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National Environmental Policy Act: Judicial Review and Remedies

The National Environmental Policy Act (NEPA) is one of the most frequently litigated federal environmental statutes. This is perhaps not surprising given NEPA's broad applicability to over 100,000 actions each year, with a historical average of 100-150 NEPA cases heard annually in federal courts. This In Focus describes how courts review legal challenges to NEPA reviews and potential remedies available for successful litigants.

Background

NEPA establishes a national policy with respect to environmental quality and the basic process for integrating environmental considerations into federal decisionmaking (i.e., "environmental review"). NEPA has been described as a "purely procedural" statute that informs reasoned decisionmaking without mandating specific decision outcomes. Agencies retain flexibility to decide how to implement proposed actions provided they meet NEPA's procedural requirements. NEPA also established the Council on Environmental Quality, which provides guidance and oversight on NEPA's implementation.

NEPA generally requires that agencies consider the environmental impacts of major federal actions. For actions with significant impacts that are discretionary in nature, agencies prepare environmental impact statements (EISs) to consider alternatives and disclose potential effects of those actions. An agency may draft an environmental assessment (EA) to determine whether impacts are significant, after which it either issues a Finding of No Significant Impacts (FONSI) or prepares an EIS. For more details, see CRS In Focus IF12560, *National Environmental Policy Act: An Overview*, by Kristen Hite and Heather McPherron (2025).

Basis for Judicial Review

Federal courts have long allowed plaintiffs to challenge an agency's compliance with NEPA under the Administrative Procedure Act (APA, 5 U.S.C. §§ 701–706). Most NEPA-related complaints are brought under the APA, as NEPA does not contain a broad judicial review provision addressing challenges to agencies' actions under the statute. A narrower provision allows a project sponsor to seek judicial review of an agency's alleged failure to comply with statutory deadlines for completing NEPA documentation.

Standard of Review

Among other causes of action under the APA, a plaintiff may claim that an agency's actions were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." In *Seven County Infrastructure Coalition v. Eagle County*, the Supreme Court reiterated that the role of courts is deferential and limited when

evaluating agency NEPA reviews under the APA's arbitrary and capricious standard. Particularly on factual matters such as evaluation of significant impacts, courts have held that they should not substitute their judgment for that of the agency. Instead, a court typically considers whether the agency acted rationally (sometimes referred to as NEPA's "rule of reason"), took a "hard look" at potential impacts, and did not clearly err in its judgment.

Limitations on Review

Several principles limit the availability of judicial review of agency action. Some limitations are constitutional, while others are rooted in statute. In the context of challenges to federal agencies' NEPA reviews, some of the more commonly cited limitations include standing, exhaustion of administrative remedies, and statute of limitations. Other limitations include mootness, ripeness, finality, and statutory preclusion. Congress may also limit review of NEPA claims.

In order to establish standing, a plaintiff must demonstrate that an agency's action harms the plaintiff's concrete interest, the harm is fairly traceable to the alleged NEPA violation and in the "zone of interests" of NEPA, and the alleged injury can be remedied by a court. Standing principles also prohibit courts from addressing alleged injuries that are "generalized grievances," as these do not present "cases" or "controversies." An organization may establish standing on behalf of its members—including for NEPA-related claims—provided that at least one member has standing, the interests are germane to its purpose, and no individual member's participation in the litigation is required to assert any claim or obtain the requested relief.

While the Supreme Court has determined that the APA has no express exhaustion requirement, even where a statute is silent, courts generally expect plaintiffs to first raise concerns with the relevant agency if there is opportunity for public comment. If plaintiffs do not do so, judges have some degree of discretion to bar them from later filing claims involving those issues. In other situations, a court may follow the Supreme Court's observation that flaws in an EA or EIS "might be so obvious that there is no need for a commentator to point them out specifically in order to preserve its ability to challenge a proposed action."

A statute of limitations is a provision in law that specifies a time by which a plaintiff must file a lawsuit. If the specific statute at issue is silent, courts have generally defaulted to a six-year limit for a plaintiff who challenges an action under the APA. While NEPA itself does not provide a statute of limitations, other statutes include limitations affecting timelines for review on certain NEPA claims. For example,

large infrastructure and other projects coordinated by the Permitting Council and covered under FAST-41 are subject to a two-year statute of limitations.

