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A Comparison of Environmental Impact Assessment Process between the National Environmental Protection Act (NEPA) and the Basic Environmental Protection Act (BEPA)

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A COMPARISON OF ENVIRONMENTAL IMPACT ASSESSMENT PROCESS BETWEEN THE NATIONAL ENVIRONMENTAL PROTECTION ACT (NEPA) AND THE BASIC ENVIRONMENTAL PROTECTION ACT (BEPA)

(Under the Direction of THOMAS SHOENBAUM)

The importance of environmental laws in the developed countries has been well recognized for a long time and a number of regulations, orders and statutes are practically operated for protection of human environments. The environmental laws are firmly located as one of major laws in the legal systems of the United States. Although Korea's environmental laws were made when those of the United States were created, different backgrounds Korea has affect from establishment of them to development and have brought about harms to environments, which are not originally intended.

After several amendments of environmental laws of Korea, there is the Basic Environmental Protection Act (BEPA), which is based on the National Environmental Protection Act (NEPA) of the United States. The BEPA is to show the government's strong intention to strengthen institutional measurements for protection of environments and among the BEPA, environmental impact assessment measurements deserves to be noticed and studied. By comparing environmental effect assessment systems between the NEPA and BEPA, I would like to have an opportunity to suggest that the BEPA would adopt better choices to protect environments.

INDEX WORDS: NEPA of the U.S., BEPA of Korea, Environmental Impact Assessment.

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DEDICATION

First of all, I thank my father that I love best in the world and always leads me to the right way. I could not imagine what I have done in Georgia and Korea without him. I love and respect you, father. And I thank my younger brother, who acts as if he is my big brother.

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CHAPTER 1

INTRODUCTION

1.1 Purpose of the Study

The earth where we live does not belong to us. It is borrowed from future generation. We have responsibilities and duties to preserve and improve the environment for them. Problems related with the environment require effective regulations, to be efficiently solved. That is why governments should take responsibility to do so. In effect, for about 20 years one of the most important emerging roles of government has been the regulation of escalating risks to human and ecological health, which have risen from our ever growing and ever more complex national and international economics.

It did not take long for governments to recognize the importance of environmental protection, but conceived regulations for it only in the most recent 20-30 years. When the concept of preparing a healthy and clean environment for the public was settled in environmental policies and became a common goal for the world to pursue, views on environmental polices by moving countries were changed. First, governments focused on recovering damaged environments and then tried to preserve them while causing little harm. Finally, they became devoted to improving and protecting environments for a better life. The last view conformed with the goal of a welfare society. There are endless public efforts as well as those of governments to have policies which consider humans and their environments. For example, NEPA (the National Environmental Protection Act) of the United States seemed to be one of sweet fruits of government and public efforts.

The contemporary American emphasis on environmentalism as regulatory policy is of fairly recent origin. From the 1960's through the first two years of the Clinton administration, the keystone legislation is the NEPA, a provision which exploded into a powerful weapon for the citizen lobbies to delay or to halt numerous projects. The Calvert Cliffs case[1] was a major influence in shaping the power of the EIS requirement, which forced agencies to write an EIS for all federal projects and to circulate the statements to local, state, and other federal agencies for their comments under section 102 (2) (c). Section 102 of NEPA was highlighted in Cliff's case and offered the opportunity for major environmental groups and citizen plaintiffs to use NEPA and EIS to force federal agencies to consider all environmental factors to the fullest possible extent.

Imprudent economic development polices of Korea, like other developing countries, brought tremendous economic expansion in a relatively short period of time, but at the same time, broke productive harmony between humans and their environment. Recently, Korean people began to evaluate their surroundings and quality of life as affected by the environment and recognized that immediate benefits from destroying an environment could not be greater than those from preserving them. Korean governments, through several amendments of environmental laws, set forth BEPA (Basic Environmental Protection Act) and EIAA (Environmental Impact Assessment Acts) under BEPA to mandate some governments and big corporations to consider the effect on the environment before they start works expected to have a significant impact.

Of course, legal institutions could not guarantee 100 % environmental protection, and a slow development of environmental laws also slows the attainment of environmental goals. Nevertheless, environmental law is considered the most valuable tool in policy

[1] Calvert Cliffs' Coordinating Comm. v. AEC, 449 F.2d 1109, 1112 (D.C. Cir. 1971).

implementation. The United States and Korea have several sub-statutes under NEPA and BEPA. Among them, legal environmental mechanisms like EIS or EIAA were created with the intention of predicting environmental damage before potentially damaging actions were undertaken, and then at least reduce any harm to the environment.

There are some reasons that I compare the Environmental Impact Assessment mechanism under NEPA and BEPA. Because BEPA is modeled after NEPA, observing NEPA's developments may offer Korean legal researchers opportunities to think about which ways BEPA should go forward in the future. Therefore, I would like to study NEPA and find what parts of BEPA should be corrected and implemented. Need of expeditious enforceable execution of environmental mechanisms in EIAA does not cover all possibilities of environmental impact and leaves many immature parts needing to be supplemented soon. It is priority to find those parts. I will suggest, then, some legal institutions and mechanisms that BEPA should take soon. Even though BEPA was based on NEPA, typical Korean situations forced legislator not to take complete NEPA institutions, but randomly take only those which were immediately necessary to prevent more environmental harm. Also, completely successful legal institutions in NEPA do not always work in BEPA. As a legal researcher, I introduce and suggest legal solutions. After thoroughly considering Korea's situation, legal principles and solutions should be adopted. Finally, I hope to suggest better policies and regulations for public participation in NEPA. Although economic success and the Korean people's awareness of the environment have increased sharply, the Korean people are practically blocked from participating in policy-making, and complaints about government's decisions appear as outrage or opposition. Their desire to participate in a decision-making process affecting

public interests, especially about environmental issues, has been realized through NGO (Non-Government Organizations). To satisfy these desires through procedures provided by law and to lead decision-makers to make better decisions, public participation should not continue to be ignored. I hope to study and introduce the procedures that can guarantee public participation in the making decision process, which needs public opinion because those decisions directly or indirectly are related to the public own interests. The regulations about public participation in NEPA are well prepared for an EA (Environmental Assessment) as well as an EIS. Public participation in the preparation of these mechanisms should be adopted in Korea's EIAA as soon as possible.

For these reasons, I will study EA and EIS which are the heart of the NEPA. While preparing procedures of EA and EIS, I'll study public participation as a separate component. The reasons why NEPA stresses the importance of public participation in decision-making and the ways in which NEPA responds to public opinion, especially their oppositions, are mainly dealt with in chapter III. Based on EIS, Americans have more sophisticated opportunities to take part in the decision-making process and can fully supervise protection of the environment. I hope that EIA of Korea can play the same role as EIS.

CHAPTER 2

THE NATIOANL ENVIRONMENTAL POLICY ACT (NEPA) OF THE UNITED STATES

2.1 NEPA

2.1.1 Purpose

The National Environmental Policy Act (NEPA) was signed into law by President Nixon on Jan.1, 1970. NEPA's statutory language established broad national policy goals. [2] It applies to all federal agencies and to every major action taken by the agencies that significantly affects the quality of the human environment.

NEPA is to hold the federal government accountable as trustee for the protection of the American Environment.[3] In an effort to provide a comprehensive policy mandate to govern federal agency activities in all of their various forms, NEPA has broad language to protect the human environment.[4] The most basic NEPA purpose, as related to providing federal accountability, is to force agencies to consider the environmental impact. [5] Section 101 of the statute proclaims Congress' goal of creating an environmental protection policy to benefit the American public, present and future.[6] Section 101 declares the federal government's national environmental policy 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

[2] 42 U.S.C. §4331 (a) (1988).
[3] S.Rep. No. 94-52, 94th Cong., 1st Sess. 8, reprinted in 1975 U.S. Code Cong. & AD. News 859, 865.
[4] 12 B.C. Envtl. Aff. L. Rev. 743, n140.
[5] Id at, n137.

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.[7] This Section makes it clear that each person has a fundamental and inalienable right to a healthful environment and each person has a responsibility to contribute to the preservation and enhancement of the environment.[8]

Another purpose of NEPA is to protect the integrity of federal agencies' decision-making[9] by opening the process to the public.[10] Indeed, regulations promulgated under NEPA by the Council of Environmental Quality (CEQ)[11] state that one of the polices of federal agencies must be to encourage and facilitate public involvement in decisions which affect the quality of the human environment.[12] A final purpose of NEPA is the early identification of the environmental consequences of government action while understanding those consequences within a large context.[13]

Section 102 outlines a procedural mechanism designed to implement this policy of environmental protection. As "action-forcing procedures", [14] it imposes upon federal agencies a duty to account for their implementation of the policy of the Act.[15] Therefore these procedures, which are designed to ensure that environmental protection is considered by agencies, require a strict standard of compliance.[16]

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[6] 42 U.S.C. §4321 (1988).
[7] 42 U.S.C. §4331 (a) (1988).
[8] S. 1075 §101(b), 91st Cong., 1st Sess., reprinted in S. Rep. No. 296, 91st Cong., 1st Sess. (1969).
[9] See, e.g., 40 C.F.R. §1500.1.(b) (1995).
[10] 42 U.S.C. 42 U.S.C. §4331, 40 C.F.R. §1512.2.
[11] See 40 C.F.R. §1503.2(d).
[12] See 40 C.F.R. §1503.1(a)(1).
[13] 40 C.F.R. §1503.1(a)(2)(i).
[14] 42 U.S.C. §4332(2) (1994).
[15] Valerie M. Fogleman, Guide to the National Environmental Policy Act, Quorubooks, p6 (1990) (referred as "Guide to NEPA")

2.2.2 Compliance with NEPA

2.2.2.1 Compliance Requirement for all Agencies and Compliance Examplation

NEPA section 102 requires all agencies to administer and interpret "to the fullest extent possible" federal policies, public laws, and regulations in accordance with the National Environmental Policy[17] and to implement the action-forcing provisions of the Act.[18] The term "to the fullest extent possible" applies to every requirement of section 102.[19] It is held by the District of Columbia Circuit that the term made compliance with NEPA's procedural requirements non-discretionary. [20] The Supreme Court subsequently interpreted the term to be "a deliberate command that the duty NEPA imposes upon the agencies to consider environmental factors not be shunted aside in the bureaucratic shuffle." [21] Considerations of administrative difficulty, delay or economic cost will not suffice to strip the section of its fundamental importance.[22] Further, Congress recognized that an agency's enabling statute should prevail when that statute either directly conflicts with, or expressly prohibits compliance with NEPA procedures. [23]

While all agencies should follow NEPA procedures, some identities are precluded from complying with NEPA under certain circumstances.[24] Where consideration of environmental impact as part of a permitting or decision–making is admitted, EPA decisions are regularly exempted from NEPA compliance. It is called a "functional

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[16] See Cliff, supra note 1 at 1112 (D.C. Cir. 1971).
[17] 42 U.S.C. §4332(1988).
[18] Flint Ridge Dev. Co. v. Scenic Reviews Ass'n of Oklahoma, 426 U.S. 776, 787-88 (1976).
[19] Id at.
[20] See Guide to NEPA, supra note 15, at 6.
[21] Flint Ridge Dev. Co. v. Scenic Rivers Ass'n, 426 U.S. 776, 787-88 (1976)
[22] See Cliff, supra note 1, at 1114-15.
[23] Douglas County II, 48 F. 3d at 1502.

equivalence of NEPA compliance, thereby rendering formal NEPA compliance redundant and unnecessary.[25] The Resources Conservation and Recovery Act[26] or Clean Air Act[27] or the Federal Insecticide, and Fungicide and Rodenticide Act[28] allow EPA decisions to be exempted from NEPA compliance, particularly when EPA actions are authorized under a comprehensive scheme or exclusive mechanism imposed by federal law that seems to satisfy NEPA's objective of protecting man and his environment.

The court reasoned EPA goals necessarily focus upon environmental preservation and virtually all EPA decisions would ultimately take environmental impacts into consideration.[29] In Amoco Oil Co. v. EPA,[30] the United States Court of Appeals for the District of Columbia ruled that an impact statement was not necessary to establish fuel regulations under CAA.[31] The court concluded that EPA actions under CAA operated as a "functional equivalent" to NEPA because CAA procedures allow for a systematic evaluation of various environmental factors.[32] And, particularly, the statute, provides ample opportunity for public comment with respect to EPA action.[33]The circuit court noted that environmental issues are considered in the general application of CAA, and further, that the Act's rule-making procedures "strike a workable balance between some of the advantages and disadvantages of full application of NEPA."[34] Court is intended to

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[24] Karin P. Sheldon & Mark Squilllance, The NEPA Litigation Guide, American Bar Assiciation 152-54 (1999). (referred as "the NEPA Litigation Guide")
[25] Id. at.
[26] Alabama v. EPA, 911 F.2d 499 (11 th Cir. 1990).
[27] Amoco Oil Co. v. EPA, 501 F.2d 722, 163 (D.C. Cir. 1974). (referred as "Amoco")
[28] Environmental Defense Fund, Inc. v. EPA, 489 F.2d 1247, 1256 (D.C. Cir. 1973).
[29] See Amoco, supra note 27, at 749-50.
[30] Id at.
[31]Id at 749.
[32] Id at 749-50.
[33] Id at.
[34] Id at 750.

allow functional equivalence only for EPA and is unlikely to extend it to agencies other than EPA.

Besides the reason of functional equivalence, exemptions of NEPA compliance are allowed for Congress[35], the judiciary, and the president.[36] For NEPA purposes, a "federal agency" may also include a state or local government or an Indian tribe that assumes NEPA responsibilities as a condition of receiving funds under section 104(h) of the Housing and Community Development Act of 1974.[37] Except for these exemptions, NEPA is a regulatory statute at all federal agencies.[38] Environmental protection becomes the mandate of every federal agency[39] to which any deference to determine whether NEPA requirement to consider environmental effects are necessary or not is not permitted.[40]

2.2.2.2 Substantive or Procedural Effect

Whether NEPA is purely procedural or has substantive content has been disputed.[41] NEPA does set forth significant substantive goals for the nation as noted above.[42] Nevertheless, the only role for the courts is to insure the agency has considered the environmental consequences because NEPA's mandate to the agencies is essentially procedural.[43]

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[35] 40 C.F.R. §§1506.8, 1508.17 (1997).
[36] 42 U.S.C. §4332(2)(D) (1994).
[37] 42 U.S.C. §5304(a) (1994).
[38] See Guide to NEPA, supra note 15, at 17.
[39] Lynton Caldwell, Science and the National Environmental Policy Act 9 (1982).
[40] See Cliff, supra note 1, at 1112.
[41] Environmental Defense Fund, Inc. v. Corps of Eng'rs, 492 F.2d 1123, 1139 (5th Cir. 1974).
[42] Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 558 (1978).
[43] Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 227 (1980).

