

NEPA Explained

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Keeping trails and areas depends on access. Keeping that access depends on land management policies and procedures, which depend on environmental issues and concerns. Those environmental issues and concerns are reviewed through NEPA.

So, what is “NEPA”? NEPA, the National Environmental Policy Act, became law on January 1, 1970 and is the basic national charter for protecting the environment. Ten years in making, NEPA is the controlling guidance for federal agencies for virtually any activity undertaken, funded, or permitted that affects the environment. All federal agencies are covered by NEPA and share some common procedures; however, each agency has different specific rules defining their NEPA process.

Key Point: NEPA applies to any activity for all federal agencies.

NEPA establishes a process that outlines federal agency responsibilities and guides public involvement. NEPA applies to “major federal actions”. The term “major” applies to the significance of the impact on the environment. NEPA is the **process** of assessing the impacts of actions on the physical, biological, and human environment. NEPA provides for **notification** by federal agencies that an action will be proposed. It provides for public **involvement** in the decision making process. And, NEPA provides a strict **timeline** for and documentation of the federal decision making process.

Key Point: NEPA is a process that includes notification rules, public involvement in decision making and timelines for decisions.

While NEPA applies to federal actions, certain nonfederal activities that require a permit, regulatory decision, or federal funding may be subject to NEPA. The NEPA process starts with a planning process for a proposed agency action, often advertised in the Federal Register. During this step, the agency develops a general description of the proposed action.

There are four main objectives in this step: 1) collect information and document the area; 2) determine the objectives of the planning effort; 3) develop a timeline and budget for the plan; and 4) identify stakeholders.

At this stage, the public has an opportunity to become involved in the planning process and express comments and concerns about the proposed action. It is not necessary to wait for a formal announcement of a proposed action to become involved. Comments and concerns from the public may be submitted at any time and may be used to develop proposed actions. Members of the public should be presenting data and proposals to the agency, as well as, compiling information about what the agency should be looking at during the planning process.

Key Point: the public can and should be involved as early as possible in any

project affecting their area of interest. Do not wait!

A review of the proposed agency action and public comments and concerns may lead to a “Categorical Exclusion” or other exemption authorized by Congress. It can also lead to a need for further review through an Environmental Assessment (EA) or Environmental Impact Statement (EIS).

The term “Categorical Exclusion” (CatEx) is applied to actions that do not individually or cumulatively have a significant effect on the environment: typically small, routine actions. As always, exceptions do occur. Categorical Exclusions are not applied in proposed actions that affect wetlands or threatened and endangered species.

Key Point: CatEx’s apply only to small routine projects.

An EIS is required if the proposed action has the potential to “...significantly affect the quality of the human environment”. If the proposed action does not meet the criteria for Categorical Exclusion or other exemption, it is reviewed to determine if an EIS is required. The Environmental Assessment is used for this purpose. Often, the EA is used help the agency determine if the impacts of the proposed action will be significant. The EA will document the need for an EIS or document and justify a Finding Of No Significant Impact (FONSI).

Key Point: the EA leads to the decision of whether a EIS or a FONSI is appropriate.

The EA contains a brief description of the proposed action, reasonable alternatives, and the probable environmental impacts. The EA must consider cumulative impacts when determining that a proposed action significantly affects the environment.

The agency is required to provide public notice of availability of EA documents. Each agency has their own regulations concerning the public notice (**scoping**) requirements. A “scoping period” is not required to prepare an EA. Often, agencies will use a scoping period to define alternatives to a proposal or determine significant environmental impacts.

Key Point: The scoping period is when the public has their say.

The EA will end with a FONSI or a determination that an EIS is required. A FONSI describes why an action not otherwise excluded will not have any significant effects on the environment. The NEPA regulations do not prescribe a public review period for a FONSI. In certain circumstances, the agency must make the FONSI available for at least a 30-day public review. As with an EA, the agency is required to provide public notice of availability of FONSI documents.

Key Point: all documents in NEPA require notice and most require public involvement.

An EIS is required if the proposed action has the potential to “...significantly affect the quality of the human environment”. For an action to “affect” the environment, it must have a causal relationship with the environment: direct, indirect, or cumulative. An EIS

is required to provide a full and fair discussion of environmental impacts of proposed alternatives. The EIS contains a full description of the **proposed action**, reasonable **alternatives**, and the probable environmental **impacts** that would avoid or minimize the adverse impacts of the proposed action.

Key Point: the EIS describes the proposed action, the alternatives and the impacts.

NEPA regulations provide for three types of EISs: 1) Individual proposed action, 2) "Programmatic" on broad federal actions, and 3) Legislative.

The "Individual Proposed Action EIS" is specific to single proposed action. The "Programmatic EIS" applies to such issues as adoption of regulations, policies, or plans. The "Legislative EIS" is prepared for proposed legislation. As previously stated, an EIS is required if the proposed action has the potential to "...significantly affect the quality of the human environment". The Individual proposed action and Programmatic EISs are the most common types prepared by federal agencies or public lands managers.

