



U.S. Department of Transportation Federal Transit Administration

National Environmental Policy Act (NEPA) Basic Concepts and Implementation





Overview

- History
- Purposes
- Agency Regulations
- Classes of Action
- Documentation – I-H versus AE Preparation
- AE Procurement
- Characteristics of Documents
- Importance of Public Engagement
- Quality Assurance & Document Review





History

- 1960s identification of potential loss of irrecoverable natural resources
- 1969 Congress drafts National Environmental Policy Act (PL 91-190) which requires physical and social environmental evaluations for federal undertakings
- Creates Council on Environmental Quality, Office of Environmental Quality, Citizens' Advisory Committee on Environmental Quality & Environmental Quality Report
- Relegates Regulation to Individual Federal Agencies





NEPA Purposes

- Sec. 2 (42 USC Section 4321)

The purposes of this Act are: To declare a 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; and to establish a Council on Environmental Quality.”





Agency Purposes

- Ensure protection of physical (natural) and social environment
- Lead reasonable layperson through the decision-making process such that he can participate in and understand development of the Locally Preferred Alternative recommendation
- Insure federal sponsor agency against litigation





Agency Regulations

- In US Department of Transportation, Federal Highway Administration (FHWA) and Federal Transit Administration (FTA) regulate through 23 CFR Part 771—Environmental Impact and Related Procedures
- Each agency further promulgates supporting guidance available online
- SAFETEA-LU Changes include State Administrator status, de minimus provisions for parklands/public lands and 180-day statute of limitations on filing litigation pursuant to permits, licenses and agency approvals/findings (FONSIs on EAs and RODs on EISs)
- FTA guidance is available in 49 CFR Part 7 Appendices D & G





Umbrella for Other Environmental Laws

- Titles VI & VII Civil Rights Act of 1964
- Uniform Relocations Assistance and Real Property Acquisition Policies Act of 1970
- Americans with Disabilities Act (ADA)
- Executive Order 12898 Environmental Justice
- 49 USC 303 Section 4(f) Impacts on Parklands/Public Lands
- Clean Air Act as amended (CAAA)
- Clean Water Act & Safe Drinking Water Act
- Farmland Protection Policy Act
- Solid Waste Disposal Act
- Resource Conservation and Recovery Act of 1976 (RCRA)
- Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)
- Emergency Planning and Community Right-to-Know Act of 1986
- National Historic Preservation Act/National Advisory Council Role
- Archaeological and Historic Preservation Act
- Archaeological Resource Protection Act
- ... **and LOTS more** ...





Agency Regulations

- CFR 771.113 Prescribes *timing* of environmental actions: NEPA work includes planning studies, engineering studies, agency coordination and public involvement.
- No final design or property acquisition (except for hardship or protective buys), construction or vehicle acquisition shall take place *prior to* classification as a categorical exclusion, or agency finding as either Finding of No Significant Impact or Record of Decision





Agency Regulations

- 23 CFR 771.115 Classes of Action
- Class I: Environmental Impact Statement
- Class II: Categorical Exclusion
- Class III: Environmental Assessment
- ASTM Procedure E-1527 Environmental Site Assessment is different from a NEPA Environmental Assessment





Classes of Action – CAT-X

- Class II Categorical Exclusions can be of two types: *listed* or *documented*
- 23 CFR 771.117(c) **lists** categorical exclusions which by nature of the agencies' experience do not tend to adversely impact the environment
- 23 CFR 771.117(d) gives categorical exclusions which must be further **documented**
- Note that at the discretion of the agency reviewer, auxiliary documentation may be requested notwithstanding inclusion in 23 CFR 771.117 (c) or (d)





Classes of Action -- EA

- Class III Actions (Environmental Assessments) are elected when project scope is not categorically excluded and/or *doubt exists* as to potential for adverse impacts
- Idea of **risk evaluation** as part of classification of action determination
- Class III Actions may be elevated to Class I Actions when potential for adverse impact or community dissent becomes apparent suggesting heightened risk