The limits of the courts' role to decide whether an agency action is arbitrary or capricious spurred the misconception that an agency action may proceed after the agency complies with NEPA's procedures even though the action is environmentally destructive.[44] Court may reject agency's substantive decision only if it was reached procedurally without a full, good faith, individualized consideration or balancing of environmental factors.[45] Weighing procedural compliance deters the purpose of NEPA's action-forcing provisions which is "to insure that the polices enunciated in section 101 are implemented."[46]

Enforcement of the procedural EIS requirement ensures substantive compliance with NEPA. Through this procedural requirement NEPA places more exacting strictures upon agency decision making than do most statutes.[47] Thus through procedural obligations, federal agencies comply with a substantive policy. The EIS as this "key of requirement of NEPA" has been the focal point of substantive litigation.[48]

2.2.3 Administrative Structure for Implementing NEPA

2.2.3.1 The Council on Environmental Quality (CEQ)

The Council on Environmental Quality (CEQ) was established by section 103 of NEPA in the Executive Office of the President in 1970.[49] The CEQ, which is a federal

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[44] Robertson v. Methow Citizens Council, 109 S. Ct. 1835, 1846 (1989).
[45] Sierra Club v. Fronhlke, 486 F. 2d 946, 952 (7th Cir. 1973).
[46] Environmental Defense Fund, Inc. v. Corps of Eng'rs, 470 F. 2d 289, 297 (8th Cir. 1972).
[47] The Preparation of Judicial Review, 14 U.S.F.L. REV. 403, 405 (1980).
[48] Liroff, The Council of Environmental Quality, 3 ENV'T REP. (BNA) 50051 (1973).
[49] 42 U.S.C. §4342 (1988).

agency,[50] has three members who are appointed by the president with the advice and consent of the Senate. One member of the CEQ is designated as chairman by the President.[51]

The purpose of the CEQ is to review and evaluate federal government programs to determine how the programs contribute to the furtherance of a national environmental policy.[52] Each federal agency implements NEPA as NEPA pertains to its actions, using as its basis for NEPA procedures, regulations promulgated by the CEQ.

The CEQ's influence within the government has waxed and waned with presidential preference. Its staff size, which hovered at 50 to 70 members through the Nixon, Ford, and Carter years, plunged to fewer than 10 under Reagan, and has recovered only in part under Bush and Clinton.[53]

The CEQ has three advisory responsibilities under NEPA: the analysis and development of national and international environmental policy; the interagency coordination of environmental quality programs; and the acquisition and assessment of environmental data.[54]

2.3.2.2 Effect of the CEQ on Federal Agencies

(a) The CEQ Guidelines

NEPA does not specifically direct the CEQ to issue regulations, or even guidelines, to implement NEPA.[55] Some authority to issue guidelines may be drawn from NEPA's

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[50] Pacific Legal Found'n v. CEQ, 636 F.2d 1259, 1263 (D.C. Cir. 1980).
[51] 42 U.S.C. §4342 (1988). See generally 20 Env'tl Rep. (BNA) 1059, 1059-60(1989).
[52] 40. C.F.R. §1512.2 (1995).
[53] See The NEPA Litigation Guide, supra note 24, at 6.
[54] Council on Environmental Quality, Fact Sheet (undated); see 40 C.F.R.§1515.2 (1989).
[55] See H.R. 1113 §3, 101 st Cong., 1 st Sess. (1989) (providing the CEQ with regulatory authority).

mandate to the CEQ "to review and appraise the various programs and activities of the Federal Government in the light of the policy set forth in NEPA," and the authority to develop and recommend to the president national environmental policies.[56] However, this language is far from being a clear grant of authority to issue guidelines or regulations.[57]

President Nixon issued an executive order charging the CEQ with the responsibility for adopting "guidelines" to implement the provisions of NEPA's section 102(2)(C) dealing with EIS requirements.[58] Those guidelines, which creatively helped shape the future of NEPA, established the CEQ as integral to the Act's implementation[59] and gave substance to the underlying statue. The guidelines were first released as interim guidelines,[60] which were successively replaced by guidelines,[61] by further proposed guidelines,[62] and by final guidelines.[63] Finally, the CEQ included n the final guidelines, interim procedures for referrals under section 309 of the Clean Air Act.[64] Due to the addition of the various new procedures in the final guidelines, the CEQ required agencies to revise their individual NEPA procedures in consultation with the CEQ.[65]

The CEQ's central role in implementing NEPA was assured after 'Calvert Cliffs'.[66] Agencies continued to be slow in publishing NEPA procedures[67], but the general form of their procedures was being set by the CEQ.

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[56] 42 U.S.C. §4344 (3) (1988).
[57] Valerie M. Fogleman, Guide to the National Environmental Policy Act, Quorubooks, 31 (1990).
[58] Exec. Order No. 11514, 3C.F.R.217 (1974).
[59] See The NEPA Litigation Guide, supra note 24, at 6.
[60] 35 Fed. Reg. 7,391 (1970).
[61] 36 Fed, Reg. 7,724 (1971).
[62] 38 Fed. Reg. 10856 (1973).
[63] 38 Fed. Reg. 20,550 (1973).
[64] Council on Environmental Quality, statements on Proposal Federal. Actions Affecting the Environment: Guidelines, 36 Fed. Reg. 7724, 7725-26 (1971).
[65] Id at.
[66] See Cliff, supra note 1 at 1117.
[67] See Agencies' Revised NEPA Procedural Compliance Guidelines Near Completion, Months After Deadline for Submission to CEQ, 1 Envtl. L. Rep. (Envtl. L. Inst.) 10,167, 10,168071 (1971).

The scope of the guidelines increased beyond requiring draft and final EIS's to include requiring consideration of environmental effects in all agency activities. The guidelines also required that EISs contain an evaluation of competing interests, including environmental and other interests.[68] The 1973 guidelines were not merely written more authoritatively in regulatory language; the CEQ published the guidelines in the Code of Federal Regulations, thus reinforcing the guidelines' regulatory appearance.[69]

(b) The CEQ Regulations

President Jimmy Carter appointed Charles Warren as the CEQ Chair. He took responsibility for drafting, adopting, and overseeing the CEQ regulations.[70] The President made efforts to strengthen the CEQ's charges and changed two major authorities of the CEQ. The guidelines were replaced by regulations[71] and permissible scope of the regulations encompassed all of NEPA's procedural provision in the section 102(2). [72] The executive order also strengthened the authority that CEQ had by virtue of section 309(b) of the Clean Air Act,[73] to receive referrals of other agencies' actions believed to be environmentally unsatisfactory. While section 309 is limited to EPA, the president now authorized all agencies to make such referrals to the council under NEPA.[74] The intent of section 309 is to make environmental agencies "effective participants" in the government's decision-making process and to assure consideration of their views by

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[68] See generally Comment, The Council on Environmental Quality's Guidelines and Their Influence ont eh National Environmental Policy Act, 23 Catholic Univ. L., Rev. 547, 561-71(1974).
[69] See Guide to NEPA, supra note 15 at 33.
[70] Exec. Order No. 11991, 3 C.F. R. 123 (1978).
[71] Exec. Order 11514 as amended by Exec. Order 11991, §§2(g), 3(h). 3 C.F.R. 123 (1978); see Andrus v. Sierra Club, 442 U.S. 347, 3557-358 (1979).
[72] Exec. Order 11991, §3(h). 3 C.F.R. 123 (1978).
[73] 42 U.S.C. §7609(b) (1994).
[74] Exec. Order 11991, §3(h). 3 C.F.R. 123 (1978); see 40 C.F.R. Part 1504(1997).

"mission-oriented" federal agencies.[75] The EPA must refer proposals to the CEQ where it considers the merits unsatisfactory from the perspective of public health or welfare or environmental quality. The CEQ regulations specify procedures for review of an EPA determination that a proposed action is unsatisfactory.[76] The CEQ also allows such referral by other federal agencies.

Finally, The CEQ provides uniform procedures for federal agencies to observe,[77] which have NEPA purposes to include reduction of paper work and delay , and to accomplish NEPA's goals.[78]

The CEQ regulations which bound on all agencies are for each agency to implement NEPA. Therefore, the regulations written by a small federal agency for use by other agencies greatly exceed the CEQ in size. The regulations contain not merely the CEQ's interpretation of NEPA but, to large extent, the CEQ's interpretation of NEPA as supported by case law, administrative experience from other federal agencies, and the lengthy rule-making process by which the regulations were finalized.[79]

The NEPA procedures adopted by the individual agencies cannot help but being varied and there might well be many similarities and differences between the procedures of the various federal agencies. Substantive differences are also expected.[80] These differences due to the nature of the individual agencies. However these differences cannot immunize them from NEPA compliance that all federal agencies should follow. Therefore, publishing voluminous manuals of procedures to be able to show agencies'

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[75] Alaska v. Andrus, 580 F.2d 465, 475-76 n.4 (D.C. Cir.1978).
[76] 40 C.F.R. §1504..
[77] 43 Fed. Reg. 55,978 (1978).
[78] 43 Fed. Reg. 55,978 (1978).
[79] 43 Fed. Reg. 55,978 (1978).
[80] Sylvester v. Corps of Eng'rs, 884 F.2d 394, 398-401 (9th Cir. 1989).

compliance with NEPA and to detail the NEPA process are required.[81] Especially, the procedures are to be made available for public review as well as review by the CEQ for conformity with NEPA and the CEQ regulations.[82]

2.2.4 The Environmental Protection Agency (EPA)

According to the CEQ regulations, the EPA takes responsibility for receiving and filing EISs as well as checking its completeness.[83] In addition, the EPA publishes the EISs.[84]

Section 309 of the Clean Air Act (CAA) provides, broader powers than NEPA for the EPA administrator to be able to comment on a substantive decision, which is usually precluded from challenging by law suits.[85] From the standpoint of public health or welfare or environmental quality,[86] this section requires the administrator to review and comment on all actions requiring preparation of an EIS as well as additional actions, and authorizes the EPA to make and publish its determination of actions considered to be environmentally unsatisfactory and to refer such matters to the CEQ.[87]

Under Section 309 of CAA, the EPA reviews and comments on drafts and final EISs as a cooperating agency. [88] However, rating is allowed for only a draft EIS. The results of rating are in 4 categories; 1) lack of objections (LO), 2) environmental concerns (EC), 3) environmental objections (EO) and 4) environmentally unsatisfactory (EU). Typical

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[81] NEPA in Practice: Environmental Policy or Administrative Reform?, 6 Envtl. L. Rep. (Envtl. L. Inst.) 50,001, 50,003 (1976).
[82] 40 C.F.R. §1507.3 (1997).
[83] 40 C.F.R. §§1506.9, 1506.10 (1977).
[84] 40 C.F.R. §1506.10 (a) (1997).
[85] See Guide to NEPA, supra note 15 at 17, and chapter 2, n 153 (1990)
[86] 42 U.S.C. §7609 (b) (1997).
[87] See Guide to NEPA, supra note 15 at 42.

comments by the EPA after reviewing draft EISs range from no objections to the intent to consider referring the action to the CEQ if the EPA's concerns are not addressed in the final EIS.[89] Comments on the final EIS range from the extreme of no formal comments because review of the final EIS was not deemed necessary[90] to the intent to consider referring the action to the CEQ if the EPA's concerns are not addressed.[91]

The EPA selectively reviews ROD (Record of Decisions). However, the time limit[92], at practice, does not allow the EPA to refer action in which agency plans were not included in the ROD. Therefore, a favorable comment to a draft EIS by the EPA aids an agency in establishing the adequacy of the subsequent final EIS. A referral to the CEQ by the EPA is also considered by a reviewing court and the agency may be entitled to deference if its proposed action is subsequently revised according to the CEQ's suggestion.

2.3 The Threshold Determination

Early in the NEPA process the agency must determine whether the proposal presented for implementation is major federal action which will significantly affect the human environment, thereby triggering the requirement of an EIS preparation.[93] The threshold issue in applying the National Environmental Policy Act (NEPA) is understanding what triggers the requirements of the statute, specifically the range of agency actions subject to

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[88] CEQ, forty most asked questions concerning CEQ's NEPA Regulations, 46 Fed. Reg. 18,026, 18,031 (1981). (referred as "Forty Questions Memorandum")
[89] 54 Fed. Reg. 41,340 (1989).
[90] Id at.
[91] Id at.
[92] "Referrals must be made within 25days after the notice of availability of the final EIS whereas the final decision (ROD) may not be made or filed" until after 30days from the notice of availability of the EIS. §1508.18, 19. (1997)

NEPA review.[94] The other threshold agency activity which requires an EIS preparation is any recommendation or report upon agency proposal for legislations.[95]

Section 102(2)(C) of NEPA directs federal agencies to "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" describing the environmental effects of the proposed action and alternatives to it.[96] But any definitions about three components: 1)major 2) federal actions having 3) significant effects on the environments, to trigger preparation of EIS is not determined by the statutes. Nor is legislative history particularly helpful in ascertaining congressional intent.

Given the lack of statutory direction, the CEQ regulations provide a useful starting point for understanding the NEPA process and for determining whether an EIS is required.[97] The Courts took a little different position to interpret those terms.

2.3.1 Major

The CEQ defines "major federal actions" as actions with effects that may be major and which are potentially subject to Federal control and responsibility.[98] Its definition equates "major" effects with "significant" ones.[99] Essentially, "major" of the major federal action and "significantly" of significantly affecting the quality of the human environment blur as distinct concepts and requirements.[100]

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[93] Scientists' Institute for Public Information, Inc. v. Atomic Energy Comm'n, 481 F.2d 1079, 1091 (D.C. Cir. 1973).
[94] See The NEPA Litigation Guide, supra note 24, at 20.
[95] 12 B.C. Envtl. Aff. L.Rev. 743, *790 n245.
[96] 42 U.S.C. §4332(2)(C) (1994).
[97] See 40 C.F.R. pt.1500 (1997).
[98] 40 C.F.R.§ 1508.18.
[99] See id.
[100] 40 C.F.R.§ 1508.18 (a).

To define the meaning of major federal actions, there were two different views.[101] One view was that any federal action causing significant impact is, by its nature, major.[102] The other view was that the statute imposes two distinct inquiries: Is there "major" federal action, and, if so, will there be a significant impact?[103] The CEQ regulations state " major reinforces but does not have a meaning independent of significantly."[104] Finally, the Tenth Circuit of Sierra Club v. Hodel, seemingly modified the CEQ's definition, finding that "major federal action does not have a meaning completely independent of significant impact."[105] Most courts read "major" in conjunction with "significantly."[106] The rationale behind this interpretation is that if an action has a significant effect on the environment, the action must necessarily be major.[107] The statutory requirement that federal action be major appears to retain some vitality, despite the CEQ regulations.[108] On a ground of protecting the environment, courts weighed whether or not an action has significant effects on the environment.

