to assess an impact's intensity must be determined on a case-by-case basis. However, CEQ specifies the following minimum factors that must be evaluated:

- Environmental impacts that may be beneficial *and* adverse.
- The degree to which the proposed action affects public health or safety.
- Unique characteristics of the geographical area, such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.
- The degree to which the effects on the quality of the human environment are likely to be highly controversial (in this context, "controversy" relates only to the interpretation of the environmental effects of a project—not to the potential controversy or unpopularity of the project as a whole).
- The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.
- The degree to which the action may establish a precedent for future actions with significant effects.
- Whether the action is related to other actions with individually insignificant but cumulatively significant impacts.
- The degree to which the action may adversely affect resources listed in, or eligible for, the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.

[48] 40 C.F.R. § 1508.27.

[49] 40 C.F.R. § 1508.27(a).

- The degree to which the action may adversely affect an endangered or threatened species or its habitat.
- Whether the action threatens a violation of federal, state, or local law or requirements imposed for the protection of the environment.[50]

Individual agencies may consider additional factors based on environmental impacts common to the types of projects pursued by that agency. Further, to adequately determine an impact's intensity, input from other agencies may be needed. For example, if a highway will cut across prime farmland, the Department of Transportation (DOT) may need assistance from the U.S. Department of Agriculture (USDA) to determine the intensity of the project's impacts.

Because degrees of impact must be evaluated to determine project significance, such an evaluation may require subjective judgments. Therefore, a clear administrative record is generally considered necessary to demonstrate that an agency appropriately determined the significance of a project's impacts.

Overview of the NEPA Process

The NEPA process includes the steps a federal agency must take to document that consideration was given to determine the significance of a proposed action's environmental impacts. For some actions, it may not be readily apparent that environmental impacts will be significant. Some projects clearly have little or no significant impact, but they still require an agency to demonstrate that the level of impacts was considered. To account for this variability, CEQ regulations establish the following three classes of action, which determine how compliance with NEPA analysis is documented:

- Actions Requiring an EIS—When it is *known* that the action will have a significant environmental impact.
- Actions Requiring an Environmental Assessment (EA)—When the significance of environmental impacts is *uncertain* and must be determined.
- Actions that are Categorically Excluded—Those which normally do not individually or cumulatively have a significant effect on the human environment.

The requirement to produce an EIS is probably the most familiar element of NEPA compliance. However, actions requiring an EIS account for a small percentage of all federal actions proposed in a given year. For example, in 2008, 543 EISs were filed with EPA (this total includes draft, final, and supplemental EISs).[51] CEQ estimates that the vast majority of federal actions require an EA or are categorically excluded from the requirement to prepare an EA or EIS.

Determining the total number of federal actions subject to NEPA is difficult, as most agencies track only the number of actions requiring an EIS. Also, as indicated in the figures above, agencies track the total draft, final, and supplemental EISs filed in a given year, not the total number of individual federal actions requiring an EIS in a given year. One agency that does track all projects is DOT's Federal Highway Administration (FHWA). According to FHWA, in 2007,

[50] 40 C.F.R. § 1508.27(b).

[51] CEQ's "Number of EIS filed with EPA by Federal Agencies," available at http://ceq.hss.doe.gov/nepa/nepanet.htm.

approximately 4% of all highway projects required an EIS, 4% required an EA, and almost 92% were classified as categorically excluded. Although projects requiring an EIS or EA represent a relatively low percentage of all projects, those projects represented a comparatively large percentage of total FHWA funding. For example, while projects requiring an EIS or EA represented 8% of the total number of projects, they accounted for almost 23% of the funds allocated by FHWA in 2007. Projects classified as categorical exclusions accounted for almost 77% of FHWA funds.[52]

Environmental Impact Statements

As soon as practicable after its decision to prepare an EIS, the agency preparing it (the "lead agency") is required to publish a notice of intent (NOI) in the *Federal Register*.[53] The NOI acts as the formal announcement of the project to the public and to interested federal, state, tribal, and local agencies.

As soon as possible after, or in conjunction with, the determination that an EIS is needed, the agency is required to determine the scope of the project. During the scoping process the "lead agency" must

- identify and invite the participation of affected parties, including federal, state, or local agencies or Indian tribes; proponents of the actions; and other interested persons;
- identify significant issues to be analyzed in depth in the EIS;
- identify and eliminate issues that are *not* significant or have been covered by prior environmental review from detailed study;
- allocate assignments for preparing the EIS to relevant agencies; and
- identify other environmental review and consultation requirements so that analyses and studies required other under federal, state, local or tribal laws may be prepared concurrently, rather than sequentially, with the EIS.[54]

During the scoping process, the lead agency may set time and page limits for an individual EIS. The agency should also determine any environmental laws, regulations, or executive orders, in addition to NEPA, that may apply to the project. For example, the agency should determine in the scoping process whether the project may affect property of historical significance, endangered species habitat, or wetlands or navigable waters—each of which may require compliance with the National Historic Preservation Act, the Endangered Species Act, or the Clean Water Act, respectively.

Once the scope of the action has been determined, EIS preparation can begin. Preparation is done in two stages, resulting in a draft and a final EIS.[55] The draft EIS should be prepared in accordance with the scope of the project and, to the fullest extent possible, meet requirements of §

[52] See "FHWA Projects by Class of Action," on FHWA's "Streamlining/Stewardship" Website, available at http://environment.fhwa.dot.gov/strmlng/projectgraphs.asp.

[53] 40 C.F.R. § 1508.22.

[54] 40 C.F.R. § 1501.7.

[55] 40 C.F.R. § 1502.9.

102(2)(C) of NEPA. The final EIS should respond to any participating agency comments and address any inadequacies in the draft EIS. A supplemental EIS may be required in some instances. A summary of the components of an EIS, as required under CEQ's regulations, is provided in **Table 3**.

