

INTRODUCTION

OVERVIEW OF NEPA

NEPA for the first time opened Federal Agency decision-making processes to involvement and scrutiny by state and local government. In fact, section 102(2)(D) of NEPA requires that the comments and views of state and county government be obtained and documented as part of its process.

Under Section 1506.2 of the Council for Environmental Quality regulations, federal agencies are required to cooperate with state and local government “to the fullest extent possible” to reduce duplication between NEPA and state and local government requirements. This cooperation is to include, also to the fullest extent possible, joint planning, joint environmental research and studies, joint public hears and joint environmental assessments.

Section 1506.2 of NEPA also gives local government a great deal more authority in the federal decisions themselves. NEPA states that federal agencies shall cooperate and fulfill the requirements of state laws and local ordinances that have environmental impact statement requirements. Where inconsistencies exists between approved state and local plans and laws, federal agencies are to describe the extent to which the agency will reconcile its proposed action with the local plan or law.

When environmental impacts are considered, these impacts are not limited to the physical environment, but also include impacts to the human environment. The human environment includes the social and economic considerations within the county.

County government, therefore, may participate in federal agencies at any one of three levels through NEPA.

Public Comment Status

The first level of participation a county can be involved is to comment along with the public during the federal scoping process. This requires a lesser commitment of resources by the county, but still requires the county to study and consider the impacts of a proposed federal action on the physical and human environment within the county, and draft comments on these impacts. If the impacts appear to be considerable, the county may still have to conduct research, and hire consultants and legal assistance in drafting their comments.

At this level of participation, the county has little say into how the scoping process is conducted, little say into the alternatives and mitigation measures the federal agency chooses to consider, and no say in the final decision itself other than through litigation. The federal agency at this level of county participation only has to demonstrate that it did indeed consider the comments and concerns of the county.

Cooperating Agency Status

The second level of NEPA the county can participate is as a cooperating agency. Many federal agencies in the past were reluctant to engage state and local government at this level of

cooperation. Since January 2002, the Council of Environmental Quality has placed renewed emphasis on ensuring the all federal agencies are actively seeking non-federal cooperating agencies in the analysis, preparation and documentation required under the National Environmental Policy Act. All federal agencies were to have regulations in place by October 31st 2002 facilitating such participation by state and local government (See section 2 of this document for CEQ memorandums and required federal agency reports). In the future, county governments will be asked to participate in the NEPA process, whenever a major federal action takes place that has possible affect on the local environment.

There are many advantages to county involvement as a cooperating agency. First, the county now has a voice in determining the scope of the NEPA document before the process begins. The county also has a voice at the table in determining where scoping hearings will be held, determining the issues and affected resources, developing the alternatives and mitigation measures, and analyzing the environmental consequences of the proposed action and its alternatives. The county still does not have a say in the final decision. The county does have a say in how that decision is reasoned and the mitigation measures that might offset possible impacts to the human environment within the county.

Acting as a cooperating agency does require further commitment of personnel and financial resources by the county. An individual may have to be committed full time to the project, there may studies, surveys, and data gathering that has to be conducted, there may be travel expenses occurred. But the lack of participation could have huge economic consequences for the county also. Examples include the impacts that the designation of critical habitat for spotted owls had on counties in Washington, Oregon and California. In Wyoming, the designation of critical habitat for grizzly bears has impacted oil and gas revenues in many counties. Limitations on road access, logging, mining and grazing has had substantial impact on the tax revenues of western and central Wyoming counties.

CEQ does recognizes the burdens that the responsibilities of being a cooperating agency may have on county resources, and requires the federal (or lead) agency to “fund or include in budget requests funding for an analysis the lead agency requests from cooperating agencies.” Federal agencies are also required to look for alternatives to travel, such as telephonic or video conferencing when funding constrains participation. Facility, service or equipment support from the federal agency is also allowed.

Lead Agency Status

The third level at which a county may participate in NEPA is as a joint lead agency. At this level of participation, the county not only has a voice in determining the scope, alternatives and analysis of a proposed action, but has a say in the final decision and mitigation measures made by a federal agency.

