



NEPA: The Magna Carta of Environmental Law

Environmental Law Institute
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Background

- Originated from growing concern over env. effects in 1960s
- Supporters advocated for national env. policy
- Signed into law Jan. 1, 1970
- Amended only for minor technical changes
- Greatly shaped by court interpretation

NEPA's Purpose

- Inject environmental consideration into agency decisions
 - “Policy” not “Protection”
 - Procedural statute; requires no particular result
 - Agencies must take “hard look”
- Ensure public awareness
- Create Council on Environmental Quality (CEQ)

Does NEPA Apply?

NEPA applies to proposals for “major Federal actions significantly affecting the quality of the human environment” – EIS required

- Proposal = agency goal + actively preparing
- Major federal action = federal agency involvement in a project + federal nexus

Who Is Responsible?

Lead Agency

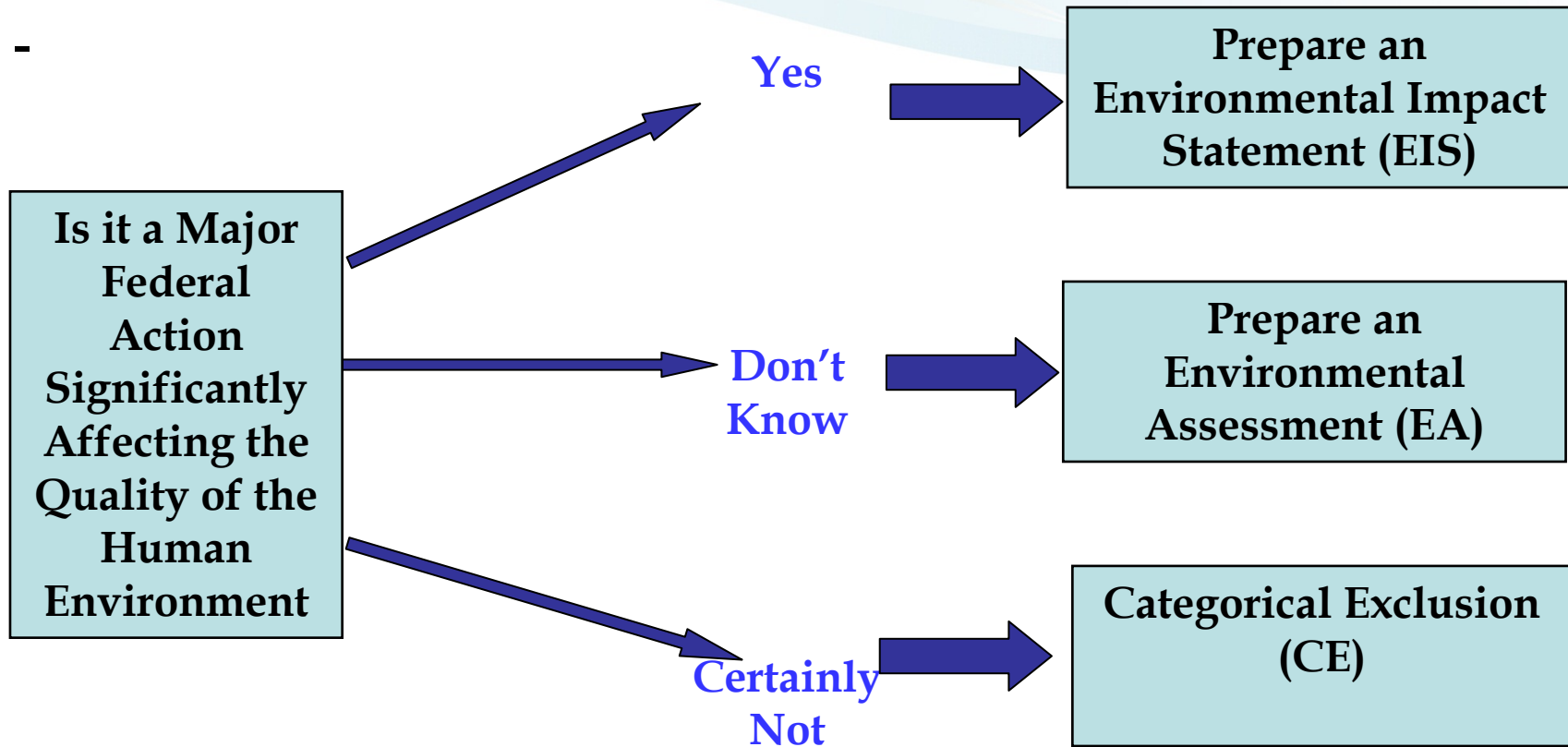
- Who should take the lead?
 - CEQ provides dispute resolution
- Consultants may be hired if supervised by lead agency
- Project applicants may participate

Who Is Responsible?

