The National Environmental Policy Act of 1969

The National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 et seq., grew out of the increased public concern for the environment that developed during the 1960s, amid increased industrialization, urban and suburban growth, and pollution across the United States.

In 2015, a United States District Court in Florida provided a documented concise background of NEPA being created to protect the environment from actions involving the Federal government [RB Jai Alai, LLC v. Secretary of The Florida Department of Transportation, 112 F.Supp.3d 1301, 1307-1308 (M. D. Fla. 2015)] as follows:

Following nearly a century of rapid economic expansion, population growth, industrialization, and urbanization, it had become clear by the late 1960s that American progress had an environmental cost. A congressional investigation into the matter yielded myriad evidence indicating a gross mismanagement of the country's environment and resources, most notably at the hands of the federal government. As a result, lawmakers and the general public alike called for an urgent and sweeping policy of environmental protection.

Congress answered these calls by enacting NEPA, which has served as "our basic national charter for protection of the environment" since 1970. With NEPA, Congress mandated that federal agencies take a "hard look" at the environmental consequences of their actions and to engage all practicable measures to prevent environmental harm when engaging in agency action. Furthermore, to remedy the widespread mistrust of the federal agencies, Congress incorporated within NEPA "action-forcing" provisions which require agencies to follow specific procedures in order to accomplish any federal project.

Since its passage, NEPA has been applied to any major project, whether on a federal, state, or local level, that involves federal funding, work performed by the federal government, or permits issued by a federal agency. Court decisions have expanded the requirement for NEPA-related environmental studies to include actions where permits issued by a federal agency are required regardless of whether federal funds are spent to implement the action, to include actions that are entirely funded and managed by private-sector entities where a federal permit is required. This legal interpretation is based on the rationale that obtaining a permit from a federal agency requires one or more federal employees (or contractors in some instances) to process and approve a permit application, inherently resulting in federal funds being expended to support the proposed action, even if no federal funds are directly allocated to finance the particular action.

The preamble to NEPA reads:

To declare national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

NEPA contains three sections: the first section outlines national environmental policies and goals; the second establishes provisions for federal agencies to enforce such policies and goals; and the third establishes the CEQ in the Executive Office of the President.

The purpose of NEPA is to ensure that environmental factors are weighted equally when compared to other factors in the decision-making process undertaken by federal agencies and to establish a national environmental policy. The act appoints the CEQ to advise the President in the preparation of an annual report on the progress of federal agencies in implementing NEPA. It also established the CEQ to advise the president on environmental policy and the state of the environment.

NEPA establishes this national environmental policy by requiring federal agencies to prepare an environmental impact statement (EIS) to accompany reports and recommendations for Congressional funding. NEPA is an action-forcing piece of legislation, meaning the act itself does not carry any criminal or civil sanctions, and therefore, all enforcement of NEPA must occur through the court system. In practice, a project is required to meet NEPA guidelines when a federal agency provides any portion of financing for the project. However, review of a project by a federal employee can be viewed as a federal action, and in such a case, it requires NEPA-compliant analysis performance.

NEPA covers a vast array of federal agency actions, but the act does not apply to state action where there is a complete absence of federal influence or funding. Exemptions and exclusions are also present within NEPA's guidelines, including specific federal projects detailed in legislation and Environmental Protection Agency (EPA) exemptions. Exemptions also apply when compliance with other environmental laws require an impact analysis similar to that mandated by NEPA. Such laws can include but are not limited to the Clean Air Act, Resource Conservation and Recovery Act, Safe Drinking Water Act, and the Federal Insecticide, Fungicide, and Rodenticide Act.

The NEPA Process

The NEPA process is the evaluation of the relevant environmental effects of a federal project or action mandated by NEPA. This process begins when an agency develops a proposal addressing a need to take action. If it is determined that the proposed action is covered under NEPA, there are three levels of analysis that a federal agency must undertake to comply with the law. These three levels include the preparation of a Categorical Exclusion (CatEx); an environmental assessment (EA); and either a Finding of No Significant Impact (FONSI), or, alternatively, the preparation and drafting of an environmental impact statement (EIS).

