

NEPA OVERVIEW & ANALYSIS

2010 Environmental Law
Workshop

Loyola Law School/Sierra Club
Angeles Chapter

Summary

- ▶ 1. OVERVIEW OF STATUTE
- ▶ 2. COMPARISONS TO CEQA
- ▶ 3. DISCUSSION OF NEPA AND GHG's
 - CASE LAW
 - RECENT GUIDANCE FROM CEQ

WHAT IS NEPA?

- ▶ The **National Environmental Policy Act** ("**NEPA**"), 42 United States Code sec. 4321 et seq.
- ▶ Signed into law January 1, 1970
- ▶ Established a U.S. national policy promoting the enhancement of the environment and also established the President's Council on Environmental Quality (CEQ).

NEPA HISTORY

- ▶ NEPA signed into law by Pres. Nixon
- ▶ Along with CWA, CAA, ESA
- ▶ NEPA was a model for CEQA, which in turn was model for other state CEQA-like laws

Nixon's Environmental Legacy: Give him a break?



NEPA contains three important sections:

1. Declaration of national environmental policies and goals.
2. Action-forcing provisions for federal agencies to enforce policies and goals.
3. Establishment of a Council on Environmental Quality (CEQ) in the Executive Office of the President.

1. Declaration of national environmental policies & goals.

► Preamble reads:

"To declare national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation..."

2.Action-forcing provisions

Evaluation of environmental effects
of federal actions and undertakings

3 STEPS:

- 1. Categorical Exclusion determination
- 2. Preparation of Environmental Assessment ("EA")
- 3. Preparation of Finding of No Significant Impact ("FONSI")
OR
Preparation of environmental impact statement ("EIS").

1. Categorical Exclusion Determination

- ▶ Action may be categorically excluded from a detailed environmental analysis if it meets certain criteria which a federal agency has previously determined as having no significant environmental impact.
- ▶ A number of agencies have developed lists of actions which are normally categorically excluded from environmental evaluation under their NEPA regulations.

EXAMPLE OF D.O.T. CATEGORICAL EXCLUSIONS

The action does not involve the following:

- ▶ The acquisition of more than minor amounts of temporary or permanent strips of right-of-way for construction of such items as clear vision corners and grading. Such acquisitions will not require any commercial or residential displacements.
- ▶ The use of properties protected by Section 4(f) of the Department of Transportation Act (49 U.S.C. 303).
- ▶ A determination of adverse effect by the State Historic Preservation Officer.
- ▶ Any U.S. Coast Guard construction permits or any US Army Corps of Engineers Section 404 permits.
- ▶ Any work encroaching on a regulatory floodway or any work affecting the base floodplain (100-year flood) elevations of a water course or lake.

2. Preparation of Environmental Assessment ("EA")

- ▶ Agency prepares a written environmental assessment (EA) to determine whether a federal action would significantly affect the environment.
- ▶ An EA is described in Section 1508.9 of the Council's NEPA regulations & includes brief discussions of the following:
 - the need for the proposal
 - alternatives (when there is an unresolved conflict concerning alternative uses of available resources)
 - the environmental impacts of the proposed action and alternatives
 - listing of agencies and persons consulted

3. Finding of No Significant Impact ("FONSI")

- ▶ Not this "Fonsi" from "Happy Days"



FONSI

- ▶ If the answer from EA is “no impacts,” the agency issues a finding of no significant impact (“FONSI”).
- ▶ The FONSI may address measures which an agency will take to reduce (mitigate) potentially significant impacts.

OR Preparation of an Environmental Impact Statement (EIS).

- ▶ If EA determines that the environmental consequences of a proposed federal undertaking may be significant, an EIS is prepared.
- ▶ EIS = a more detailed evaluation of the proposed action and alternatives.
- ▶ The public, other federal agencies and outside parties may provide input into the preparation of an EIS and comment on the draft EIS when completed.

EIS Filings

- ▶ Per October 28, 1977 Memorandum of Agreement between CEQ and the EPA, EPA is responsible for the receipt and filing of EISs prepared by the Federal Agencies.
- ▶ EPA publishes Notices of Availability for all EISs filed during the previous week:
[http://www.epa.gov/compliance/nepa/eisdata.html?](http://www.epa.gov/compliance/nepa/eisdata.html)

NEPA is Procedural

- ▶ NEPA is a purely procedural statute.
- ▶ Even if the analysis reveals significant negative environmental impacts, the agency may go forward with project as long as it fully discloses the negative effects.