Table 3. Components of an EIS

EIS Component	Description
Purpose and Need Statement	A brief statement, developed by the lead agency, specifying the underlying purpose of a project and the need to which the agency is responding (40 C.F.R. § 1502.13).
Alternatives	A discussion of the range of alternatives, including the proposed action, that will meet the project's purpose and need. The discussion should explore and objectively evaluate all "reasonable" alternatives, and for alternatives which were eliminated from detailed study, a brief discussion of the reasons for their having been eliminated. A "no action" alternative may also be required to establish a baseline against which other alternatives may be compared (40 C.F.R. § 1502.14).
Affected Environment	A succinct description of the environment of the area(s) to be affected by the alternatives under consideration. For example, the affected environment may include wetlands, prime farmland, urban areas, historic sites, or endangered species habitat (40 C.F.R. § 1502.15).
Environmental Consequences	An analysis of impacts of each alternative on the affected environment, including a discussion of the probable beneficial and adverse social, economic, and environmental effects of each alternative. This section must also include, where applicable, a discussion of both the direct and indirect effects of each alternative and the significance of those effects; a description of the measures proposed to mitigate adverse impacts; and methods of compliance with any applicable legal requirements may (e.g., whether and how compliance with the Endangered Species Act will be accomplished if endangered species habitat is impacted) (40 C.F.R. § 1502.16).
List of Preparers	List of names and qualifications of individuals responsible for preparing the EIS (40 C.F.R. § 1502.17).
Appendix	Any material prepared in connection with the EIS. Such materials normally consist of material which substantiates any analysis fundamental to the EIS (40 C.F.R. § 1502.18).

Source: CRS review of requirements in 40 C.F.R. § 1502.

The action's purpose and need statement is the foundation on which subsequent sections of the EIS are built. No hard-and-fast regulatory definition of "purpose and need" exists. However, as it has been interpreted, the statement cannot be so narrow that it effectively defines competing "reasonable alternatives" out of consideration. The "purpose" of an action may be a discussion of the goals and objective of an action. The "need" may be a discussion of existing conditions that call for some improvement.

The goals defined in the purpose and need evaluation facilitate the development of viable project alternatives. CEQ regulations refer to the alternatives section of the EIS as the "heart" of the document.[56] Alternatives that must be considered include those that are practical and feasible from a technical, economic, and common-sense standpoint, rather than simply desirable from the standpoint of the agency or a potentially affected stakeholder.[57] Large, complex projects may

[56] 40 C.F.R. § 1502.14.

[57] See answer to question 2a regarding Alternatives Outside the Capability of Applicant or Jurisdiction of Agency in CEQ's guidance document "Forty Most Asked Questions."

have a large number of reasonable alternatives. In this case, CEQ suggests that only a representative number of the most reasonable examples, covering the full range of alternatives, should be presented.[58]

Once the final EIS is approved and the agency decides to take action, the lead agency must prepare a public record of decision (ROD). CEQ regulations specify that the ROD must include a statement of the final decision, all alternatives considered by the agency in reaching its decision, and whether all practicable means to avoid or minimize environmental harm from the selected alternative have been adopted and, if not, why they were not.[59]

Generally, once the ROD has been issued, an agency's action may proceed (as long as other statutory requirements are met). In addition to the EIS and the ROD, the final procedural record of the NEPA process may include, but is not limited to, planning documents, notices, scoping hearings, documents supporting findings in the EIS, public comments, and agency responses.[60]

Environmental Assessments

If an agency is uncertain whether an action's impacts on the environment will be significant, it usually prepares an environmental assessment (EA). An EA is carried out to clarify issues and determine the extent of an action's environmental effects. CEQ regulations define an EA as a concise public document that (1) provides sufficient evidence and analysis for determining whether to prepare an EIS or a finding of no significant impact (FONSI), (2) aids agency compliance with NEPA when no EIS is required, and (3) facilitates preparation of an EIS when one is necessary.[61]

The CEQ regulations require no standard format for EAs; however, the regulations do require agencies to include a brief discussion of the need for the proposal, alternatives, impacts of the proposal and alternatives, and a list of agencies and individuals consulted.[62] Individual agency regulations and guidance may include more specific requirements. Some agencies suggest that the process for developing an EA should be similar to developing an EIS. For example, the applicant should consult interested agencies to scope the project to determine the potential for social, economic, or environmental impacts; briefly discuss the project's purpose and need; identify project alternatives and measures to mitigate adverse impacts; and identify any other environmental review requirements applicable to the project (e.g., permitting requirements under Section 404 of the Clean Water Act). Public participation in the EA process is left largely to the discretion of the lead agency.

[58] Ibid., answer to question 1b regarding how many alternatives have to be discussed when there is an infinite number of possible alternatives.

[59] 40 C.F.R. § 1505.2.

[60] Copies of this documentation are generally available from the lead agency. Often, particularly for EISs, NEPA documentation is available on an agency's website.

[61] 40 C.F.R. § 1508.9(a).

[62] 40 C.F.R. § 1508.9(b).

If at any time during preparation of the EA, a project's impacts are determined to be significant, EIS preparation should begin. If the impacts are determined not to be significant, the lead agency must prepare a FONSI. The FONSI serves as the agency's administrative record in support of its decision regarding a project's impact. The FONSI also must be available to the public.[63]

Categorical Exclusions

If a project is of a type or in a category known to have no significant environmental impacts, it is categorically excluded from the requirement to prepare an EA or EIS. Individual agencies are required to specifically list, in their respective NEPA regulations, those projects that are likely to be considered categorical exclusions (CEs).[64] For example, DOT has identified the construction of bicycle and pedestrian lanes, landscaping, and the installation of traffic signals as actions that would generally be classified as categorical exclusions.[65]

Whether or what types of documentation may be required to demonstrate that a project is categorically excluded will depend on whether the project involves extraordinary circumstances that may cause a normally excluded action to have a significant environmental effect.[66] An individual agency's NEPA requirements may specify criteria under which otherwise excluded actions may require documentation to prove that the CE determination is appropriate.

