

**NEPA 101**  
**HOW NEPA CAN HELP YOU ACHIEVE**  
**THE RESULTS YOU WANT**  
**DINAH BEAR**  
**MARCH 24, 2011**

I. HISTORY AND PURPOSE OF NEPA

A. Why NEPA is an exciting law:

1. Society's first attempt at systematically addressing environmental issues
2. Holistic and integrative
3. Evolving – future orientation
  - a. New issues
  - b. Nature of law: policy or process?

B. Legislative origins of NEPA

1. Discussion beginning in 1930s
2. First legislative attempt in 1959 with S. 2549, the Resources and Conservation Act introduced by Senator Murray from Montana. The bill was aimed at establishing an efficient mechanism in the President's Office to coordinate resource conservation on the basis of national goals.
3. Another bill that influenced the drafting of NEPA was introduced by Senator Gaylord Nelson in the 87<sup>th</sup> and 89<sup>th</sup> Congress. The Nelson bill, S. 2282, included provisions to address use and application by federal agencies of ecological information and research methods for achieving better management of the environment. A later bill introduced by Senator Nelson in 1969, S. 1752, would have created a five member Council on Environmental Quality in the Office of the President.
4. A unique joint House-Senate Colloquium to Discuss a National Policy for the Environment was held in July, 1968. The objective was to, "avoid conventional committee jurisdiction limitations and bring together interested members with executive branch heads and leaders of industrial,

commercial, academic, and scientific organizations.” Letter of Submittal to the U.S. Congress, Senators Henry Jackson and Kuchel and Congressmen Miller, Blatnik, Daddario, Fulton and Mosher, October, 1968.

5. As cited in the Congressional White Paper, “Several social attitudes [had] become the action force in the movement for improved environmental policies and programs. One is the desire for esthetically attractive surroundings. Another is the recognition of the folly of excessive population densities. Still another is the mounting irritation, disgust, and discomfort (aside from actual economic loss) resulting from such anomalies as smoggy air and polluted streams and seashores. Rachael Carson’s *Silent Spring* . . . Cuyohoga River catching on fire. . . . oil spill at Santa Barbara. . . . activism of 1960’s . . . Nixon’s staff.
6. Finally, on the same day as the White Paper was published in the Congressional Record, Senator Henry Jackson introduced S. 1075 with one of the more noble rationales underlying proposed legislation; to wit:

“The survival of man, in a world in which decency and dignity are possible, is the basic reason for bringing man’s impact on his environment under informed and responsible control.”
7. NEPA was opposed proactively by President Nixon, as was its various predecessors by every President.
8. In the House, Rep. Dingell held a three day hearing in the spring of 1969, with such witnesses as Margaret Mead and David Brower. (As Dingell later pointed out, the hearing witnesses included scientists, engineers, ecologists, statisticians, economists, anthropologists, conservationist and various governmental witnesses.) By September, 1969, he and other House members introduced H.R. 12549 to amend the Fish and Wildlife Coordination Act to provide for the establishment of a Council on Environmental Quality.
9. Various version of NEPA were considered by both the House and Senate, with Senators Henry Jackson and Edmund Muskie and Congressmen John Dingell and George Miller playing leading rolls. Congress passed the conference report in December, 1969. President Nixon signed NEPA on January 1, 1970.
10. A companion bill to NEPA, the Environmental Quality Improvement Act, 42 U.S.C. §4372, was passed into law in April 3, 1970. It establishes the

Office of Environmental Quality, which serves as staff to CEQ, and enumerated the Office's responsibilities and authorization.

C. Purposes and Policies of NEPA

1. Purpose: "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. §4321.
2. Policies: ". . . it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans." 42 U.S.C. §4331(a).
3. "In order to carry out the policy set forth in this Act, 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:
  - a. Fulfill the responsibilities of each generation as trustee of the environment for succeeding generations
  - b. Assure for all Americans safe, healthful, productive, and aesthetically and culturally pleasing surroundings
  - c. Attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences
  - d. Preserve important historic, cultural and natural aspects of our national heritage, and maintain wherever possible, an environment which supports diversity, and variety of individual choice

- e. Achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities
  - f. Enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources." 42 U.S.C. §4331(b).
4. "The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment." 42 U.S.C. §4331(c).

