

NATIONAL ENVIRONMENTAL POLICY ACT (NEPA)

AIR FORCE ENVIRONMENTAL BASIC COURSE

5 MAY 1997

I. REFERENCES

- A. National Environmental Policy Act (NEPA) of 1969, P.L. 90-190, 42 U.S.C. " 4321-4347
- B. Council on Environmental Quality (CEQ) Regulations on Implementation of NEPA, 40 C.F.R. Parts 1500-1508 (1986)
- C. Forty Most Asked Questions Concerning CEQ's NEPA Regulations, 46 Fed. Reg. 18026 (23 Mar 81)
- D. Army Regulation 200-2, Environmental Effects of Army Actions (23 Dec 88), as amended.
- E. Air Force - AFI 32-7061, The Environmental Impact Analysis Process (Jan 95)
- F. OPNAVIST 5090.1B, The Environmental and Natural Resources Program Manual (1 Nov 94)
- G. Marine Corps Order 5090.2, Environmental Compliance and Protection Manual (26 Sep 91)
- H. Department of Defense, 32 C.F.R. Part 188, Environmental Effects in the United States of DoD Actions (10 Dec 91)
- I. Executive Order 12898, Federal Actions to Address Environmental Justice in Minority and Low-Income Populations (11 Feb 94).
- J. Executive Order 13045, Protection of Children From Environmental Health Risks and Safety Risks (21 Apr 97), 62 Fed.Reg. 19885
- K. Helpful Web Sites - <http://ceq.eh.doe.gov/nepa/nepanet.htm>
<http://es.inel.gov/oeca/ofa>

II. OVERVIEW OF NEPA

- A. Statutory Purpose
 - 1. Declares a national environmental policy (' 101)
 - 2. Mandates that federal agencies prepare a detailed statement on the environmental impacts of major federal actions significantly affecting the quality of the human environment (' 102(2)(c)).
- B. Goals
 - 1. Insert environmental considerations into decision-making process
 - 2. Ensure public participation

C. Nature of NEPA

1. NEPA is procedural, not substantive.
 - a. Prescribes a process, not a result
 - b. Requires identification and evaluation of adverse environmental effects
 - c. Prohibits uninformed, not unwise, actions. Robertson v. Methow Valley, 490 U.S. 332, at 350 (1989)
2. Courts cannot “interject itself within the area of discretion of the executive as to the choice of the action to be taken.” Strycker’s Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, at 228 (1980).

III. REGULATORY FRAMEWORK

A. CEQ regulations.

1. Promulgated as federal regulations and binding on agencies
2. Require agencies to prepare implementing regulations

B. Agency regulations.

1. Provide specific agency procedures for analysis and documentation
2. Must identify typical actions that normally:
 - a. are categorically excluded from further evaluation (CATEX)
 - b. require an environmental assessment (EA)
 - c. require an environmental impact statement (EIS)

IV. EXCEPTIONS TO NEPA COMPLIANCE

A. Classified Information - 40 C.F.R. ' 1507.3 (c). Limited exemption which only excuses public disclosure of classified portions. Does not justify non-compliance.

B. Statutory Exemptions - 40 C.F.R. ' 1500.6

1. Explicit exemption required.
2. Examples - BRAC, EPA actions

C. Statutory Conflict - 40 C.F.R. ' 1500.6

1. If another statute makes NEPA compliance impossible, may be excused.

2. “Impossible” interpreted narrowly by courts.

D. Emergencies - 40 C.F.R. ' 1506.11

1. Actions necessary to protect life and property, or to protect national defense and national security.
2. Exemption only applies to actions necessary to control immediate effects.
3. CEQ consultation required.

V. NEPA ENVIRONMENTAL ANALYSIS FRAMEWORK

- Do I have a federal action? (See Outline Section VI below)
- If so, is there an exemption that applies? (See Outline Section IV above)
- If not, what level of environmental analysis is required? (See Outline Section VII below)

VI. FEDERAL ACTION

- A. Definition of federal action is found within the definition of “Major Federal Action” at 40 C.F.R. ' 1508.18.

1. Includes adoption of official policy, plans, programs, or projects.
2. Agency specific regulations may further define this term.

3. **NOTE:** A federal action does not have to be considered “major” for NEPA to apply. If you have a federal action, it is only a question of what level of NEPA is required. The EIS requirement kicks in for “major” federal actions.

