



## CRS Report for Congress

# Overview of National Environmental Policy Act (NEPA) Requirements

Kristina Alexander  
Legislative Attorney  
American Law Division

### Summary

The National Environmental Policy Act (NEPA) establishes environmental policies that apply to the federal government, but it is best known for imposing environmental review procedures on federal agency actions. NEPA requires agencies to review the potential environmental impacts of their projects, recording their review in a publicly available document. There are three types of environmental documents, based on the type of review: a categorical exclusion (CE), an environmental assessment (EA) and an environmental impact statement (EIS). The act dictates procedure, not results. Agencies are required to take a “hard look” at the environmental impacts, not to meet set environmental standards nor to choose the project with the least environmental consequence. This report provides an overview of NEPA’s requirements.

### General

The National Environmental Policy Act of 1969 (NEPA)<sup>1</sup> establishes environmental policies that apply to the federal government, but it is best known for imposing environmental review procedures on federal agency actions. Except as otherwise provided by Congress, the act applies to all federal agency actions,<sup>2</sup> including those that intersect with private activities, such as through a federal permit or funding, although its requirements vary depending on the nature of the action involved.<sup>3</sup>

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<sup>1</sup> Act of January 1, 1970, P.L. 91-190, 83 Stat. 852; 42 U.S.C. §§ 4321 *et seq.*

<sup>2</sup> 42 U.S.C. § 4332 (“The Congress authorizes and directs that, to the fullest extent possible... all agencies of the Federal Government shall [do the following]”) (emphasis added). 40 C.F.R. § 1508.12 defines “Federal agency” as not meaning the Congress, the Judiciary, or the President. Attention focuses on this regulation from time to time, e.g. when the President established several national monuments without a NEPA review.

<sup>3</sup> There are also several judicially created exemptions for when NEPA does not apply, although they are the exception. Some examples include appropriations, where the statute provides no (continued...)

NEPA created the Council on Environmental Quality (CEQ), which promulgated regulations implementing the act.<sup>4</sup> The NEPA regulations emphasize communicating with the public, reducing delays of federal projects, and making better decisions.<sup>5</sup> Agencies are to integrate NEPA reviews with other agency planning and review processes,<sup>6</sup> and coordinate with other federal agencies and with similar state processes when appropriate.<sup>7</sup> Each agency is expected to elaborate on how to comply with NEPA in the context of its own duties. Agencies generally issue regulations specifying their NEPA review process.<sup>8</sup> When more than one federal agency is involved in an action, the regulations provide for the responsibilities of a “lead agency”<sup>9</sup> and “cooperating agencies.”<sup>10</sup>

NEPA establishes goals for agency actions. It sets as a national environmental policy that the federal government “use all practicable means” to improve and coordinate federal actions to assure “safe, healthful, productive, and aesthetically and culturally pleasing surroundings” and to “attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences.”<sup>11</sup>

In addition to this policy, NEPA requires certain practices, including using a “systematic, interdisciplinary approach using natural and social sciences and environmental design in planning and decisionmaking.”<sup>12</sup> The most significant of these practices are the requirements in Section 102(2), which states that “for proposals for legislation and other major Federal actions significantly affecting the quality of the human environment” the agency must prepare a detailed environmental review discussing

- (i) the environmental impact of the proposed action,
- (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
- (iii) alternatives to the proposed action,

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<sup>3</sup> (...continued)

discretion, and where the statutory deadline is too short.

<sup>4</sup> 40 C.F.R. §§ 1500 *et seq.* CEQ is within the Executive Office of the President with three members appointed by the President. 42 U.S.C. § 4342. It does not have the responsibility for enforcing NEPA requirements. Each agency oversees its own compliance with the act.

<sup>5</sup> 40 C.F.R. §§ 1500.1 - 1500.5.

<sup>6</sup> 40 C.F.R. § 1500.2(c).

<sup>7</sup> 40 C.F.R. § 1506.2.