2.3.2 Federal

In order for an action to be federal, there must obviously be a nexus between a federal agency and an action.[109] Problems to determine whether federal agency supervision[110] or planning of a project[111] should be considered tantamount to federal actions are expected

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[101] See The NEPA Litigation Guide, supra note 24, at 30.
[102] See Minn. Pub. Interest Research Group v. Butz, 498 F.2d 1314, 1321-22 (8 th Cir.1974).
[103] See Hanly v. Mitchell, 460 F.2d 640.644 (2d Cir.1972).
[104] 40 C.F.R.§ 1508.18. (1997).
[105] Sierra Club v. Hodel, 848 F.2d 1068, 1091-92(10th Cir.1988) .
[106] Id at.
[107] City of Davis v. Coleman, 521 F 2d 661, 673 n.15 (9th Cir.1975).
[108] See The NEPA Litigation Guide, supra note 24, at 30.
[109] 12 B.C. Envtl. Aff. L. Rev. 743, *774.
[110] Davis v. Morton, 335 F. Supp. 1258 (D.N. Mex. 1971), rev'd 469 F.2d 593 (10th. Cir. 1973).
[111] 40 C.F.R. §1508.18 (a) (1983).

while courts and agencies do not convene opinions to define federal action. Similarly, this issue has arisen in cases where agency action or involvement is contemplated but has yet to occur. [112]

Despite the CEQ regulations of the "major federal action" provision, the distinction between active federal participation in a project and the mere implementation of a project or federal issuance of a permit to those engaged in a private activity remains a contested issue.

When the federal portion is sufficiently critical to the non-federal actions, non-federal portions would be federalized enough to trigger a comprehensive EIS.[113] Here are three tests to be considered as federalized action: (1) the degree of discretion exercised by the agency over the federal portion of the project: (2) whether the federal government had given any direct financial aid to the project; and (3) whether the overall federal involvement with the project was sufficient to turn essentially private action into federal action.[114]

Sometimes, the most tenuous federal portion to the non-federal actions makes agency action sufficient to require compliance with the EIS requirements.[115] Any kinds of agency actions or proposals presumed to be a federal action are subject to the policies and procedures outlined in NEPA.[116] NEPA interpretation of EIS requirement provides federal agencies with responsibility commensurate with the standard of a duty in their capacity as trustees of the environment.[117]

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[112] I. Schoenbaum, Environmental Policy Law, at 118 (1982).
[113] See e.g., Winnebago Tribe of Nebraska, 621 F. 2d at 272-73.
[114] Winnebago Tribe of Nebraska, 621 F. 2d at 272.
[115] McGregor, Environmental Law 110 (1981).
[116] McGregor, Environmental Law 110 (1981).
[117] Restatement (Second) of Trusts, § 348 (1959).

2.3.2.1 Federal Funding

The acceptance of federal funding by a nonfederal entity may result in an action becoming federal.[118] However, the presence of federal funding is not determinative of whether the underlying action is federal. It would be one factor in the analysis of whether a federal agency has sufficient control over, responsibility for, or involvement in an action for the action to be characterized as federal.[119]

To satisfy a publicly funded project being federalized, the funding should be substantial and there must be a nexus between the federal funding and a proposed action.[120] The action necessarily characterized as federal needs to be commenced.[121] Later, although it would be future federal action, a tentative non-binding allocation of funds is generally insufficient to federalize the underlying action.[122]

2.3.2.2 Federal Control

An action may become federal if a federal agency has the right to exercise control over it.[123] The federal agency must have the power to decide whether to approve or deny an action,[124] or whether to impose conditions on it.[125] If a federal agency has no

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[118] Homeowners Emergency Life Protection Comm v. Lynn, 541 F.2d 814, 817 (9th Cir.1976)
[119] Atlanta Coalition on Transp. Crisis, Inc. v. Atlanta Regional Comm'n,599 F.2d 1333,1347(5th Cir.1979)
[120] Id at.
[121] City of Boston v., Volpe, 464 F. 2d 254, 258-59 (1st Cir. 1972).
[122] See Guide to NEPA, supra note 15, at 58.
[123] Id at 58.
[124] City & County of Denver v. Bergland, 695 F.2d 829 840 (6th Cir. 1981).
[125] See Sierra Club v. Hodel, 848 F 2d 1069, 1089-90 (10th Cir .1988). (referred as " Hodel.")

discretion as to whether to act, the action is not a federal action for the purposes of NEPA.[126]

Implicit in federal action is the idea that the agency has discretion to act or to influence the proposed action.[127] Two cases involving the secretary of the interior illustrate this point. In South Dakota v. Andrus, the court found that NEPA did not apply to the secretary's issuance of a mining patent.[128] There was no major federal action, because issuance of a patent is a ministerial, non-discretionary action once the requirements of the General mining Law have been satisfied.[129] In NRDC v. Berklund, by contrast, the court found that the Secretary's issuance of a preference right coal lease did constitute major federal action subject to NEPA. Although issuance of the lease itself was non-discretionary under the Mineral Leasing Act, the Secretary had discretion in setting lease terms.[130] The touchstone of major federal action is an agency's authority to influence significant nonfederal activity.[131]

2.3.2.3 Federal Permits and Approvals

If a federal agency has discretion to permit or approve an activity, it is usually undisputed that the agency controls the action.[132] Distinction between publicly and privately funded projects is the belief that federal license and permit procedures render private actions federal in nature for the purposes of NEPA compliance.[133]

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[126] See Pacific Legal Found'n v. Andrus, 657 F.2d 829,840 (6th Cir. 1981).
[127] See The NEPA Litigation Guide, supra note 24, at 29.
[128] South Dakota v. Andrus, 596 F.2d 848, 850-52 (9th Cir. 1979).
[129] NRDC v. Berklund, 458 F. Supp. 925, 937-38 (D.D.C. 1978).
[130] See Hodel, supra note 125, at1089 (10th Cir .1988).
[131] Id at.
[132] See Guide to NEPA, supra note 15, at 59.
[133] 40 C.F.R. §1508.18 (a) (1997).

The extent of the action that is federalized depends on the facts of each case. A large-scale nonfederal action is not necessarily federal simply because one portion of it requires a federal permit or approval.[134] Limited permitting by a federal agency may not be sufficient to federalize the action.[135] Practical consideration limited the scope of federal agency analysis to the federal component of larger projects so that limited federal involvements make it possible that an agency should not be required to devote scarce resources to studying the entire project.

2.3.2.4 Small-Handle Problems

There are some projects in which a federal agency's involvement is tangential or minor.[136] "Small-handle" is the term generally used to refer to instances where the amount of federal involvement is arguably marginal, and the issue becomes whether or not a comprehensive EIS is required.[137] Facing the small-handle problems, the courts decided whether the phrase "major federal actions significantly affecting the quality of the human environment" required a dual standard of analysis or a unitary standard of analysis.[138] The dual standard adopted by some courts involved an analysis of both the scope of federal involvement in the project and the significance of the project's environmental effects.[139] Thus, federal involvement had to be major before the courts

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[134] Sylvester v. Corps of Eng'rs, 884 F.2d 394, 400-01 (9th Cir.1989).
[135] See Save Our Wetlands, Inc. v. Sands, 711 F.2d 634, 644 n.9 (5th Cir. 1983).
[136] See The NEPA Litigation Guide, supra note 24, at 31.
[137] 23 B.C. Envtl. Aff. L. Rev. 437 n. 4.
[138] NAACP v. Nedical Center, Inc., 584 F. 2d 619, 626-27.
[139] 23 B.C. Envtl. Aff. L. Rev. 437 at 445.

would require an EIS.[140] Unitary standard involved only the environmental harm component.[141]

While the courts' choice between dual and unitary standards is not decided yet, the CEQ regulations explicitly have adopted the unitary approach.[142] Courts which adopted unitary standard or review confined its determination to whether defendants reasonably concluded that a project would have no significant environment effects.[143] Circuit and CEQ reasoned unitary approach can meet the NEPA purpose, because a small possibility of a minor federal action significantly affecting the environment is not excluded.[144] The unitary approach apparently does not require a court to assess how "major" the federal involvement in the project, so that it would be interpreted as "every federal action significantly affecting the quality of the human environment".[145]

When federal involvements go along with the NEPA requirement that an agency consider indirect and cumulative effects of the federal action, the courts would take a broader view of the effect of federal involvement in a project and generally require an agency to look at an entire project. If the impacts of the whole project will be significant, an EIS should be done.[146] A broader view of an agency's NEPA obligations seemed based on a more literal application of the CEQ's regulations regarding indirect and cumulative effects.[147] For the small handle problem, the unitary approach is suitable.[148]

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[140] NAACP, 584 F. 2d at 626.
[141] City of Davis, 521 F. 2d at 673 n.15.
[142] 40 C.F.R. § 1508. 18.
[143] City of Davis, 521 F. 2d at 673 n.15.
[144] Minnesota Pub. Interest Research Group, 498 F. 2d at 1321-22.
[145] Id at.
[146] Colorado River Indian Tribes v. Marsh, 605 F. Supp. 1425, 1431-34 (C.D. Cal. 1985).
[147] When should the National environment Policy Act require an Environmental Impact statement, 23 B.C. ENVTL. AFF. L.REV. 437 (1996).
[148] 40 C.F.R. §1501.4(a)(2), 1508.4 (1989); see also, Daniel R. Mandelker, NEPA Law and Litigation, § b. 04 (2) (2D ed. 1992 (Supp. 1995).

2.3.3 Significant Effecting/Effects, or Impacts on the Quality of Human Environment

An action has environmental effect if it impacts the physical environment. Effects are synonymous with impacts.[149] Effects included direct effects as well as indirect effects. If any environmental effects of a proposed action which meets the "degradation" standard, the action falls in the threshold action requirement for the development of an EIS.

First of all, effects that an agency considers in an EIS should be foreseeable. If effects are highly speculative or indefinite, they are excluded from being considered. Criteria to distinguish which actions are speculative include: the agency's degree of confidence in predicting the effects' occurrence; the available knowledge with which to describe the impacts in a manner useful to the decision maker; and the feasibility of the decision maker's meaningfully considering an analysis of environmental effects later in the action without being obligated to continue the action because of past commitments.

Foreseeable effects include indirect effects as well as direct effects. Direct effects occur at the same time and place as a proposed action. Indirect effects are also caused by an action but occur at a later time and greater distance. Indirect effects include the growth-inducing potential of an action,[150] the loss of a resource,[151] a change in an area's character[152] and the opportunity to classify land as wilderness if a decision is made to manage the land as non-wilderness.[153]

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[149] 40 C.F.R. §. 1508.8 (1997).
[150] Greenspon v. FHWA, 488 F. Supp.1374, 1381 (D. Md. 1980).
[151] Concerned Citizens on I-190 v. Secretary of Transp., 641 F.2d 1, 5-6 (1st Cir. 1981).
[152] National Helium Corp. v. Morton, 486 F. 2d 753, 764 (9th Cir. 1982).
[153] Coalition for Canyon Preservation v. Bowers, 632 F. 2d 774, 783 (9th Cir. 1980).

These effects on the human environment from changes in the physical environment include impacts on human health and welfare.[154] Under 102(C) of the NEPA[155], which provides that an agency must evaluate the environmental impact and any unavoidable adverse action significantly affecting the quality of the human environment, the terms "environmental effect" and "environmental impact" are to be read to include a requirement of a reasonably close causal relationship between a change in the physical environment and the effect at issue; this requirement is like the doctrine of proximate cause in tort law. By a general rule, the proposed action must affect the environmental status quo in order to trigger NEPA.[156] According to the theme of §102 which is sounded by the adjective "environmental," NEPA does not require the agency to assess every impact or effect of its proposed action, but only the impact or effect on the environment.[157]

Some socio-economic effects should be covered by NEPA because they are caused by an impact on the physical environment. On the other hand, other socio-economic effects that do not impact on the physical environment are not covered by NEPA. Socio-economic effects include local unemployment, reduction in jobs, and unrealized risks of crime, which are somewhat different from the quality of urban life (noise, traffic, congestion, overburdened mass transportation systems, crime, congestion, and availability of drugs). The effects from the quality of urban life are the criteria that are sometimes regarded by other courts as having only socio-economic effects. The CEQ regulations also require agencies to consider socio-economic effects in an EIS when such

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[154] Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc., 462 U.S. 87, 106-07 (1983).
[155] 42 USCS 4332(C).
[156] Assure Competitive Transp., Inc. v. United States. 635 F 2d. 1301, 1309 (7th Cir. 1980).

effects are interrelated with natural or physical effects. However, the mere interrelation with an impact on human environment does not satisfy the EIS requirement. When impacts on the physical environment exist, the CEQ regulation to consider the socio-economic effects can be mandatory. [158]

2.4 Categorical Exclusions (CE)

When actions normally do not have significant environmental impacts, individually or cumulatively, they belong to Categorical Exclusions (CE).[159] Need to prepare an EA or EIS exempts CE from the NEPA process.[160] Therefore, an agency is inclined to use CE to avoid either an EIS or EA and this tendency leads to a fertile source of litigation.[161] Agencies generally adopt broad criteria to characterize the type of actions that normally do not cause guidelines for implementing NEPA.[162]

CE is defined by Federal Highway Administration regulations as "actions which: do not induce significant impacts of planned growth or land use for the area; do not require the relocation of significant numbers of people; do not have a significant impact on any natural, cultural, recreational, historic, or other resources; do not affect travel patterns; do not otherwise, either individually or cumulatively, have any significant environmental impacts.[163]

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[157] Metropolitan Edison Co. Et Al. v. People Against Nuclear Energy Et. Al., 460 U.S. 766, 12 (1983). (referred as "Metropolitan")
[158] Id at 14 (1983).
[159] 40 C.F.R. §1501.4(a)(2), 1508.4 (1989).
[160] Sierra Club v. United States Forest Serv. 843 F.2d 1190, 1191-1192 (9th Cir. 1988). (referred as "Forest")
[161] See The NEPA Litigation Guide, supra note 24, at 37.
[162] See, eg., 23 § 771.117(a) (1989).
[163] See Guide to NEPA, supra note 15, at 74, n97.