Major change from original S. 1075. Compare:

"The Congress recognizes that each person has a fundamental and inalienable right to a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment." Congressional Record, S-29088, October 8, 1969.

#### D. Section 101

- 1. Cited in at least thirteen executive orders as authority. Raised in litigation in case challenging President Clinton's authority to establish the American Heritage Rivers Program.
- 2. Part of Congressional mandate to U.S. Institute for Environmental Conflict Resolution is to assist in the implementation of Section 101.
  - a. The National Environmental Conflict Resolution Advisory Committee, an advisory committee to the U.S. Institute, published a report in April, 2005, advising on the relationship between Section 101 of NEPA and environmental conflict resolution and offering recommendations for implementation. See [www.ecr.gov/necrac/reports.htm](http://www.ecr.gov/necrac/reports.htm) for an electronic version or contact the U.S. Institute at (520) 901 8501.

#### E. Implementation Provisions of NEPA

- 1. The policies, regulations and laws of the United States "*shall* be interpreted and administered in accordance with the policies set forth in this Act." 42 U.S.C. §4332(1) (emphasis added). Also see Section 105 of

NEPA, “The policies and goals set forth in this Act are supplementary to those set forth in existing authorizations of Federal agencies.” 42 U.S.C. §4335.

2. All federal agencies shall:
  - a. utilize a systematic, interdisciplinary approach which will insure the integrated use of natural and social sciences and the environmental design arts in planning and decisionmaking;
  - b. identify and develop methods in procedures that will insure that unquantified environmental amenities and values are given appropriate consideration in decisionmaking along with economic and technical factors;
  - 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
    - (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented
    - (iii) alternatives to the proposed action
    - (iv) the relationship between local short-term uses of man’s environment and the maintenance and enhancement of long-term productivity
    - (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.” 42 U.S.C. §4332(C).
3. “Study, develop and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources.” 42 U.S.C. §4332(E).
4. Recognize the global character of environmental problems and consistent with foreign policy of the United States, assist in efforts to prevent the

decline in the quality of the world's environment;

5. Share environmental information and advice with States, counties, cities, institutions and individuals;
6. Initiate and utilize ecological information in the planning and development of natural resources;
7. Assist the Council on Environmental Quality.

## II. NUTS AND BOLTS OF PROCEDURAL PROVISIONS

A. Section 102(1): "Congress authorizes and directs that to the fullest extent possible, the policies, regulations and laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act."

B. Relevant authorities to consider:

1. Statute
2. CEQ regulations and guidance
3. Agency procedures
4. Agency guidance, handbooks, etc.

## III. LEVELS OF REQUIRED ANALYSIS

A. Environmental Impact Statement (EIS): must be included "in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment" 42 U.S.C. 4332; 40 CFR 1502.3.

1. Primary purpose of an EIS is to serve as an action forcing device to insure that the policies set forth in and the analysis required by NEPA are infused into the decisionmaking process of the agency.
2. Procedural steps - Issue Identification and Analysis
  - a. Notice of Intent: Federal agency publishes brief notice in Federal Register which announces proposed action and possible alternatives; intent to prepare an EIS; agency's proposed scoping

process, including information about any planned scoping meeting; name and address of contact person in agency. 40 CFR 1508.22.

- b. Scoping: a process to determine the scope of issues to be addressed in an EIS, and for identifying the significant issues related to a proposed action. Scoping may or may not include meetings, but the process should involve interested private citizens and organizations. Agencies should be prepared at this point to articulate what the purpose and need for the proposed action will be, and may want to refine it as the scoping process proceeds up to the point of publication of the draft EIS. Scoping is also the point at which all other environmental requirements applicable to the proposal should be identified; responsibilities should be allocated among all government agencies; any time and page limits set, and, in general, the entire structure and process to be used for that particular EIS should be discussed with all identifiable participants.
- c. When there is more than one federal agency either proposing an action or involved in the same action or group of actions, a “lead agency” supervises the preparation of the EIS. Federal, state or local agencies, including at least one federal agency, may act as joint lead agencies. For resolution of disputes over who should be lead agency, see 40 CFR 1501.5.
- d. Scoping is also the time when cooperating agencies should be identified. Cooperating agencies are agencies with jurisdiction by law over some aspect of a project (e.g., the authority to issue a permit) or special expertise (e.g., water quality or cultural heritage). Cooperating agencies can either be federal, state, local or tribal agencies. CEQ has issued guidance on cooperating agencies, with an associated reporting requirement. See 40 CFR 1508.5 for the definition and CEQ’s NEPA website at [www.nepa.gov](http://www.nepa.gov) for guidance on this issue.
- e. Draft EIS: purpose of and need for action; affected environment; alternatives, including proposed action; environmental effects.
- f. The EIS must state how the alternatives in it and decisions based on it will or will not achieve the requirements of Title I of NEPA. 40 CFR 1502.2(d).

