



National Environmental Policy Act (NEPA) - 42 USC § 4331 et seq.

Council on Environmental Quality Rules - 40 CFR § 1502 et seq.

Summary:

NEPA is a “stop-and-think” statute. It requires federal agencies to prepare an Environmental Impact Statement on all major federal actions significantly affecting the quality of the human environment.

Federal actions include not only activities the federal government conducts, but also activities the federal government funds or permits.

The EIS requires an assessment of the direct, indirect and cumulative effects of the action, and alternatives to the action.

NEPA does not dictate that the federal government must choose the least environmentally harmful alternative; it just requires the agency to consider alternatives.

Policy:

Primary:

Declaration of National Environmental Policy:

Congress, recognizing the profound impact of man’s activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the federal government to use all practicable means and measures 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.

In order to carry out this policy, it is the responsibility of the federal government to use all practicable means to improve and coordinate federal plans, functions, programs and resources to the end that the Nation may -

- (1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
- (2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;
- (3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;
- (4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

- (5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and
- (6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

Secondary:

Agencies shall integrate the NEPA process with other planning at the earliest possible stage to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts. 40 CFR 1501.2.

Judicial:

NEPA requires an agency proposing a course of action to "stop and think" about the effect it may have on the environment. *Becker v Federal Railroad Admin*, 999 F Supp 240 (D Conn 1996).

"It is pointless to consider environmental costs unless you also consider alternatives to avoid them." *Calvert Cliffs' Coordinating Committee, Inc v US Atomic Energy Commission*, 449 F 2d 1109 (CA DC 1971).

Regulating Agency:

All federal agencies must comply with NEPA, but two agencies have a special role.

Council on Environmental Quality

Writes rules governing Environmental Assessments (EA) and Environmental Impact Statements (EIS). These are called the "CEQ regulations," and are found at 40 CFR Part 1502.

EPA

Reviews and comments on EISs prepared by other Federal agencies and maintains a national filing system for EISs.

Regulated Activity:

All major federal actions significantly affecting the quality of the human environment require an Environmental Impact Statement (EIS). The EIS must include an analysis of:

- (1) the environmental impact of the proposed action;
- (2) any adverse environmental effects which cannot be avoided should the proposal be implemented;
- (3) alternatives to the proposed action;
- (4) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity; and
- (5) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Action: an adoption of policies, plans, programs or approvals. Rule 1508.18(b).

Federal: partially subject to federal control or responsibility, requiring a federal agency to supervise or approve the action, or federally funded. Rule 1508.18(a).

Major: includes actions that have a significant impact. Rule 1508.18.

Alternatives: The proposed alternatives are the heart of the EIS. This section must present the environmental impacts of the proposal and the alternatives in comparative form thus providing a clear basis for choice among options by the decisionmaker and the public. The agency preparing the EIS must:

- (a) Rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their elimination;
- (b) Devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits;
- (c) Include reasonable alternatives not within the jurisdiction of the lead agency;
- (d) Include the alternative of no action;
- (e) Identify the agency's preferred alternative or alternatives, if one or more exists, in the draft statement and identify such alternative in the final statement unless another law prohibits the expression of such a preference; and
- (f) Include appropriate mitigation measures not already included in the proposed action or alternatives. Rule 1502.14.

Effects: The analysis of environmental consequences of the proposed action forms the analytical basis for comparisons of the proposed action and possible alternatives. This section should include the environmental impacts of the alternatives and the proposed action, any adverse impacts that cannot be avoided, and any irreversible or irretrievable commitments of resources. It should also include a discussion of:

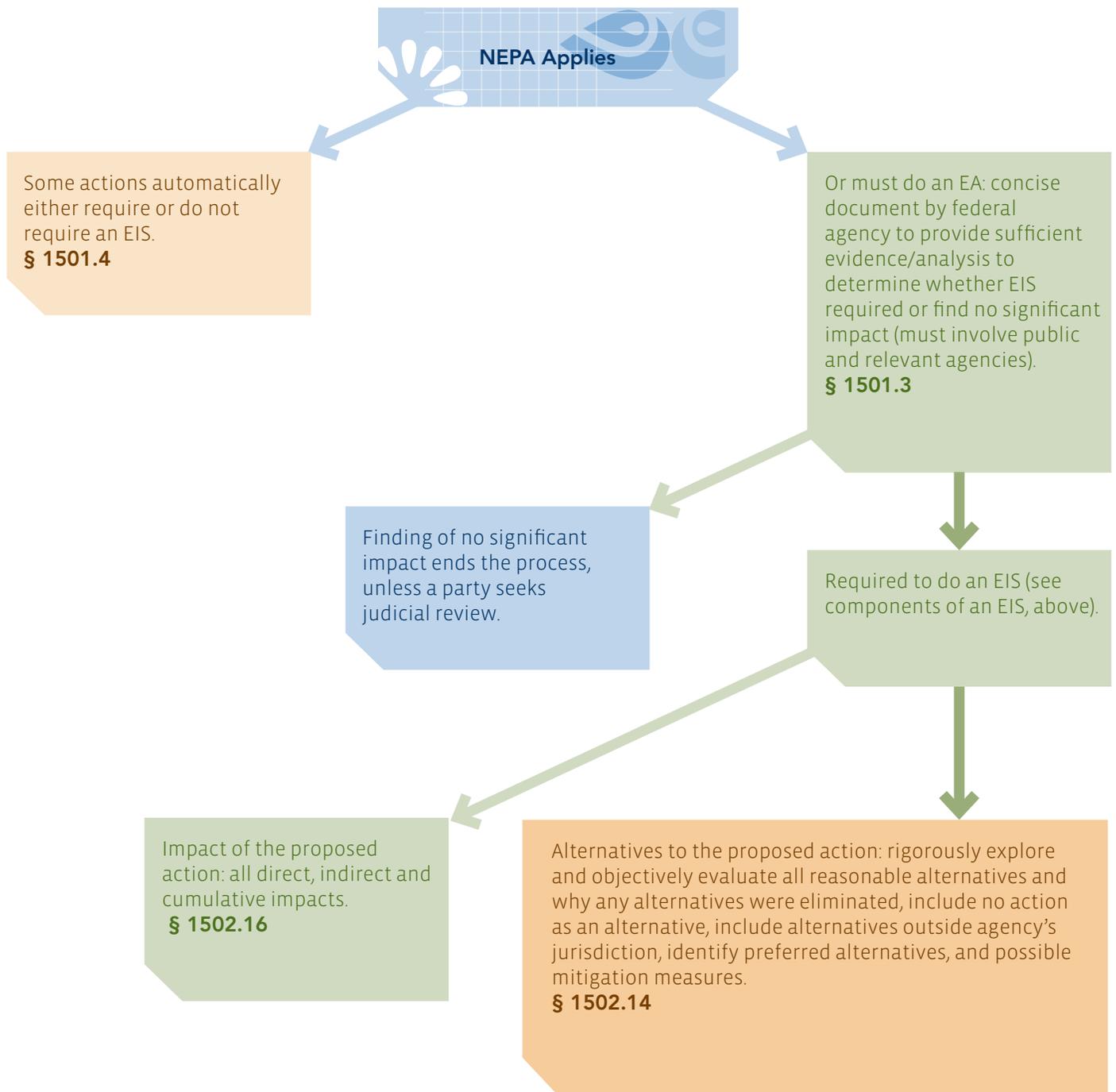
- (a) Direct effects, caused by the action that occur at the same time and place, and their significance;
- (b) Indirect effects, caused by the action that are at a later time or farther removed in distance, but are still reasonably foreseeable, and their significance;
- (c) Possible conflicts between the proposed action and land use plans or policies for the area;
- (d) The environmental effects of alternatives including the proposed action;
- (e) Energy requirements and conservation potential of various alternatives and mitigation measures;
- (f) Natural or depletable resource requirements and conservation potential of various alternatives and mitigation measures;
- (g) Urban quality, historic and cultural resources, and the design of the built environment, including the reuse and conservation potential of various alternatives and mitigation measures; and
- (h) Means to mitigate adverse environmental impacts. § 1502.16.

State Laws: An agency must also include analyses from other applicable State laws. This is important to fully understand the significance of the proposed action, as other statutory obligations may provide additional insight into whether the project impacts may be significant.

NEPA requires the lead Federal agency to "cooperate with State and local agencies to the fullest extent possible to reduce duplication between NEPA and comparable State and local requirements." The goal is "that one document will comply with all applicable laws." NEPA further requires that environmental impact statements "shall discuss any inconsistency of a proposed action with any ... State ... laws (whether or not federally sanctioned). Where an inconsistency exists, the statement should describe the extent to which the agency would reconcile its proposed action with the ... law." § 1506.2.

Editorial Comment

An analysis under the Michigan Environmental Protection Act could be required in an EA or EIS.



During the EA process, the EPA must provide notice of the EA and allow for comments by the public and Federal agencies on whether an EIS should be required.

After preparing a draft environmental impact statement and before preparing a final version, the agency must invite comments from the public, Federal, State, and local agencies. When preparing the final EIS the agency must respond to comments either by including additional alternatives, modifying its analyses, making factual corrections, or explaining why the comments do not warrant further action. § 1503.1

The agency in charge must also provide public notice of NEPA-related hearings, public meetings, and the availability of environmental documents. §1506.6

An individual or group with standing may challenge an agency's decision on whether (1) NEPA applies, (2) an EIS is required or not, and (3) whether the EIS meets the requirements of NEPA and the CEQ regulations in federal court under the judicial review chapter of the Administrative Procedures Act.

Important NEPA Cases:

Kleppe v Sierra Club, 427 US 390; 96 S Ct 2718 (1976)

Sierra Club brought suit against federal agencies responsible for coal leases to try to force them to do an Environmental Impact Statement for the Great Plains region.

Court held that they did not have to do an EIS for the region because all of the federal action was either on a local or national scale, not a regional scale.

Thomas v Peterson, 753 F 2d 754 (CA Idaho 1985)

The Forest Service is required to prepare an Environmental Impact Statement under NEPA before they approve logging or road construction for loggers.

Vermont Yankee Nuclear Power Corp v Natural Resources Defense Council, 435 US 519; 98 S Ct 1197 (1978)

NRDC appealed from Atomic Energy Commission's decision to grant license to Vermont Yankee to build and operate a nuclear power plant.

Courts give a good deal of deference to the agencies responsible for creating an EIS.

In outlining alternatives in the EIS, the agency does not have to propose all alternatives, just those that might be reasonably feasible, and an EIS doesn't fail by not raising all possible alternatives.

Discussed the need to raise energy conservation as an alternative, and stated that it was not necessary in this case because that alternative was not well understood or known at the time – this analysis suggests that now, 30 years later, that alternative should be considered in an EIS evaluating a proposed power plant.

Oregon Natural Resources Council v Marsh, 52 F 3d 1485 (9th Cir 1995)

Environmental group filed action under NEPA to prevent the Army Corps of Engineers from constructing a dam.

Court found that the second EIS supplement violated NEPA because its scope was only limited to river temperature and turbidity and did not include other cumulative impacts of the dams.

The Corps had to prepare another EIS supplement to evaluate the impact of dam production in conjunction with other dams and all significant environmental factors.

The court did not, however, order demolition of the dam or termination of the dam project.