B. Examples of federal actions

1. An expenditure of money or issuance of a permit may be enough of a federal hook to trigger NEPA.
2. Activities of a non-federal agency can become a federal action through the federal agency’s ability to influence or control the non-federal activity. Sierra Club v. Hodel, 848 F.2d 1068 (10th Cir. 1988).
3. Can inaction be a federal action? Split of authority, but general rule is that if the agency has no discretion to act, NEPA is not required. Defenders of Wildlife v. Andrus, 627 F.2d 1238 (D.C. Cir. 1980).

C. Proposal - 40 C.F.R. ' 1508.23

1. Exists when agency has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal, and the effects can be meaningfully evaluated.
2. May exist in fact as well as by declaration.

VII. LEVELS OF ENVIRONMENTAL ANALYSIS

A. Categorical Exclusions (CATEX) - 40 C.F.R. ' 1508.4.

1. A CATEX is a category of actions which an agency has determined, through promulgated rules, has no significant individual or cumulative effect on the human environment.
2. The purpose of a CATEX is to reduce unnecessary paperwork and delay.
3. Regulations must provide for extraordinary circumstances under which CATEX is not appropriate.
4. Documentation of some types of CATEX are often required (i.e. Record of Environmental Consideration (REC)).

B. Environmental Assessment (EA) - 40 C.F.R. " 1501.3, 1508.9

1. An EA is a concise document which briefly provides sufficient analysis for determining the environmental impacts of a decision. It is used to determine whether or not an EIS is required.
2. CEQ created EA's, not NEPA.
3. Contents of EA:
 - a. Need for the proposed action.
 - b. Reasonable alternatives.
 - c. Examines environmental impacts of proposed action and alternatives.
 - d. Listing of agencies/persons consulted.
4. EA has only two possible results:

- a. Finding of No Significant Impact (FONSI), or
- b. Intent to prepare an EIS.

5. Mitigated FONSI

- a. Using mitigation measures to reduce the significance of an action to insignificant level justifying a FONSI rather than an EIS.
- b. Not recognized by NEPA or CEQ.
- c. EA should commit to adopting specific mitigation measures, and analyze how these measures will mitigate the impacts to insignificant levels.

C. Environmental Impact Statement (EIS) - 40 C.F.R. " 1501.4, 1502.1-1502.25, 1508.11

1. EIS Specific Requirements

- a. Publish Notice of Intent to prepare EIS
- b. Scoping
- c. More extensive public comment and review periods
- d. Record of Decision (ROD)

2. Threshold for EIS -- **MFASAQHE**

- a. **M**ajor **F**ederal **A**ction
- b. **S**ignificantly **A**ffecting
- c. The **Q**uality of the **H**uman **E**nvironment

3. "Major Federal Action Significantly..."

- a. "Major" reinforces but does not have a meaning independent of "significantly." 40 C.F.R. ' 1508.18.
- b. "Significance" requires consideration of both context and intensity of the effect or impact of the action. 40 C.F.R. ' 1508.27. (effects and impacts are synonymous)

- 1. Context - Will the project affect society as a whole, or be felt only regionally or locally? The significance of a project will vary depending upon the setting of the proposed action.

2. Intensity - What is the severity of the project's impact?

- identify beneficial and adverse impacts
- degree which the action affects public health or safety
- unique characteristics of the affected geographic area
- likelihood of controversy
- degree of uncertainty
- establishes precedent for future actions with significance
- cumulative impact
- effect on scientific, cultural or historic resources
- effect on endangered species or critical habitat
- cause violation of federal, state or local environmental laws

4. "...Affecting the Quality of the Human Environment" - Must consider the nature of the proposal's effects on the quality of the human environment.

a. Affecting - "will or may have an effect on" - 40 C.F.R. ' 1508.3

b. Types of Effects - 40 C.F.R. ' 1508.8

1. Direct - caused by the action and occurring at the same time and place
2. Indirect - caused by the action and are later in time or farther removed in distance, but still reasonably foreseeable.
3. Cumulative - 40 C.F.R. ' 1508.7 (see section VIII C. below).

c. Human Environment - includes natural and physical environment and the relationship of people with that environment - 40 C.F.R. ' 1508.14

1. Effects may be beneficial or detrimental.
2. Effects include ecological, aesthetic, historic, cultural, economic, social, or health. But economic and social effects alone do not constitute significance (40 C.F.R. ' 1508.14).