- g. EIS can be prepared either by federal agency or consultant selected by agency. If a consultant is used, he/she must execute a disclosure statement specifying that he/she has no financial or other interest in the outcome of the project. The agency may always accept information from any party, including the applicant, but the agency always has the duty to independently evaluate such information.
- h. Draft EIS is circulated for public and agency comment for at least 45 days. 40 CFR 1506.10(c).
- i. Federal agencies with jurisdiction by law or special expertise with respect to any relevant environmental impact are expected to comment (although this may take the form of a 'no comment' letter). 40 CFR 1503.2.
- j. At the conclusion of the comment period, the lead agency must evaluate the comment letters. 40 CFR 1503.4.
- k. The final EIS is prepared, taking into account the substantive comments received in the draft EIS. Those comments are included in the final statement, along with the agency's responses. 40 CFR 1503.4(b).
- l. The final EIS is sent to any person, organization or agency which submitted substantive comments on the draft EIS.
- m. Both the draft and final EIS must be filed with the Office of Federal Activities in the Environmental Protection Agency. OFA publishes the official Notice of Availability for both the draft and final EISs and various time periods under the regulations run from the date of the notice.
- n. CEQ does not dictate the use of any particular methodology. The regulations state that, "Agencies shall insure the professional integrity, including scientific integrity, of the discussion and analyses in environmental impact statements. They shall identify any methodologies used and shall make explicit reference by footnote to the scientific and other sources relied upon for conclusions in the statement. An agency may place discussion of methodology in an appendix." 40 C.F.R. 1502.24.

- o. What if you don't know everything you need to know to make a decision? See 40 CFR 1502.22, addressing "incomplete or unavailable information". Basically, the agency either has to obtain the information, or, if the overall costs of obtaining are exorbitant or the means to obtain it are not known, the agency must include within an EIS: 1) a statement explaining what information is incomplete or unavailable; 2) an explanation of why that missing information is relevant to the evaluation of reasonably foreseeable significant adverse effects; 3) a summary of the existing credible scientific evidence relevant to the issue, and 4) the agency's evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community. "Reasonably foreseeable", for purposes of this regulation, includes impacts which have catastrophic consequences, even if their probability of occurrence is low, so long as the analysis is supported by credible scientific evidence, is not based on pure conjecture and is within the "rule of reason".

### 3. Decisionmaking

- a. No decision may be made concerning the proposed action until at least 30 days after the notice of availability of the final EIS or 90 days after publication of the notice of availability of the draft EIS, whichever is later. 40 CFR 1506.10(b).
- b. At the time of its decision, the agency must prepare and the decision maker must sign a Record of Decision (ROD). 40 CFR 1505.2.
- c. The ROD states what the decision is, identifies alternatives considered by the agency in making its decision, specifies which alternatives were considered to be environmentally preferable, and discusses factors which were balanced by the agency in making its decision. The ROD states whether all practical methods to avoid or minimize environmental harm are being adopted, and, if not, why not, and includes a description of any applicable enforcement and monitoring programs.