3. Implementation of NEPA

Council on Environmental Quality (CEQ)

- ▶ In the Executive Office of the President.
- ▶ In 1978, CEQ promulgated regulations [40 CFR Parts 1500-15081] implementing NEPA.
- ▶ Regulations address administration of the NEPA process, including preparation of EISs.

Some Key Differences Between NEPA & CEQA

- ▶ 1. Comparison of Environmental Documentation
- ▶ 2. NEPA is narrower than CEQA in process and in practice

1. NEPA versus CEQA Documents

NEPA Document Type	NEPA Document	CEQA Document Type	CEQA Document
Categorical exclusion	Categorical exclusion	Categorical exemption	Categorical exemption
Environmental Assessment (EA)	Finding of No Significant Impact (FONSI)	Initial Study (IS)	Negative Declaration (ND) or Mitigated Negative Declaration (MND)
Environmental Impact Statement (EIS)	Record of Decision (ROD)	Environmental Impact Report (EIR)	Notice of Determination (NOD)
Reevaluation	Reevaluation	Addendum	Addendum
Supplemental		Supplemental or Subsequent	

JOINT EIR/EIS

- ▶ If a major federal project, or project using federal funds, is seeking approval in California, its lead agency must prepare both an EIS and an EIR.
- ▶ Both can be combined into one document (since the EIS and EIR have the same elements for the most part).
- ▶ If separate documents, challengers can get two "bites at the apple"

2. NEPA = Narrower Than CEQA

▶ A. CEQA applies more broadly:

- NEPA: applies only to projects receiving federal funding or work
- CEQA: applies to projects receiving any state/local approval, permit, or oversight

NOTE: Development projects in CA funded only by private sources are exempt from NEPA but likely subject to CEQA.

NEPA = Narrower Than CEQA (cont'd)

B: CEQA is more "action-forcing"

- NEPA: agency can list all reasonable alternatives and their impacts, then choose the worst one for the environment.
- CEQA:
 - ▶ requires the lead agency to identify ways to reduce or avoid environmental damages
 - ▶ Agencies must implement alternative or mitigation measures if feasible and would substantially lessen significant environmental effects
 - ▶ agency can approve a project without mitigations or alternatives **only** if it adopts "Statement of Overriding Considerations" which details overriding economic, legal, social, technological, or other considerations that outweigh the project's significant, unmitigated impacts.

NEPA = Narrower Than CEQA (cont.)

C. CEQA = "easier to litigate"

In both CEQA and NEPA, courts play major role in interpreting laws

- ▶ Citizen/interest group lawsuits are the main way the laws are enforced
- ▶ Judicial review almost always based on the "administrative record"
- ▶ What courts look for: facts and reasoning to support conclusions

Barriers to Judicial Review

- ▶ Standing to sue: sometimes a defense under NEPA, less so under CEQA
- ▶ Ripeness: sometimes a defense under NEPA, less so CEQA
- ▶ Exhaustion of administrative remedies: similar under both laws
- ▶ Mootness: similar under both laws

Barriers to Judicial Review

(cont'd)

▶ Attorneys Fees

- CEQA: CCP 1021.5
- NEPA: Equal Access to Justice Act – tougher standard

▶ Statute of limitations

- CEQA: 30–180 days (depending on what's challenged)
- NEPA: 6 years under Administrative Procedure Act (but subject to “laches” doctrine)

Barriers to Judicial Review

(cont'd)

- ▶ CEQA advantages over NEPA:
 - More liberal standing rules
 - "fair argument" standard
 - lower costs, quicker decisions,
- ▶ Joint documents typically sued under CEQA, not NEPA

Legal Remedies under both NEPA and CEQA

- ▶ – Void the agency action
- ▶ – Injunctions: temporary or permanent
- ▶ – Order agency to comply with NEPA or CEQA by redoing document
- ▶ – No order to approve or disapprove project

NEPA CASE LAW OF INTEREST

Greenhouse Gas Cases



Greenhouse Gas Cases

- ▶ Friends of the Earth v. Mosbacher,
488 F. Supp. 2d 889 (N.D. Cal. 2007)
- ▶ Center for Biological Diversity
v. Nat'l Highway Traffic Safety Admin.,
508 F.3d 508 (9th Cir. 2007)

Friends of the Earth v. Mosbacher

488 F. Supp. 2d 889 (N.D. Cal. 2007)

- ▶ Environmental groups challenged OPIC and Export-Import Bank for funding international fossil fuel projects that contribute to climate change
- ▶ Although projects are located abroad, Court finds effects on domestic environment & financing decisions made within U.S
- ▶ Court rejects argument that impact of global warming is too remote and speculative to be considered under NEPA
- ▶ Case later settled with agencies agreeing to study impacts
- ▶ Case did not establish clear legal rules on merits of climate change lawsuits under NEPA

