

National Environmental Policy Act of 1969 (NEPA)

Agencies: U.S. Council on Environmental Quality

Citation: [42 U.S.C. §§ 4321 et seq.](#)

Enacted as: the “National Environmental Policy Act of 1969”, on January 1, 1970

Where Law Applies: Under the [National Environmental Policy Act](#) (NEPA), the federal government is responsible for using “all practicable means, consistent with . . . national policy, to improve and coordinate Federal plans, functions, programs and resources” to fulfill responsibilities under this policy. (42 U.S.C. § 4331(b)). The application of NEPA beyond U.S. territory has often been litigated in the federal courts. A number of cases to applying NEPA involving projects outside of the United States turn on whether there are substantial environmental effects within U.S. territory and/or whether decisions are made in the U.S. and the U.S. has legislative or other control over activities in the area outside of the United States . Where the effects are primarily found to be within the territory of a foreign sovereign nation there is a presumption that NEPA would not apply. The courts also consider existing treaties with the U.S to ensure they are respected and followed.

A factor considered by some courts is whether the decision that led to the environmental effects was made within the territory of the U.S. Notably, the Circuit Court of Appeals for the D.C. Circuit has held “that the presumption against the extraterritorial application of statutes . . . does not apply where the conduct regulated by statute occurs primarily, if not exclusively, in the United States, and the alleged extraterritorial effect of the statute will be felt in . . . a continent without a sovereign, and an area over which the United States has a great measure of legislative control” (e.g., Antarctica). *Environmental Defense Fund Inc. v. Massey*, [986 F.2d 528 \(D.C. Cir. 1993\)](#).

NOAA’s policy on the extraterritorial application of NEPA is to apply NEPA both within and beyond the [U.S. Exclusive Economic Zone \(EEZ\)](#). [NOAA Administrative Order \(NAO\) 216-6, Environmental Review Procedures for Implementing the National Environmental Policy Act](#) (May 20, 1999), sections 3.01 and 7.01.

Summary:

Signed into law by President Richard Nixon on January 1, 1970, the National Environmental Policy Act (NEPA) (42 U.S.C. §§ 4321 *et seq.*) was the first major environmental law in the United States and established national environmental policies for the country. NEPA mandates Federal agencies to consider the impacts of their activities—including the issuance of Federal permits, Federal funding, and other Federal agency actions—on the environment, and to ensure that information about these environmental impacts is available to the public before final decisions are made.

The Council on Environmental Quality (CEQ) promulgates [regulations](#) that require agencies to create their own NEPA implementing procedures. These procedures must meet the CEQ

standard while reflecting each agency's unique mandate and mission. Consequently, NEPA procedures vary from agency to agency. Further procedural differences may derive from other statutory requirements and the extent to which Federal agencies use NEPA analyses to satisfy other review requirements.

The [NEPA process](#) begins when an agency proposes to take an action (this can include proposals to adopt: rules and regulations; formal plans that direct future actions; program; and specific projects). Once the proposal is conceptualized and any reasonable alternatives have been developed, the agency must determine if the action has the potential to affect the quality of the human environment. This process results in one of three levels of NEPA analysis. Agencies may:

- a. apply a [Categorical Exclusion](#);
- b. prepare an [Environmental Assessment \(EA\)](#); or
- c. prepare an [Environmental Impact Statement \(EIS\)](#).

If the agency determines that the action will have no significant impacts, then the agency must prepare a [Finding of No Significant Impact \(FONSI\)](#), briefly presenting the reasons why an action will not have a significant impact on the environment.

The EIS process ends with the completion of a [Record of Decision](#), which explains the agency's decision, describes the alternatives the agency considered, and discusses plans for mitigating potential environmental effects and monitoring those commitments. By continuing to monitor mitigation commitments, agencies implement NEPA requirements well after the environmental impact analysis is completed.