### 4. Supplemental EISs - agencies must prepare supplements to either draft or final EISs if:

- a. The agency makes substantial changes in the proposed action that are relevant to environmental concerns
  - b. There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.
    - (i) Supplements are prepared in the same manner as initial EISs, except that scoping is not required. 40 CFR 1502.9(c).
- 5. Programmatic EISs: prepared for a major program, plan or policy; often followed by site-specific EISs or EAs prepared at subsequent decision stages. The process of preparing a broad statement and more narrowly focused NEPA analysis, is referred to as subsequently, tiering. 40 CFR 1502.20; 1508.18.
- 6. Legislative EIS: NEPA requires an EIS on proposals for legislation which would significantly affect the quality of the human environment. A legislative EIS is prepared in the same manner as an administrative EIS, except that there need not be a scoping process, and except for certain circumstances, only one statement need be prepared. 40 CFR 1506.8.
- 7. Is “*major federal action significantly affecting the quality of the human environment*” a one step or two step question?
  - a. Major reinforces, but does not have a meaning independent of significantly. *Minnesota PIRG v. Butz*, 498 F.2d 1314 (8th Cir. 1974).
  - b. “Major Federal actions” includes actions . . . . which are potentially subject to Federal control and responsibility.” 40 CFR 1508.18.
- 8. “Actions” include much more than construction projects; for example, the term encompasses rules, regulations and interpretations adopted pursuant to the APA; adoption of formal plans and programs.
- 9. General revenue sharing funds with no federal agency control over the

use of the funds and judicial or administrative civil or criminal enforcement activities are not actions for the purposes of NEPA.

10. What does “significantly” mean?
  - a. Case by case determination, judging both context and intensity of particular proposal in context of criteria at 40 CFR 1508.27:
    - (i) What is the context (local, regional, affected interest)?
    - (ii) To what degree will proposal affect public health and safety?
    - (iii) Are there unique characteristics such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas?
    - (iv) Is there controversy regarding environmental effects?
    - (v) Are there highly uncertain, unique or unknown risks?
    - (vi) Will it establish a precedent or principle?
    - (vii) Is the proposed action related to other actions with individually insignificant but cumulatively significant impacts?
    - (viii) Does the proposal adversely affect scientific, cultural or historic resources?
    - (ix) Would the proposal adversely affect an endangered or threatened species or its habitat?
    - (x) Would the action be likely to result in a violation of Federal, State, or local law or environmental requirements?
    - (xi) “Significant impacts” may be both beneficial or adverse for purposes of NEPA. See 40 CFR 1508.27(b)(1); EDF v. Marsh, 651 F.2d 983 (5th Cir. 1981).

11. What are “effects” and “impacts”?
  - a. Synonymous terms under NEPA. Effects include ecological, aesthetic, historic, cultural, economic, social or health. These impacts are to be included in analysis for both EISs and EAs.
  - b. Three types of effects: direct, indirect and cumulative.
    - (i) direct effects, which are caused by the action and occur at the same time and place
    - (ii) indirect effects, which are caused by the action and are later in time or farther removed in distance but are still reasonably foreseeable
    - (iii) cumulative impacts, which result from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions. 40 CFR 1508.7, 1508.8.
  
12. What alternatives must be analyzed in an EIS?
  - a. Reasonable alternatives to the proposed action that meet the agency’s purpose and need.
  - b. Sometimes “reasonable alternatives” may include those outside of the lead agency’s jurisdiction. *NRDC v. Morton*, 458 F.2d 817 (D.C. Cir. 1972).
  - c. If the proposed action is the subject of a request for a federal permit or regulatory approval, the federal agency must consider both public and private purpose and need.
    - (i) Courts have stressed the need to consider the objectives of the permit applicant, *Roosevelt Campobello International Park Comm’n. v. EPA*, 684 F.2d 1041 (1st Cir. 1982), but have also reemphasized the requirement for the agency to exercise independent judgment as to the appropriate articulation of objective purpose and need. *Van Abeema v. Fornell*, 807 F.2d 633 (7th Cir. 1986).