Center for Biological Diversity v. Nat'l Highway Traffic Safety Admin., 508 F.3d 508 (9th Cir. 2007)

- ▶ Challenge to EA for NHTSA rule setting CAFE standards for light trucks for model years 2008-2011
- ▶ Court rejects argument that CAFE rule impact on global warming is "too speculative to warrant NEPA analysis"
- ▶ Impact of greenhouse gas emissions on climate change is precisely the kind of cumulative impacts analysis that NEPA requires agencies to conduct
- ▶ FONSI was arbitrary and capricious for failure to evaluate "incremental impact" that expected emissions would have on climate change
- ▶ EIS was required "because the evidence raises a substantial question as to whether the Final Rule may have a significant impact on the environment"

The CEQ Draft Guidance Re GHG

February 10, 2010



CEQ Guidance

- ▶ Federal courts for some time have held that under some circumstances NEPA requires analysis of the environmental impacts of GHG emissions. See *Mid-States Coalition for Progress v. Surface Transportation Board*, 345 F. 3d 520 (8th Cir. 2003).
- ▶ CEQ's Draft Guidance goes further, offering guidance on when and how that analysis should be performed.

Trigger for GHG analysis = 25,000 tons

- ▶ Draft Guidance proposes annual emissions of 25,000 tons of CO₂-equivalent as an indicator that an assessment of GHGs emissions is meaningful enough to warrant description in the NEPA analysis
- ▶ Above that level, CEQ recommends agencies:
 - (1) quantify cumulative emissions over life of project;
 - (2) discuss measures to reduce GHG emissions, including consideration of reasonable alternatives; &
 - (3) qualitatively discuss the link between such GHG emissions and climate change.

Why 25,000 tons?

- ▶ Twenty-five thousand tons is roughly equal to the annual emissions from a large industrial or commercial facility. (EPA provides a [GHG calculator on its Web site.](#))
- ▶ CEQ notes that 25,000 tons of CO₂-equivalent triggers obligation to report GHG emissions under Clean Air Act regulations recently adopted by EPA
- ▶ CEQ does not propose that 25,000 tons be the threshold for concluding that a project has a significant affect on the environment, thereby necessitating an EIS.
- ▶ As practical matter, most projects with that level of GHG emissions already require NEPA review due to other environmental impacts.

CEQ'S POTENTIAL MITIGATION STRATEGIES RE GHG

CEQ mentions:

- ▶ enhanced energy efficiency
- ▶ lower GHG-emitting technology
- ▶ renewable energy
- ▶ planning for carbon capture and sequestration
- ▶ capturing or beneficially using fugitive methane emissions
- ▶ (it does *not* mention the purchase of carbon offsets as a potential mitigation strategy.)

Effect of climate change on proposed project

- ▶ CEQ notes that climate change can affect a proposed project in a variety of ways, including exposing it to a greater risk of floods, storm surges or higher temperatures
- ▶ Climate change effects should be considered in the analysis of projects that are designed for "long-term utility and located in areas that are considered vulnerable to specific effects of climate change (such as increasing sea level or ecological change) within the project's timeframe."
- ▶ Agencies "need not undertake exorbitant research or analysis of projected climate change impacts in the project area or on the project itself, but may instead summarize and incorporate by reference the relevant scientific literature."

Open Issues in CEQ Guidance

- ▶ What level of GHG emissions should be considered to have cumulative effects?
 - One of the toughest issues re use of NEPA to analyze climate change impacts
 - Will likely draw a large volume of public comment.
- ▶ Should CEQ provide guidance to agencies on how to determine whether GHG emissions are “significant” for NEPA purposes, thus requiring an EIS?

Conclusions Re CEQ GHG Guidance

- ▶ This proposed Guidance is one in a series of recent federal administrative agency actions regarding climate change.
 - EPA's GHG Endangerment Finding
 - Securities Exchange Commission's Guidance on disclosure of climate change risks

FURTHER RESOURCES

- ▶ <http://www.whitehouse.gov/administration/eop/ceq>
- ▶ <http://www.whitehouse.gov/sites/default/files/microsites/ceq/20100218-nepa-consideration-effects-ghg-draft-guidance.pdf>
- ▶ <http://www.epa.gov/climatechange/endangerment.html>
- ▶ <http://www.sec.gov/news/press/2010/2010-15.htm>

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