Although categorically excluded projects do not have significant environmental impacts, an agency may require a certain level of documentation to prove that the CE determination is appropriate. Also, the fact that a project does not have a significant impact, as defined under NEPA, does not mean that it will not trigger statutory requirements of other environmental laws. For example, if historical sites, endangered species habitats, wetlands, or properties in minority neighborhoods, to name a few, are affected by a proposed federal action, compliance with related environmental laws, in addition to NEPA, may be required.

In 2010, CEQ released "Guidance Clarifying Use of Categorical Exclusions."[67] This guidance was designed to ensure that agencies establish and use categorical exclusions appropriately and transparently. It also calls on agencies to review their existing categorical exclusions periodically to avoid the use of outdated NEPA procedures.

A simplified overview of the NEPA process is illustrated in **Figure 1**.

[63] 40 C.F.R. § 1501.4(e)(1).

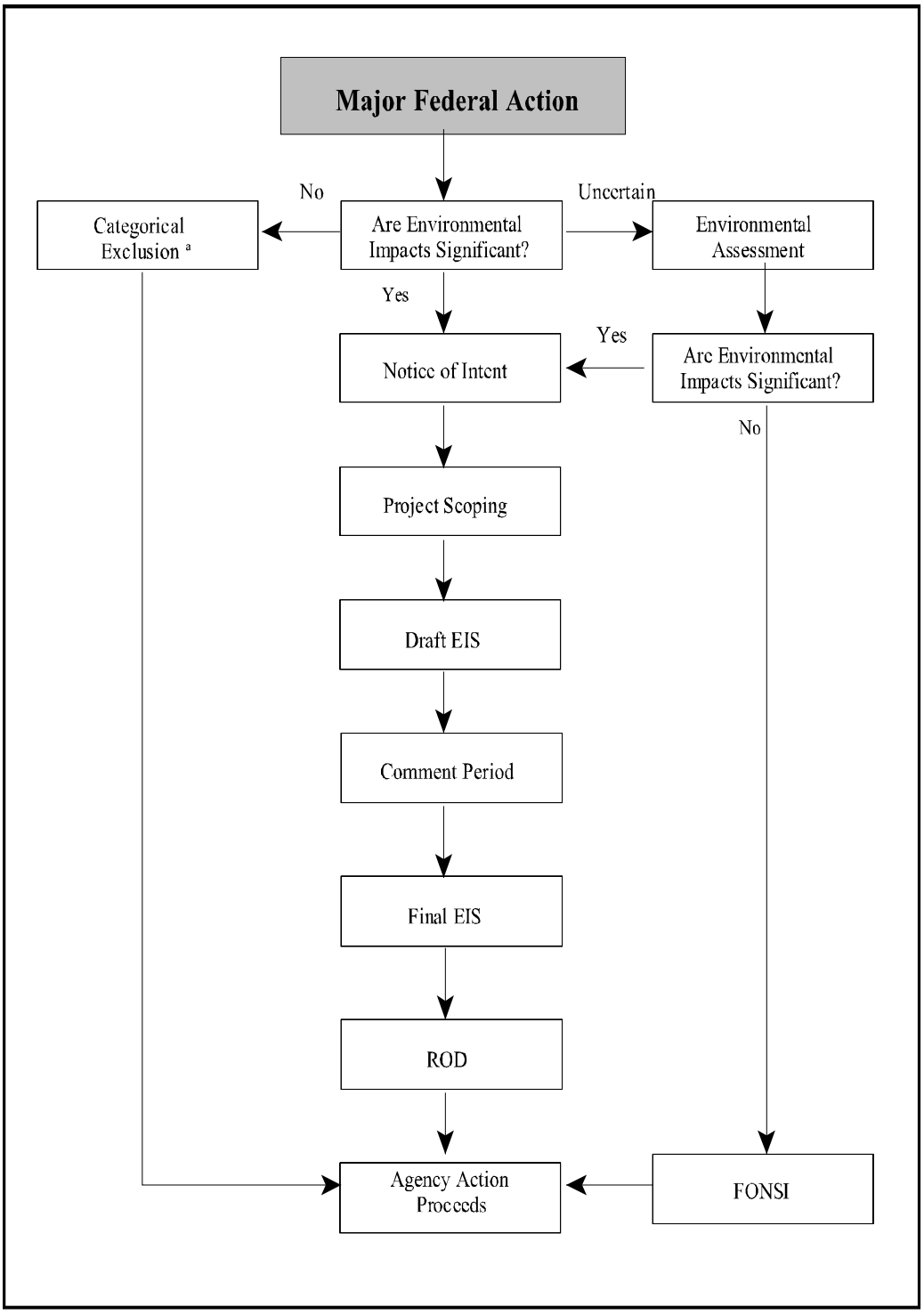
[64] 40 C.F.R. § 1507.3.

[65] 23 C.F.R. § 771.117.

[66] 40 C.F.R. § 1508.4.

[67] The guidance is available online at http://www.whitehouse.gov/administration/eop/ceq/initiatives/nepa.

Figure 1. Overview of the NEPA Process



Source: 40 C.F.R. §§ 1501-1506.

a. If an action is not specifically identified as a categorical exclusion in the respective agency's NEPA regulations, it may still require an environmental assessment to confirm that its impacts are not significant. An agency may also choose to prepare an environmental assessment, even though it is not required to do so, to aid in its compliance with NEPA.

Agency Participation in the NEPA Process

Federal actions to which NEPA applies involve the participation of a "lead agency" and "cooperating agencies." As stated previously, the lead agency is the federal agency that takes responsibility for preparing the NEPA documentation.[68] State or local agencies may act, with the federal lead agency, as joint lead agencies. The project applicant[69] may initially develop substantive portions of the environmental document; however, the lead agency is responsible for its scope and overall content. A cooperating agency is any federal agency, other than a lead agency, that has jurisdiction by law or special expertise regarding any environmental impact involved in a proposal.[70] A tribal, state, or local agency may also be a cooperating agency. **Table 4** lists selected statutes that may apply to a given federal action and the corresponding agency that could subsequently be required to participate in the NEPA process.

