



NEPA FUNDAMENTALS

ELI Summer School 2019

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NATIONAL ENVIRONMENTAL POLICY ACT OF 1969

- 42 U.S.C. §§ 4321, et seq.
- 40 C.F.R. Parts 1500-1508
- Signed into law January 1, 1970
- Many states have NEPA-like statutes
- Principles have been exported to many other countries

See: <https://ceq.doe.gov/>

HISTORY

- 1961 Int'l Clean Air Congress
- 1962 WH Conservation Congress
- 1962 Silent Spring, Rachel Carson
- 1963 CAA (1970, 1977, 1990)
- 1964 Wilderness Act
- 1965 Storm King Mountain decision
- 1966 Dams in Grand Canyon stopped
- 1969 Cuyahoga R catches on fire & Santa Barbara Channel oil rig explodes
- **January 1, 1970 NEPA**
- 1970 EPA
- 1972 CWA (1948)
- 1973 ESA



SENATOR HENRY M. JACKSON, APRIL 16, 1969

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

PURPOSE:

“To declare a 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.” 42 U.S.C. 4321.

POLICY:

“....it 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, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.” 42 U.S.C.

4331(a).

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NEPA IS INTENDED TO:

- have an “action forcing” influence on agency decision-making
- improve agency decision-making
- require that the government inform and involve the public in agency decisions

IT IS NOT:

- intended to compel any particular decision
- change the obligations and responsibilities of agencies under other substantive statutes

CEQ (EOP)

- promulgates and interprets NEPA regulations
- reviews agency NEPA procedures
- can designate lead agency
- makes alternative arrangements for emergencies
- conducts a formal dispute resolution process
- conducts informal dispute resolution
- assists coordination among agencies
- provides education & training

EPA

- reviews and rates EISs
- files EISs/Notices of Availability

Other Agencies

- comply with NEPA
- have their own NEPA regulations and procedures

NEPA'S MANDATE TO FEDERAL AGENCIES

- NEPA's mandate "is to insure a fully informed and well-considered decision"
Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1978).
- "In reaching its decision, [the agency] will have available, and will carefully consider, detailed information concerning significant environmental impacts" *Robertson v. Methow Valley Ctzn Cncl*, 490 U.S. 332, 349 (1989).

WHAT IS REQUIRED?

- 42 U.S.C. 4332 (2)(C) - an Environmental Impact Statement (EIS) is required for “every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment”
...
...
- Actions that may not amount to “major federal action significantly affecting the quality of the human environment” may also require NEPA review (Environmental Assessment or Categorical Exclusion) pursuant to the CEQ regulations (40 C.F.R. 1508.9, 1508.4).

NEPA REVIEW: TYPE DEPENDS ON NATURE OF IMPACTS

(1) **Categorical Exclusion**: “a category of actions which do not individually or cumulatively have a significant effect on the human environment ... and for which, therefore, neither an EA nor an EIS is required.” 40 CFR 1508.4

- A categorical exclusion is not an exemption from NEPA
- An action that is normally categorically excluded from further review could require an EA or even an EIS in “extraordinary circumstances”
- Can’t invoke a categorical exclusion without having a category already established through an agency process that has identified actions that don’t require an EA or EIS (40 CFR 1507.3)



(2) Environmental Assessment: A concise public document that serves to briefly provide sufficient evidence and analysis for determining whether to prepare an EIS; aids in an agency's compliance with NEPA when no EIS is necessary. 40 C.F.R. 1508.9.

- Public disclosure
- EA results in EITHER (1) Finding of No Significant Impact (FONSI): presents the reasons why an action will not have a significant effect on the human environment. 40 CFR 1508.13; or (2) EIS ...

(3) Environmental Impact Statement (EIS): triggered by a proposed major federal action significantly affecting the quality of the human environment. 42 U.S.C. 4332; 40 CFR 1502.3.

- **Record of Decision (ROD):** This documents the agency's decision. 40 CFR 1505.2. The ROD states what the decision is, identifies alternatives considered, specifies which alternatives were considered to be environmentally preferable, and discusses factors which were balanced by the agency in making its decision. The ROD states whether all practical methods to avoid or minimize environmental harm are being adopted, and, if not, why not, and includes a description of any applicable enforcement and monitoring programs.

How do you evaluate the potential significance of impacts to determine if an EIS is required? It “requires considerations of both context and intensity” and the careful exercise of best professional judgment. 40 CFR 1508.27.

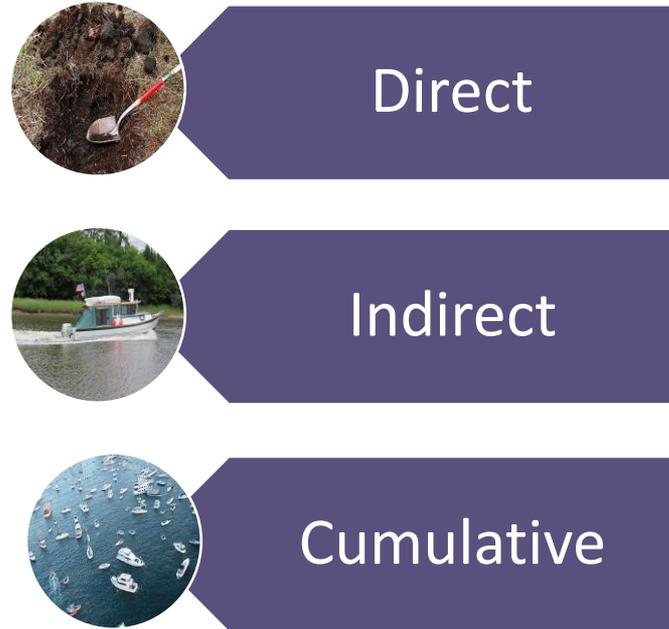


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ESSENTIAL ELEMENTS: ALTERNATIVES & CONSEQUENCES

40 C.F.R. 1502.14, 1508.9

40 C.F.R. 1508.7, 1508.8



COURTS EXPECT AGENCIES TO TAKE A “HARD LOOK” AT ISSUES

- “[T]his vaguely worded statute seems designed to serve as no more than a catalyst for development of a ‘common law’ of NEPA.” *Kleppe v. Sierra Club*, 427 U.S. 390, 421 (1976) (Marshall, J., dissenting).
- The agency *must show* that it "considered the relevant factors and articulated a rational connection between the facts found and the choice made." *Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 105 (1983).

NEPA TOPICS WE DID NOT COVER

- Components of an EA or EIS
- Lead Agencies
- Cooperating Agencies
- Tiering
- Supplemental Analyses
- Scoping
- Programmatic Analysis
- Restrictions on Action
- Adoption of NEPA work
- Incomplete or Unavailable Information
- Uncertainty
- Trans-border impacts
- Segmentation
- Emergencies
- Etc.

REFORMS IN THE TRUMP ADMINISTRATION: EXAMPLES

- **NEPA Regulatory Reform:** ANPR issued 6/20/18; proposed rule expected very soon
- **Process Reform:** “Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects,” EXECUTIVE ORDER 13807 (August 15, 2017) (One Federal Decision & timelines for review of major infrastructure projects)
- **Process Reform:** Department of the Interior Secretarial Order 3355 (EIS & EA page and time limits; emphasis on categorical exclusions; streamlined document clearance)

THANK YOU!



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