

Santa Susana Field Laboratory
Area IV Environmental Impact Statement:
Overview of NEPA and other Applicable
Environmental Laws

Sean B. Hecht
May 15, 2012

My background and role today

- I have experience teaching and participating in administrative processes relating to NEPA and other laws
- My professional title is Executive Director, UCLA Environmental Law Center, but my role here is independent of my UCLA position
- I am here to provide background information about NEPA and other relevant laws
- My opinions expressed here today are independent of DOE and do not necessarily reflect DOE's views

National Environmental Policy Act (NEPA)

- Federal agencies prepare an EIS on “major federal actions that significantly affect the quality of the human environment.”
- NEPA promotes public participation in agency decision-making
 - NEPA is “essentially procedural,” but it is the vehicle that often provides the public with the information needed to raise substantive concerns
- NEPA makes environmental protection part of the mandate of every federal agency
 - NEPA requires agencies to ***consider*** environmental impacts when making a decision

42 U.S.C. §4321. Congressional declaration of purpose

The purposes of this chapter 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.

42 U.S.C. §4331(b) [NEPA §101]

In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—

- (1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
- (2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;
- (3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

. . . .

42 U.S.C. §4332. [NEPA §102]

The Congress authorizes and directs that, to the fullest extent possible:

(2) All agencies of the Federal Government shall . . .

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) The environmental impact of the proposed action

NEPA

- *Calvert Cliffs' Coordinating Committee v. Atomic Energy Commission, 449 F2d 1109 (D.C. Cir. 1971):*
 - Made clear that it was not enough for an agency to prepare an EIS and have it *accompany* the application
 - The agency must actually *consider* the EIS in making a decision
 - The Court also held that it was not enough to indicate that the applicant would comply with other environmental laws, such as Clean Water Act
 - Must still consider the adverse impacts of the pollution even if pollution may be lawful

What types of federal projects require NEPA analysis?

- NEPA applies when a Federal agency has discretion to choose among one or more alternative means of accomplishing a particular goal

What are federal regulations?

- REGULATIONS:
 - Interpret statutory terms
 - Establish procedural requirements to satisfy those terms
 - Impose substantive requirements consistent with the statute's purpose and language
- NEPA regulations are written by the White House Council on Environmental Quality (CEQ)
- Federal agencies also have their own supplemental NEPA regulations

§ 1500.1 Purpose.

(c) Ultimately, of course, it is not better documents but better decisions that count. *NEPA's purpose is not to generate paperwork—even excellent paperwork—but to foster excellent action.* The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment.

Timing of NEPA Compliance

- NEPA compliance must be carried out as soon as possible after a proposal has crystallized
- Agency may not make irreversible or irretrievable commitment of resources in support of a particular action until it has complied with NEPA

Key triggers for NEPA to apply

- Recommendation or report on a proposal
- Major federal action
 - CEQ regulation 1508.18: *major* reinforces, but does not have a meaning independent of *significantly*
- Significantly affects the human environment
 - CEQ regulation 1508.27:
 - Cumulative actions
 - Short- and long-term effects
 - Unique/endangered resources

§ 1508.23 Proposal.

"Proposal" exists at that stage in the development of an action when an agency subject to the Act has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the effects can be meaningfully evaluated. Preparation of an environmental impact statement on a proposal should be timed . . . so that the final statement may be completed in time for the statement to be included in any recommendation or report on the proposal. A proposal may exist in fact as well as by agency declaration that one exists.

NEPA Compliance Process

- Is it a major federal action that significantly affects the quality of the human environment?