Common NEPA Claims

Failure to Prepare a NEPA Document

When an agency approves a proposed action without preparing an EIS, plaintiffs may challenge the agency's decision, asserting that the action would result in significant impacts and therefore requires preparation of an EIS. For example, plaintiffs may challenge an agency action they allege triggered NEPA where the agency failed to initiate an environmental review. In those cases, to determine whether agency activity is a qualifying action under NEPA, courts commonly consider whether the agency irreversibly committed resources. Others may bring a claim where an agency prepares an EA and then issues a FONSI, and a court may examine whether the agency took the requisite "hard look" at effects or considered substantial questions about whether to prepare an EIS. Plaintiffs may also allege failure to supplement existing analysis if new activity triggers effects that have not been previously analyzed, to which courts apply NEPA's "rule of reason."

Improper Reliance on Categorical Exclusions

An agency may determine that a proposed action falls into a "categorical exclusion" (CE). CEs are a type of action that a federal agency or Congress has determined "normally does not significantly affect the quality of the human environment." When an agency applies a CE to a specific action, it does not prepare an EA or EIS. Whether an agency's decision to apply a CE was arbitrary or capricious is a fact-specific determination where a court considers whether an agency was rational in applying a CE and followed its own procedures to do so.

Where an agency determines that site-specific *extraordinary circumstances* exist that could result in more significant impacts, the agency may decline to apply a CE to an action. One court has ruled that the Forest Service was not required to consider extraordinary circumstances before applying a congressionally created CE where the statute did not mandate such consideration.

Inadequate Analysis of Effects

Plaintiffs may argue that an agency's NEPA review was arbitrary or capricious because it failed to consider certain impacts or to fully consider the weight of the impacts reviewed. Disputes regarding the appropriate scope of analysis can arise, including whether anticipated effects are too attenuated from a proposed action to include in an EIS or EA. While recognizing a "gray area" for indirect effects, the Supreme Court has underscored that a NEPA analysis for any given project need not consider the broader effects of separate projects if an agency determines that those upstream and downstream effects are remote in both time and place. The Court's decision built on previous decisions holding that statutory authority informs the scope of relevant effects and that the APA's arbitrary and capricious standard mandates that courts defer to an agency's determination on what effects to include or exclude.

Remedies in NEPA Litigation

Remand

If a court determines that an agency action was arbitrary or capricious, or otherwise violated NEPA, it may order the agency to revisit the analysis and cure the violation. For example, a court may order remand for an agency to explain its reasoning behind a certain decision or to consider effects initially excluded from an EIS or EA.

Vacatur

In NEPA cases, courts have recognized that vacatur is the "ordinary" remedy for an APA violation. Courts may vacate an agency's environmental document or could potentially vacate the underlying decision that is the subject of the NEPA analysis. *Seven County* clarified that a NEPA deficiency may not be sufficient to warrant vacatur of an underlying project approval "absent reason to believe that the agency might disapprove the project if it added more" to an EIS. A court may also vacate an agency's NEPA review if the agency violates notice and comment requirements or other procedural obligations that cast "serious doubt" over the agency's decision. Courts have the option to remand NEPA matters without vacatur and may consider other remedies in light of the "seriousness" of the NEPA deficiencies and any "disruptive consequences" of vacatur.

Injunction

A litigant concerned about irreparable harm from the agency's action may request *injunctive relief*, or an order requiring an agency to take or refrain from taking a certain action. Plaintiffs can request a *temporary restraining order* to prevent imminent harm while the court considers whether to enter a pre-judgment (*preliminary*) injunction while litigation is pending and/or a final (*permanent*) injunction following a ruling on the merits. There is no "thumb on the scales" in favor of an injunction versus other relief such as vacatur.

Before issuing a permanent injunction, a court generally considers whether a plaintiff has shown that (1) irreparable injury absent an injunction would occur, (2) other available remedies do not adequately compensate for the injury, (3) the balance of the hardships demonstrate that injunctive relief is warranted, and (4) the public interest would not be disserved by an injunction. When considering a preliminary injunction request, a court replaces the second factor with whether the requesting party is likely to succeed on the merits. A preliminary injunction is an "extraordinary remedy" that is "never awarded as a matter of right."

Injunctive relief in NEPA litigation could be complete (such as halting a project) or partial (such as imposing specific conditions for a project to proceed). A court might grant a narrow injunction when an agency can address discrete concerns or when a project is already approved or nearly complete when a lawsuit is filed.

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