<sup>8</sup> *See, e.g.*, Federal Highway Administration (FHWA) regulations at 23 C.F.R. Part 771; United States Department of Agriculture (USDA) regulations at 7 C.F.R. Part 1b; Housing and Urban Development (HUD) regulations at 24 C.F.R. Part 50.

<sup>9</sup> 40 C.F.R. § 1501.5.

<sup>10</sup> 40 C.F.R. § 1508.5.

<sup>11</sup> NEPA § 101(b); 42 U.S.C. § 4331(b).

<sup>12</sup> NEPA § 102(2); 42 U.S.C. § 4332(2).

- (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
- (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented. 42 U.S.C. § 4332(2)(C).

These environmental reviews are to be conducted early in the decision-making process so that they can contribute to the process and not be used to “rationalize or justify decisions already made.”<sup>13</sup>

## NEPA Documents

An environmental review under NEPA can take one of three forms: a categorical exclusion (CE); an environmental assessment (EA); or an environmental impact statement (EIS). For each of these, the CEQ regulations require consideration of the possible environmental effects of an agency action. The extent of that analysis depends on the circumstances and the likely degree of environmental impacts.

CEs are at one end of the spectrum. CEs are used for categories of actions that have been determined not to have a significant effect on the human environment, individually or cumulatively, and therefore, do not require further analysis.<sup>14</sup> Typically, CEs are used for minor actions that an agency does repeatedly and knows will have no or only minor environmental effects. Agencies publish lists of activities that are CEs. When a project arises that falls into a category on the list, a CE may be invoked.<sup>15</sup> However, if an “extraordinary circumstance” (such as wetlands or a threatened or endangered species) is present, a CE may not be used.<sup>16</sup> Even though a CE represents a determination that an environmental review is not necessary, the determination still must be documented and cannot be made after a project has begun.<sup>17</sup>

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<sup>13</sup> 40 C.F.R. § 1502.5. *See also* 40 C.F.R. § 1501.2.

<sup>14</sup> 40 C.F.R. § 1508.4.

<sup>15</sup> For example, FHWA has determined these actions are suitable for CEs: landscaping, construction of bike and pedestrian lanes, improvements to existing truck stations (23 C.F.R. § 771.117). The Forest Service lists these CEs: closing an area during a period of extreme fire danger, adjusting special use or recreation fees, approving a Surface Use Plan for oil and natural gas exploration in a new field without herbicides (FSH 1909.15\_31). CEs in HUD include inspections and testing of properties for hazards or defects, purchase of tools, and approval of foreclosure sale of HUD-held mortgages (24 C.F.R. § 50.19).

<sup>16</sup> 40 C.F.R. § 1508.4. Some examples of “extraordinary circumstances” include highly controversial issues (see *Fund for Animals v. Babbitt*, 89 F.3d 128, 133 (2d Cir. 1996)); actions that cumulatively may have significant effects (see *Citizens for Better Forestry v. USDA*, 481 F. Supp. 2d 1059, 1089 (N.D. Cal. 2007)); and actions that may have significant effects, such as by affecting an endangered species or an archeological site.

<sup>17</sup> *See Wilderness Watch and Public Employees for Environmental Responsibility v. Mainella*, 375 F.3d 1085 (11th Cir. 2004) (NEPA was violated where record indicated that a categorical exclusion was invoked only after the action had been taken); *Anacostia Watershed Soc’y v. Babbitt*, 871 F. Supp. 475, 481 (D.D.C. 1994); *Fund for Animals, Inc. v. Espy*, 814 F. Supp. 142, 150-51 (D.D.C. 1993) (a categorical exclusion must be invoked prior to the agency action).