2.5 The Environmental Assessment (EA)

2.5.1 Introduction

Environmental Assessments (EAs) are de the CEQ regulations. The regulations define the EA as a concise public document that serves three purposes: it provides sufficient evidence and analysis to determine "whether to prepare an EIS or FONSI (Finding of No Significant Impact)"; it helps agencies comply with NEPA's requirements (such as the other requirements of section 102(2)) when no EIS is necessary; and it facilitates the preparation of an EIS.[164] All actions, except CEs, need EAs including actions for which an EIS is not prepared.[165] Important function of an EA is to highlight an agency's requirement to consider environmental factors and to serve the statutory purposes of NEPA beyond that of being an initial step toward an EIS or a FONSI.[166]

2.5.2 The Extent of Details of the EA and the EA for Finding of No Significant Impact (FONSI)

The Use of EAs by agencies has greatly increased since the 1970s. The vast majority of NEPA analysis is carried out in EAs, not EISs.[167] The annual number of EAs' preparation is not compatible to that of draft and final EISs.[168] Dependence on an EA has been raised and its role may amount to an EIS, especially for FONSI. If so, how detailed must an EA be to faithfully carry out its role?

CEQ regulations define an EA as a brief or concise document and classical definition of an EA is no more than a document to decide whether federal actions have significant

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[164] 40 C.F.R. § 1508.9 (a) ((1997).
[165] See Guide to NEPA, supra note 15, at 65.
[166] NEPA §102(2)(E), 42 U.S.C.§4332(2)(E) (1994), see also Sierra Club, 808 F.Supp. at 871.
[167] See The NEPA Litigation Guide, supra note 24, at 37.

impact or not. According to Section 1508.9 (a), an EA ordinarily is a "concise public document."[169] It presumably focuses on whether a proposed action would significantly affect the environment. The only substantive requirement relating to such an EA in the CEQ regulations is found at 40 C.F.R. §1508.9(b). This requires only that an EA include a "concise" discussion of the need for a proposal, alternatives to it, impacts of the proposed action and alternatives, and a list of persons and agencies consulted. The regulations do not contain page limits for EAs, but the Council has generally advised agencies to keep the length of EAs to not more than approximately 10-15 pages. Some insisted that a comprehensive EA is sometimes necessary, but a lengthy EA indicates that an EIS is needed. [170]

As opposed to an original meaning of an EA, an increasing preference by agencies and their tendency to depend on EAs requires detailed EAs on top of EISs.[171] In a close case, some courts are reluctant to order the preparation of an EIS, at least when there is no evidence that the time and expense of preparing an EIS would lead to a better, more informed decision.[172] Most of all, an EA's detail which amounts to that of EIS is necessary for FONSI. An EA and FONSI are subject to public review together, and an EA should be attached to a FONSI.

The EA provides the information and analysis to support that conclusion, when an agency must prepare a finding of no significant impact (FONSI).[173] In Save Our

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[168] See Guide to NEPA, supra note 15 at 77.
[169] 40 C.F.R.§ 1508.9 (1989).
[170] See The NEPA Litigation Guide, supra note 24, at 6.appendix C 329, Question 36(a).
[171] Cronin v. United state Dep't of Agric., 919 F.2d 439, 443 (7th Cir. 1990).
[172] River Road Alliance, Inc. v. Corps of Engineers of United States Army, 764 F.2d 445, 449-51 (7th Cir. 1985).
[173] 40 C.F.R. §1508.9(a)(1) (1989).

Ecosystems v. Clark,[174] the Court of Appeals for the Ninth Circuit distinguished between an EA prepared "simply to determine whether to prepare an EIS" and an EA that "serves as the decision making document to assess the environmental costs" of an agency's proposed action. EAs, which may be attached to the FONSI, could be said to merely explain why an EIS will not prepared, however, FONSI must succinctly state the reasons for deciding that the action will have no significant environmental effects. If relevant, FONSI must show which factors were weighed most heavily in the determination.[175]

The FONSI must include, summarize, or attach and incorporate by reference, the environmental assessment. [176] NEPA's requirement that agencies consider alternatives is independent of the EIS requirement and applies even to agency actions for which no EIS is required.[177]

2.5.3 Delegation: who prepares an EA

A federal agency, basically, should prepare an EA, but Section 1506.5 (b)[178] allows an agency to permit an applicant to prepare an EA. When the applicant for a federal funding or approval, or a consultant gathers the data used in an EA and prepares the EA,[179] the agency takes the total responsibility for the EA, including the accuracy of information contained, its scope and the content and evaluation of the environmental

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[174] Save Our Ecosystems v. Clark, 747 F.2d 1240 (9th Cir. 1983).
[175] CEQ, Forty Most asked questions concerning CEQ's NEPA Regulations, 46 Fed. Reg. 18,037 (1981). (referred as "Forty Questions Memorandum")
[176] 40 C.F.R. §1508.13 (1989).
[177] Bob Marshall Alliance v. Hodel, 852 F. 2d 1223, 1228-29 (9 th Cir. 1988), ert. Denied, 489 U.S. 1066 (1989).
[178] 40 C.F.R.§ 1506.5(b) (1989).
[179] Friends of the Earth v, Hints, 800 F.2d 822, 8834-35 (9th Cir. 1986).

issues.[180] And when a project consultant is involved with the proposed action, the agency which is responsible for the EA must make the ultimate decision.[181]

All applicants cannot prepare EAs. There is an exception to the statute above. Applicants for community block grants from the Department of Housing and Urban Welfare[182] are prohibited from preparing EAs.

2.5.4 Criteria for the CEQ to Aid Agencies in Determining Whether an Action's Potential Environmental Effects are Severe Enough to be Significant

To aid agencies in identifying actions that may have significant environmental effects because "significance" is an amorphous term that is not defined in either NEPA or its legislative history,[183] the CEQ regulations contain a list of criteria based on CEQ's interpretation of the case law of the 1970s minus marginal decisions.[184]

The Criteria have two divisions into context and intensity: One is context of action determined by analyzing its relationship to its setting-local, regional, and / or national- and the interests it affects and is also influenced by the short-and long-term nature of its effects.[185] The other is intensity of action which is measured by the severity of its impact on the environment. The CEQ lists ten criteria to aid agencies in determining whether an action's potential environmental effects are severe enough to be significant.[186]

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[180] Life of the Land v. Brinegar, 485 F.2d 460, 467 (9th Cir. 1973).
[181] Brandon v. Pierce, 725 F. 2d 555, 563-64 (10th Cir. 1984).
[182] U.S.C. §5304(g) (1988).
[183] Hanly v. Kleindienst, 471 F.2d 823. 830 (2d Cir. 1972), cert. denied, 412 U.S. 908 (1973).
[184] 40 C.F.R. §1508.27 (1989).
[185] Id. §1508.27(a).
[186] Id. §1508.27(b).

2.5.4.1 The Context of Action

The Context of Action defines when and where an environment impact assessment is needed. First, about the locale which should be investigated, [187] NEPA must be complied with on a site-specific basis.[188] Locale is determined by the geography of an area and the nature of an action.[189] The locale for a site-specific action is the area directly affected by the action plus its immediate surroundings.[190]

Second, about the period when effects exist, temporary or short-term effects of actions are not sufficient to make effects significant.[191]

2.5.4.2 The Intensity of Action

(a) Beneficial or Adverse Effects

NEPA and the CEQ regulations require consideration of beneficial as well as adverse effects in threshold determinations, even if an agency believes that the overall effects of the action are more beneficial than adverse.[192] Beneficial economic effects of an action cannot be balanced against adverse environmental effects at the threshold determination state.[193]

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[187] Mont Vernon Preservation Soc'y v. Clements, 415 F. Supp. 141, 147 (D.N.H. 1976).
[188] See Guide to NEPA, supra note 15, at 87.
[189] Sierra Club v. Marsh, 769 F.2d 868, 881 (1st Cir. 1985).
[190] Id at.
[191] Louisiana *ex rel*. Custs v. Lee, 635 F. Supp. 1107, 1121 (E.D. La. 1986).
[192] Hiram Clarke Civic Club, Inc. v. Lynn, 476 F.2d 421, 426-27 (5 th Cir. 1973); 40 C.F.R. §1508.27(b)(1)(1989).

(b) Effects on Public Health and Safety

The CEQ regulations require consideration of the degree to which a proposed action affects the public health or safety.[194] Public health was identified in NEPA's legislative history as the primary reason for NEPA's enactment and has been referred to as the most important subject dealt with by the act.[195] It is not clear whether public health includes psychological health as well as physical health. Establishing a casual chain between a physical effect on the environment and its effect on psychological health is a problem which has not been solved. To determine whether §102 requires consideration of a particular effect, the relationship between that effect and the change in the physical environment caused by the major federal action at issue should be noted.[196]

The United States Supreme Court adopted a narrow interpretation of section 102(C) of NEPA and found that this language limits NEPA's application to agency actions that affect the physical environment.[197] While the parties acknowledged that psychological health effects may be cognizable under NEPA, the Court recognized that an agency action triggers the terms set forth in NEPA when the "relationship between the change in the environment and the "effect at issue" is not too remote.[198]

The NEPA does not require consideration of stress caused by the symbolic significance individuals attach to federal actions; psychological health damage caused by symbol is even farther removed from the physical environment, and more closely connected with the broader political process, than psychological health damage caused by

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[193] Sierra Club v. Marsh, 769 F.2d 983, 993 (5th Cir. 1981).
[194] 40 C.F.R. §1508. 27 (b)(2) (1989).
[195] 115 Cong. Rec. 19, 009(1969)
[196] See Metropolitan, supra note 157.
[197] Id at 772 (1983).
[198] Id at.

risk.[199] Some effects that are "caused by" a change in the physical environment in the sense of "but for" causation, will nonetheless not fall within §102 because the causal chain is too attenuated. For example, residents of the Harrisburg area have relatives in other parts of the country. Renewed operation of TMA-1 may well cause psychological health problems for these people. They may suffer "anxiety, tension and fear, a sense of helplessness," and accompanying physical disorders, because of the risk that their relatives may be harmed in a nuclear accident. However, this harm is simply too remote from the physical environment to justify requiring the NRC to evaluate the psychological health damage to these people that may be caused by renewed operation of TMI-1.[200]

(c) Unique Character of an Affected Area

In making a threshold determination, the CEQ regulations require consideration of a geographic area's unique characteristics. Unique characteristics include the area's historic or cultural resources, prime farmlands, parklands, wild and scenic rivers, wetlands, or ecologically critical areas. The agency's action must significantly affect the unique characteristics. For example, when the major change between old and new roads through parkland was increased traffic capacity, the reviewing court upheld the agency's determination that the proposed road construction did not have a significant effect on the environment.[201]

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[199] 42 USCS 4321.
[200] See Metropolitan, supra note 157, n5 (1983).
[201] Falls Road Impact Comm., Inc. v. Dole, 581 F. Supp. 678,696 (E.D. Wis.), aff'd, 737 F. 2d 1476 (7th cir. 1984).

(d) Controversiality of an Environmental Effect

Agencies must consider the degree to which the environmental effects of their proposed actions are likely to be highly controversial.[202] The term "controversial" applies to the environmental effects, nature, and size of a proposed action, not opposition to the proposed action itself.[203] The mere opposition from public for their own benefits is not enough to be controversial for purpose of NEPA. Neighborhood opposition to local effects of an action did not make that action "highly controversial."[204] To be controversial, the nature of the action needs scientific controversy about the action's environmental effects. Evidences showing that actions could be disputed[205] may consist of disagreement with an insignificance determination by other agencies, experts, or knowledgeable members of the public.[206] Opposition is discussed in Chapter 3 in detail.

(e) Uncertain, Unique or Unknown Risks

The CEQ regulations require agencies to consider the degree to which the environmental effects of their actions are highly uncertain or involve unique or unknown risks.[207] An agency is under a duty to consider the possible environmental effects of experiment as well as the expected environmental effects. [208] The courts have established a framework for considering scientific uncertainty in threshold determinations.[209] The

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[202] 40 C.F.R. §1508.27 (b)(4) (1989).
[203] Hanly v. Kleindienst, 471 F. 2d 158, 162 (2d Cir. 1972), cert denied, 412 U.S. 908 (1973).
[204] Maryland-Nat'l Capital Park & Planning Comm'n v. Martin, 447 F. Supp. 350, 353 (D.D.C.1978)
[205] dispute regarded whether environmental effects were significant. (Bosco v. Beck, 475 F. Supp. 1029, 1038)
[206] See Forest, supra note 160 at.1193.
[207] 40 C.F.R. §1508.27 (b)(5) (1989).
[208] Foundation on Economic Trends v. Bowen, 722 F. Supp. 787, 792 (D.D.C. 1989).
[209] See Guide to NEPA, supra note 15, at 90.

Second Circuit[210] weighed an agency's consideration of uncertain scientific effects although it upheld the Department of Transportation's decision not to prepare an EIS for transporting radioactive materials by highway through urban areas.[211] The court explained that its decision not to require the preparation of an EIS was from no significant impact the action had, not from lack of analyzing uncertain scientific effects.[212]

Generally, courts give great deference to agency determinations regarding the level of harm that would result from their proposed actions.[213] The agency is expected to study and assess effects with reasonable methodology, which is justified in light of current scientific opinions.[214] Uncertain, unique or unknown risks cannot be an excuse to preclude agencies from considering effects. As already noted, the goal of assessing impacts is not to analyze, in detail, the environmental effects but to better determine how to reduce environmental harm.

Remote risk of a significant environmental effect may not require an agency to prepare an EIS. By the way, if the environmental effects of an agency's proposed action are uncertain, unique, or unknown, the agency may not determine that the action will not significantly affect the environment by relying on obtaining future information.[215] It should be noted that the agency always has a duty to fully discuss the basis for its determination of insignificance in the EA.

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[210] City of New York v. United state Dep't of Transp., 715 F.2d 732, 746 (2d Cir. 1983), *appeal dismissed and cert, denied,* 465 U.S. 1055 (1984).
[211] Id at.
[212] See Forest, supra note 160 at1194 (9th Cir. 1988).
[213] New York v. U.S. Department of Transportation, 715 F. 2d 732, 750 (2d Cir. 1983).
[214] Id at 751.
[215] Jones v. Gordon, 792 F. 2d 821, 829 (9th Cir. 1986).

(f) Precedential Nature of an Environmental Effects

The effects of actions that may establish a precedent for future actions with significant effects or that represent " a decision in principle about a future consideration" must be evaluated in determining an effect's intensity.[216] Once the plans are initiated and begun, it is probable that the decision makers will order the project continued.[217]

(g) Cumulative Environmental Effects

The CEQ regulations do not contain a requirement for an agency to prepare a cumulative action analysis in an EA but require that an agency prepare a cumulative action analysis in an EIS.[218]

A cumulative effect "results from the incremental impact on 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. Cumulative effects can result from individually minor but collectively significant actions taking place over a period of time.[219] The CEQ regulations call for consideration of more detailed cumulative impacts[220] but the courts have largely been stymied in expressing a meaningful guide to determine when federal agencies must bundle effects and when agencies may segment them or defer their programmatic analysis versus site-specific analysis.[221] Effects which should be considered in an EA, or EIS would be detailed in the EAs effects' section.