13. Agency must legitimately assess the relative merits of reasonable alternatives before making its decision. *Dubois vs. USDA*, 102 F.3d 1273 (1st Cir. 1966).
14. Agency must not only identify and study reasonable alternatives on own initiative, but also analyze and consider significant alternatives that are called to its attention by other agencies, organizations, communities, members of the public. *Seacoast Antipollution League vs. Nuclear Regulatory Commission*, 598 F.2d 1221, 1330 (1st Cir. 1979).
15. A new alternative in a final EIS or ROD that is within the range of previously considered alternatives probably won't require a supplement to an EIS (on the grounds that there's a new alternative). But if an alternative is configured so differently that the public hasn't been fairly presented with the agency's analysis of that new alternative and commentators might have pointed out new issues posed by the new configuration, the agency probably needs to prepare a supplemental EIS. *Dubois v. USDA*, Id.
16. Changed circumstances can require reconsideration of alternatives in an EIS. ("Because elimination of the contract appears significantly to alter the range of viable alternatives available to the Forest Service in managing the areas in question, we hold that the Forest Service's decision not to reconsider land use alternatives in an EIS after providing public notice and conducting proceedings in keeping with the requirements of NEPA and ANILCA was not reasonable.") *Alaska Wilderness Recreation and Tourism Ass'n vs. Morrison*, 67 F.3d 723, 731 (9th Cir. 1995).
17. The agency must always analyze the **no action alternative** (and sometimes, it actually ends up being the agency's final decision). If the proposed action would be a brand new action (for example, the proposed action is whether to approve an application for a new ski resort), the "no action" alternative is denying the permit. If the proposed action builds on an already existing action (for example, revision of land management plan), the no action alternative is a continuation of the plan in existence at the time of the proposed revision). Note that if the action is already permitted and the applicant has applied for a renewal of the permit, the no action alternative may be a continuation of the permit without any changes.
18. Clarity in writing. NEPA documents should be written in plain language

so that decision-makers and the public can understand them. 40 CFR 1502.8.

19. Highly technical prose can hurt, not help, an agency's case in court. *Oregon Environmental Council v. Kunzman*, 614 F. Supp. 657 (D. Ore. 1985). Length, by itself, doesn't necessarily help either - in fact, it may help persuade a judge that an EA really needed to be an EIS, or that an EIS buries the salient points in too much paper. See *Blue Mountain Biodiversity Project v. Blackwood*, Court of Appeals, 9th Circuit, 12/2/98.

B. Environmental Assessments: A concise public document that serves to briefly provide sufficient evidence and analysis for determining whether to prepare an EIS; aids in an agency's compliance with NEPA when no EIS is necessary, and facilitates preparation of an EIS if one is necessary, 40 CFR §1508.9.

1. An EA should include:
  - a. A brief discussion of the need for the proposal
  - b. Reasonable alternatives to recommend courses of action for any proposal which involves conflicts concerning the uses of natural resources (Section 102 (2)(E) of NEPA).

- c. Environmental impacts of the proposed action and alternatives
- d. List of agencies and persons consulted
- e. Public must be involved in the preparation of an EA - agency's discretion as to how, but not discretionary to do it.

2. Findings of No Significant Impact (FONSI): a document which briefly presents the reasons why an action will not have a significant effect on the human environment. It may include a summary of the EA or simply be attached to the EA. 40 CFR 1508.13.

- a. In two circumstances, an agency must make a FONSI available for public review for 30 days, 40 CFR 1501.4(d)(2)(i)(ii).:
  - (i) If the proposed action is, or is closely similar to an action which normally requires an EIS; or
  - (ii) If the nature of the proposed action is without precedent.

C. Categorical exclusions: “a category of actions which do not individually or cumulatively have a significant effect on the human environment . . . and for which, therefore, neither an EA nor an EIS is required.” 40 CFR 1508.4. A categorical exclusion is not an exemption from NEPA; conceivably, an action that is normally categorically excluded could require an EA or even an EIS.

- 1. Agencies must be alert to extraordinary circumstances in which a normally excluded action may have a significant environmental effect. Examples include a significant impact on wetlands, historic sites, important habitat.
- 2. Absent extraordinary circumstances, no further documentation is required under NEPA for such actions.
- 3. CEQ will ask for administrative record for some proposed categorical exclusions.

D. NEPA and the Rest of the World

- 1. “Little NEPA” laws for state, city and tribal governments.