Yes -- No -- Maybe

- If **YES**, prepare an EIS
- Can only answer **NO** if the action has been “categorically excluded”
- If **MAYBE**, prepare an environmental assessment or EA
 - Helps agency decide whether to prepare an EIS
 - Allows the agency to analyze possible alternatives to the proposal even where an EIS is not needed
 - This is required by Section 102(2)(E) of NEPA

2007 Court Order

- *NRDC v. DOE*: Plaintiffs claimed that EIS was required before remediating Area IV
- DOE had only performed EA, not EIS
- 2007 Summary Judgment order (U.S. District Judge Samuel Conti): determined that an EIS is required

Decision to Prepare EIS



Notice of Intent
§§ 1508.22, 1501.7



Scoping
§ 1501.7



Draft EIS (DEIS)
§ 1502.9(a)



Public Comment
§ 1503



Final EIS (FEIS)
§ 1502.9(b)



Record of Decision (ROD)
§ 1505.2

Cooperating agencies

- A “cooperating agency” is an agency that has jurisdiction by law or special expertise with respect to any environmental impact involved in a proposal (or a reasonable alternative). Thus, a “cooperating agency” typically will have some responsibilities for the analysis related to its jurisdiction or special expertise.
- May be federal, state, or local agencies
- USFWS, DTSC may be cooperating agencies here

Scoping

- Goal: to define the scope of issues to be addressed in depth in the EIS. (See CEQ regulation 1501.7).
- Identify people or organizations who are interested in the proposed action;
- Identify the significant issues to be analyzed;
- Identify and eliminate from detailed review issues that will not be significant or have been adequately covered in prior review;
- Determine the roles and responsibilities of lead and cooperating agencies;

Scoping (continued)

- Identify any related EAs or EISs;
- Identify gaps in data and informational needs;
- Set time limits for the process and page limits for the EIS;
- Identify other environmental review and consultation requirements so they can be integrated with the EIS; and
- Indicate the relationship between the development of the environmental analysis and the agency's tentative decisionmaking schedule.

Re-scoping?

- Non-linear process, not rare to go back to prior step
 - Funding
 - New information
 - Other reasons
- DOE has articulated that purpose and need here are constrained by consent orders with DTSC
- Court order

The Elements of an EIS

- Recommended format 40 CFR 1502.10
- Key components
 1. Cover sheet
 2. Executive summary
 3. Table of contents
 4. Purpose and need for the proposed action
 5. Alternatives including the proposed action (the “heart of the EIS”)
 6. Description of the affected environment(s)
 7. Description of the environmental consequences
 8. List of preparers (ID team)
 9. List of agencies; persons to whom copies sent
 10. Index
 11. Appendices

Purpose and need for the proposed action

- The purpose and need statement explains to the reader why an agency action is necessary, and serves as the basis for identifying the reasonable alternatives that meet the purpose and need
- Here, DOE has stated that purpose and need are bounded by the requirements of the 2007 and 2010 consent orders
- Purpose and need statement must be reasonable (for example, a purpose and need that are unreasonably limited by the scope of a permit applicant's proposal has been found to be unreasonably narrow)

Environmental setting

- The EIS must describe the environmental setting accurately and comprehensively
- This provides a “baseline” for understanding and analyzing project impacts

Scope of an Action

- “Scope consists of the range of actions, alternatives, and impacts to be considered in an environmental impact statement. * * *”
 - Actions include connected, cumulative, and similar actions
 - Alternatives include “no action,” other “reasonable courses of action,” and mitigation measures for all alternatives
 - Impacts may be direct, indirect, or cumulative.
(CEQ regulation 1508.25)

Connected, cumulative, and similar actions

- Connected actions are interdependent, or cannot proceed without the other
- Cumulative actions are multiple proposed actions that will have cumulatively significant impacts
- Similar actions have similarities that provide a basis for evaluating their environmental consequences together, such as common timing or geography.

Alternatives Analysis

- **§ 40 CFR 1502.14 Alternatives including the proposed action.**
- This section is the heart of the environmental impact statement.
* * * [I]t should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public. [A]gencies shall:
 - (a) Rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.
 - (b) Devote substantial treatment to each alternative ...
 - (c) Include reasonable alternatives not within the jurisdiction of the lead agency.
 - (d) Include the alternative of no action.
 - (e) Identify the agency's preferred alternative or alternatives, if one or more exists...
 - (f) Include appropriate mitigation measures not already included in the proposed action or alternatives.

