

One of the most important provisions, of the new NEPA law, § 107(f), allows the lead agency to delegate preparation of environmental reviews to project applicants. There are unsettled questions about when this provision applies and how it interfaces with other parts of NEPA. There are clear conflicts of interest in assigning this role to the project applicant.

Section 107(f) reads as follow:

“A lead agency shall prescribe procedures to allow a project sponsor to prepare an environmental assessment or an environmental impact statement under the supervision of the agency. Such agency may provide such sponsor with appropriate guidance and assist in the preparation. The lead agency shall independently evaluate the environmental document and shall take responsibility for the contents.”

This seemingly simple language will not be quite so simple to implement. Below I discuss some of the main issues.

State government units. Prior to the 2023 amendments, NEPA § 102(2)(D) provided for preparation of environmental impact statements by state agencies for federally funded projects. The 2023 amendments retained this provision but renumbered it as subsection (G). The problem is that subsection (G) contains restrictions that are not found in new 107(f):

- Subsection (G) applies only to projects where the nexus is funding rather than requirement of a federal permit or other approval.
- It applies only when the state official or agency has statewide jurisdiction.
- It applies only to environmental impact statements, not environmental assessments.
- It requires “early notification” to other affected agencies and jurisdictions and requires the funding agency to respond in writing to any disagreements.
- It requires federal funding agencies to “furnish guidance and participate in such preparation,” whereas under section 107(f) this is discretionary.

The upshot is that state agencies are subject to greater restrictions than private sector firms receiving federal project funding. It’s hard to see any reason why that makes sense. Moreover, agencies can apparently give greater responsibility to local government units (which aren’t covered by subsection (G)) and to state governments for actions that are federally regulated but not federally funded. That also doesn’t seem to make much sense.

CEQ might best deal with these issues through by importing some of the requirements of subsection (G) into regulations implementing section 107(f). The counter-argument would be that Congress could have done so itself but chose not to, implying that section 107(f) was supposed to be more freewheeling than subsection (G). However, it seems more plausible that delegation to private applicants was supposed to be more restrictive than delegation to state agencies, not less so. That argues for using subsection (G) as the starting point for implementing section 107(f).

Coverage of agency regulations. Agencies are required to issue regulations but there is no deadline for doing so. So until the agency issues a regulation, participation by project sponsors is not allowed. What happens if the agency issues a regulation empowering preparation of environmental documents for some categories of projects or applicants but not others? There's nothing in the statute that requires all categories to be covered in a single regulation. It's also not entirely clear whether the agency regulation is supposed to cover all applicants and projects. Section 107(f) speaks of the regulation authorizing "a project sponsor". That seems ambiguous. It could mean "some" project sponsors or "any" project sponsor. The use of "shall" might support coverage of all project sponsors but might only mean that the agency has to issue regulations covering at least some sponsors.

New research and analysis. New section 106(a)(3) requires an agency to conduct new research or analysis when that is essential to determining the need for an impact statement and "the overall costs and time frame of obtaining it are not unreasonable." One question is whether this provision applies at all when a project applicant rather than an agency is involved. If it does, what is an unreasonable cost might well be different for a cash-strapped agency versus a private firm that stands to make a substantial profit from a project.

Role of cooperating agencies. Section 107(f) says that the private applicant can produce "an" environmental review, rather than "the" environmental review. This seems to leave the door open to other EIS or EAs by agencies other than the lead agency. This also seems implied by § 107(b), which calls for one environmental review document only "to the extent practicable."

Cooperating agencies are also supposed to have the right to comment on an impact statement. Does that apply only after the applicant's work is done, or do they have input into the applicant's process?

Public input. Section 107(c) requires the statement of intent to prepare an environmental impact statement to include "a request for public comment on alternatives or impacts and on relevant information, studies, or analyses with respect to the proposed agency action." It

sounds like this input is supposed to happen at the stage when the applicant is preparing the draft impact statement. What opportunities will the public have to provide input before or after that phase?

Content of the agency regulations. Section 107(f) does not speak to the content of the agency regulations. However, other provisions seems to prevent the agency from giving the applicant a blank check. New section 102(2)(D) requires all agencies to “ensure the professional integrity including the scientific integrity, of the discussion and analysis in an environmental document.” It is followed by new subsection (E), which requires agencies to “make use of reliable data and resources in carrying out this Act.” This provisions clearly require the agency to take steps to insure that the data and analysis in an applicant-prepared environmental review be unbiased and reliable. CEQ will have to figure out how to operationalize that in its regulations.

Review by the lead agency. The lead agency is required to “independently evaluate” the applicant’s work product. Is it sufficient if the agency merely certifies that it has done so? Or must the lead agency take other steps, such as consulting other agencies or allowing public input? Must the agency write a separate document assessing controversial issues in the applicant’s document?

One analogy might be provided by the common practice in which trial courts ask the parties to submit proposed findings of fact and conclusions of law. Appeals courts tend to be unhappy if the trial court merely rubberstamps the document submitted by the winning side.

Given the two-year limit on the issuance of an environmental impact statement and the one-year limit for environmental assessments, agencies will need to give applicants substantially less time to prepare their drafts in order to leave time for independent review.

It’s also not clear what procedure should be followed if the lead agency decides to amend the draft — for instance, does it need to give the applicant notice of such a decision?

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One reason it is important for the process to have credibility relates to judicial review.

Since the federal agency is essentially adopting the applicant’s draft (with or without modifications), in theory the normal “arbitrary or capricious” standard should apply during judicial review. However, in practice, courts are likely to be skeptical if the process lacks credibility, since the project applicant is always going to favor going ahead with its favored

alternative.

After all, the unsupported word of the fox that all is well in the henhouse may not receive much judicial deference. It's important to have independent corroboration, lest the hens become daily lunch special.