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[216] 40 C.F.R. §1508.27 (b)(6) (1989).
[217] Massachusetts v. Watt, 716 F.2d 946, 952-53 (1st Cir. 1983)
[218] 40 C.F.R. §1508.25(a)(2) (1989).
[219] 40 C.F.R. §1508.7 (1989).
[220] 40 C.F.R. §1508.7 (1989).
[221] See The NEPA Litigation Guide, supra note 24, at 77.

The cumulative actions analysis does not focus on the resource affected by the action as cumulative effects analysis does, but on whether the actions are so interrelated that they comprise a local, regional, or national program.[222] Where a proposed action is related to other actions with individually insignificant but cumulatively significant impact, the effects of the action should be considered together with the environmental effects of other actions.[223] The CEQ desired that agencies take an earlier and more coordinated approach to examining past, present, and future actions.[224] Moreover, the CEQ cumulative effects guidance calls for more-detailed environmental disclosure at higher levels of planning and decision making.[225]

(h) Effects on Historic, Scientific, or Cultural Resources

The CEQ regulations require measurement of an effect's intensity by the degree to which an action may cause the loss or destruction of significant scientific, historical, or cultural resources or the degree to which it may affect structures, sites, districts, highways, or objects listed in or eligible for listing in the National Register of Historic Places.[226] NEPA's policy statement refers to "culturally pleasing surroundings," and to the preservation of "important historic, cultural, and natural aspects of our national heritage."[227] Thus, the environment protected by NEPA includes historic and cultural

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[222] Kleppe v. Sierra Club, 427 U.S. 390, 409-10 (1976). (referred as "Kleppe")
[223] Fritiofson v. Alexander, 772 F. 2d 1225, 1246 (5th Cir. 1985).
[224] The CEQ issued a guidance document titled Considering Cumulative Effects Under the National Environmental Policy Act January 1997.
[225] See The NEPA Litigation Guide, supra note 24, at 78.
[226] 40 C.F.R. §1508.27 (b)(8) (1989).
[227] 42 U.S.C. §§ 4331 (b)(2), 4331(b)(4)(1988).

resources in addition to natural resources.[228] If historic property eligible for the National Register would be affected by agency action, an EIS was required.[229] However, if an agency action affects the cultural character of an area but not the physical environment, the actions which are not related to the latter need not comply with NEPA.[230]

(i) Effects on Endangered Species

It is necessary that endangered or threatened species are protected and agencies must evaluate the degree to which actions may adversely affect endangered or threatened species or critical habitat identified under the Endangered Species Act.[231] The simple fact that they exist or could exist does not sufficiently trigger an EIS. [232] Therefore, when an EIS is determined not to be prepared, an agency should show on the basis of an adequate EA that the existence of the endangered or threatened species will not be seriously threatened by the agency's action.[233]

(j) Compliance with Federal, State, or Local Law

A final CEQ regulation for determining the significance of an action's environmental effect is based on whether the action has the potential to violate federal, state, or local environmental protection laws.[234] An action violating an environmental law or standard

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[228] Preservation Coalition, Inc. v. Pierce, 667 F. 2d 851, 859-60 (9th Cir. 1982).
[229] WATCH (Waterbury Action to Conserve Our Heritage, Inc.) v. Harris. 603 F. 2d 310, 318, 326 (2d Cir.) cert. denied, 444 U.S. 995 (1979).
[230] Goodman Group, Inc. v. Dishroom, 679 F. 2d 182, 185086 (9th Cir. 1982).
[231] 40 C.F.R. §1508.27 (b)(9) (1989).
[232] Friends of Endangered Species, Inc. v. Jantzen, 596 F. Supp. 518, 525 (N.D.Cal. 1984), *affd,* 760 F. 2d 976 (9th Cir. 1985).
[233] Cabinet Mountains Wilderness/ Scotchman's Peak Grizzly Bears v. Peterson, 685 F. 2d 678, 684 (D.C. Cir. 1982).
[234] 40 C.F.R. §1508.27 (b)(10) (1989).

requires the potential violation to be addressed,[235] but violating standards promulgated under the environmental law does not mean an action is significant.[236]

In Public Citizen v. National Highway Traffic Safety Administration,[237] the court upheld agency determination of insignificance but criticized failure to increase air emissions within legal limits.[238] Courts' deference to agencies' decisions, especially when courts review an agency's threshold determination, makes it not inevitably but relevantly that an agency complies with local zoning ordinances and other environmental laws.[239] By complying with local ordinances, an agency demonstrates that it is acting in accordance with the demands of the community's residents regarding such factors as land use, construction safeguards, aesthetics, population density, crime control, and neighborhood cohesiveness.[240] Zoning regulations required proposed agency action to comply with local standards.[241] Compliance with zoning ordinance is some evidence that the action does not significantly affect the environment.[242] On the other hand, as noted above violation of zoning ordinances does not necessarily mean that an environmental effect is significant.[243]

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[235] See Forest, supra note 160 at 1195 (9th Cir. 1988).
[236] Public Citizen v. National Highway Traffic Safety Admin., 845 F.2d 256, 268 (D.C. Cir. 1988).
[237] Id at.
[238] Id at.
[239] Goodman Group, Inc. v. Dishroom, 679 F.2d 182, 186 (9th Cir. 1982). An agency's compliance with other environmental laws always does not mean to comply with the NEPA.
[240] Mary land-Nat'l Capital Park & Planning Comm'n v. United States Postal Serv., 487 F. 2d 1029. 1036-37 (D.C. Cir 1973).
[241] Id at.
[242] New Hope Community Ass'n v. HUD, 509 F. Supp. 525, 529-30 (E.D.N.C. 1981).
[243] Stewart v. United States Postal Serv., 508 F. Supp. 112, 116 (N.D. Cal. 1980).

2.6 The Environmental Impact Statement (EIS)

2.6.1 Introduction

The NEPA requires that the federal government file an EIS whenever it takes an action "significantly affecting the quality of the human environment."[244] Designed to ensure that the federal government consider the environmental effect of proposed action, the Environmental Impact Statement (EIS) is the central procedural requirement of NEPA.

An EIS serves as an action forcing device. The EIS shall provide full and fair discussion of significant environmental impacts and shall inform decision-makers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment.[245] In order to satisfy the "detailed statement" requirement of this section,[246] agencies must provide "sufficient detail" to ensure that the agency has acted in good faith, made a full disclosure, and insured the integrity of the process.[247] While courts have recognized that agencies cannot be held to the duty of submitting perfect EISs,[248] a proper EIS is able to present and evaluate all of the factors prescribed in Section 102 (2)(c).[249] Additionally, the EIS can be completed in time for the final statement to include every recommendation or report on proposals for legislation and other major federal actions significantly affecting the quality of the human environment.[250]

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[244] NEPA of 1969, § 102 (2) (C), 42 U.S.C. §4332(2) (C) (1982).
[245] 40 C.F.R. 1502.1 (1997).
[246] 42 U.S.C. § 4332 (2) (c) (1976).
[247] McGregor, Environmental Law 111 (1981).
[248] Environmental Defense Fund v. Corps of Engineers, 470 F. 2d at 297.
[249] 40 C.F.R. 1502.2(a) (1997).
[250] 40. C.F.R. §1502.5. (1997).

The prime purpose of an EIS is to place upon an agency the obligation to consider every significant aspect of the environmental impact of proposed action. Further, the EIS is to apprise federal decision maker of the disruptive environmental effects that may stems from their decisions. Therefore, when major federal projects significantly affect the quality of the human environment and an EIS is triggered, filing of an EIS should be done prior to the federal action.[251] The CEQ regulated agencies to prepare an EIS as close as possible to the time the agency is developing or presenting it with a proposal. Post hoc assessment of environmental impacts is practically useless because it does not help protect the environment and is contrary to the goal of the EIS, which is predict impacts and avoid significant harm.

For proposals initiated by private parties who are applying for federal permits, leases, licenses, or approvals, an EA or impact statements must be completed when the agency makes its report or recommendation on the application or request, and certainly before the action is taken.[252] Agencies are directed to begin NEPA documents "no later than immediately after the application is received" from a private party.[253] An agency also must set time limits if an applicant for a proposed action requests them, as long as the limits are consistent with NEPA's purposes and other essential consideration of national policy.[254]

The second purpose of an EIS is to enable the agency to inform the public that it has indeed considered environmental concerns in its decision-making process. The mandated public notice and comment procedures upon the EIS submitted by the agency is the most

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[251] Cady v. Morton, 527 F. 2d 786, 794 (9th Cir. 1975).
[252] Blue Ocean Preservation Soc'y v. Watkins, 754 F. Supp at 1461.
[253] 42 U.S.C. §4332(2)(C).
[254] 40 C.F.R. §1501.8 (a) (1997).

effective check on the agency's action.[255] Public participation in the federal agency decision-making process is an important procedural safeguard against agency actions that impose an undue burden on the environment[256], and is consistent with NEPA administrative planning to public scrutiny.[257] Public participation in an EA and an EIS would be separately dealt with in chapter III.

2.6.2 Who Prepares an EIS?

NEPA, concerning the broad environmental protection policy, imposes on the federal government a general mandate to file the statement and to prepare the EIS. Especially, the EIS is considered a method of accounting imposed by NEPA upon the agencies acting as a trustee of the environment to benefit the public. [258] NEPA seeks to ensure that the federal government considers the environmental impact of its action.

In preparing an EIS, multiple federal agencies may be involved. It is necessary to decide the lead agency and the cooperative agency.[259] To make clear which agency has the primary responsibility for preparing an EIS, the CEQ outlines a process to determine lead and cooperative agencies. Lead agencies should take all responsibilities for preparing an EIS, and cooperative agencies have either jurisdiction by law over a proposed action or special expertise regarding environmental effects involved in the proposed action. [260]

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[255] California v. Bergland, 483 F. Supp. 465. 496 (E.D. Cal. 1980).
[256] Alaska v. Andrus, 580 F.2d 465, 474 (D.C. Cir. 1978).
[257] Restatement (Second) of Trusts, §348 (1959).
[258] Id at.
[259] 40 C.F.R. §§1501.5, 1501.6 (1989).
[260] 40 C.F.R. §§1508.5 (1989).

Although responsible federal officials must file the statement, preparing EISs is not limited to them. Under the 1975 Amendment to NEPA,[261] federal delegation to the states was allowed if: the state agency preparing the EIS had station-wide jurisdiction;[262] the federal official responsible for delegation furnished guidance in the EIS preparation;[263] independent federal evaluation was made to prior to approval;[264] and the certain notice provisions were met.[265] These conditions apply whenever EIS preparation is delegated to states.

NEPA basically does not foreclose agencies from depending on information they do not gather for an EIS.[266] The CEQ regulations provide that an agency may direct an applicant to submit required types of environmental information to be used in preparing the EIS as long as the agency independently evaluates the information and is responsible for its accuracy.[267] When the agency delegates the gathering of information to the applicant, the CEQ regulations provide that the agency must list the names of agency personnel who independently evaluated the applicant's information.[268]

When there are unresolved disputes about the delegation to private parties, two possible parties are expected to take charge of preparing EISs: Applicants for federal funding or permits and other contractors with no interests in the proposed action. [269] State agencies, undertaking the job of EIS preparation, can delegate it to private parties, and

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[261] 42 U.S.C. §4332 (2)(D) (1982).
[262] 42 U.S.C. §4332 (2)(D)(i) (1982).
[263] 42 U.S.C. §4332 (2)(D) (ii)(1982).
[264] 42 U.S.C. §4332 (2)(D (iii) (1982).
[265] 42 U.S.C. §4332 (2)(D)(iv) (1982).
[266] See Guide to NEPA, supra note 15, at 115 (1990).
[267] 40 C.F.R. §1506.5(a)(1997).
[268] 40 C.F.R. §1506.5(a)(1997).
[269] See Guide to NEPA, supra note 15, at 115 (1990).

consulting firms have begun to play a significant role in EIS preparation. [270] Because NEPA does not regulate this delegation once it is given to states, private parties actually prepare an EIS.

NEPA welcomes and uses information the public gathers for preparing an EIS but shows negative response to private parties' EIS preparation. Providing proposition to limit an applicant allowed to prepare an EIS, NEPA partially admits the delegation to a private party. NEPA's reasons not to originally allow the delegation to private entities were because of their concerns that it would divide responsibility of an EIS and leave courts powerless under the NEPA to affect the conduct of private parties. It is distinguishable from having banned state preparation of an EIS, which was presumed biased for not satisfying NEPA goals.[271]

By admitting federal-state delegation of EIS preparation, courts have faced the problems resulting from delegation to private parties. While there are no judicial standards and congress is silent on the subject of private party's EIS preparation, the CEQ makes clear that contractors can prepare EISs when they sign disclosure statements "specifying that they have no financial or other interest in the outcome of the project."[272] Furthermore, in Sierra Club v. Sigler, [273] the court declared for an agency not to delegate its public duties to private entities, especially who may objectively be questioned on the grounds of conflict of interests. It satisfies the responsibility of delegation but still falls short of explaining about the state bias that originally created the delegation problems.[274]

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[270] Sierra Club v. United States Army Corps of Engineers, 541 F. Supp. 1367 (S.D.N.Y. 1982).
[271] 13 B.C. Envt'l. Aff. L. Rev. 79, 119.
[272] 40 C.F.R. §1506.5 (c) (1997).
[273] 695 F. 2d 957 (5th Cir. 1983).
[274] 13 B.C. Envtl. Aff. L. Rev. 79, 106.

The CEQ regulations provide that a federal agency may select a contractor to prepare an EIS for it and in practice the applicant has also been permitted to select contractors. Choosing contractors does not preclude the federal agency from its general duties to participate in the EIS's preparation, to provide guidance, to independently evaluate and verify the EIS before approving it, and to be responsible for the EIS's scope and contents. An appointed contractor must disclose in the EIS that it has no financial or other interest in the outcome of the project, but as long as the plaintiff does not invoke arguments that the failure to reveal affected environmental factors, it may not necessarily be considered as harm by a reviewing court.

The delegation of EIS preparation to private parties means to transfer delegation from public to private sectors. When it comes to NEPA's creation to impose responsibility on not private sectors but governments, there is no valid role for private EIS preparation. Rather than extending delegation entities to prepare an EIS, it should be prepared by a government in light of NEPA's goal.

2.6.3 Contents of EIS

EISs should contain the environmental effects, alternatives and mitigations. The environmental effects section provides the analytic basis for the concise comparison in the 'alternatives' section of the EIS.[275] All significant environmental effects should be considered in an EIS and I already explained what environmental effects should be dealt with in the EA section. Here, alternative and mitigation will be studied.