2. NEPA's application to federal actions abroad.
  - a. Executive Order 12114, "Environmental Effects of Major Federal Actions Abroad".
  - b. Decision in *Environmental Defense Fund, Inc. v. Massey*, 986 F.2d 518 (D.C. Cir. 1993) applied NEPA to operations of National Science Foundation at McMurdo Station in the Antarctica.
3. NEPA's application in the transboundary context
  - a. CEQ guidance, "Memorandum to Heads of Agencies on the Application of the National Environmental Policy Act to Proposed Federal Actions in the United States with Transboundary Effects," (July 1, 1997).
  - b. Courts have sometimes acknowledged this issue by granting intervenor status for neighboring country plaintiffs, or avoided issue by finding that NEPA fault first lies within the United States. *See, Swinomish Tribal Community v. Federal Regulatory Commission*, 627 F.2d 499 (D.C. Cir. 1980) for an example of the former and *National Organization for the Reform of Marijuana Laws v. Department of State*, 452 F. Supp. 1226 (D.D.C. 1978) for the later.
  - c. First case to squarely hold that NEPA requires analysis of transboundary impacts is *Government of the Province of Manitoba v. Salazar*, 692 F. Supp. 2d 37 (1020), dealing with alleged transboundary effects from the Northwest Area Water Supply Project, a proposal to withdraw water from reservoir on the Missouri River and transfer it across the continental divide in at 45-mile long pipeline for use in North Dakota. Concern was foreign biota transfer into the Hudson Bay Basin. "NEPA requires agencies to consider reasonably foreseeable transboundary effects resulting from a major federal action taken within the United States."
4. Trade agreements: Executive Order 13141.
  - a. Procedures developed through public process, published in 65 *Federal Register* 79442 (12/19/00); also available on USTR

website at [www.ustr.gov](http://www.ustr.gov).

- b. Process has or is being implemented for free trade agreements with Jordan, Singapore, Morocco, Southern Africa CU, Dominican Republic, Bahrain, Panama, Thailand, Central America, Chile, Australia, Andean countries and the FTAA and WTO/DOHA rounds.
5. NEPA's application in the Exclusive Economic Zone (EEZ) is an issue in several cases involving sonar tests sponsored by the Department of the Navy, the National Science Foundation or private scientific institutions.
- a. Natural Resources Defense Council, et. al. vs. U.S. Department of the Navy, (C. Dist. Ca., September 17, 2002). Programmatic challenge to the Navy's Littoral Warfare Advanced Development Program (WAD), an organizational structure that coordinates testing of potential technologies, including use of active sonar). Tests take place in both EEZ and high seas. The court first found against the plaintiffs on the issue of whether there was a "program" for purposes of NEPA. However, before the court ultimately ruled in favor of the government, it analyzed the NEPA/EEZ issue. The court was persuaded that the reasoning in *EDF v. Massey* was applicable to the EEZ due to lack of foreign policy issues and NEPA's procedural nature. It also rejected the Navy's arguments that compliance with E.O. 12114 preempted NEPA. A series of cases brought by NRDC involving the Navy's use of sonar and its impact on marine mammals resulted ultimately in Supreme Court review in *Winters v. NRDC*, 555 U.S. 7 (2008). In that decision, the Court focused on standards for preliminary injunctive relief, and did not address either the merits or the transboundary issue.
  - b. *Center for Biological Diversity v. National Science Foundation*, 55 ERC (BNA) 1871, 2002 U.S. Dist. LEXIS 22315, (N. Dist. Ca., October 30, 2002). Involved National Science Foundation funded acoustical research with airguns in the Mexican EEZ to develop information about structure of sea floor and data about the rifting of the continental lithosphere where the Pacific and North American plates meet in the Gulf of California. For analytical purposes, the court treated Mexico's EEZ as equivalent to the high seas and then applied *EDF v. Massey*.

## IV. INSTITUTIONAL ROLES – NEPA OVERSIGHT

### A. Council on Environmental Quality

1. Structure - 3 Council Members confirmed by the Senate; one is appointed Chair by the President, but, for a variety of reasons, under current appropriations law, all authority is vested in one Member and CEQ has operated with only one Member since the Reagan administration.
2. Located in the Executive Office of the President to fulfill an advisory role to President, interagency coordination and oversight role with agencies.
3. Particular role in procedural aspects of NEPA
  - a. Promulgation and interpretation of NEPA regulations
    - (i) “Substantial deference” should be given by lower courts to CEQ’s interpretation of NEPA, *Department of Transportation v. Public Citizen*, 541 U.S. 754 (2004); *Andrus v. Sierra Club*, 442 U.S. 347 (1979); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989). *See also, Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004) affirming CEQ’s authority to issue regulations interpreting NEPA.
  - b. Guidance regarding NEPA
    - (i) Guidance documents may address legal issues, policy issues or methodology.
    - (ii) Three most recent guidance documents, all published in draft for public comment in 2010, deal with: 1) promulgation and implementation of categorical exclusions; 2) monitoring and mitigation; 3) climate change under NEPA. The first two have been published in final form. All can be found at [www.nepa.gov](http://www.nepa.gov).
  - c. Role set out in regulations:
    - (i) Review of agency NEPA procedures, 40 CFR 1507.3

- (iii) Designation of lead agency, 40 CFR 1501.5(e)
- (ii) Alternative arrangements for supplemental EISs, 40 CFR 1502.9(c)(4)
- (iii) Alternative arrangements for emergencies, 40 CFR 1506.11.