Source: <http://ceq.hss.doe.gov> (last visited July 3, 2013)

Legislative History:

The National Environmental Policy Act was passed by the U.S. Congress in December of 1969 and signed into law by President Richard Nixon on January 1, 1970. The Act was developed in response to public concern in the late 1950s and 1960s about decades of environmental neglect and degradation, with the aim to promote the general welfare by creating conditions whereby man and nature can productively co-exist in order to benefit present and future generations. NEPA was modeled on the Resources and Conservation Act of 1959 (S. 2549), introduced by Senator James E. Murray in the 86th Congress. *See* National Environmental Policy Act of 1969 (to accompany S. 1075), [S. Rep. No. 91-296 \(1969\)](#), page 11.

For the next ten years, similar bills were introduced and hearings held to discuss Congress's potential response. In 1968, a joint House-Senate colloquium was convened by Senator Henry Jackson, chairman of the Senate Committee on Interior and Insular Affairs, and Representative George Miller, chairman of the House Committee on Science and Astronautics, to discuss the need for and means to implement a national environmental policy. Senator Jackson encouraged a colloquium discussion of "action-forcing" processes that eventually created the idea of an environmental impact statement (EIS) requirement. Other statements were made regarding the need to enable federal agencies to give adequate attention to environmental values.

In 1969, Senator Jackson and Representative John Dingell introduced the Senate (S. 1075, Feb. 17, 1969) and House (H.R. 12549, July 1, 1969) bills, respectively, that would later become NEPA. After the Senate hearing, Senator Jackson introduced amendments to the Senate bill which included a requirement that with every major federal action significantly affecting the quality of the environment, federal agencies include a finding that the environmental impact of the proposed action was studied and considered. The Senate bill also provided all federal agencies with a legislative mandate to consider the environmental consequences of their actions. The Senate passed its version of NEPA in July 1969 without debate or amendments. In September 1969, the House passed its version. In December 1969, a conference committee reported a version containing additions and compromises. Notably, the requirement that all major federal actions be preceded by a “finding” on environmental impacts was changed to the preparation of a “detailed statement”, later referred to as an EIS. After minimal debate, both the House and Senate agreed to the conference report in late December 1969. Since the law’s signing on January 1, 1970, Congress has amended the Act for minor technical changes; however, amendments have been made to other laws, such as the Clean Air Act (42 U.S.C. 7401 *et seq.*), affecting how NEPA is implemented.

Sources: http://www.fta.dot.gov/documents/Unit1_01CRSReport.pdf and http://ceq.hss.doe.gov/legal_corner/nepa_legislative_history.html (last visited July 3, 2013)

Cases:

- **Landmark Cases:**

- *Env'tl. Def. Fund, Inc. v. Massey*, 986 F.2d 528 (D.C. Cir. 1993), *rev'g* 772 F. Supp. 1296 (D.D.C. 1991).

- **Other Relevant Cases:**

- *Basel Action Network v. Mar. Admin.*, 370 F. Supp. 2d 57 (D.D.C. 2005).
- *Border Power Plant Working Group v. U.S. Dep't of Energy*, 260 F. Supp. 2d 997 (S.D. Cal. 2003).
- *Born Free U.S.A. v. Norton*, 278 F. Supp. 2d 5 (D.D.C. 2003).
- *Center for Biological Diversity v. Nat'l Sci. Found.*, No. C 02-5065 JL, 2002 WL 31548073 (N.D. Cal. 2002).
- *Consejo de Desarrollo Economico de Mexicali, A.C. v. United States*, 438 F. Supp. 2d 1207 (D. Nev. 2006).
- *Friends of the Earth, Inc. v. Mosbacher*, 488 F. Supp. 2d 889 (N.D. Cal. 2007).
- *Greenpeace U.S.A. v. Stone*, 748 F. Supp. 749 (D. Haw. 1990).
- *Hirt v. Richardson*, 127 F. Supp. 2d 833 (W.D. Mich. 1999).
- *Natural Res. Def. Council v. Nuclear Regulatory Comm'n*, 647 F.2d 1345 (D.C. Cir. 1981).
- *Natural Res. Def. Council v. U.S. Dep't of Navy*, No. CV-01-07781 CAS (RZX), 2002 WL 32095131 (C.D. Cal. 2002).
- *NEPA Coalition of Japan v. Aspin*, 837 F. Supp. 466 (D.D.C. 1993).
- *Swinomish Tribal Cmty. v. Fed'l Energy Regulatory Comm.*, 627 F.2d 499 (D.C. Cir. 1980).