Table 4. Selected Federal Statutes and Potential Corresponding Key Cooperating Agencies

Statute	Potential cooperating agency
National Historic Preservation Act	Advisory Council on Historic Preservation and/or state or tribal historic preservation officer
Endangered Species Act	The Department of the Interior's U.S. Fish and Wildlife Service and/or the Department of Commerce's National Marine Fisheries Service
Clean Water Act	The Army Corps of Engineers and/or EPA
Wild and Scenic Rivers Act	The agency responsible for managing the listed or study river (e.g., the National Park Service, U.S. Fish and Wildlife Service, Bureau of Land Management, or Forest Service)
Farmland Protection Policy Act	The Natural Resources Conservation Service of USDA

Source: Table prepared by CR and based on the likely applicability of selected federal statutes.

Note: Tribal, state, and local agencies may also be included among those required to participate in a given EIS.

Responsibilities of the Lead and Cooperating Agencies

At the request of the lead agency, the cooperating agency is required to assume responsibility for developing information and preparing environmental analyses, including portions of the EIS related to its special expertise. Such a role may be set out in a memorandum of understanding or agreement between the agencies. A cooperating agency may be excused from some or all of these responsibilities if precluded by other program requirements.

[68] 40 C.F.R. § 1508.16.

[69] A project applicant may be any public or private entity initiating a "federal" action. For example, a state department of transportation may initiate the NEPA process for a federally funded surface transportation project. A project applicant may also be a private entity requesting a federal permit. For example, a livestock owner applying for a permit to graze cattle on federal land may also initiate the NEPA process. The lead agency in such a case would be the federal agency (e.g., the U.S. Department of Agriculture's Forest Service) issuing the permit.

[70] 40 C.F.R. § 1508.5.

Some projects have involved disagreements regarding the authority of and extent to which coordinating agencies should be involved in the NEPA process. For example, some stakeholders have expressed confusion regarding the degree to which a coordinating agency has the right to influence the development of certain elements of an EIS. In 2003, this issue of agency authority was the subject of correspondence between Transportation Secretary Norman Mineta and CEQ Chairman James Connaughton. Secretary Mineta asked for clarification regarding the role of lead and cooperating agencies with regard to developing purpose and need statements.[71] Secretary Mineta referred to the sometimes extended interagency debates over purpose and need statements as a cause of delay in highway project development. In his response, Chairman Connaughton referred to CEQ regulations specifying that the lead agency has the authority and responsibility to define a project's purpose and need. Further, Chairman Connaughton referenced previous federal court decisions giving deference to the lead agency in determining a project's purpose and need. Chairman Connaughton's letter also quotes CEQ's regulations, citing the lead agency's "responsibilities throughout the NEPA process for the 'scope, objectivity, and content of the entire statement or of any other responsibility' under NEPA."

Addressing Agency Comments

Before completing an EIS, the lead agency is required to consult with and obtain comments from cooperating agencies regarding any environmental impact involved in the proposed action.[72] The CEQ regulations specify requirements for inviting and responding to comments on the draft EIS.[73] In addition to the cooperating agencies, which must comment, the lead agency is required to request comments from appropriate state, local, or tribal agencies; the public, particularly those persons or organizations who may be interested in or affected by the action (see further discussion under the "Demonstrating Public Involvement" section, below); any agency that has requested to receive EISs on similar actions; and the applicant (if there is one).[74]

If a lead agency receives comments on a NEPA document, the agency is required to assess and consider those comments and respond in one or more of the following ways:

- Modify proposed alternatives, including the proposed action.
- Develop and evaluate alternatives not previously considered.
- Supplement, improve, or modify its analyses.
- Make factual corrections in the EIS.
- Explain why the comments do not warrant further response from the lead agency, citing the sources, authorities, or reasons that support the agency's position and, if appropriate, indicate circumstances that would trigger agency reappraisal or further response.[75]

[71] Text of Secretary Mineta's May 6, 2003 letter, and Chairman Connaughton's May 12, 2003 response, are available at http://www.environment.fhwa.dot.gov/guidebook/Ginterim.asp.

[72] 42 U.S.C. § 4332(2)(C).

[73] 40 C.F.R. § 1503.

[74] 40 C.F.R. § 1503.1.

[75] 40 C.F.R. §1503.4.

Under CEQ regulations, lead agencies are required to invite comments on a draft EIS, cooperating agencies have a duty to comment on it, and lead agencies are required to respond to those comments. As illustrated in the choices listed above, the lead agency is not precluded from moving forward with a project if it sufficiently addresses those comments. However, if negative comments are received, to avoid a potential legal challenge after the project has reached an advanced stage of development, the lead agency is well-served to resolve the issue.

EPA's Unique Role in the NEPA Process

Independent of its potential to participate as a lead or cooperating agency,[76] EPA has two distinct roles in the NEPA process. The first regards its duty, under § 309 of the Clean Air Act, to review and comment publicly on the environmental impacts of proposed federal activities, including those for which an EIS is prepared. After conducting its review, EPA must rate the adequacy of the EIS and the environmental impact of the action.[77] The EIS may be rated "adequate," "needs more information," or "inadequate." The lead agency is required to respond appropriately, depending on EPA's rating. With regard to rating the environmental impacts of an action, EPA would rate a project in one of the following four ways: lack of objections, environmental concerns, environmental objections, or environmentally unsatisfactory. If it determines that the action is environmentally unsatisfactory, EPA is required to refer the matter to CEQ for dispute resolution.[78] However, such referral should be made only after concerted, timely, but unsuccessful attempts to resolve differences with the lead agency.[79]

EPA's second duty is an administrative one, in which it carries out the operational duties associated with the EIS filing process. In 1978, these duties were transferred to EPA by CEQ in accordance with terms of a Memorandum of Agreement (MOA).[80] Under the MOA, EPA's Office of Federal Activities is designated the official recipient of all EISs prepared by federal agencies. EPA maintains a national EIS filing system. By maintaining the system, EPA facilitates public access to EISs by publishing weekly notices in the *Federal Register* of EISs available for public review, along with summaries of EPA's comments.