Section 1506.2(c) states that “Agencies shall cooperate with State and local agencies to the fullest extent possible to reduce duplication between NEPA and State and local requirements...” This section of NEPA goes on to state, “such cooperation shall to the fullest extent possible include joint environmental impact statements. In such cases one or more Federal agencies and one or more State or local agencies shall be joint lead agencies.” The key to county involvement

as a joint lead agency is the existence of “local ordinances [that] have environmental impact statement requirements.”

For county involvement in the NEPA process a thorough knowledge of the NEPA process itself is necessary. This handbook attempts to provide the reader with a basic understanding of this process.

Purpose and the Two Objectives of NEPA

NEPA is a planning process that has two objectives. First, NEPA is an action device that forces planners to consider significant environmental impacts of a proposed action. Second, NEPA is a process which provides full disclosure to the public that federal agencies did in fact consider environmental concerns in their decision making process.

In *Robertson v. Methow Valley Citizen Council* (490 U.S. 332, May 1, 1989), the U.S. Supreme Court stated:

NEPA itself does not impose duties mandating particular results, but simply prescribes the necessary process for preventing uninformed—rather than unwise—agency action...If the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs.

40 CFR Sec. 1500.1 Purpose.

The National Environmental Policy Act (NEPA) is our basic national charter for protection of the environment. It establishes policy, sets goals (section 101), and provides means (section 102) for carrying out the policy. Section 102(2) contains “action -forcing” provisions to make sure that federal agencies act according to the letter and spirit of the Act. The regulations that follow implement section 102(2). Their purpose is to tell federal agencies what they must do to comply with the procedures and achieve the goals of the Act. The President, the federal agencies, and the courts share responsibility for enforcing the Act so as to achieve the substantive requirements of Section 101.

- (a) NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA. Most important, NEPA documents must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail.
- (b) Ultimately, of course, it is not better documents but better decisions that count. NEPA's purpose is not to generate paperwork—even excellent paperwork—but to foster excellent action. The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment. These regulations provide the direction to achieve this purpose.

NEPA for the first time opened Federal Agency decision making processes to involvement and scrutiny by state and local government. In fact, NEPA requires that the comments and views of state, county and other federal agencies be obtained and documented as part of its process.

Sec. 1506.2 Elimination of duplication with State and local procedures.

- (a) Agencies authorized by law to cooperate with State agencies of statewide jurisdiction pursuant to section 102(2)(D) of the Act may do so.
- (b) Agencies shall cooperate with State and local agencies to the fullest extent possible to reduce duplication between NEPA and State and local requirements, unless the agencies are specifically barred from doing so by some other law. Except for cases covered by paragraph (a) of this section, such cooperation shall to the fullest extent possible include:
 - (1) **Joint planning processes.**
 - (2) **Joint environmental research and studies.**
 - (3) **Joint public hearings (except where otherwise provided by statute).**
 - (4) **Joint environmental assessments.**
- (c) Agencies shall cooperate with State and local agencies to the fullest extent possible to reduce duplication between NEPA and comparable State and local requirements, unless the agencies are specifically barred from doing so by some other law. Except for cases covered by paragraph (a) of this section, such cooperation shall to the fullest extent possible include joint environmental impact statements. In such cases one or more Federal agencies and one or more State or local agencies shall be joint lead agencies. Where State laws or local ordinances have environmental impact statement requirements in addition to but not in conflict with those in NEPA, Federal agencies shall cooperate in fulfilling these requirements as well as those of Federal laws so that one document will comply with all applicable laws.
- (d) To better integrate environmental impact statements into State or local planning processes, statements shall discuss any inconsistency of a proposed action with any approved State or local plan and 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 plan or law.

Technically, unless the local government applies for a Lead Agency Status they cannot be joint partners with the agency. Most local governments cannot afford the huge costs associated with federal planning, especially the research necessary for writing Environmental Impact Statements. However, in practice the local government can apply for Cooperating Agency Status and receive all the benefits associated of a joint partnership and none of the costs.