In the middle of the spectrum are Environmental Assessments. EAs are conducted to determine whether an EIS is needed or a finding of no significant impact (FONSI) is appropriate.<sup>18</sup> EAs are intended to be concise, but are also required to consider the need for the project, the environmental impacts of the project and its alternatives, alternatives required by section 102(2)(E), and a list of the agencies and persons consulted.<sup>19</sup>

At the other end of the spectrum are full reviews for major federal actions that may significantly affect the environment — EISs.<sup>20</sup> These documents are the most complex and have drawn the most scrutiny. The thoroughness with which an agency must study environmental effects and consider alternatives is greatest if an EIS is required.<sup>21</sup> An EIS must discuss an adequate range of proposed alternatives, and the direct, indirect, and cumulative effects or impacts of each. The required documents can be voluminous and may take years to produce. Under NEPA, different versions of EISs are produced: DEIS (draft EIS), which is circulated for comment; FEIS (final EIS); SEIS (supplemental EIS); and DSEIS (draft supplemental EIS), also circulated for comment.<sup>22</sup>

Even though both EISs and EAs require reviews of environmental impacts, there is a difference between these documents. An EA review is intended to be briefer. Its purpose is to find whether there are significant environmental impacts. If there are significant impacts, an EIS is developed to analyze those impacts in detail. Both documents must review not only the impacts of the planned project, but the impacts of the alternatives. However, there is a distinction between the review within an EA and that of an EIS. The regulations require an EA to “include brief discussions” on the impacts of the alternatives. In contrast, an EIS’s alternatives analysis is referred to as the “heart of the environmental impact statement.”<sup>23</sup> The document must “devote substantial treatment to each alternative.”<sup>24</sup> A successful EIS will clearly illustrate how the agency made its decision to choose that alternative. NEPA does not require the agency to choose the most environmentally-preferable alternative.

CEs, by their nature, are extremely brief. Agencies have been encouraged to create more CEs<sup>25</sup> because CEs are perceived to be less of a burden on agency resources than

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<sup>18</sup> 40 C.F.R. § 1508.9(a)(1). An EA that results in a FONSI is referred to as an EA-FONSI.

<sup>19</sup> 40 C.F.R. § 1508.9(b).

<sup>20</sup> 40 C.F.R. § 1501.4, and parts 1502 and 1503.

<sup>21</sup> *Mt. Lookout - Mt. Nebo Property Protection Ass’n v. FERC*, 143 F.3d 165 (4th Cir. 1998).

<sup>22</sup> *See* 40 C.F.R. § 1502.9 for a description of these different types of documents. Additionally, the type of an EIS can vary depending on the nature of the project. A site-specific EIS is prepared for one project. A programmatic EIS is prepared for a series of related projects. A generic EIS is prepared for a type of project that will be repeated.

<sup>23</sup> 40 C.F.R. § 1502.14. The act mentions alternatives twice, in Sections 102(2)(C)(iii) and 102(2)(E).

<sup>24</sup> 40 C.F.R. § 1502.14(b).

<sup>25</sup> *See* 48 Fed. Reg. 34263, 34265 (July 28, 1983) (criticizing excessive use of EAs, and encouraging agencies to draft broadly defined criteria for CEs).

EAs or EISs.<sup>26</sup> For example, the CEQ issued draft guidance in 2006 encouraging agencies to designate more CEs. Additionally, three recent significant pieces of federal legislation directed creation of CEs: the Energy Policy Act of 2005 (for projects disturbing fewer than five acres); the Safe, Accountable, Flexible, and Efficient Transportation Equity Act: A Legacy for Uses of 2005 (for activities using intelligent transportation infrastructure and systems); and the Healthy Forests Restoration Act of 2003 (P.L. 108-148) (for hazardous fuel reduction projects on federal land). Agencies update their lists of CEs regularly. The Federal Aviation Administration, for example, added 18 CEs to its list in 2004. The Forest Service added two in February 2007.

## Public Participation

NEPA prescribes federal agency review but does not specify public involvement in the reviews. However, the NEPA regulations discuss and require public participation. The public participation aspects of the NEPA process are regarded by many as a valuable aspect of the law. Agencies must

Provide public notice of NEPA-related hearings, public meetings, and the availability of environmental documents so as to inform those persons and agencies who may be interested or affected.<sup>27</sup>

Public input is encouraged early in the process. CEQ recommends that a scoping process be conducted for EISs and that public comment be included in the scoping process.<sup>28</sup> The CEQ regulations specify levels of notice to the public depending on whether an action is of national or local interest, and state that in all cases the agency must mail notice to those who requested it regarding a particular action.<sup>29</sup> Also, draft EISs must be made available for public comment.<sup>30</sup> Those comments must be responded to by the lead agency in the final version of the document.<sup>31</sup> Court challenges to EISs must wait until there is a final agency action. EISs are final only upon the issuance of the Record of Decision (ROD).