Demonstrating Public Involvement

As the law has been interpreted, one of the primary goals of NEPA is to give the public a meaningful opportunity to learn about and comment on the proposed actions of the federal government *before* decisions are made and actions are taken. To meet this goal, CEQ's

[76] NEPA documentation is required of EPA for research and development activities, facility construction, wastewater treatment plant construction under the Clean Water Act, EPA-issued National Pollutant Discharge Elimination System (NPDES) permits, and certain projects funded through EPA annual appropriations acts. For more information about EPA's requirements with regard to NEPA compliance, see http://www.epa.gov/compliance/nepa/epacompliance/index.html.

[77] See an explanation of EPA's "Environmental Impact Statement (EIS) Rating System Criteria" at http://www.epa.gov/compliance/nepa/comments/ratings.html.

[78] 40 C.F.R. §1504.1.

[79] 40 C.F.R. §1504.2.

[80] Although the MOA is not readily available, reference to it and the allocation of duties between EPA and CEQ is discussed in a March 7, 1989, *Federal Register* notice available on EPA's Compliance and Enforcement website under "EIS Filing System," at http://www.epa.gov/compliance/resources/policies/nepa/index.html.

regulations require agencies to encourage and facilitate public involvement in decisions that significantly affect the quality of the human environment (i.e., projects that require an EIS).[81] Specifically, agencies are required to provide public notice of NEPA-related hearings, public meetings, and the availability of environmental documents so as to inform public stakeholders that may be interested in or affected by a proposed action.[82] Documentation related to the public's participation in the NEPA process (e.g., public comments or hearings transcripts) must be included in the final EIS.

As mentioned above, the lead agency must seek and respond to public comments. Public stakeholders likely to comment on federal actions will vary according to the action. They may include individuals or groups expected to benefit from or be adversely affected by the project, or special interest groups with concerns about the project's environmental impacts. For example, a road-widening project may have an impact on adjacent homes or businesses. Such a project may elicit comments from the local business community (e.g., individual businesses, the Chamber of Commerce, or local development organizations) and area home owners. A project with impacts on sensitive environmental resources, such as wetlands or endangered species, may generate comments from environmental interest groups.

If stakeholders have concerns about a project's impacts, their comments may be directed at virtually any element of that project, the NEPA process, or related documentation. If stakeholder comments are not addressed sufficiently, stakeholders may respond by filing suit. To avoid conflict after a project has reached an advanced stage of development, CEQ recommends that continuous contact with nonagency stakeholders be maintained throughout the decision-making process—from the earliest project planning stages to the selection of a particular alternative, including the intervening stages to define purpose and need and to develop a range of potential alternatives. The need for such contact was illustrated in a 1997 CEQ study. Study results found that one element of the NEPA process critical to effective and efficient implementation was "the extent to which an agency takes into account the views of the surrounding community and other interested members of the public during its planning and decisionmaking process."[83]

CEQ regulations specify public involvement requirements only for federal actions requiring an EIS. Agencies may devise their own policy regarding public involvement in the preparation of an EA or in making a categorical exclusion determination. (For more information, see CRS Report RL32436, *Public Participation in the Management of Forest Service and Bureau of Land Management Lands: Overview and Recent Changes*, by (name redacted).)

The Use of NEPA as an "Umbrella" Statute

Large, complex actions, such as bridge and highway construction, mining operations, or oil and gas development on public lands, may require compliance with literally dozens of federal, state, tribal, and local laws. Depending on the resources present at a project site, compliance with various categories of legal requirements may apply to a given federal action, as illustrated in **Table 5**.

[81] 40 C.F.R. § 1500.2(d).

[82] 40 C.F.R. § 1506.6.

[83] Council on Environmental Quality, *The National Environmental Policy Act: A Study of Its Effectiveness After Twenty-five Years*, January 1997, p. ix.

Table 5. Categories of Legal Requirements Potentially Applicable to Federal Actions

Category of laws	Selected potential corresponding authorities
Laws intended to protect physical resources	Clean Air Act
	Clean Water Act
	Pollution Prevention Act
	Safe Drinking Water Act
Laws intended to protect cultural resources	National Historic Preservation Act
	Archaeological and Historical Preservation Act
	Historic Sites and Buildings Act
Laws intended to protect natural resources	Endangered Species Act
	Marine Mammal Protection Act
	Fish and Wildlife Coordination Act
	Migratory Bird Treaty Act
Laws intended to minimize impacts to communities or individuals	Emergency Planning and Community Right to Know Act
	Farmland Protection Policy Act
	Title VI of the Civil Rights Act
Special status land use laws	Wild and Scenic Rivers Act
	The Coastal Zone Management Act
	Wilderness Act

Source: Table prepared by CRS and based on a review of selected federal actions.

Note: Tribal, state, or local laws may also be applicable to a given impacted resource.

To integrate the compliance process and avoid duplication of effort, NEPA regulations specify that, to the fullest extent possible, agencies must prepare the EIS concurrently with *any* environmental requirements.[84] The EIS must list any federal permits, licenses, and other entitlements required to implement the proposed project. In this capacity, NEPA functions as an "umbrella" statute; any study, review, or consultation required by any other law that is related to the environment should be conducted within the framework of the NEPA process.

NEPA forms the framework to coordinate and demonstrate compliance with these requirements. NEPA itself does not *require* compliance with them. Theoretically, if the requirement to comply with NEPA were removed, compliance with each applicable law would still be required. The use of NEPA as an umbrella statute can lead to confusion in this regard. For example, consider a project alternative that requires compliance with the Endangered Species Act (ESA). One required element of the EIS may include a demonstration that, among other potential requirements, a biological assessment be prepared in compliance with the ESA. The requirement to comply with the ESA, including the involvement of the appropriate agency with jurisdiction over compliance, would simply be *identified* within the framework of the NEPA process, not required by NEPA.

