

Because NEPA's discussion of environmental impact statements (EIS) was very brief, the requirements and procedures were elaborated by courts and guidance from a White House office. That changed in 2023, because much of the subject is now covered explicitly by new statutory language.. Thus, NEPA is a bit less of a "common law" subject than it used to be.

Here are the key questions that have to be addressed in applying NEPA to an agency action and the answers provided by the 2023 amendments.

Is any environmental document required (§ 106(a))?

An environmental document such as an EIS is required unless:

1. The action is not considered final under the Administrative Procedure Act.
2. The action is subject to a categorical exclusion.
3. The action is non-discretionary and the "agency does not have authority to take environmental factors into consideration in determining whether to take the proposed action."
4. Preparation of the document would "clearly and fundamentally conflict" with another statute. (§ 102(2)(C) confusingly contains different language, "inconsistent with other statutory requirements").

Section 106 does not reference § 102(2)(C), which applies the EIS requirement only to "major" actions (as defined in § 111(10)). On a literal reading, environmental documents are required under § 106 even for non-major actions. But presumably this was not intended, despite the sloppy drafting.

Who prepares an environmental document?

If more than one agency is involved, a lead agency is designated, and the presumption is that it will be in charge of all environmental documents (though this is not mandatory). However, drafting can also be delegated to a project sponsor such as a permit applicant, subject to final agency review. (§ 107).

What kind of document — an environmental impact statement (EIS) or just an environmental assessment (EA)?

Under § 107(b), an EIS is required if the action "has a reasonably foreseeable significant effect on the quality of the human environment."

If the agency finds that action's impact is not significant or that "the significance of such

effect is unknown,” it prepares a more streamlined document called an environmental assessment (EA).

What does an EA involve (§ 107)?

An EA contains a “finding of no significant impact” (FONSI) or a finding that an EIS is required, is under 75 pages long, and is generally due within a year of when the agency decides to prepare it. It must “include a statement of purpose and need that briefly summarizes the underlying purpose and need for the proposed agency action.”

Section 102(2)(F) requires a discussion of “technically and economically feasible alternatives.” That requirement seems to be pretty much duplicated by § 102(2)(H) — one of many drafting glitches in the 2023 amendments. (See my next post for more about this).

What does preparing an EIS entail (§ 107)?

In terms of process, here are the statutory rules:

1. An EIS must be under 150 pages (300 for an action of extraordinary complexity), and is generally due within two years of when the agency decides it is required.
2. The notice of intent to produce an EIS must request public comment.
3. Section 107 requires appointment of a single agency to lead the process when multiple agencies have authority over some or all of a project.
4. Under section 1087(f), agencies now have the power to delegate preparation of the documents to the project sponsor, subject to final agency approval. This is a big change from prior law.

In terms of content, here are the requirements:

1. Like an EA, an EIS must include a statement of purpose and need.
2. The EIS must discuss reasonably foreseeable environmental effects.
3. It must also discuss “a reasonable range of alternatives to the proposed agency action . . . that are technically and economically feasible, and meet the purpose and need of the proposal.” (§102(2)(C)(iii)). Note that the “purpose and need restriction” is absent from sections 102(2)(F) & (H), which seemingly require a broader range of alternatives, yet another drafting misfire.

The White House Council on Environmental Quality is has proposed new guidelines that flesh out a lot of details about the process, but the amended statute codifies and sometimes

modifies requirements that were previously up to the courts and the executive branch.