The NEPA process for an EIS begins with publishing a Notice of Intent (NOI) in the Federal Register. The NOI is the official agency public announcement that a proposed planning effort is starting. During this part of the planning process, the agency solicits public input to identify major resource issues to be addressed in the proposed plan. At this point, the public will have at least 30 days to provide comments pertaining to the area to be addressed in the plan.

Key Point: the first step of an EIS is the NOI which allows at least 30 days for public comment.

The first step, the scoping period, is the first formal opportunity for the public to participate in the NEPA planning process. At this time, public meeting dates may be scheduled during the duration of the scoping period. During the scoping period, you can provide written comments that identify key issues and concerns, identify current or expected uses that can contribute to cumulative impacts on the environment, and identify actions that can lessen expected impacts to the environment.

Key Point: after the NOI, Scoping begins, and the public has its first chance to get involved.

It is very important for members of the public to participate in the scoping stage of the planning process. Frequently, the scoping period will introduce travel management plans. It is important to include any data on existing or incorrectly identified routes to be included in the final stages of the planning process.

The scoping period will define the social, economic, and environmental issues, develop reasonable alternatives, and define mitigation measures. The agency will use this data to develop a draft EIS.

Key Point: data and comments gathered during Scoping are used to develop the first draft EIS.

A major section of the draft EIS is the range of alternatives. An EIS is required to have at least three alternatives: 1) No Action Alternative; 2) Agency Preferred Alternative; and 3) an Environmentally Preferred Alternative.

The “No-Action Alternative” provides the point of reference for comparison of the environmental effects of the other alternatives. The “Agency Preferred Alternative” is the one that best fulfills the agency mission and statutory responsibilities considering the identified social, economic, and environmental issues. The “Environmentally Preferred Alternative” is the one that best promotes the national environmental policy expressed in NEPA. Generally, this alternative causes the least damage and best protection to the environment.

Key Point: all the possible alternatives must be presented in the EIS.

Depending on the complexity of the proposed action, additional alternatives may be provided. In addition, members of the public have the option to develop and submit their own alternative for consideration.

Each alternative is reviewed and compared using a scientific and analytical basis to determine the environmental effects and any adverse effects that cannot be avoided. In general, the effects include direct, indirect, and cumulative effects, conflicts with laws or other plans, and social and economic effects. As noted, the alternatives must provide a “reasonable” range of alternatives and a scientific and analytical comparison of the alternatives. And, measures to mitigate adverse environmental impacts must be included in the comparison review.

Once complete the draft EIS is released for a minimum 45-day review and comment by members of the public and other federal, state, and local government agencies. Comments should be specific and relevant to the proposed action. In general, comments should identify incomplete or incorrect information, offer a new idea or alternative, or describe why an alternative or element would or would not work.

The draft EIS and all comments are reviewed and used to develop the Final EIS. The intent of the NEPA process is to help agencies make decisions based on an understanding of environmental consequences. The data contained in the draft EIS and the public comments are used to develop final actions that protect, restore, and enhance the environments.

Key Point: The data contained in the draft EIS and the public comments are used to develop final actions that protect, restore, and enhance the environments.

NEPA requires that federal agencies disclose the environmental effects of their actions and identify alternatives and mitigation measures. NEPA does not require agencies to implement environmentally preferred alternatives or mitigation measures.

The final alternative must have been adequately discussed and evaluated in the EIS. Once selected, the agency will issue a Record of Decision (ROD) stating the final selected alternative along with a statement explaining the decision and factors

considered during the decision process. Additional information such as mitigation measures and monitoring and enforcement actions will be included in the ROD. All documentation, including public comments received, becomes part of the official Administrative Record for the proposed action.

Key Point: after all this, a ROD states the final alternative.

Agency responsibility does not stop with the ROD. Every 3-5 years, the decisions documented by an EIS are required to be reviewed. Any new data can generate a new EIS or an amendment to the current EIS.

NEPA regulations provide for an administrative appeal process of the final decision. The exact process is detailed in the individual agency NEPA regulations.

NEPA contains no enforcement mechanism or authority. Enforcement of NEPA is through lawsuits brought by private citizens, special interest groups or state and local governments or agencies. Courts have recognized that NEPA does not impose a substantive duty on federal government to protect the environment. Instead, the courts have take the role of ensuring that the agency has adequately reviewed the environmental consequences and adequately documented the decision making process. Under a judicial review, courts are restricted to reviewing the official Administrative Record when determining whether a federal agency violated NEPA requirements. As always, there are exceptions.....

Reference Sources:

The National Environmental Policy Act of 1969 as amended (PL 91-190, 42 USC 4321-4347, Jan. 1, 1970, as amended by PL 94-52, Jul. 3, 1975, PL 94-83, Aug. 9, 1975, and PL 97-258, Sept 13, 1982)

Memorandum: Forty Most Asked Questions Concerning CEQ's NEPA Regulations (46 Fed. Reg. 18026, Mar. 23, 1981 as amended by 51 Fed. Reg. 15618, Apr 25, 1986)

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