[84] 40 C.F.R. § 1502.25.

NEPA Implementation and Project Delays

Stakeholders such as state and local project sponsors and industry representatives with an interest in the implementation of a federal action sometimes charge that NEPA implementation is inefficient and overly time-consuming, leading to what they perceive as unnecessary delays in needed government actions. Some agency representatives feel that the NEPA process, when implemented as required by the CEQ regulations, actually facilitates a more efficiently executed project. Environmental organizations look at the NEPA process as a necessary step in ensuring that the public gets a voice in the federal decision-making process and that expediting that process is not necessarily in the best interest of the public or the environment. Further, they argue that blaming the environmental compliance process for project delays is misplaced. One argument is that federal projects may be delayed because resource agencies, required by law to participate in the compliance process, are overburdened and not sufficiently funded, staffed, or equipped to meet the demand.

Causes of Project Delays Attributed to the NEPA Process

Delays attributed to the NEPA process fall into two broad categories—those related to the time it takes to complete required documentation and delays resulting from NEPA-related litigation.

In the past, particularly in the years after NEPA was implemented, the preparation of NEPA documentation played a role in delaying individual federal actions. However, there is little data available to demonstrate that NEPA currently plays a significant role in delaying federal actions. This lack of data is attributable to the fact that, other than the Department of Energy and DOT, federal agencies do not routinely maintain information on the time it takes to complete the NEPA process. Therefore, gathering accurate data on how long it takes to prepare NEPA documentation, and whether the NEPA process is directly the cause of project delays, is difficult. For example, the preparation of NEPA documentation is generally done concurrently with preliminary project design. If a project undergoes specification changes, those alterations may necessitate modifications to the NEPA documentation. Consequently, the time to complete the NEPA process may be extended.

The perception that NEPA results in extensive delays and additional costs to the successful delivery of certain federal projects can be magnified when compliance with multiple environmental laws and regulations is required (see "The Use of NEPA as an "Umbrella" Statute," above). The sometimes extensive reviews, documentation, and analysis required by agencies such as the Army Corps of Engineers, the U.S. Fish and Wildlife Service, the Coast Guard, and EPA, as well as various state regulatory and review agencies, add further to the perception that extensive delays are related to the NEPA process. Such "delays" may actually stem from an agency's need to complete a permit process or analyses required under separate statutory authority (e.g., the Clean Water Act or Endangered Species Act), over which the lead agency has no authority.

Litigation is probably the most often cited cause of NEPA-related project delays. Although this may have been the case in the past, the total number of NEPA-related cases in the past 10 years has been small (especially when compared with the total number of federal actions requiring some environmental review under NEPA). For example, in 2005, a total of 118 NEPA-related cases were filed. Of those, 43 resulted in an injunction. The majority of cases were filed against two agencies—the USDA's Forest Service (with 50 cases files) and the Department of the

Interior's Bureau of Land Management (with 12 cases files).[85] The main reason that plaintiffs filed suit was because they believed that the EIS or EA was inadequate (e.g., information was incomplete or the document did not sufficiently analyze the cumulative or indirect effects of an action).

NEPA litigation began to decline in the mid 1970s and has remained relatively constant since the late 1980s.[86] This trend may be due in part to improved agency compliance with promulgated regulations and improved agency expertise in preparing required documentation. However, another factor may be the decrease in the number of federal actions funded by Congress that would be defined as "major federal actions" under NEPA.[87]

Although litigation has decreased, agency concern regarding the threat of litigation may still affect the NEPA process, particularly for complex or controversial projects. In addition to CEQ regulations and an agency's own regulations, a project sponsor may be mindful of previous judicial interpretation when preparing NEPA documentation in an attempt to prepare a "litigation-proof" EIS. CEQ has observed that such an effort may lead to an increase in the cost and time needed to complete NEPA documentation, but not necessarily an improvement in the quality of the documents ultimately produced.[88]

Studies Into NEPA's Effectiveness and Causes of Delays

In the past 20 years, numerous surveys and reports, conducted by both public agencies and private organizations, have studied the effectiveness of the NEPA process. They sought to determine issues such as how the NEPA process is implemented at individual agencies, whether the NEPA process delays project implementation, and, if so, how those delays may be addressed and NEPA more effectively implemented.

In 2004, a survey of staff from the Department of Defense, the Department of the Interior, and the Forest Service sought to determine the degree to which the NEPA process slowed decision making and delayed projects.[89] The survey identified the following primary reasons for project delays:

- Decision maker changes in the project.
- Court challenges to a project.
- Poor documentation that needed to be redone.

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[85] See, Council on Environmental Quality "2005 Litigation Survey," available at http://ceq.eh.doe.gov/nepa/nepanet.htm.

[86] See Council on Environmental Quality, *Environmental Quality: 25th Anniversary Report* (the CEQ 1994-95 Annual Report) 1996, p. 51, available at http://ceq.eh.doe.gov/nepa/reports/reports.htm, and Litigation Surveys for 2001 through 2005, available at http://ceq.eh.doe.gov/nepa/nepanet.htm.

[87] Dinah Bear, "NEPA at 19," 19 *ELR* 10062.

[88] Council on Environmental Quality, "NEPA Study of Effectiveness After Twenty-five Years," p. iii.

[89] The survey, *Fast Tracking NEPA Documents—Tools to Overcome Schedule Delays*, was conducted in 2003 and 2004 by Tetra Tech, Inc., for presentation at the 30th National Defense Industrial Association Environmental and Energy Symposium and Exhibition. The survey includes responses from agency staff identified as NEPA project managers, NEPA resource authors, agency NEPA officers or reviews, or non-NEPA professionals, such as engineers. Results are available at http://www.dtic.mil/ndia/2004enviro/, under April 7, 2004, Session Nine.