4. Formal dispute resolution – Referrals

- a. Referral process: 40 CFR 1504 et seq.
- b. Origins derive from Section 309 of the Clean Air Act, directing the Administrator of EPA to review and comment publicly on the environmental impacts of Federal activities, including (but not limited to) actions for which EISs are prepared). If the Administrator determines that the matter is “unsatisfactory from the standpoint of public health or welfare or environmental quality”, he or she must refer the matter to CEQ.
- c. By regulation, CEQ expanded the referral process to other Federal agencies.
- d. Criteria for referral:
  - (i) Possible violation of national environmental standards of policies;
  - (ii) Severity;
  - (iii) Geographical scope;
  - (iv) Duration;
  - (v) Importance as precedents;
  - (vi) Availability of environmental preferable alternatives.
    - (a) The focus of the referral is on the underlying proposal, not adequacy of NEPA documentation.

- e. Timing: no later than 25 days after the notice of availability for the final EIS. In the case of referral w/o an EIS associated with the proposed action, CEQ negotiates a mutually agreeable timeline with the referring and lead agency.
  - (i) Outline of process: referring agency must put together statement w/factual evidence leading to the conclusion that the matter is unsatisfactory from the standpoint of public health or welfare or environmental quality; identify any existing environmental requirements or policies which would be violated by the matter; identify material facts in controversy and agreed-upon facts; present a finding that the issue raised is of national importance because of the threat to national environmental resources or policies or for some other reason; review steps taken to try to resolve concerns at an earlier stage; offer recommendations as to what mitigation alternative, further study, or other course of action (including abandonment of the matter) are necessary to remedy the situation.
  - (ii) The lead agency has 25 days to respond.
  - (iii) If CEQ accepts the referral (has rejected 3 on grounds that the issues presented weren't of national importance or that agency hadn't exhausted administrative remedies) , CEQ has 60 days to take various actions. Options include interagency mediation, public meetings or hearings, site visits, sending the matter back for further work, making recommendations to the President, publishing findings and recommendations in the *Federal Register*.

5. Other Dispute Resolution Roles

- a. Informal dispute resolution regarding interpretation of NEPA and CEQ regulations.

6. Resolving disputes related to role as environmental advisor to President 42 U.S.C. 4344(4).

7. Assisting “in coordinating among the Federal departments and agencies those programs and activities which affect, protect, and improve environmental quality” 42 U.S.C. 4372(d)(5).

8. Assisting the Federal departments and agencies in the development and interrelationship of environmental quality criteria and standards established through the Federal Government.” 42 U.S.C. 4372(d)(6).
9. Frequent causes of disputes that come to CEQ under NEPA rubric
  - a. Lack of early coordination w/other governmental levels (state, local, tribal) that may have a little NEPA law (should be done jointly, see 40 CFR 1506.2); thus, someone ends up going through the process twice.
  - b. Failure to solicit non-federal agency as cooperating agency.
  - c. Lack of early attention to need to analyze cumulative effects (see CEQ’s “Considering Cumulative Effects under the National Environmental Policy Act”, January, 1997; available on NEPANET website (see end of outline) or in hard copy from CEQ.
  - d. Scope of analysis (“small federal handle” issue – i.e., single federal permit that relates to small part of big project).
  - e. Disagreement about appropriate scope of mitigation.
10. Work on litigation and legislation related to NEPA
11. Education and training

## B. Role of EPA in NEPA

1. Section 309 of the Clean Air Act instructs the Administrator of EPA to review and comment in writing on the environmental impact of proposed legislation, authorized construction, proposed regulations, or any other major federal agency action.
  - a. EPA review and rating system for EISs, administered by Office of Federal Activities (OFA) in Enforcement Division.
2. EPA/ OFA also files EISs and publishes notices of availability.
  - a. EPA has recently revised its filing procedures and also solicited public comments on distribution and filing of EISs. Of note are

questions regarding the length of time EISs should remain available to the public and whether there would be any problems with reviewing EISs made available only on the internet. Vol. 76 Federal Register pp. 2681-2683 (January 14, 2011).