Classes of Action – EIS

- Class I Actions Environmental Impact Statements (EIS)
- Elect EIS when risk is apparent (environmental adverse impact or community dissent) because heightened public engagement, advertisement and extended comment period provide greater sponsor/agency protection
- Sponsors tend to elect EIS on basis of complexity of projects rather than on risk—this tends to be unduly expensive in terms of both time and money
- EIS should not be elected strictly on basis of extents of project, lengthy period scheduled for construction or monetary value





Classes of Action – EIS

- EISs are usually accomplished in three parts: Publication of Notice of Intent, Draft EIS and Final EIS (when updating 18+ month old information) there is a Supplemental EIS)
- EISs are usually two-volume documents
- Volume I: Problem Statement, Purpose & Need Statement, Evaluation Criteria, Evaluation of Environmental Impacts, Agency Correspondence, and Finding (Record of Decision)
- Volume II: Supporting Technical Information





NEPA Work: In-House or Contracted to an Architect/Engineer

- Make a *conscious decision* on basis of available and flexibility of time, funding and staff skills
- Contracting NEPA documentation to an Architect/Engineer (AE) requires a different level of effort and different set of staff skills supporting different tasks than does I-H accomplishment
- Do not suppose that contracting relieves the sponsor agency of participation in NEPA development—it just infers a different kind of participation





NEPA Work: In-House

- **Congeeing the Stakeholders and Public into efficient working group(s)**
- **Responsibility for stakeholder consensus on the problem statement, purpose & need, project scope of work, array of alternatives, and evaluation criteria (including weights)**
- **Coordinating Interagency Consultation with resource agencies**
- **Coordinating Federal sponsor agency Tribal liaison correspondence**
- **Preparing Interagency Correspondence—initial query letters and negotiating conditions for incorporation into draft finding**
- **Technical investigation (writing or causing to have written all of the actual documentation for each technical area of investigation in a cogent, accurate persuasive manner) in accordance with Federal, State and local laws, regulations and procedures (including MPO coordination requirements)**
- **Determining a Public Participation action plan, conducting the public engagement and documenting the results**
- **Responding to comments/requests for changes to the document made by the various external contributors including but not limited to the sponsor agency**





NEPA Work: AE Contactor/Consultant

- Acquiring procurement expertise
- Writing scope of work for the project
- Writing scope of work for AE services
- Slating and Scoping Process (evaluating technical expertise of AE team)
- Conducting prospective AE negotiations based upon independent estimate of time and level of effort (LOE)
- Understanding change order negotiation procedures
- Understanding concept of constructive change
- Preparing and implementing a quality assurance plan
- Evaluating deliverables





Areas of Investigation - Topics

- Air quality impacts including hotspot analyses pursuant to Clean Air Act Amendments (CAAA)
- Land Use and Zoning conditions
- Traffic impacts addressing congestion and VHT
- Historical/Cultural/Archaeological Resources (NHPA 106)
- Parklands (Transit Act 4(f)/SAFETEA-LU 6009 4(f) *deminimus impacts*)
- Noise and Vibration
- Implications for Land Acquisition and Relocation (Uniform Act)
- Hazardous Materials (HAZMAT) and Hazardous Wastes (HAZWASTE)
- Community Disruption and Environmental Justice
- Impacts on Public Lands (NHPA 106 and Transit Act 4(f))
- Impacts on Wetlands
- Floodplains Impacts
- Clean water impacts including navigable waterways
- Coastal Zone Management
- Impacts on ecologically sensitive areas including biological and botanical endangered and threatened species
- Impacts on safety and security
- Impacts caused by construction (temporary)





Basic Contents of Class I (EIS) & Class III (EA) NEPA Documents

- Executive Summary
- Table of Contents
- Problem Statement
- Transportation Goals and Strategies
- Purpose and Need for the Solution to the Problem
- Development of Criteria for Prospective Solutions
- Weighting of Criteria (optional)
- Array of Potential Solutions to be Evaluated
- Areas/Vicinities/Corridors/Sites Potentially Impacted by Solution
- Investigation of Environmental Impacts (treat each topic separately)
- Rating of Potential Solutions in terms of Criteria
- Rating of Potential Solutions in terms of Environmental Impacts
- Documentation of Public Engagement
- Recommendation of Locally Preferred Alternative (Best Solution from Array)
- Draft Finding
- Correspondence Appendix
- Technical Appendices (Class I: Environmental Impact Statement only)