Executive Order No. 11514 as amended by Executive Order No. 11991 directs the Council on Environmental Quality (CEQ) to issue "regulations to Federal agencies for the implementation of the procedural provisions of" NEPA and for Federal agencies to "comply with the regulations issued by the Council". Importantly the Supreme Court of the United States finds "that CEQ regulations are entitled to substantial deference." The Council on Environmental Quality's NEPA regulation 40 C.F.R. § 1501.4 specifies the process to determine whether to prepare an Environmental Impact Statement (EIS) as follows:

In determining whether to prepare an environmental impact statement the Federal agency shall:

(a) Determine under its procedures supplementing these regulations (described in § 1507.3) whether the proposal is one which:

(1) Normally requires an environmental impact statement, or (2) Normally does not require either an environmental impact statement or an environmental assessment (categorical exclusion).

(b) If the proposed action is not covered by paragraph (a) of this section, prepare an environmental assessment (§ 1508.9). The agency shall involve environment al agencies, applicants, and the public, to the extent practicable, in preparing assessments required by § 1508.9(a)(1).

(c) Based on the environmental assessment make its determination whether to prepare an environmental impact statement.

(d) Commence the scoping process (§ 1501.7), if the agency will prepare an environmental impact statement.

(e) Prepare a finding of no significant impact (§ 1508.13), if the agency determines on the basis of the environmental assessment not to prepare a statement.

(1) The agency shall make the finding of no significant impact available to the affected public as specified in § 1506.6.(2) In certain limited circumstances, which the agency may cover in its procedures under § 1507.3, the agency shall make the finding of no significant impact available for public review (including State and areawide clearinghouses) for 30 days before the agency makes its final determination whether to prepare an environmental impact statement and before the action may begin. The circumstances are: (i) The proposed action is, or is closely similar to, one which normally requires the preparation of an environmental impact statement under the procedures adopted by the agency pursuant to § 1507.3, or(ii) The nature of the proposed action is one without precedent.

In addition to complying with the Council on Environmental Quality's NEPA regulations in 40 C.F.R. § 1500 through § 1508, each Federal agency is required by 40 C.F.R. § 1507.3(a) to adopt supplemental procedures for their agency's implementation of NEPA. The Department of the Interior's NEPA regulations are contained in 43 C.F.R. part 46 (in §§ 46.10 through 46.450).

Preparation of a Categorical Exclusion

A Categorical Exclusion (CatEx) is a list of actions an agency has determined do not individually or cumulatively significantly affect the quality of the human environment (40 C.F.R. §1508.4). If a proposed action is included in an agency's CatEx, the agency must make sure that no extraordinary circumstances might cause the proposed action to affect the environment. Extraordinary circumstances include effects on endangered species, protected cultural sites, and wetlands. If the proposed action is not included in the description provided in the CatEx, an EA must be prepared. Actions similar to the proposed one may have been found to be environmentally neutral in previous EAs and their implementation, and so an agency may amend

their implementing regulations to include the action as a CatEx. In this case, the drafted agency procedures are published in the Federal Register and a public comment period is required. An agency cannot rely on a CatEx prepared by a different agency to support a decision not to prepare an EA or EIS for a planned action; however, it may draw from another agency's experience with a comparable CatEx in seeking to substantiate a CatEx of its own.

The Council on Environmental Quality (CEQ) created Categorical Exclusions to reduce paperwork (40 CFR § 1500.4(p)) and reduce delay (40 CFR § 1500.5(k)) so agencies can better concentrate on actions that do have significant effects on the human environment. In 2003 the National Environmental Policy Task Force found agencies "indicated some confusion about the level of analysis and documentation required to use an approved categorical exclusion". In 2010 CEQ issued guidance on the existing regulations for Categorical Exclusions consistent with NEPA and past CEQ guidance. This CEQ 2010 guidance acknowledges, "Since Federal agencies began using categorical exclusions in the late 1970s, the number and scope of categorically excluded activities have expanded significantly. Today, categorical exclusions are the most frequently employed method of complying with NEPA, underscoring the need for this guidance on the promulgation and use of categorical exclusions." This CEQ 2010 guidance goes on to caution, "If used inappropriately, categorical exclusions can thwart NEPA's environmental stewardship goals, by compromising the quality and transparency of agency environmental review and decision-making, as well as compromising the opportunity for meaningful public participation and review." Indeed, the expanded use of Categorical Exclusions undermines NEPA by reducing environmental analysis and public comment, thereby increasing NEPA litigation. The CEQ 2010 guidance emphasizes that Categorical Exclusions must capture the entire proposed action and not be used for a segment or an interdependent part of a larger proposed action. Examples of Exceptional Circumstances that prevent use of Categorical Exclusions include where there are "potential effects on protected species or habitat, or on historic properties listed or eligible for listing in the National Register of Historic Places." The CEQ specifically cites the 2010 Deepwater Horizon oil spill as an example why agencies need to periodically review their Categorical Exclusions "in light of evolving or changing conditions that might present new or different environmental impacts or risks."