Cooperating Agencies

- Fed. Agencies with jurisdiction/expertise
- Tribal, state, and local agencies
- Develop info/prepare analyses for EIS

NEPA Applies – EIS Required?



“Significant” Effect?

- Determined case-by-case
 - Context
 - Intensity

What is "Context"?

Context = Affected environment where proposal is planned

- Significance cannot be viewed in isolation!
- Take into account the entire affected region and society as a whole.
- Consider socioeconomic, legal, and political situation, and the locality.

What is “Intensity”?

Intensity = severity of impacts

- Determined on case-by-case basis

Required factors to consider:

- Env. impact – beneficial *and* adverse
- Public health
- Unique characteristics of the area
- Controversy – must be highly controversial
- Uncertain, unique, or unknown risks

What is “Intensity” (cont.)?

More required factors:

- Effects on cultural resources
- Endangered species
- Violation of federal, state, or local environmental protection laws

Non-exhaustive list

No factors dispositive

Which “Effects”?

- Agency must analyze “effects” including: ecological, aesthetic, historic, cultural, economic, social, health
- Agency must consider direct, indirect, and cumulative effects
 - But only those effects that are reasonably foreseeable, not remote and speculative

Environmental Assessments

- Used to determine if EIS is required
- Leads agency to EIS or Finding of No Significant Impact (FONSI)
- “Concise public document” – so says CEQ

Preparing an EA

- No prescribed format
- EA must briefly discuss:
 - Purpose and need for the proposed action
 - The proposal and feasible alternatives
 - Env. effects of the proposal and alternatives
 - The agencies and persons consulted during preparation of the EA

FONSIs

- Documents agency determination that an EIS is not needed
- A concise statement of the agency's reasoning
- Conclusions must be supported by data and analysis in EA

Mitigated FONSI

Mitigation used to remove significant effects and allow EA → FONSI

- Courts generally accepting if demonstrated
 - Hard look at env. effects
 - Effective mitigation
 - EA adequately supports mitigated FONSI
- Time/\$ saver
- Often = more environmentally friendly projects

Environmental Impact Statements

EIS = Evaluation of env. effects

- Ensures fully informed decision-making
- Ensures public awareness/participation
- Does not ensure environmentally preferable alternative is selected

EIS Required – Now What?

Notice of Intent

- Published in Fed. Reg. as soon as practicable
- Formal announcement of proposal
- Must describe:
 - Proposed action + possible alternatives
 - Scoping process/scheduled meetings
 - Lead agency contacts

EIS Required – Now What?

Scoping

- Public process to ID issues for EIS
 - Invite affected parties to participate
 - Identify significant issues to be analyzed/excluded
 - Actions
 - Impacts
 - Alternatives
 - Eliminate issues that need not be analyzed
 - Identify other env. review or consultation required
- Set EIS ground rules

Draft EIS

Required contents:

- Statement of “Purpose and Need”
- Alternatives to proposal
- Description of affected environment
- Analysis of env. effects for each alternative

Draft EIS (cont.)

Purpose and Need Statement

- Foundation of EIS
- Brief statement by lead agency
 - Project's purpose (goal/objectives)
 - Need agency is responding to with project
- Reasonable scope; not artificially constrained

Draft EIS (cont.)

Alternatives Analysis

- Heart of the EIS
- Proposed action + no action alt + “reasonable range” of alts.
 - Alts that are practical and feasible technically, economically, and logistically
 - Identify preferred alt. & environmentally preferable alt.
 - Explain eliminated alts.

Draft EIS (cont.)

- Description of Affected Environment
 - Baseline conditions
- Analysis of Environmental Effects
 - Summary of impacts of each alt.
 - Comparison of each alt's effects
 - Direct, indirect, cumulative effects
 - Mitigation measures

DEIS Review

- Request comments
- File DEIS with EPA
 - EPA publishes notice in Fed. Reg.
- 45 day (min.) public comment period
- Review/address comments
 - Modify proposal/alts or develop new alts
 - Supplement/modify analysis
 - Make factual corrections
 - Explain inaction

Final EIS

Final EIS = Draft EIS +:

- Responses to comments on DEIS
- Revisions or additions to DEIS

File w/ EPA, publish in Fed. Reg.

30-day cooling off period

Final decision on proposed action

Record of Decision (ROD)

ROD = explanation of decision and process

- Selected alternative
- Alternatives considered (incl. env. preferable)
- Bases for choosing selected alt. over others
- Factors considered
- Mitigation adopted/rejected

Filing ROD = final agency action

Additional Resources

NEPAnet – CEQ’s NEPA website

<http://ceq.hss.doe.gov/nepa/nepanet.htm>

EPA’s NEPA Policies and Guidance –

<http://www.epa.gov/compliance/resources/policies/nepa/>

CEQ, NEPA’s Most 40 Asked Questions –

<http://ceq.hss.doe.gov/nepa/regs/40/40p3.htm>