James Connaughton, Chairman of the President's Council of Environmental Quality on January 30, 2002, formalized this benefit to local governments. Connaughton wrote a Memorandum of Understanding to all federal agencies stating:

CEQ regulations addressing cooperating agencies status (40 C.F.R. §§1501.6 & 1501.5) implement the NEPA mandate that Federal agencies responsible for preparing NEPA analyses and documentation do so 'in cooperation with State and local governments...' It is incumbent on Federal agency officials to identify as early as practicable in the environmental planning process those Federal, State, Tribal and local government agencies that have jurisdiction by law and special expertise with respect to all reasonable alternatives or significant environmental, social or economic impacts associated with a proposed action that requires NEPA analysis. (See page 85 for full text)

Legal Concepts & Guidelines Regarding NEPA

There are two triggers of NEPA (Both must be present before NEPA analysis is needed). First, there must be the irreversible and irretrievable commitment of Federal resources. These resources can include federal funding, a federal permit, federal land, or a commitment of federal personnel. Second, there must be the potential for environmental effect.

There are three main principles of NEPA. First, the requirements of NEPA have only been met when the lead agency has enough site-specific information and analysis to make an irreversible and irretrievable commitment of resources to a project. Case law states that this site-specific analysis and documentation must be complete before any decision are made to implement an action.

Second, the scope of the NEPA document must clearly identify the objectives of the proposed action, the decisions that must be made, and the action's possible effects that are to be considered. Third, the environmental analysis and documentation must be issue-driven and analytical rather than just an encyclopedia of information. An agency must clearly identify the adverse impacts a project may have on the natural and human environment if the project is implemented. The agency must create alternative ways and mitigation measures that address the projects objectives, then attempt to resolve the project's adverse affects. The agency must predict the impact the project and each of its proposed alternatives have on each identified issue. Finally, this information and analysis must be disclosed to the public.

Laws affected by NEPA

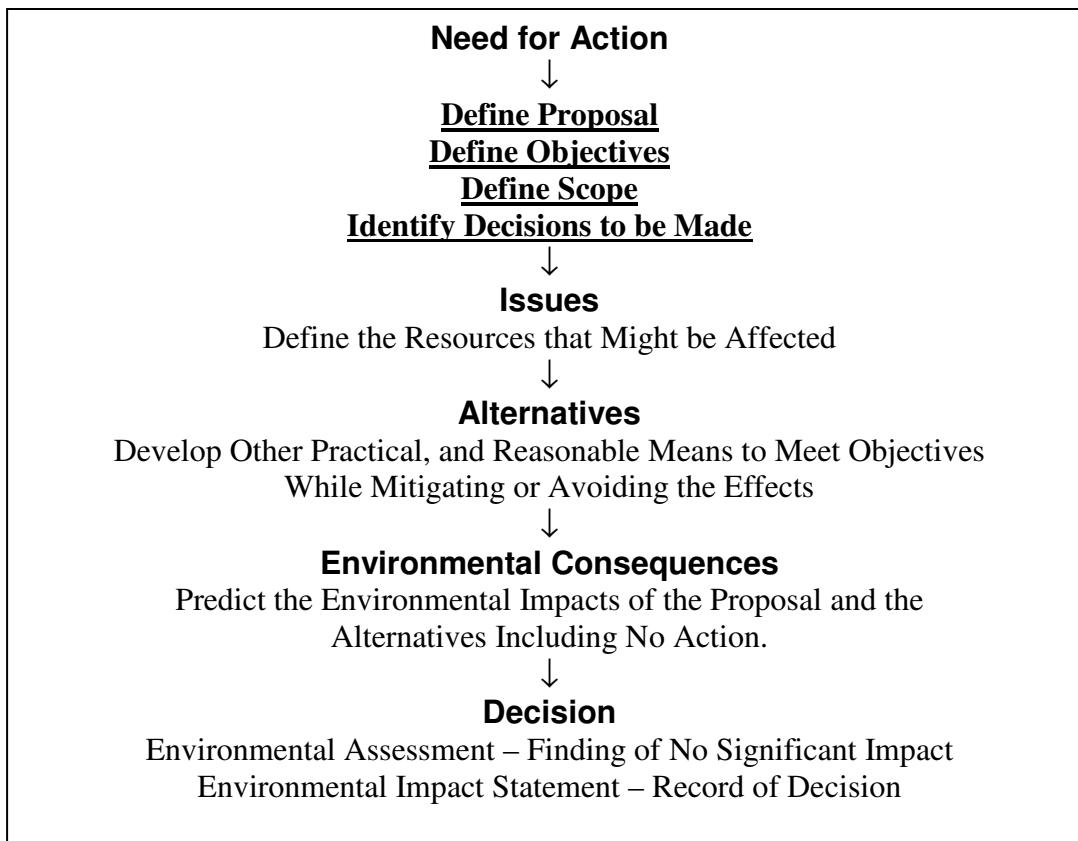
Section 1502.25(a) of the CEQ regulations requires "[t]o the fullest extent possible, agencies shall prepare draft environmental impact statements concurrently with and integrated with environmental impact analyses and related surveys and studies required by..." federal laws including the:

- * Clean Water Act
- * Clean Air Act
- * Endangered Species Act
- * Federal Lands Protection and Management Act
- * National Forest Management Act
- * National Historic Preservation Act
- * Resource Conservation and Recovery Act
- * Archaeological Resources Protection Act
- * Comprehensive Environmental Response, Compensation, and Liability Act
- * Superfund

This section of NEPA, thus allows state and local participation in most all federal environmental decision making processes.

Analytic Planning Process Required by NEPA

Law requires that the NEPA process be interdisciplinary and that its analysis process be systematic. This means that the steps of the NEPA process are organized and build on each other. It also means that the process is cyclic, so that whenever a new significant circumstance or change in the proposal occurs, the process returns to the appropriate point. The process is to drive the outcome of the document. The desired outcome is not to drive the process.



To facilitate this process, the following analytical steps have been provided by federal agencies.

Determine the Need for Action Section 1502.3

The first step in the environmental process is for the agency to identify the Need for Action. Needs for Action may include:

1. A specific agency mission or policy that needs to be fulfilled
2. A specific problem that needs to be addressed
3. A specific request for action that needs to be considered
4. A specific deficiency that needs to be filled

If there is no need for action, there is no action to be considered under NEPA.

Define the Proposal Section 1508.23

The second step in the NEPA process is for an agency to define the proposal. A proposal exists at the stage in the development of an action when an agency subject to the Act 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.”

An example of a proposal is the U.S. Forest Service proposing to commercially thin 5,000 acres in the Medicine Bow National Forest so that spacing between Ponderosa pine is no less than 12 feet.

Determine the Objectives

Objectives are intended to fulfill the Need of Action. Objectives must be clearly and specifically defined, in quantitative terms when possible, so that practical means (Alternatives) can be developed to meet these objectives.

An example of an objective is the U.S. Forest Service wishes to reduce fuel loading so wildfires can be consistently contained within 100 acres during the peak fire season.

Define the Scope

The objectives of a proposed action, the decisions to be made, and the effects to be considered in the environmental analysis and document must be clearly identified. This is called the “scope” which defines the parameters of the environmental analysis, and it is the most critical step in defining the direction and intensity of the analysis process. Responsibility for selecting the scope rests with the lead agency in consultation with its cooperating agencies. But, once the scope is selected, whether narrow or broad, NEPA requires that site specific analysis be conducted before a decision to implement the objectives can be implemented and irreversible and irretrievable resources are committed. NEPA also requires that the scope of the analysis selected by the agency be appropriate to understand the impacts fully. (See Text Box)

Sec. 1508.25 Scope.

Scope consists of the range of actions, alternatives, and impacts to be considered in an environmental impact statement. The scope of an individual statement may depend on its relationships to other statements (Sec. 1502.20 and 1508.28). To determine the scope of environmental impact statements, agencies shall consider 3 types of actions, 3 types of alternatives, and 3 types of impacts. They include:

(a) **Actions** (other than unconnected single actions) which may be:

(1) **Connected actions**, which means that they are closely related and therefore should be discussed in the same impact statement. Actions are connected if they:

(i) Automatically trigger other actions which may require environmental impact statements.