Basic Differences Between Class I (EIS) & Class III (EA) NEPA Documents

- **EIS:** treat more areas of investigation in depth; more complex problem statement; broader array of solutions; more complex rating criteria; more public involvement; more interagency coordination and more intense negotiation toward finding; more technical supporting data/information appended
- **EA:** relatively fewer areas of investigation require documentation (more "N/A"); relatively less correspondence, public involvement and interagency negotiation documentation; little or no supplementary technical support data appended





Successful NEPA Public Engagement

- **Springboard off your MPO's or State DOT's Participation Plan**
- **Create a tailored Participation Plan which is an Artful Mixture of Innovative and Tried-n'-true Activities, Techniques and Opportunities for each NEPA effort**
- **Encourage Input from Environmental Justice-protected Low-income and Minority Segments of the Public**
- **Involve Tribal Governments and Resource Agency Representatives (as needed)**
- **Include Activities Designed to Attract and Sustain Meaningful Involvement of Low-English Proficiency Segments of the Public**
- **Differentiate between Community Representatives and Blow-hards**
- **Provide food, transportation and childcare as frequently as possible**
- **Provide special services such as those of a translator or American Sign Language signer (as needed)**





Quality Assurance Plan & Review

- Schedule and check each deliverable on timetable
- Proofread and correct errors prior to submittal for review
- Ensure documents are well-coordinated between chapters (do not accept/approve chapters sequentially)
- Ensure that correspondence query and response pairs lead to resolution of resource agency's, environmental advocate's or public participant's issue(s)
- Ensure that concessions made in correspondence are included in draft finding
- Ensure that the document passes the "reasonable layman" test
- Ensure that language used is simple and persuasive leading to logical recommendation of the locally preferred alternative





Other Useful References

Federal Transit Programs Fiscal Year 2008 Citations to Federal Laws, Regulations and Directives:

- 16 USC Section 1531-1544 Endangered Species Act
- 42 USC Section 7401-7671 *Clean Air Act (as amended)*
- 49 USC Section 5325(b) *Special Procurement Procedures for Architectural and Engineering Services*
- 49 USC Section 5332 *Nondiscrimination in Federal Public Transportation Programs*

- EO 12898 Environmental Justice Executive Order *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*
- EO 13007 *Indian Sacred Sites*
- EO 13166 Limited English Proficiency Executive Order
- EO 11593 *Protection and Enhancement of the Cultural Environment*
- EO 11738 *Administration of the Clean Air Act and the Federal Water Pollution Control Act with Respect to Federal Contracts, Grants, or Loans*

- 36 CFR Part 800 US Advisory Council on Historic Preservation regulations, *Protection of Historic and Cultural Properties*
- 49 CFR Part 38 Americans with Disabilities Act requirements
- 40 CFR Parts 1500-1508 Council on Environmental Quality regulations on compliance with National Environmental Policy Act of 1969, as amended





Understanding NEPA for FTA Grants

- Understand that it is necessary to **reserve adequate time in your project development schedule to either accomplish the NEPA documentation I-H or contract for AE consultant accomplishment (including QA/QC)**
- Understand that NEPA Class I and Class III documentation usually must be accomplished and **finding rendered prior to final design, land acquisition, vehicle procurement and other key actions application for FTA grants**
- Understand that **NEPA Class II documentation is usually conveyed within the FTA grant application** in the Transportation Electronic Award and Management (TEAM) system
- Understand that in order to **avoid allegations of constructive change, FTA personnel are available to discuss NEPA needs and deliverables with FTA grantees** (rather than directly with their AE consultant contractors)
- Understand that NEPA law remains the same while **agency regulations change; it is necessary to keep current (SAFETEA-LU changes)**
- Understand that **assistance is available through your FTA Regional Office**