Alternatives Analysis

- Range of reasonable alternatives is informed by the agency's reasonable stated purpose and need for the proposed action
- Mitigation measures should be identified in alternatives analysis
- SB 990 and cleanup standards set forth in AOC are relevant to bounding the range of reasonable alternatives here

Analysis of environmental impacts

- Analysis must be scientifically sound
- Agency has discretion to select methodologies that it concludes are appropriate, if supported by evidence, even if there is good-faith disagreement
- Analysis must include direct, indirect, and cumulative impacts

Cumulative Impacts

- "Cumulative impact" is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions....
(CEQ regulation 1508.7)

Comments and Final EIS

- Agency circulates Draft EIS
- Public and other agencies have opportunity to comment on Draft EIS
- Lead agency must provide reasoned respond to all comments
- Final EIS must include comments and agency's responses

Supplemental EISs

- Supplementation and revision: before EIS is complete
- Supplemental EIS:
 - After an EIS is complete, an agency must prepare a supplemental EIS if:
 - Agency makes substantial changes to proposed action relevant to environmental concerns
 - There are significant new circumstances or information relevant to environmental concerns
(CEQ regulation 1502.9(c)(1))

NEPA Outcome

- Agency must complete Final EIS in accordance with NEPA and its implementing regulations
- Agency decisionmakers must be informed before making their decision
- Ultimate decision need not be environmentally preferable alternative
- Record of Decision

Resources to assist with NEPA participation

- CEQ's NEPA page: <http://ceq.hss.doe.gov/>
- NEPA statute: http://ceq.hss.doe.gov/laws_and_executive_orders/the_nepa_statute.html
- Regulations: http://ceq.hss.doe.gov/ceq_regulations/regulations.html
- Citizens' Guide to NEPA: http://ceq.hss.doe.gov/publications/citizens_guide_to_nepa.html
- Dept. of Energy NEPA guidance: <http://energy.gov/nepa/guidance-requirements>

Endangered Species Act

- Section 7
 - Federal agency must consult with US Fish and Wildlife Service about impacts on listed (endangered or threatened) species
 - If listed species may be affected, consultation will generally result in Biological Opinion from USFWS determining whether there will be jeopardy to endangered or threatened species, and measures to limit harm to individuals and species
- Section 9
 - “Take” of fish or wildlife is prohibited
 - FWS can authorize incidental take of endangered species if measures are taken to limit the harm

National Historic Preservation Act

- Section 106 requires federal agencies to consider the effects of projects they carry out, approve, or fund on historic properties.
- Additionally, federal agencies must provide the ACHP an opportunity to comment on such projects prior to the agency's decision on them.
- Includes Native American historic sites

National Historic Preservation Act

- Under Section 106, federal agencies must:
 - gather information about nearby properties that are listed, or eligible for listing, in the National Register of Historic Places (referred to as “historic properties”);
 - determine how those historic properties might be affected;
 - explore measures to avoid or reduce harm to historic properties; and
 - reach agreement with trustee agencies on measures to resolve any adverse effects or, failing that, obtain advisory comments from the ACHP.

Clean Air Act

- DOE must comply with the Clean Air Act
- Possible air quality impacts associated with site remediation:
 - Excavation dust
 - Transportation – increased vehicular traffic
 - Impacts from on-site remedies

Clean Water Act

- DOE may not take actions that violate the Clean Water Act
- NPDES Permit required for discharges of pollutants from point sources
- Best management practices for discharges of pollutants from nonpoint sources
- Section 404 permit required for disturbance of “waters of United States,” including many tributaries and wetlands

California Environmental Quality Act (CEQA)

- Requires environmental impact analysis, similar to NEPA
- Report is “EIR”
- Important differences between NEPA and CEQA
 - CEQA applies to all local and state permitting decisions; NEPA applies to federal decisions
 - CEQA requires implementation of all feasible mitigation measures; NEPA does not

California Environmental Quality Act (CEQA)

- Where there are state and federal actions requiring pre-decision environmental review, CEQA review (EIR) may be coordinated with NEPA review
- Or the two analyses may be performed separately, through separate federal and state processes – but coordination is necessary
- But the ultimate actions must comply with both laws