



ADVOCATES for the **West**

The National Environmental Policy Act: 101

Lizzy Potter
Advocates for the West, Inc.
Boise-Portland-D.C.

Purpose:

Introduce NEPA and
how you can use the statute to protect
National Conservation Lands

National Environmental Policy Act (“NEPA”)

- NEPA is “our basic national charter for protection of the environment” 40 C.F.R. § 1500.1(a)
- Twin purposes:
 - (1) to foster **informed decision making** by requiring agencies to consider the environmental impacts of their proposed actions; and
 - (2) to ensure that agencies **inform the public** that they have considered environmental concerns in their decision making.

When does NEPA apply?

- When agencies propose **major federal actions significantly** affecting the quality of the human environment. 42 U.S.C. § 4332
- **Actions** include: new or continuing activities, whether entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies; new or revised agency rules, regulations, plans, policies, or procedures; and legislative proposals. 40 C.F.R. § 1508.18
- **Major** has no independent meaning. 40 C.F.R. § 1508.18
- **Significantly** requires consideration of the context and intensity of the action. 40 C.F.R. § 1508.27 lists the **factors to consider** when evaluating the context and intensity of the action.

What does NEPA require?

- Where a proposed federal action will have significant impacts, the agency must prepare an **environmental impact statement**
- The EIS must take a “**hard look**” at those impacts by disclosing:
 - Direct, indirect, and cumulative effects of the action;
 - A reasonable range of alternatives to the proposed action; and
 - High quality information and accurate scientific analysis with professional and scientific integrity;
 - and more. 42 U.S.C. § 4332(2)(C); 40 C.F.R. §§ 1502.14, 1502.16
- Some activities **categorically require** preparation of an EIS, like a Resource Management Plan (“RMP”). 43 C.F.R. § 1601.0-6
- Agencies **must supplement an EA/EIS** if there are substantial changes to action, or significant new info or circumstances arise. 40 C.F.R. § 1502.9(c).

May the Agency Avoid an EIS?

- Agencies may prepare a more concise **environmental assessment** to determine if an EIS is required
 - Often results in a Finding of No Significant Impacts ("FONSI"). 40 C.F.R. §§ 1501.4(e), 1508.9, 1508.13
 - Not all EIS requirements apply
- Other activities may be **categorically excluded** ("CE" or "CX") from NEPA unless extraordinary circumstances arise. 43 C.F.R. § 46.210
 - Personnel, monitoring, post-fire logging or hazardous fuels work, etc.
 - Agencies often try to shove large projects into these buckets
- Agency may use a **Determination of NEPA Adequacy** ("DNA") to determine an existing EIS/EA is adequate – but rarely appropriate.

What does NEPA not allow or require?

- Agencies may not use an EIS/EA to merely rationalize a predetermined outcome – they must **start early** enough to contribute to the decision-making process. 40 C.F.R. § 1502.5
- **DOES NOT dictate particular outcome** nor require the agency to choose the most environmentally-beneficial outcome
- PROHIBITS:
 - **Irreversible and irretrievable commitment of resources** pending EA/EIS. 42 U.S.C. § 4332(2)(C)(5)
 - Actions that would have an **adverse environmental impact or limit the choice of reasonable alternatives**. 40 C.F.R. § 1506.1

Opportunities to Participate in a Typical NEPA Process

- **Pre-planning:** Request interested party status and notice of any developments *in writing*. 40 C.F.R. § 1506.6(b)
- **Environmental Assessments**
 - Draft EA – likely a public comment period. 40 C.F.R. § 1506.6(a)
 - Final EA + FONSI – maybe comment period. 40 C.F.R. § 1501.4(e)(2)
- **Environmental Impact Statement**
 - Scoping period – asks for comment on what issues the agency should consider. 40 C.F.R. § 1501.7
 - Draft EIS + public comment period.
 - Final EIS must respond to comments on DEIS, and include 30-day wait before final decision. 40 C.F.R. §§ 1502.9(b), 1503.4
 - Record of Decision (“ROD”). 40 C.F.R. § 1505.2

Issue Spotting

- Did the agency rely on a stale EIS/EA through a DNA or did the agency abuse a CE/CX?
- Did the agency take action before it finished the NEPA analysis?
- Should the agency have prepared an EIS instead of an EA/FONSI?
- Did the agency provide adequate public notice and comment? You can ask agency to extend the comment deadline if needed.
- Did the agency leave out tribes, local communities, expert wildlife or resource agencies, or other interested persons from the process?
- Did EA/EIS address and disclose the key impacts and alternatives?
- Did EA/EIS rely on accurate and sound science?

Key Issues to Raise in Comments on an EA or EIS

- **Purpose and need** 40 C.F.R. § 1502.13
- **Alternatives are the “heart”** 40 C.F.R. § 1502.14
 - Propose a citizen’s alternative
 - A “reasonable range” should include no-action/status-quo
- **Affected environment** 40 C.F.R. § 1502.15
 - Point out missing data about species, recreation, cultural resources, or other aspects of the environmental baseline
 - Call the agency out on misrepresenting or excluding studies or data
 - Did the agency include the entire area that may be affected?
- **Environmental impacts** 40 C.F.R. § 1502.16
 - Ignoring or poorly describing direct, indirect, & cumulative impacts
 - Conflicts with other laws or policies
 - Sloppy or poor analysis

Other Issues to Consider or Raise

- **Remind agency of other legal obligations** – prevent undue degradation under FLPMA, follow duties under enabling legislation for special place, or protect objects in National Monument proclamation
- **Review documents that EA/EIS relies on** – e.g., specialist reports
- **Make comments specific and include supporting docs.** 40 C.F.R. § 1503.3
- **Other agencies must comment** if they have jurisdiction or expertise, 40 C.F.R. § 1503.2, so figure out what they said
- **Incorporation by reference** OK if “it is reasonably available for inspection ... within the time allowed for comment”. 40 C.F.R. § 1502.21.
- **Tiering** to programmatic or broad EIS may be ok. 40 C.F.R. § 1502.17
- **Agency must insure the professional and scientific integrity**, and identify its methodologies, and sources relied upon 40 C.F.R. § 1502.24

Using NEPA to Achieve Your Goals

- **Challenging a decision through appeals or litigation**
 - Commenting at every step to exhaust administrative remedies
 - Raise all potential issues and include all potential support in the record
- **Advancing your agenda through policy avenues**
 - Part of a public campaign to engage federal agencies, politicians, or local/state agencies to oppose project, introduce legislation, etc.
 - Examples of public comment campaigns succeeding
- **Outreach goals**
 - Use disclosure of impacts to rally local communities
 - Action alerts and generating significant attention

Resources

- Dep't Interior NEPA regs: 43 C.F.R. Part 46
- BLM NEPA Citizens Guide:
<https://www.blm.gov/programs/planning-and-nepa/what-informs-o>
- BLM E-Planning Portal: https://eplanning.blm.gov/epl-front-office/eplanning/lup/lup_register.do
- Council on Environmental Quality (“CEQ”):
<https://ceq.doe.gov/>
- Wilderness Society BLM Citizen’s Guide

Questions?

- Lizzy Potter
 - epotter@advocateswest.org
- Todd Tucci
 - ttucci@advocateswest.org