**C. Role of U.S. Institute for Environmental Conflict Resolution**

1. Established by Congress in 1998 in the Environmental Policy and Conflict Resolution Act (Pub. L. 105-156). The Institute is part of the Morris K. Udall Foundation, an independent federal agency of the executive branch located in Tucson, Arizona and overseen by a board of trustees appointed by the President.
2. Primary purpose is to assist parties in resolving environmental, natural resource and public lands conflicts. It was also charged with assisting in achieving the substantive goals of NEPA laid out in Section 101.
3. Opened for business on October 22, 1998, in Tucson, Arizona.
4. Provides alternative dispute resolution education and training and actual dispute services, including dispute resolution involving two or more federal agencies (with CEQ concurrence).
5. National Environmental Conflict Resolution Advisory Committee (advisory committee to Institute) issued a report in late 2004 focusing on linkages between environmental conflict resolution and Section 101 of NEPA.
6. Website: [www.ecr.gov](http://www.ecr.gov)

**D. CEQ's website for NEPA:**

1. NEPAnet Website: [www.nepa.gov](http://www.nepa.gov)
2. Text of statute
3. Text of regulations
4. Agency NEPA web site
5. CEQ guidance documents

6. NEPA legislative history
7. Organizations, training, etc.
8. NEPA Task Force Report
9. Native American websites
10. Foreign country EIA websites

**NEPA Practice Guide:  
Getting to the Heart of NEPA: Alternatives**

**I. The concept**

- A. There's always another way
- B. You are the agency
- C. You're not just "No"
- D. Not everything is possible
- E. Good ideas are attractive....well maybe not initially to the agency

**II. The experience**

- A. Mid-1980s: "Least herbicide alternative" – Region 6 FS – largely adopted
- B. Native Ecosystem Alternative – Hells Canyon NRA – key pieces adopted
- C. Sustainable Multiple Use Alternative – Manti-La Sal NF – Bush intervened
- D. Sustainable Multiple Use Alternative – Tushar Allotments – 2-year collaboration; new economics guidance
- E. Environment Protection Alternative – La Sal Mines Complex - ???

**III. The scoping notice is the starting bell**

- A. Get information you need, fast
  - i. Data
  - ii. Agency outline/format
- B. Assemble your "I.D. Team"
- C. Establish internal criteria for your alternative
  - i. Reasonable
  - ii. Feasible

- iii. Science-based
- iv. Cost-effective
- v. Psychologically attractive
- vi. Better - and they know it (even if they don't want to admit it)
- D. Run parts past Agency personnel
- E. Provide supporting science
- F. List significant issues that must be addressed
  - i. Include issues raised by your alternative
  - ii. Include issues that, if not addressed, could get you to the legal table for an Appeal --- at which you could negotiate re: parts of your alternative

#### **IV. Now you're at the table**

- A. Ask for a meeting to discuss your alternative
- B. Who does the agency listen to?

#### **V. The Draft EIS/EA is your time to comment**

- A. Was your alternative analyzed well?
- B. Was your alternative analyzed well but for...?
- C. Was your alternative eliminated from consideration in detail?
- D. Was your science used?
- E. Gather your support
  - i. Media
  - ii. Influential people
  - iii. Public
- F. Meet again with the agency

#### **VI. Final EIS/EA: Your alternative isn't included or is massacred? Don't give up**

- A. Appeal
- B. Appeal resolution
- C. Agency conversations
- D. Litigation
- E. The next EA/EIS...

#### **VII. Final EIS/EA: Key parts accepted? Don't go away**

- A. You're still the agency...implement it!
- B. Expand it to repeated application and/or policy

#### **VIII. Follow-through: The tale of Tushar Allotments EIS**

- A. Alternative submitted during scoping
- B. Alternative not considered in Draft EIS
- C. Alternative considered in Final EIS...but economics off-base
- D. Economics analysis of Final EIS

- E. Appeal Resolution
- F. Guidelines for economic analysis
- G. Two-year (well, four now) collaboration
- H. Applications elsewhere