2.6.3.1 Alternatives

The requirement of agency evaluation of alternatives to the proposal is considered the "heart of the EIS." This element of the EIS has been termed the "linchpin" of the NEPA procedural mandate[276] and requires a thorough study and detailed discussion of alternatives to the proposed action.[277]

The CEQ recommends that the EIS present the environmental impacts of the proposal and the alternatives as a comparison, "thus sharply defining the issues and providing a clear basis for choice among options by the decision-maker and the public."[278] The CEQ regulation also emphasizes that the alternative analysis must be conducted early enough in decision-making so that no viable alternative is excluded from consideration.[279]

(a) Range of Alternatives

The CEQ has acknowledged that no hard-and-fast rules can be used to describe a reasonable range of alternatives.[280] The degree to which any particular alternative should be discussed in an EIS or be considered at all by the agency is dependent upon the surrounding circumstances.[281] Because the agencies themselves are initially responsible for determining the range of alternatives considered appropriate to the project, agencies themselves must weigh the reasonableness of the various options to the proposed actions.[282]

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[275]Forty Questions Memorandum, 46 Fed. Reg. 18,026. 18,028 (1981).
[276] 40 C.F.R. §1502.14 (1997).
[277] Id. §4332(2)(E).
[278] 40 C.F.R. §1502.14 (1997).
[279] 40 C.F.R. §1505.1(e) (1997).
[280] Forty Questions Memorandum,46 Fed. Reg. 18,026, 18,027 (Question 1b) (1981).
[281] Piedmont Heights Civic Club, Inc. v. Moreland, 637 F. 2d 430, 436 (5th Cir. 1981).
[282] North Slope Borough v. Andrus, 642 F. 2d 589, 601 (D.D.C. 1980).

The range of alternatives is thus subject to a rule of reason.[283] Judge Leventhal, in stating the case regarding the consideration of section 102 (2)(c)(iii) alternatives, posed the current standard as "reasonableness." An EIS should be of sufficient depth to provide the agency with a sound basis for a reasoned decision, and must include: 1) discussion of a "no-action" alternative; 2) an evaluation of different methods of achieving the objective sought by the agency outside the jurisdiction of the agency preparing the EIS; and 3) methods of partial satisfaction of the agency goal with less detrimental environmental consequences.

The reasonable alternatives concerned above is identified by the court, which rules that the alternatives discussion in an EIS must be judged by a reasonableness standard and an EIS need not consider alternatives "whose effect cannot be reasonably ascertained, and whose implementation is deemed remote and speculative."[284] Thus, an agency is not required to consider "every extreme possibility which might be conjectured."[285]

"Reasonable alternatives" has not yet been clearly defined. The court seems to conclude that for suggested alternatives to be reasonable meets the goals of the proposed action.[286] The problem of not unreasonably narrowing the objective of the proposed action still remains to be solved,[287] but this theme is commonly used for defining the reasonable alternatives in many of the cases.[288]

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[283] Life of the Land v. Brinegar, 485 F.2d 460, 472 (9th Cir. 1973).
[284] Id at.
[285] Carolina Envtl. Study Group v. United States, 510 F.2d 796, 801 (D.C. Cir. 1975).
[286] See The NEPA Litigation Guide, supra note 24, at 89.
[287] Simmons v. United States Army Corps of Engineers, 120 F. 3d 664 (7th Cir. 1997).
[288] Idaho Conservation League v. Mumma, 9956 F.2d 1508, 1522 (9th Cir. 1992).

The same range of reasonable alternatives applies to a third- party applicant's proposal as shown in the Roosevelt Campobello decision of the First Circuit Court of Appeals.[289] The CEQ explained reasonable alternatives include only those practical or feasible from the "technical and economic standard" point and are using common sense, rather than meeting simply the applicants' desirable objectives.[290]

All alternatives must be considered, including no action alternatives. The CEQ interprets the no action alternative to apply to two types: first, if an agency is conducting an ongoing action and is developing new plans, the no action alternative is the continuance of the changed ongoing plan. When the agency is considering conducting a new action, the no action alternative is the agency not acting at all.[291] In the latter case, the no-action alternative serves as a sort of baseline for existing environmental conditions.[292]

Although the no-action alternative must be included in an EIS, a shorter discussion of the no-action alternative, compared with the other alternatives, is enough.[293] It implies that the agency believed that the concept of a no-action plan was self-evident while the other alternatives needed explanation.[294]

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[289] Roosevelt Campobello Int'l Park Comm'n v. Environmental Protection Agency, 684 F.2d 1041 (1st Cir. 1982).
[290] Forty Questions Memorandum, 46 Fed. Reg. at 18,027 (1981).
[291] Forty Questions Memorandum, 46 Fed. Reg. 18,026, 18,027 (1981).
[292] Bureau of Land Management Manual Handbook H-1790-1, V-17 (1988).
[293] Oregon Natural Resources Council v. Lyng, 882 F.2d 1417, 1423, n.5 (9th Cir. 1989).
[294] Seattle Audubon Soc'y v. Moseley, 80 F.3d 1401, 1403 (9th Cir. 1996).

(b) Consideration of Alternatives

The reasonableness of proposed alternatives should be determined "by how much the likely environmental harm will be reduced by another selection."[295] Alternative assessment is to infuse environmental concerns into the agency decision-making process and present federal agencies with a "clear basis for choice among options." The proper scope of alternatives to be considered should be determined by the agency's statutory mandate, and help decide how narrowly or broadly one views the objective of an agency's proposed action.[296] As long as the EIS weighs an agency's analysis of the affected environment and environmental effects, the environmental effects of alternatives should be discussed in EIS.[297] Alternatives considered in an EIS generally have the environmentally preferred alternatives and agency's preferred alternatives.

First of all, CEQ requires that a ROD (Record of Decision) should identify all alternatives considered by the agency which is responsible for the EIS and the alternatives chosen in ROD should be environmentally preferable.[298] Some insisted that the agency should be allowed flexibility to consider environmentally preferable alternatives in the ROD stage so that its flexibility could move its requirement as the part of the draft EIS to the record of decision stage.[299] However, for practical reasons an agency cannot be allowed to fail to consider the environmentally preferred alternatives.

As stressed once more, alternatives considered in the EIS preparations should be environmentally preferred alternatives. Consistent with the need to consider environmentally proffered alternatives, the CEQ defines them as the alternatives that

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[295] Commonwealth of Massachusetts v. Watt, 716 F. 2d 949 (1983). (referred as "Massachusetts")
[296] 715 F. 2d at 743.
[297] Natural Resources Defense Council, Inc. v. Grant, 355F. Supp. 280, 289 (E.D.N.C. 1973).
[298] 40 C.F.R. §1505.2 (b) (1997).

cause the least damage to the biological and physical environment, including historic, cultural, and natural resources as expressed in NEPA's section 101.[300] Consideration of alternatives to reduce harm on the environment is necessary for the EIS. If we keep in mind that the EIS is not an end in itself but rather a means toward the goal of better decision-making, consideration of environmentally preferred alternatives should be done in a draft and final EIS.

The second is the agency's preferred alternatives. The reasonableness of analyzing alternatives is inevitably dependent on the mission of the agency, because an agency considers alternatives,.[301] The agency must fulfill its statutory mission and responsibilities, giving consideration to economic, environmental, technical and other factors,[302] while the EIS must be objective.[303] Complexity of alternatives' impact results in the different extent [304] to which its impact should be analyzed and given more deference to the agency's decision.[305] The agency must identify its preferred alternative or alternatives in the draft EIS and in the final EIS unless another law prohibits it from doing so.[306] The court did not review the agency methods of surveying alternatives but reviewed only the pertinences of alternatives to the proposed actions. Therefore, alternative assessments do not have a consistent standard and this agency's mission preference assessment needed effort to develop the standard of federal government accountability.

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[299] 43 Fed. Reg. 55,984 (1978).
[300] Forty Questions Memorandum, 46 Fed. Reg. 18,028 (Question 6a) (1981).
[301] See Massachusetts, supra note 295, at 716, 743 (1983).
[302] Forty Questions Memorandum, 46 Fed. Reg. 18,028 (Question 4a) (1981).
[303] Id.
[304] Robinson v. Knebel, 550 F.2d 422, 425-26 (8th Cir. 1977).
[305] Alaska v. Andrus, 580 F.2d 465, 476 (D.C.Cir.)
[306] 40 C.F.R. §1502.14 (e) (1997).

Most alternatives prepared by agencies might be accepted. Complexity of alternatives determination and their assessment would allow deference to the federal agencies. When an agency develops a new alternative between the draft and final EIS, the CEQ regulations require a supplement to be prepared and circulated in the same manner as the original draft and final EIS.[307] To invoke the supplemental EIS with the reason of a new alternative stems from substantial changes in the proposed action and from significant new circumstances or information relevant to environmental concern and bearing on the proposed action or its impacts.[308]

2.6.3.2 Mitigation

The CEQ regulations require agencies to discuss mitigation measures in an EIS[309] and in the ROD.[310] They define mitigation to include avoidance of the environmental effect of the proposed action by not taking part of all of the action; minimizing the environmental effect by limiting the degree of magnitude of the action and its implementation; rectifying the environmental effect by repairing, rehabilitating, or restoring the environment affected by the proposed action; reducing or eliminating the environmental effect by preservation or maintenance operations to be taken during the life of the action; and compensating for the environmental effect by replacing or providing substitute resources or environments.[311] Therefore mitigation measures must cover a range of environmental effects of the proposed action.[312]

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[307] See The NEPA Litigation Guide, supra note 24, at 98.
[308] 40 C.F.R. §1502.9 (c) (1997).
[309] 40 C.F.R. §§ 1502.14(f), 1502.16 (h), 1508.25(b)(3) (1989).
[310] Id.§ 1505.2(c).
[311] Id §1508.20
[312] Forty Questions Memorandum, 46 Fed. Reg. 18,026, 18,031(1981).

Mitigation measures should be enough to make sure that environmental consequences have been fairly evaluated.[313] As most agencies' decisions are given deference, the United States Supreme Court counted on an agency's discretion to perform the mitigations measures,[314] with the result that the agency does not have to adopt mitigation measures considered in the EIS.[315] If so, not considering all complete discussion of site-specific mitigation measure in EIS does not mean that an agency is allowed neither to be informed nor responsive to a need to minimize adverse environmental effects of a proposed action.[316] Therefore, a major federal agency may also contemplate adoption of various mitigation measures that would collectively lessen such impacts to the degree that the project would no longer be considered significant.[317]

2.6.4 CEQ tests for one EIS

In the scoping process pluralistic decision-making process held to determine the range of alternatives, effects, and actions,[318] the CEQ tests require agencies to consider four category actions in one EIS: connected, cumulative and similar actions and unconnected single actions.[319]

The CEQ regulations require the preparation of a single EIS for "connected actions," which are defined as actions that are closely related or interdependent, that automatically trigger other actions that may require EISs, or that cannot or will not proceed unless other

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[313] Ronbertson v. Methow Valley Citizens Council, 109 S.Ct. 1835, 1847 (1989).
[314] 40 C.F.R. §1505.3 (1997).
[315] S. 1089 §1(b)(2), 101st Cong., 1st Sess.(1989).
[316] Sierra Club v. Clark, 774 F.2d 1406, 1411 (9th Cir. 1985).
[317] Robertson v. Methow Valley Citizen Council, 490 U.S. 332, 352 (1989).
[318] 40 C.F.R. §§1501.7, 1508.25 (1989).
[319] Id.§1508.25(a).

actions are taken previously or simultaneously.[320] Whether connected or related actions must be considered in a single EIS prepared before actions are taken, or may be treated as separate activities for NEPA review purposes depend on the extent of "independent utility" in individual actions. The way "that the courts have required a single EIS for connected actions when it would have been 'irrational or at least unwise' for an agency to have undertaken one of the related activities without the others"[321] has been applied so that an agency is not to divide what is essentially an interrelated activity into multiple actions with individually insignificant impact.[322]

Under the CEQ regulations, a proposed action is cumulative if it has cumulatively significant impacts when it is viewed with other proposed actions.[323] As a leading case, Kleppe v. Sierra Club[324] included not only the CEQ regulation basis of cumulative actions but also the need of programmatic EIS.[325] The cumulative actions test differs from the connected actions test by focusing on the environment affected by an action rather than the type of actions causing the impact.[326] Thereby even independent utility may cause cumulative effects on the environment.[327]

The CEQ defines similar actions as proposed or reasonably foreseeable agency actions with a common feature, such as timing or geography.[328] An agency's discretion to

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[320] 40 C.F.R. §1508.25(a)(1) (1997).
[321] Save the Yaak Comm. v. Block, 840 F. 2d 720 (9th Cir. 1988).
[322] Thomas v. Peterson, 753 F. 2d at 758.
[323] Id.§1508.25(a)(2).
[324] 427 U.S. 390(1976).
[325] Id. at 397-98.
[326] See Guide to NEPA, supra note 15, at 128 (1990).
[327] Forty Questions Memorandum, 42 Fed Reg. 61, 069, 61,070 (1977).
[328] 40 C.F.R. § 1508.25(a)(3) (1989).

determine that to consider the combined impacts of similar actions or reasonable alternatives together may be advantageous.[329]

Unconnected single actions, or individual actions are not clearly defined, but reversing the CEQ's definition of connected action helps to define them.[330] Unconnected single actions do not automatically trigger other actions potentially requiring EISs, are not interdependent parts of larger actions upon which they depend for their justification, and do not require prior or simultaneous actions to be taken in order for them to proceed.[331]

2.6.5 Comprehensive EISs

A programmatic EIS is, naturally, broader than a site-specific EIS. It addresses the "adoption of programs, such as a group of concerted actions to implement a specific policy or plan."[332] It would address the environmental impacts of such a program on a national basis.[333] The analysis must be sufficiently comprehensive to identify and evaluate all potentially significant consequences of the proposal.[334] A comprehensive EIS for joint actions is appropriate when it is "the best way" to assess the environmental effects of connected, cumulative, or sufficiently similar actions.[335] A comprehensive EIS is required if an agency has several proposed actions pending at the same time and those actions will have cumulative or synergistic environmental effects.[336]

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[329] 40 C.F.R. § 1508.25(a)(3) (1989).
[330] See Guide to NEPA, supra note 15, at 129 (1990).
[331] 40 C.F.R. § 1508.25(a) (1989).
[332] 40 C.F.R. §1508.18(b)(3) (1997).
[333] See The NEPA Litigation Guide, supra note 24, at 25.
[334] Id at 68.
[335] Foundation on Economic Trends v. Heckler, 756 F.2d 143, 159 (D.C. Cir. 1985).
[336] Kleppe v. Sierra Club, 427 U.S. 390, 410 (1976); see 40 C.F.R. §1508.25 (1989).