Streamlining the NEPA process with categorical exclusions have been criticized, for example allowing BP's exploration plan that resulted in the Deepwater Horizon oil spill to use a categorical exclusion instead of requiring an Environmental Impact Statement.

Preparation of an Environmental Assessment (EIS) and a Finding of No Significant Impact (FONSI)

EAs are concise public documents that include the need for a proposal, a list of alternatives, and a list of agencies and persons consulted in the proposal's drafting. The purpose of an EA is to determine the significance of the proposal's environmental outcomes and to look at alternatives of achieving the agency's objectives. An EA is supposed to provide sufficient evidence and analysis for determining whether to prepare an EIS, aid an agency's compliance with NEPA when no EIS is necessary, and it facilitates preparing an EIS when one is necessary.

Most agency procedures do not require public involvement prior to finalizing an EA document; however, agencies advise that a public comment period is considered at the draft EA stage. EAs need to be of sufficient length to ensure that the underlying decision to prepare an EIS is legitimate, but they should not attempt to substitute an EIS.

However, the Council on Environmental Quality regulation 40 C.F.R. § 1500.1(b) states: "NEPA procedures must ensure that environmental information is available to public officials and citizens before decisions are made and before actions are taken." Likewise, 40 C.F.R. § 1500.2 states: "Federal agencies shall to the fullest extent possible: ... (d) Encourage and facilitate public involvement in decisions which affect the quality of the human environment." A U.S. District Court describes the essential requirement for public input on a draft EA as follows:

The Ninth Circuit has read these regulations to mean that "the public must be given an opportunity to comment on draft EAs and EISs." Anderson v. Evans, 371 F.3d 475, 487 (9th Cir.2004). Because the regulations "must mean something," the Circuit has held that an agency's failure to obtain any public input on a draft EA "violates these regulations." Citizens for Better Forestry v. U.S. Dept. of Agriculture, 341 F.3d 961, 970 (9th Cir.2003).

If no substantial effects on the environment are found after investigation and the drafting of an EA, the agency must produce a Finding of No Significant Impact (FONSI). This document explains why an action will not have a significant effect on the human environment and includes the EA or a summary of the EA that supports the FONSI determination.

Preparation of an Environmental Impact Statement

If it is determined that a proposed federal action does not fall within a designated CatEx or does not qualify for a FONSI, then the responsible agency must prepare an EIS. The purpose of an EIS is to help public officials make informed decisions based on the relevant environmental consequences and the alternatives available. The drafting of an EIS includes public party, outside party, and other federal agency input concerning its preparation. These groups subsequently comment on the draft EIS.

An EIS is required to describe the environmental impacts of the proposed action, any adverse environmental impacts that cannot be avoided should the proposal be implemented, the reasonable alternatives to the proposed action, the relationship between local short-term uses of man's environment along with the maintenance and enhancement of long-term productivity, and any irreversible and irretrievable commitments of resources that would be involved in the proposed action.

An agency may undertake the drafting of an EIS without the initial drafting of the EA. This may happen if the agency believes that the action will have a significant impact on the human or natural environment or if the action is considered an environmentally controversial issue.

The responsible decision-maker is required to review the final EIS before reaching a final decision regarding the course of action to be taken. The decision-maker must weigh the potential environmental impacts along with other pertinent considerations in reaching the final decision. A record of decision (ROD) is issued which records the agency's final decision.