- Changes in or additions to project alternatives.
- Compliance requirements of the Endangered Species Act.

Depending on the agency responding, factors "outside the NEPA process" were identified as the cause of delay between 68% and 84% of the time.

In 1997, CEQ published a study to determine NEPA's effectiveness and methods to improve its implementation.[90] Study participants included individuals and organizations that were knowledgeable about NEPA and could be characterized as both supporters and critics of NEPA. Generally, participants felt that NEPA's enduring legacy was that it provided a framework for collaboration between federal agencies and those who will bear the environmental, social, and economic impacts of agency decisions. However, they also felt that NEPA often takes too long and costs too much, agencies make decisions before hearing from the public, documents are too long and technical for many people to use, and training for agency officials is inadequate at times. Participants felt that critical elements of efficient NEPA implementation included the extent to which an agency integrates NEPA's goals into its internal planning processes at an early stage and provides information to the public.

The study found that the extent to which the public is involved in the decision-making process also influences the potential for litigation. The study also found that some states, citizen groups, and businesses believe that certain EAs are prepared to avoid public involvement (i.e., because public meetings are not always required for EAs). The preparation of an EA, rather than an EIS, is reportedly the most common source of conflict and litigation under NEPA.[91] The study further found that nongovernmental organizations (NGOs) and citizens viewed the NEPA process as a one-way communication process, skeptical that their input was effectively incorporated into agency decision making and hypothesizing that their involvement was often solicited after decisions regarding actions and alternatives have already been made. Citizens also reported being frustrated when they were treated as adversaries rather than welcome participants in the NEPA process. Citizens reported that they often felt overwhelmed by the resources available to project proponents and agencies. As a consequence, litigation may be seen as the only means to affect environmental decisions significantly.[92]

In 2002, a comprehensive study of the NEPA process was conducted by CEQ's NEPA Task Force. CEQ formed the task force to review NEPA implementation practices and procedures and to determine opportunities to improve and modernize the process. The task force interviewed federal agencies; reviewed public comments, literature, and case studies; and spoke with individuals and representatives from state and local governments, tribes, and interest groups. In 2003, the task force released a report of its findings and recommendations.[93]

In compiling its research, the task force received more than 739 stakeholder comments. Those comments reflected current issues and challenges to NEPA implementation. With regard to delays in and the effectiveness of the NEPA process, a large percentage of comments were directed at factors related to NEPA analysis and documentation requirements and to the role and effects of

[90] Council on Environmental Quality, "NEPA Study of Effectiveness After Twenty-five Years."

[91] Ibid., p. 19.

[92] Ibid., p. 18.

[93] "The NEPA Task Force Report to the Council on Environmental Quality: Modernizing NEPA Implementation," September 2003, and comments documented by the Task Force are available at http://ceq.eh.doe.gov/ntf/index.html.

litigation. According to CEQ, many respondents expressed a belief that the general requirement to provide adequate analysis had been taken to an extreme; that documents had become too time-consuming and costly to produce; and that the resultant "analysis paralysis" forestalled appropriate management of public lands and ultimately left the public distrustful and disengaged. The stakeholders felt this was brought on by vague requirements that were open to considerable interpretation and, therefore, an easy target for litigation. Because the requirements were vague, those commenters further felt that agencies were not sure how much analysis would be considered adequate by the courts, resulting in pressure to produce more.

In contrast, other respondents felt the "analysis paralysis" scenario was a misnomer. These respondents believed that agencies often predetermine the outcome of the planning process, that they often fail to consider other reasonable alternatives, and that the analysis agencies provide is often inadequate to support the management plan they propose. These commenters felt that the environmental effects of proposed actions are often inadequately considered, particularly the cumulative effects; that agencies rely on inadequate or outdated data; and that agency research is not held to the same rigorous standards as research in other fields, particularly in terms of scientific reference and peer review. Moreover, they felt that agencies are sometimes intent on following a predetermined course of action and ignore concerns submitted by the public. With regard to the role of litigation, a number of respondents felt that litigation only results when agencies do not comply with NEPA requirements. Some felt that it is only through litigation that concerned parties can get agencies to recognize their concerns and give serious attention to the environmental effects of their proposed actions.

One issue discussed in the task force report was challenges faced by agencies with regard to budget, training, and staffing constraints. This issue is discussed in more depth in a report, cited by the task force, that was prepared by the Natural Resources Council (an environmental conservation organization). That report surveyed 12 federal agencies to determine how they implemented the NEPA process.[94] Included in the report was a finding that, due to budget and staff constraints, most agencies' NEPA offices lack an ongoing national tracking system to monitor the numbers and types of NEPA documents that their agency is preparing or has completed. Also, the report found that agencies were unable to document their NEPA workload, calculate average preparation times or costs, show trends in these factors over time, or respond objectively to assertions that excessive time or money is being spent on complying with NEPA's requirements. The absence of such information, the report asserted, leaves agencies in a weak position to respond factually to or critically evaluate administrative or legislative proposals to "streamline" the NEPA process (see discussion, below).

Efforts to Streamline the NEPA Process

Some members of Congress have expressed concerns that project delays are the result of inefficient interagency coordination required for large, complex projects. As a result, in the 108th Congress, several laws were enacted that included provisions intended to streamline the NEPA process. Although not defined in any of the legislation, the term "streamlining" was broadly used

[94] Robert Smythe and Caroline Isber, "NEPA in the Agencies: 2002, A Report to the Natural Resources Council of America," October 2002, available at http://www.naturalresources council.org/ewebeditpro/items/O89F2656.pdf. Many of the findings regarding agency implementation of NEPA and recommendations for change were directed to the CEQ NEPA Task Force.

to describe legislative or administrative procedures intended to expedite the NEPA process.[95] It usually refers to a process or procedures to better coordinate federal, state, tribal, or local agency action, when compliance with multiple environmental laws, regulations, or executive orders is required.