The following links discuss CEQ's case law summaries:

- National Association of Environmental Professionals (NAEP) NEPA Case Law Review
 - [Major Cases Interpreting NEPA](#) (up until 1996)
 - Recent NEPA Cases
 - [NEPA 2005 Update](#)
 - [NEPA 2004 Update](#)
 - [NEPA 2003 Update](#)
- [CEQ's 2001 NEPA Case Law Update](#)
- [CEQ's 2000 NEPA Case Law Update](#)
- [CEQ's 1999 NEPA Case Law Update](#)
- [CEQ's 1998 NEPA Case Law Update](#)

For NEPA cases relating to international law, see http://www.gc.noaa.gov/gcil_seaward.html

Law Articles:

- Sherry Hutt, Caroline M. Blanco, Walter E. Stern, Stan N. Harris, Cultural Property Law, 2004 A.B.A. Sec. Env't, Energy, and Resources 129.
 - States that as NEPA is only implicated when there is a major Federal undertaking affecting the quality of the human environment, UCH must be affected by that action before it can be protected under NEPA.
- Lois J. Schiffer, The National Environmental Policy Act Today, With an Emphasis on its Application Across U.S. Borders, 14 DUKE ENVTL. L. & POL'Y F. 325 (2003).
 - The relevant section of this article examines application of NEPA abroad through several case studies, including *Center for Biological Diversity v. National Science Foundation* (55 ERC 1873, 1876-77 (N.D. Cal. 2002)), in which the court held that NEPA applied on the high seas. The author argues that although "[t]he analysis seems sound that NEPA does not actually present a question of extraterritorial application of the laws, since most decisions take place entirely within the United States [. . .] courts can, and indeed do, effectively take into account foreign policy and national security considerations as they evaluate whether injunctions are appropriate." (Schiffer at 344).

Other Relevant Sources:

CEQ's NEPA Site: <http://ceq.hss.doe.gov/>

NOAA Office of General Counsel for International Law:

http://www.gc.noaa.gov/gcil_seaward.html

- [Executive Order 12114](#), *Environmental Effects Abroad of Major Federal Actions* (44 Fed. Reg. 1957 (Jan. 9, 1979)) (requires federal agencies to publish procedures for assessing the impacts of federal actions in the global commons and foreign nations. The requirements are not as rigorous as those under NEPA and there is less opportunity for

public comment. The Executive Order was issued "in furtherance of NEPA" but is independent of NEPA and creates no cause of action).

- Council on Environmental Quality, [*Implementing and Explanatory Guidance for Executive Order 12114*](#) (44 Fed. Reg. 18722 (Mar. 29, 1979)).
- Council on Environmental Quality, [*Guidance on NEPA Analyses for Transboundary Impacts*](#) (July 1, 1997)(requires federal agencies to analyze the "reasonably foreseeable transboundary effects" in their analysis of proposed federal actions).
- Council on Environmental Quality, [*NEPANET home page*](#).
- [*Department of Commerce Administrative Order \(DAO\) 216-12, Environmental Effects Abroad of Major Federal Actions*](#) (March 10, 1983) (prescribes U.S. Department of Commerce policy, procedures and responsibilities for implementing Executive Order 12114).

NOAA Office of Program Planning and Integration: National Environmental Policy Act Coordination <http://www.nepa.noaa.gov/>

Linda Luther, *The National Environmental Policy Act: Background and Implementation*, CRS Report for Congress (Nov. 16, 2005), available at http://www.fta.dot.gov/documents/Unit1_01CRSReport.pdf.

- This report provides information about NEPA's background and legislative history, provisions of the law, the role of the courts and CEQ in its implementation, how agencies implement NEPA's requirements, how the public is involved in the NEPA process, the means by which NEPA is used as an umbrella statute to coordinate or demonstrate compliance with other environmental requirements, and claims by some stakeholders that NEPA causes delays in some federal actions.

Claudia Geotz Phillips, [*An Evaluation of Ecosystem Management and Its Application to the National Environmental Policy Act: The Case of the U.S. Forest Service*](#), Ph.D Dissertation (1997)

- Chapter 2 discusses the passage of NEPA and its intent, process, and evolution over twenty-seven years.