About the timing of preparing programmatic EIS, the same principles of the site-specific EIA preparation are applied because an agency's obligation to prepare an EIS is triggered by the existence of proposals affecting human environment whether or not its action requires a particular site-specific activity or programmatic activity.[337]

Scientist's Institute for Public Information, Inc v. Atomic Energy Commission[338] case showed several advantages to preparing an EIS on the overall effects of broad agency programs, and not just on individual facilities. A comprehensive statement is suitable for studying a more exhaustive consideration of effects and alternatives and considering cumulative impacts that might be slighted in a case by analysis, avoiding duplicative reconsideration of basic policy questions.[339]

Comprehensive or programmatic EISs must set forth sufficient site-specific information on the particular matter to support decisions.[340] On the other hand, where the programmatic EIS is not sufficiently detailed for the requirements of NEPA and circumstances and policy have changed, a site-specific EIS should be prepared. This is the reason that each site-specific EIS for individual actions that are part of a broad program of policy is not a substitute for a comprehensive EIS.[341]

In Ventling v. Bergland[342] an agency may rely on a programmatic EIS to support a site-specific action, reasoning the programmatic EIS is sufficiently detailed and there is

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[337] Scientists Inst. for Pub. Info. (SIPI) v. Atomic Energy Comm'n (AEC), 481 F. 2d 1079, (D.C. Cir. 1973).
[338] Id at 1087-88.
[339] Id at 1087-88 (quoting CEQ guidelines published in 1972).
[340] See The NEPA Litigation Guide, supra note 24, at 69.
[341] Natural Resources Defense Council v. Hughes, 437 F. Supp. 981, 992 (D.D.C. 1977), modified, 454 F. Supp. 148 (D.D.C. 1978).
[342] Ventling v. Bergland, 479 F. Supp. 174 (D.S.D. 1979).

no change of circumstances or policies.[343] The court states that in these circumstances, no useful purpose would be served by requiring a site-specific EIS.[344]

Salmon River Concerned Citizens v, Robertson case,[345] related to a programmatic EIS and the cumulative effects analysis supports the certification of a comprehensive EIS. The court deferred to agency's decision and upheld that a detailed assessment of cumulative impacts could be deferred until site-specific EA's or EIS's were being prepared.[346] It would be possible under the proposition that a more practical and meaningful assessment of cumulative impacts could be accomplished on each site-specific basis.[347] The court did not forget to caution the agency to react cautiously to its approval of this portion of the programmatic EIS.[348] The Salmon River decision is an example of common sense.

The district court identified the agency's staged disclosure approach as an appropriate use of tiering. [349] "Tiering" deals with the relationship of programmatic and site-specific NEPA documents. The mechanism allows federal agencies to incorporate relevant information contained in programmatic documents by referring to them in later site-specific NEPA documents. Tiering helps reduce duplication and delay by eliminating repetitive discussions[350] and concentrating on the issues specific to the new proposed action being considered.[351] The CEQ regulations encourage tiering of NEPA documents so that earlier environmental disclosures do not have to be repeated.

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[343] Id at 180.
[344] Id at.
[345] Salmon River Concerned Citizens v. Robertson, 798 F. Supp. 1434 (E.D. Cal. 1992).
[346] Id at 1437.
[347] Id at.
[348] Id at 1441. n13.
[349] Id at.
[350] 40 C.F.R. §§1500.4(i), 1502.4(d), 1502.20.
[351] 40 C.F.R. §§ 1502.20, 1502.21,1508.28.

Site-specific EISs under a comprehensive EIS are prepared when an agency makes a "critical decision" leading to the development of a site[352] and when the agency proposes a major federal action that may significantly affect the environment.[353] Site-specific analysis may also be contained in comprehensive EISs or in tiered EAs as long as the analysis is incorporated into a site-specific EIS by reference or is adequately evaluated in the comprehensive EIS if no site-specific EIS is prepared.[354]

2.7 The Record of Decision (ROD)

The record of decision was introduced to connect the means to the ends and to see that the decision-maker considers and pays attention to what the NEPA process has shown to be an environmentally sensitive way of doing things.[355]

The Record of Decision (ROD) must identify the agency's decision and explain why the decision maker made his determination.[356] The ROD should include an explanation about the reasons why the agency preferred one alternative over another and why the agency decision maker balanced the factors in a certain manner. Finally, it must be shown that the agency has taken all practicable means to avoid or minimize environmental harm from the selected alternative.[357]

While the ROD is occasionally published in the Federal Register,[358] it is not circulated to the public like an EIS.[359] It can avoid exposure of agency decision-making.

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[352] California v. Block, 690 F.2d 753, 761 (9th Cir. 1982).
[353] Bandoni v. Higginson, 638 F. 2d 172, 181 (10 th Cir. 1980), cert denied, 452 U.S. 954 (1981).
[354] Headwaters, Inc. v. BLM, 684 F. Supp. 1053, 1055 (D. Or. 1988).
[355] Council on Environmental Quality, The National Environmental Policy Act- Final Regulations, 43 Fed. Reg. 55,978, 55,985 (1978).
[356] 40 C.F.R. §1505.2 (1989).
[357] 40 C.F.R. §1505.2 (1989).
[358] Grazing Field Farm,626 F.2d at 1074.
[359] Forty Questions Memorandum, 46 Fed. Reg. 18,026, 18,036 (1981)

It is the only court that can review the ROD rather than the EIS itself, and determine whether or not an agency complies with the NEPA. Therefore, a ROD cannot be replaced by an EIS.[360]

The CEQ has stated that "the terms of a ROD are enforceable by agencies and private parties," and that "a ROD can be used to compel compliance with or execution of the mitigation measure identified therein."[361] Even though there is no specific requirement for publication of the ROD itself, either in the Federal Register or elsewhere, when its function is concerned it must be made available to the public through appropriate public notice.[362]

[360] Forty Questions Memorandum, 46 Fed. Reg. 18,037 (1981)
[361] Forty Questions Memorandum, CEQ, 46 Fed. Reg. 18,037 (1981)
[362] 40 C.F.R. §1506.6(b) (1989).

CHAPTER 3

PUBLIC PARTICIPATION

The administrative agencies of the executive branch of the federal government have opened their decision-making processes to unparalleled levels of citizen input and scrutiny.[363] Environmental statutes have led this massive attempt to allow and encourage citizen participation.[364] NEPA states that each person has a responsibility to contribute to the preservation and enhancement of the environment.[365] In addition, the opportunities for public participation under the NEPA are fundamentally important far beyond environmental concerns.[366] The processes for public notice, public information, public input, and agency response to public input under NEPA have become the primary interaction between several major federal agencies and large parts of their constituencies.[367] While NEPA does not specifically mention the importance of the public participation procedures, it implies federal agencies are required to make available to the public "advice and information useful in the restoring, maintaining, and enhancing the quality of the environment."[368]

Despite the statute's silence, section 101(a)'s policy declaration[369] refers to federal government cooperation with other concerned public and private organizations and state and local governments to create and maintain favorable environmental conditions.

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[363] Robert C. Paehlike, Environmental Values and Democracy: The Challenge of the Next Century, in Environmental Policy in the 1990s, at 362 (Norman J. Vig & Michael E. Kraft eds., 1990).
[364] 33 U.S.C. 1351-1387 (1994).
[365] 42 U.S.C. . §4331 (c) (1994).
[366] See The NEPA Litigation Guide, supra note 24, at 101.
[367] Id at.
[368] 42 U.S.C. §4331(2) (G) (1994).

Section 102(2)(C) requires EIS's to be made available to the public under the Freedom of Information Act (FOIA) to infuse their opinion into decision-making process.[370]

NEPA does not clearly regulate public participation. On the contrary, through the CEQ regulations, extensive public participation in preparing EIS and EA are provided by the procedures.

3. 1 Public Participation in the Categorical Exclusion (CE)

The EA or EIS becomes the main vehicle for the public to evaluate an agency's contemplated course of actions. Moreover, those concerned about economic or other issues as well as the environment ask public participation for actions related to Categorical Exclusion (CE).

Categorical Exclusion (CE), which requires neither an EA nor an EIS preparation, needs some types of public participation depending on case laws. The CEQ regulations require each federal agency to include "specific criteria for and identification of" its categorically excluded actions in its NEPA procedures.[371] The regulations require agencies to adopt such procedures after notice in the Federal Register, opportunity for public comment, and review by the CEQ.[372] The agency's action to be categorically excluded in its NEPA procedures does not require preparation of an EA or EIS, public participation is also not required.[373] However, when the action is of significant public

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[369] 42 U.S.C. §4331 (a) (1994).
[370] Id at.
[371] 40 C.F.R. §1507.3(b)(2) (1997).
[372] 40 C.F.R. §1507.3(a) (1997).
[373] See The NEPA Litigation Guide, supra note 24, at 115.

concern, an argument could be made for some type of public notice and input based on case law and the regulations' general provisions for public involvement.[374]

3.2 Public Participation in the Threshold Determination

The CEQ requires the agencies to involve other agencies and general public participation in the preparation of an EA "to the extent practicable."[375] While courts' opinions about whether or not to allow public participation in threshold decision making are not determined,[376] public participation in an EA's preparation becomes inevitable factor as shown by the number of annual EA preparations, which greatly exceeds that of EIS preparations.[377] EAs have become the standard means of environmental documentation for many agency actions that are subject to intense environmental controversy. An EA is much more than a vehicle for determining whether to prepare an EIS and takes charge of primary communication between the agency and its constituents about the agency's decision and its consequences. An EA allows the public to attempt to influence the agency's decision about whether to prepare an EIS and allows the public to influence the substance of the agency's decision even when no EIS is prepared.[378] Because FONSI is determined after an EA has determined that action does not need an EIS preparation, an EA should sufficiently support this determination. An EA's function needs to involve the public in implementing their NEPA procedures, under section

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[374] Id at.
[375] 40 C.F.R. §1508.9(b).
[376] Compare Hanly v. Kleindienst, 471 F.2d 823, 836 (2d Cir 1972) with Richland Park Homeowners Ass'n v. Pierce, 671 F.2d 935, 943 (5th Cir. 1982).
[377] 42 U.S.C. §4332(2) (C)(1994).
[378] See The NEPA Litigation Guide, supra note 24, at 116.

1506.6(b). Therefore, public participation should be considered for the threshold determination as important as for EISs.

The CEQ regulations could benefit from more-explicit prescriptions for public participation in preparing and considering EAs. As far as the EA's functions are concerned, the 45-day comment period as an EIS should be given. The CEQ regulations require that "in certain limited circumstances," an agency must provide a 30-day period for "public review" after issuing a FONSI, but must do so before making a final decision about whether to prepare an EIS and before undertaking an action whose impacts have been found not to be significant. This normally requires the preparation of an EIS.

The agency is directed to involve other agencies and the general public in preparation of an EA. The preparation of EA's provides the primary opportunity for interest groups to contribute to the decisions of some federal agencies.[379] And in general, an agency must permit public participation in certain EAs and FONSI in advance of its decision not to prepare an EIS.[380] Public participation should take place before an EA is written because an EA does not have a separate draft and final EA like EIS. The CEQ regulations require not only that agencies "shall involve environmental agencies, applicants, and the public, to the practicable, in preparing" an EA, but also that agencies provide public notice of the availability of EAs and FONSIs to inform those persons and agencies who may be interested or affected.

Although NEPA and its implementing regulations do indeed encourage agencies to obtain public input regarding agency decisions, agencies are under no obligation to hold public hearings or give any particular form of the public notice. Hearings or public notice

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[379] See The NEPA Litigation Guide, supra note 24, at 116.
[380] See Guide to NEPA, supra note 15, at 82.

which are represented as ways for public to participate are not statutorily required. Yet, when their advisable effects are considered not deniable, they should be definitely provided in the NEPA process.[381]

3.3 Public Participation in the Preparation of an EIS

As soon as practicable after deciding to prepare an EIS, an agency must publish a notice of intent in the Federal Register.[382] The notice should briefly describe the proposed action, possible alternatives, and the agency's scoping process, and list the name and address of an agency contact person.[383] The preparation of an EIS creates extensive opportunities for public participation. The process leading to the finalization of an EIS involves a number of steps and permits a wide range of parties the opportunity to comment[384]: scoping, a draft EIS, a final EIS and a post EIS process. Public participation on each step is required.

Scoping is the early and open process for "determining the scope of issues to be addressed and for identifying significant issues related to a proposed action," and [385] is not limited to environmental issues. By inviting agencies and people in scoping, an agency can more quickly obtain comments on a draft EIS, thus giving early attention to environmental impacts. When public participation does fail to raise the issue, not as the threshold, agencies are not immune from a responsibility to address it in a draft EIS.[386]

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[381] Como- Falcon Community Coalition, Inc. v. United States Dep't of Labor, 609 F.2d 342, 345 (8th Cir. 1979).
[382] 40 C.F.R. §§§ 1501.7, 1508.22, 1507.3(e) (1997).
[383] 40 C.F.R. § 1508.22 (1997).
[384] 40 C.F.R. §1500.3.
[385] 40 C.F.R. §1501.7.
[386] See The NEPA Litigation Guide, supra note 24, at 121.