In 2008, most agencies filed fewer than 10 EISs.[96] Just over 63% of all EISs were filed by seven agencies—USDA-Forest Service (124); DOT's Federal Highway Administration (64) and Federal Transit Administration (21); the Department of the Interior's Bureau of Land Management (48) and National Park Service (25); the Department of Defense's Army Corps of Engineers (42), and the Department of Energy's Federal Energy Regulatory Commission (19). It may not be surprising, then, that many streamlining activities involve actions sponsored by those agencies. For example, what follows are bills enacted since the 108th Congress[97] and selected types of projects for which streamlining provisions have been included:

- The Healthy Forests Restoration Act of 2003 (P.L. 108-148): "hazardous fuel reduction" projects on federal land.
- Vision 100-Century of Aviation Reauthorization Act (P.L. 108-176): airport capacity enhancement projects at congested airports.
- The Safe, Accountable, Flexible, and Efficient Transportation Equity Act of 2005: A Legacy for Users (P.L. 109-59): construction of or modifications to surface transportation projects.
- The Energy Policy Act of 2005 (P.L. 109-58): various energy development projects, such as oil and gas leasing and permitting on federal land, and the designation of energy facility rights-of-way and corridors on federal lands.
- The Water Resources Development Act (WRDA) of 2007 (P.L. 110-114): water resources projects undertaken by the Army Corps of Engineers.

Streamlining provisions are unique to the class of projects at issue. However, most include some or all of the following elements:

- The designation of specific projects as categorical exclusions.
- The designation of a specific agency as the "lead agency" for all classes of certain actions (e.g., delegation of DOT as the lead agency for all highway or transit projects requiring review under NEPA).
- Direction to the lead agency to develop a "coordinated environmental review" process to ensure early coordination and cooperation among federal, state, tribal, and local agencies required to participate in a project.

[95] The term "streamlining" has also been used to refer to administrative or legislative actions intended to expedite the process of complying with other environmental requirements, such as permitting.

[96] See the Council on Environmental Quality's "Number of EIS filed with EPA by Federal Agencies" for 2008, available at http://ceq.hss.doe.gov/nepa/Calendar_Year_2008_Filed_EISs.pdf.

[97] Since 2007, there have been various legislative proposals with provisions intended to expedite the NEPA process or waive NEPA requirements for certain classes of federal action, but few legislative proposals have progressed beyond their introduction.

- Delegation of specific authority to the lead agency, such as the authority to establish deadlines for cooperating agencies, specify a project's "purpose and need," or specify project alternatives.
- Delegation of certain federal authority to state or local agencies (e.g., the authority to determine whether certain classes of projects may be categorically excluded from environmental requirements).
- Direction to the lead agency to develop dispute resolution procedures if agencies reach an impasse in the NEPA process.

Streamlining proposals have generated a great deal of controversy among interested stakeholders (e.g., agency representatives, industry groups, and environmental organizations). Most stakeholders agree that the process for complying with environmental requirements applicable to complex federal projects can be implemented more efficiently. How that should be done and the degree to which it is necessary have been the subject of considerable debate. Some stakeholders, such as industry representatives who would like to see projects implemented more quickly, argue that the authority of lead agencies must be strengthened to reduce delays caused by disagreements among agencies. They also contend that lead agencies should have the authority to set and enforce deadlines with regard to the cooperating agency decision-making process. Environmental groups are concerned that by speeding up the compliance process and strengthening lead agency authority, concerns of the public or cooperating agencies will be minimized or ignored, in effect rubber stamping lead agency decisions. Further, some environmental groups contend that "streamlining" is a thinly veiled attempt at weakening environmental protection and reducing public participation in the federal decision-making process.

Conclusion

NEPA is a procedural statute that, along with CEQ and individual agencies' regulations, specifies procedures that must be followed in the federal decision-making process. It imposes no requirement other than to require agencies to consider the environmental impacts of their actions before proceeding with them and to involve the public in that process. It does not dictate what the decision must be. More specifically, it does not require the agency to select the least environmentally harmful alternative or to elevate environmental concerns above others.

The role the courts have played in NEPA's implementation is arguably more pronounced compared to many other environmental laws because of several unique factors. These include the initial lack of binding regulations applicable to the EIS preparation process, the absence of an agency authorized to enforce its requirements, and NEPA's requirement to involve the public in the decision-making process. With regard to the latter, when members of the public oppose a project or feel that their opinions are not given sufficient weight, their involvement may result in turning to the courts to halt the project until their concerns are addressed. During the past 35 years, interested stakeholders have challenged the adequacy of NEPA documentation and agency compliance with NEPA in court and, in some instances, used NEPA litigation to try to halt or slow projects to which they were opposed. As a result, the progress of some federal projects was slowed. However, particularly in the past 10-15 years, the number of projects affected by NEPA-related litigation is very small. Also, unlike other environmental laws, NEPA itself cannot stop a project altogether. This does not mean that, during the course of a NEPA-related lawsuit, an agency may not decide to abandon a given project or project alternative.

As a policy statute, NEPA supplements other statutes. Consequently, agencies often are required to comply with provisions of other state, tribal, and federal environmental requirements before they can proceed with a given action. This requirement can lead to confusion when procedures to comply with other laws are integrated with NEPA compliance, and it can give the impression that NEPA alone is responsible for the time it takes to obtain the appropriate authorization or approval for a federal project.

Although stakeholders disagree about the extent to which NEPA currently halts or delays federal actions, few disagree that agencies can improve their methods of NEPA compliance. Many elements of recent legislative proposals intended to streamline NEPA compliance already exist in CEQ's regulations. Those include integrating NEPA early in the planning process, integrating NEPA requirements with other environmental requirements, eliminating duplication with state and local procedures, swiftly addressing disputes with other agencies, and establishing appropriate time limits on the EIS process. Debate is likely to continue with regard to if or to what degree further streamlining may be accomplished.

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