(ii) Cannot or will not proceed unless other actions are taken previously or simultaneously.

(iii) Are interdependent parts of a larger action and depend on the larger action for their justification.

(2) **Cumulative actions**, which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement.

(3) **Similar actions**, which when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental consequences together, such as common timing or geography. An agency may wish to analyze these actions in the same impact statement. It should do so when the best way to assess adequately the combined impacts of similar actions or reasonable alternatives to such actions is to treat them in a single impact statement. (con't next page)

- (b) **Alternatives**, which include:
 - (1) **No action alternative**.
 - (2) **Other reasonable courses of actions**.
 - (3) **Mitigation measures** (not in the proposed action).
- (c) **Impacts**, which may be: (1) Direct; (2) indirect; (3) cumulative.

Sec. 1508.7 Cumulative impact.

Cumulative impact is the 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.

Sec. 1508.8 Effects.

Effects include:

- (a) **Direct effects**, which are caused by the action and occur at the same time and place.
- (b) **Indirect effects**, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems. Effects and impacts as used in these regulations are synonymous. Effects includes ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative. Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.

Identify the Decision to Be Made

In analyzing the scope of a project, the agency must consider its legal requirements and repercussions, public expectations and desires, deadlines, need for action, the results of not taking action, and costs. Decisions to be made include how, when, how much, and possibly where the objectives of a need for action will be met, and whether the impacts of such actions are significant enough to require an Environmental Impact Statement.

To determine if the impacts of an action are significant enough to require an Environmental Impact Statement, agencies normally prepare an Environmental Assessment.

Environmental Assessments

Environmental Assessments are used to analyze whether significant environmental impacts will occur if an action is undertaken and if an Environmental Impact Statement evaluating these impacts in greater detail is necessary. (See the following text box for CEQ determination of significance.)

Environmental Assessments are also used for actions not believed to have *significant* environmental impact, but where decisions must be made regarding alternative uses of available resources. CEQ created the Environmental Assessment under the authority section 102(2)(E), and defines when an Environmental Assessment is necessary in section 1501.3 of its regulations. CEQ states that “the a gency shall involve environmental agencies, applicants, and the public, to the extent practicable, in preparing assessment...” Section 1501.4(b)

Sec. 1508.27 Significantly.

Significantly as used in NEPA requires considerations of both context and intensity:

- (a) **Context.** This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short- and long-term effects are relevant.
- (b) **Intensity.** This refers to the severity of impact. Responsible officials must bear in mind that more than one agency may make decisions about partial aspects of a major action. The following should be considered in evaluating intensity:
 - (1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.
 - (2) The degree to which the proposed action affects public health or safety.
 - (3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.
 - (4) The degree to which the effects on the quality of the *human environment* are likely to be highly controversial.
 - (5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.
 - (6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.
 - (7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.
 - (8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.
 - (9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.
 - (10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment. [43 FR 56003, Nov. 29, 1978; 44 FR 874, Jan. 1979]

Section 1508.14 Human environment

“Human environment” shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with the environment. This means that economic or social and natural effects are not intended by themselves to require preparation of an environmental impact statement. When an environmental impact statement is prepared and economic or social and natural or physical effect are interrelated, then the environmental impact statement will discuss all of these effects on the human environment.

If agencies determines that their actions with have no significant impact on the environment, it is required under Section 1501.4(e)(2) of NEPA to ‘make their finding of no significant impact (FONSI) available for public review (including state and local clearinghouses) for 30 days before the agency makes its final determination whether to prepare an environmental impact statement and before action may begin.

Section 1508.13 requires federal agencies to describe within the FONSI decision document why the action will not have significant effect on the human environment and why an environmental impact statement will not be prepared.

The decision criteria that must be considered in FONSI document includes:

- i) Technical Factors
- ii) Economic Factors
- iii) Environmental Factors
- iv) Political Considerations
- v) Administrative Considerations
- vi) Professional Values
- vii) Personal Values

The burden of proof to demonstrate that no significant effects are even likely lies on the agency, thus FONSI decisions can be vulnerable to litigation.

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