Public hearings are appropriate for any type of environmental document when there is substantial controversy regarding a project or substantial interest in having a hearing.<sup>32</sup>

No public involvement in the preparation of an EA or in making a categorical exclusion determination is specified by the CEQ regulations, although agency-specific

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<sup>26</sup> “Establishing, Revising, and Using Categorical Exclusions under the National Environmental Policy Act,” 70 Fed. Reg. 54816, 54817 (September 19, 2006).

<sup>27</sup> 40 C.F.R. § 1506.6(b).

<sup>28</sup> 48 Fed. Reg. 34263 (July 28, 1983). *See also* Forest Service Handbook, 1909.15, ch. 30, requiring an abbreviated scoping process for categorical exclusions.

<sup>29</sup> 40 C.F.R. § 1506.6(b).

<sup>30</sup> 40 C.F.R. § 1503.1.

<sup>31</sup> 40 C.F.R. § 1503.4.

<sup>32</sup> 40 C.F.R. § 1506.6(c)(1).

regulations may require some public notice for these determinations.<sup>33</sup> Notably, the CEQ regulations for these documents do not require drafts to be issued to the public.

## NEPA Litigation

Because NEPA does not provide a right of action, suit is brought under the Administrative Procedure Act (5 U.S.C. §§ 706 *et seq.*). Like other APA cases, the court reviews the administrative record to see if the agency acted arbitrarily or capriciously. NEPA litigation is complicated, and just about every word in “major Federal actions significantly affecting the quality of the human environment” has been disputed, scrutinized, and defined by the courts. Some issues have been resolved. For example, there is consensus that a court’s review of a NEPA document is to ensure that the agency took a “hard look” at the environmental impacts of an action.<sup>34</sup> Also, the courts agree that NEPA “does not mandate particular results, but simply prescribes the necessary process.”<sup>35</sup> Thus, “NEPA merely prohibits uninformed — rather than unwise — agency action.”<sup>36</sup> Most court cases relate to when an EIS needs to be prepared and to the adequacy of EIS coverage.<sup>37</sup>

For EAs, the contention generally is whether that document demonstrates that no EIS is required. Sometimes this can take the form of a claim that the agency had decided that an EIS was not required *before* preparing the EA, which is against the express purpose of the document. The courts review EAs to determine whether the agency considered the alternatives and the impacts from those alternatives.

CEs are different. They are intended to allow agencies to find that a project has no significant effects on the environment without conducting a review, but the agency must still assemble a record to support its decision. Disputes regarding CEs center on whether the category was proper in the first place or whether the designation of a CE for a particular project was appropriate. One factor in determining whether a CE was appropriate is whether the action normally requires an EA or an EIS.<sup>38</sup>

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<sup>33</sup> For example, the FHWA regulations require that EAs are made available for public review, but not comment. 23 C.F.R. § 771.119(d).

<sup>34</sup> *Natural Resources Defense Council v. Morton*, 458 F.2d 827, 838 (D.C. Cir. 1972).

<sup>35</sup> *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

<sup>36</sup> *Id.* at 351.

<sup>37</sup> *See* THE NEPA LITIGATION GUIDE, Karin Sheldon and Mark Squillace, eds. (American Bar Association, 1998).

<sup>38</sup> 40 C.F.R. § 1501.4(a)(2). *See, e.g.,* *Citizens for Better Forestry v. USDA*, 481 F. Supp. 2d 1059 (N.D. Cal. 2007) (rejecting agency CE for nationwide rulemaking in part because the previous times the agency changed that rule it prepared EAs).