VIII. PROBLEM AREAS

A. Development of Purpose and Need - 40 C.F.R. ' 1502.13

1. Courts unlikely to overturn an agency's statement of purpose and need
2. Define narrowly to limit alternatives
3. Examples

- a. NRDC v. Morton, 458 F.2d 827 (D.C. Cir. 1972) - Secretary of Interior's EIS to examine oil and gas leasing with the purpose to "meet nation's energy crisis needs" found to require examination of all alternatives which could meet that need.
- b. Izaak Walton League of America v. Marsh, 655 F.2d 346 (D.C. Cir. 1981) - Corps of Engineers EIS for a new lock and dam defined the purpose as the "need for more capacity at the lock and dam, more capacity in waterways, and more safety at the lock and dam." With these underlying needs, only the replacement of the lock and dam was

and need
the
narrow
feasible.

B. Consideration of Adequate Range of Alternatives - 40 C.F.R.' 1502.14

1. Alternatives are the heart of an EIS
2. Examine in comparative form to give choice among options
3. Include No Action Alternative
4. Reasonable Alternatives

C. Cumulative Impacts - 40 C.F.R. ' 1508.7

1. Defined as "impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time."
2. Suggested analysis:
 - a) Define analysis area. The boundaries will differ depending on resource category. May also include temporal boundaries.
 - b) Define impact evaluation criteria. At what point does the impact become

significant to the resource category?

- c) Conduct interviews with on and off post officials to determine past, present, and reasonably foreseeable future actions, no matter how minor. Use scoping and comments to draft to help identify these activities.
- d) Analyze the effects of your action in relation to those other activities.

3. CEQ draft guidance: “Analyzing Cumulative Effects Under the National Environmental Policy Act.”

D. Environmental Justice - Executive Order 12898

1. Purpose is to avoid disproportionate placement of adverse environmental, economic, social or health impacts from Federal actions and policies on minority and low-income populations or communities.

2. Suggested Analysis

- a) Identify minority or low-income populations off-post
- b) Consider whether or not proposed action will disproportionately affect these populations
- c) Identify mitigation measures
- d) Perform outreach

3. Draft Guidance for Considering Environmental Justice Under the National Environmental Policy Act, CEQ, 28 Mar 97

E. Segmentation

1. NEPA requires examination of related actions in a single document. 40 CFR '1502.4. Examining an overall plan in a piecemeal fashion in order to avoid significance which might merit an EIS is segmentation. 40 C.F.R. '1508.27(b)(7)

2. Related actions are those with a common purpose, timing, impact, or location. 40 C.F.R. '1508.25(a)(1) tests:

- a. Automatically trigger other actions which may require EIS;
- b. Cannot or will not proceed unless other actions are taken previously or simultaneously (will proceeding on this piece prejudice the ultimate decision on the rest of the action?), or;
- c. Are interdependent parts of a larger action and depend on the larger action for their justification (independent utility test).

3. Other limitations during NEPA process:

- a. Take no action with an adverse environmental impact.
- b. Take no action which will limit the choice among alternatives.
- c. Make no irretrievable commitment of resources.

F. Supplementation - 40 C.F.R. '1502.9(c).

1. Supplementation of an environmental document is required if:

- a. the agency makes substantial changes in the proposed action that are relevant to environmental concerns;
- b. there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts; or
- c. where the agency thinks the purposes of NEPA will be furthered.

2. Whether new information is "significant" is a determination for the agency to and is accorded deference by the courts (arbitrary and capricious standard).

resolve,

- If there remains a major Federal Action to occur, and if the new information is sufficient to show that the remaining action will affect the quality of the human environment, a SEIS must be prepared.

-Marsh v. Oregon National Resources Council, 490 U.S. 360 (1989).

3. Supplements are prepared the same as a regular document, except for scoping.

G. Incomplete or unavailable information - 40 C.F.R. '1502.22.

1. Must include info in EIS if

- a) info is relevant to reasonably foreseeable significant adverse impacts
- b) is essential to a reasoned choice among the alternatives, and
- c) the overall costs of obtaining it are not exorbitant.

2. If the costs to obtain the info are exorbitant, or there are unknown means to obtain it, the EIS must contain a statement explaining the omission.

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