The regulations state that comments on a draft EIS " shall be as specific as possible and may address either the adequacy of the statement or the merits of the alternatives discussed or both." Because a final EIS treatment of issues in light of the absence of comments on the draft is not adequate, a party who fails to raise an issue during the public comment period on a draft EIS may be refrained from raising the issue in a subsequent action for judicial review of the agency's final decision.[387]

In the final EIS, the agency must summarize and respond to comments submitted on the draft EIS.[388] However, an agency does not need to respond to every individual comment.[389] A court simply reviews whether an agency responds to comments in its final EIS. Moreover, the CEQ regulations provide that an agency should consider any responsible opposing opinions not involved in draft EISs at appropriate points.[390] The "appropriate point" may be a separate "comments and responses" section rather than the body of the EIS.[391]

Finally, the regulations require the agency to refrain from making a final decision about an action until thirty days after notice of filing the final EIS is published in the Federal Register.[392] Not only the public but also agencies or individuals may make comments during this period.[393] Public comments on it are necessary. Referrals must be made within 25 days after the notice of availability of the final EIS, whereas the final decision may be made or filed within 30 days from the notice of availability of the EIS.[394] During this period, people may make comments anytime without permission from the

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[387] Vermont Yankee, 435 U.S. at 553-53.
[388] 40 C.F.R. §§1503.4 (1997).
[389] Conservation Law Found v. Andrud, 623 F.2d 712,717 (1st. Cir. 1979).
[390] 40 C.F.R. §§1502.9(b) (1997).
[391] Oregon Natural Resources Council v. Marsh, 832 F.2d 1489, 1498-99 (9th Cir. 1982).
[392] 40 C.F.R. §§1506.10(b) (2) (1997).
[393] 40 C.F.R. §§1503.1(b) (1997).

regulations. Nevertheless, the specific regulatory provision for such post-EIS comments may imply an agency duty to consider and respond to them.[395]

When significant changes of the agency's proposal and new circumstances happen between a draft and final EIS,[396] they require an agency to prepare a supplement to an EIS. Comments on post-EIS avoid repeated unnecessary works to prepare a revised draft EIS. The need for a supplementary EIS has been disputed and no statute, rule or case law requires public notice and opportunity for comment "every time an agency receives some important supplemental information."[397] However, it seems to be logical that to allow public participation to determine whether the supplement is necessary or not as a post EIS process.[398]

3.4 Problems of Actual Public Participation: Who Participates?

Participation in American society indicates that a significant sector of the population engages in little or no involvement while relatively small groups are extremely active.[399] According to studies, improper representation of the population overall, more socio-economically advantaged individuals, participate disproportionately to their number and organized participants reflect an upper class cross section of society.[400] This trend is not surprising because the economically advantaged are more likely to own land, automatically involving them in the mainstream participants in land use control.[401] As a convincing example, the overwhelming majority of state participants in the notice and

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[394] 40 C.F.R. §§1504.3(b), 150610(b) (1997).
[395] See The NEPA Litigation Guide, supra note 24, at 126.
[396] 40 C.F.R. §§1502.9(c) (1997).
[397] Delaware Water Emergency Group v. Hansler, 536 F. Supp. 26, 45 (E.D. Pa. 1981).
[398] State of California. V. Watt, 683 F.2d 1253, 1268 (9th Cir. 1982).
[399] Stuart Langton, Citizen Participation in America 9, 28 (1978).
[400] Id at.

comments and public hearings tend to be either governmental agencies and/or consultants.[402] The impact of public opinion and access to reshape a project is not precluded in a very controversial situation, but, if any, few public hearings actually lead to a reversal of a permit decision by a department or the U.S. Army Corps of Engineers[403] For example, because public hearings frequently associated with the Corps are much more formal and costly, Corps regulations have fairly detailed procedures for conducting public hearings. These burdens are one of the reason that formal public hearings are used less frequently.[404]

Those who end up participating the most in the permit process are generally highly educated regulators and regulatees.[405] The ordinary citizen would probably have very little to contribute that would change the minds of either the developer or the decision maker and is less likely to engage in politics and voting.[406] A less publicized function of public participation may be that it is a tool used by agencies to legitimize themselves. An agency has a tendency to prefer public participation that is not disruptive of its mission, and does not welcome citizen's control of its actions on programs.[407]

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[401] 10 J. Envtl. L. & Litig. 221, 287.
[402] Jack DeSario & Stuart Langton, Citizen Pariticipation in Public Decision Making 123 (1987).
[403] See supra note 402, n 125, see also State Exec, Order No. 1996-18 (Aug. 1, 1995).
[404] State Exec. Order No. 1995-18 (Aug. 1. 1995).
[405] In re Louis A. Smith, No. 87-6-208w, 1994 WL 236142 at *10 (Mich. Dep't Natural Resources May 18, 1994).
[406] 10 J. Envtl. L. & Litig. 221, 288.
[407] Stuart Langton, Citizen Participation in America 9, 32 (1978).

3. 5 NEPA & CEQ's Efforts to Involve Public Participation in Environmental Decision Making

The regulations promulgated by the CEQ are by far the most important source of law governing public participation under NEPA. The regulations for public notice and input are far stronger, more explicit, and more comprehensive than those of NEPA.[408]

The CEQ regulations concerning public participation must satisfy three general but powerful requirements.[409] First, NEPA purpose must assure that environmental information is available to public officials and citizens, because accurate scientific analysis, expert agency comment, and public scrutiny are essential to implementing NEPA. Next, under policy, NEPA requires federal agencies to the fullest extent possible to implement procedures and to encourage and facilitate public involvement.[410] Finally, in a separate section concerning public involvement, agencies shall not only make diligent efforts to involve the public in preparing and implementing their NEPA procedures but also solicit appropriate information from the public.[411]

Each of these provisions is mandatory, and is substantially broader than NEPA's requirement for EIS's.[412] NEPA procedures, as referred to in the first and third provisions quoted previously, include the preparation of EA's[413] and FONSI's.[414] Similarly, the requirement to "encourage and facilitate public involvement" applies to all agency decisions "which affect the quality of the human environment."[415]

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[408] See The NEPA Litigation Guide, supra note 24, at 107.
[409] 40 C.F.R. §1500.1(b) (1997).
[410] 40 C.F.R. §1500.2 (1997).
[411] 40 C.F.R. §1506.6.(b) (1997).
[412] 42 U.S.C. §4332(2)(C) (1994).
[413] 40 C.F.R. §1508.9 (1997).
[414] 40 C.F.R. §1508.13 (1997).
[415] See The NEPA Litigation Guide, supra note 24, at 109.

Agencies must provide public notice of NEPA-related hearings, public meetings, and make environmental documents[416] available, such as EIS's, EA's, FONSI's, and notice of intent to prepare EIS's.[417] The notice must sufficiently inform persons and agencies who may be interested or affected. [418]

The CEQ regulations instruct agencies to hold public hearings "whenever appropriate," as well as whenever required to do so by agency-specific statutes.[419] The regulations specify that criteria for deciding whether to hold a hearing should be based on whether there is substantial environmental controversy concerning the agency action under consideration or substantial interest in a hearing,[420] and on whether another agency with jurisdiction over the action has requested a hearing.[421]

The text of NEPA requires federal agencies to prepare EISs, and agencies to comment on EIS. The CEQ regulations require that material incorporated by reference in an EIS must be reasonably available for inspection by potentially interested persons within the time allowed for comment, [422] like an EIS which is available to the public.

NEPA's policy of active public involvement and participation must be balanced against the policy of allowing an agency to make reasoned decisions in an expeditious manner. This balance is necessary to avoid excessive costs and delays in the administrative process. The nature of government's decision-making contemplates the progressive development of facts and consequent analysis in different stages, with functional differences.

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[416] 40 C.F.R. §1506.6(b) (1997).
[417] 40 C.F.R. §1508.10 (1997).
[418] 40 C.F.R. §1506.6(b) (1997).
[419] 40 C.F.R. §1506.6(c) (1997).
[420] 40 C.F.R. §1506.6(c)(1) (1997).
[421] 40 C.F.R. §1506.6(c)(2) (1997).
[422] 40 C.F.R. §1502.21 (1997).

3.6 How to Deal with Controversial Issues

3.6.1 Controversial Issues

3.6.1.1 the distinction between "opposition" and "controversy"

According to the CEQ regulations, significance of a proposed project is likely to be "highly controversial," and its controversy suffices to affect the assessment of significance for purposes of determining the type of agency duties under NEPA.[423] Interpreting the meaning of "significantly" provides one factor to evaluate the extent to which environmental quality affected could be highly controversial.[424]

The meaning of "controversy" should be distinguished from that of "opposition." The court of Friends of the Ompompannoosuc v. Federal Energy Regulatory Comm'n, stated that "controversy" potentially affected agency duties under NEPA and "opposition" simply reflected the reality that virtually all projects have critics.[425] The public's fear of certain hazards and their perception or risks may be "irrational,"[426] opposition from these factions may transform the proposed project into being controversial.[427]

These reasons noted above are enough to support that opposition from the public cannot be controversial, however, the public has not always acted out of ignorance or made choices deemed undesirable by experts. The goal of NEPA of incorporating public

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[423] 40 C.F.R. §1508.27(b)(4) (1997).
[424] 40 C.F.R. §1508.27(b)(4) (1997).
[425] Friends of the Ompompannoosuc v. Federal Energy Regulatory Comm'n, 968 F.2d 1549, 1557 (2d Cir. 1992).
[426] Zechauser & Viscusi, Risk Within Reason, 248 SCI. 563.
[427] Town of Orangetown v. Gorsuch, 718 F. 2d 29, 39 (2d Cir. 1983).

opinion into the decision-making process and of obtaining comments from other agencies implies that the relevance of substantial opposition or criticism of a project should play an important role in defining the significance of that project.[428] The public should not be categorically dismissed from participation in the decision process and, to some extent, public opinions should be accepted.

To be able to affect agency's determinations and to be cognizable under the NEPA, [429] opposition must focus on the anticipated environmental effects, not merely the government's decision to go forward with the project. [430] In Town of Orangetown v. Gorsuch,[431] the court distinguished between opposition being directed at "subjective" factors, such as personal dislike or disagreement on the sewage treatment plant, and being "objective" to emphasize the environmental aspects of the agency's decision-making process.[432] Where the character of the dissent has an objective scientific basis, review courts have been more inclined to evaluate whether the agency has a reasoned explanation for its decision to dismiss the controversy.[433]

The Hanly II court, once more, emphasized the degree of opposition corresponding to and reflecting NEPA's structure and put priority on agency duties to consider a significant impact on the quality of the human environment. It is not clear that the amount of opposition to major federal actions substantially affects agency duties under NEPA. Sheer quantity opposition does not constitute a sufficient degree of controversy. If so, the large numbers of objecting people [434] may be the certification made by the

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[428] 21 Wm. & Mary Envtl. L. & Pol'y Rev. 175, 188 (1997).
[429] Id at.
[430] Rucker v. Willis, 484 f.2d 158, 162 (4 th Cir. 1973).
[431] Town of Orangetown v. Gorsuch, 718 F.2d 29 (2d. Cir. 1983).
[432] See supra note 430, at 195.
[433] Id at 194.
[434] West Houston Air Commission v. Federal Aviation Administration 784 F.2d 704 (5th Cir. 1986).

population affect. [435] On the other hand, the lack of adverse public response regarding the permit applicants for the discharge facility previously mentioned did not necessarily render the project "insignificant" for NEPA purposes. [436]

Non-value natural characters of science, such as scientific uncertainty, experts' socially-relevant choices influenced by their visions,[437] thoughts about the end-goal of research,[438] the state of scientific knowledge and personal stake in the process and outcome need the publics' participation,[439] at least, to be a mechanism fostering political legitimacy.[440] Controversy within the scientific community has played an influential role in the assessment of whether a proposed project is considered "significant" for NEPA purposes. In Wild Sheep v. United State Department of Agriculture,[441] a federal court admitted that an agency insufficiently considered the relevance of scientific "controversy" in the NEPA decision-making process.[442] It also observed that "controversial" for purposes of assessing significance of proposed agency action had reference where a substantial dispute exists as to the size, nature, or effect of the major federal action rather than to the existence of opposition to a use.[443]

Greenpeace Action v. Franklin illustrates the role of controversy to affect the determination of significance in agency decision-making under NEPA.[444] Upholding the lead agency's decision not to prepare an EIS, the court reasoned that even though the

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[435] Id at 705 (5th Cir. 1986).
[436] Mahelona v. Hawaiian Electric Co.418 F. Supp. 1328, 1333-1334 (D. Haw. 1976).
[437] Wm. & Mary Envtl. L. & Pol'y Rev. 1, 33 n.165.
[438] Id at, n.166.
[439] Id at, n.167.
[440] Christopher J. Peters, Adjudication as representations 313-77 (1997).
[441] Wild Sheep v. United State Department of Agriculture 681 F.2d 1172 (9th Cir. 1982).
[442] Id at.
[443] Id at 1182.
[444] Greenpeace Action v. Franklin, 14 F.3d 1324 (9th Cir. 1993). (referred as Greepeace).

Service's scientific data was not dispositive[445] and a dispute existed among qualified experts pertaining to its management measures,[446] it did not equate to a controversy for NEPA purposes. The court also found that an environmental controversy cannot be established "post hoc" by critics of a proposal simply presenting the differing views of their own experts when at the time of the agency action there was no dispute.[447]

Comments from experts and other agencies seriously question the validity of an agency's scientific assumptions and have been actually preferred to opposition from public. A scientific controversy may affect the preparation of an EIS.[448] The comments received by other agencies with jurisdictional responsibilities and expertise in the relevant fields "may" influence the decision-making or dictate a particular result. The nature and extent of the disagreement, though, may affect whether the proposal is considered "highly controversial."[449] However, because NEPA does not require unanimity of opinion,[450] the fact that disagreement exists among government agencies does not constitute a sufficient controversy to necessitate the preparation of an EIS.[451] Similarly, in Roanoke River Basin Association v. Hudson, the court upheld the agency decision, finding that the courts are inclined to be the "most deferential" to responsible agency decision.

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[445] Id at 1332-36 (9th Cir. 1993)
[446] See Greenpeace, supra note 446, at 1335.
[447] Id at 1334 (9th Cir. 1993)
[448] Sierra Club v. United States Forest Serv., 843 F.2D 1190, 1193-94 (9th Cir. 1988).
[449] Roanoke River Basin Association v. Hudson, 940 F.2d 58, 64 (4th Cir. 1991).
[450] Id at 153.
[451] Id at 62 (4th Cir. 1991).

(a) Tests to determine "Controversial"

The characterization of what degree of controversy satisfies the CEQ requirement has been variously stated as being a "substantial dispute,"[452] "robust dissent,"[453] or of an "extraordinary nature."[454] With difficulty of finding appropriate, neutral principles to determine whether opposition amounts to a "controversy" for NEPA purposes,[455] courts have had numerous opportunities to consider whether a particular dispute was sufficiently "controversial" to influence agency decision-making under the act.[456] They concluded a principled set of factors is necessary to provide more consistent analysis.[457]

In determining whether a particular dispute is considered "highly controversial" for purposes of affecting agency decision-making duties, a court should evaluate the stage of the process in which the information is raised and the value to the on-going duties remaining by the agency.[458] 21 Wm. & Mary Envtl. L. & Pol'y Rev. 175 article analyzed several dimensions to this inquiry:

> (1) will the information serve a useful purpose in light of the remaining decisions; (2) are the goals of NEPA advanced regarding meaningful public involvement and fully developed information available to the governmental agency; (3) what is the nature of the controversy in light of purpose and goals of the proposed project; and (4) at what stage of administrative proceedings was the disputed information raised, and have other groups had an opportunity to raise the same issue at an earlier time?[459]

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[452] Hanly II, 471 F.2d 823, 830 (2d Dir. 1972).
[453] Foundation for Global Sustainability v. McConnell, 829 F. Supp. 147, 153 (W.D.N.C. 1993).
[454] Town of Orangetown v. Gorsuch, 718 F.2d 29, 39 (2d Cir. 1983).
[455] West Houston Air Comm'n v. Federal Aviation Admin., 784 F.2d 702 (5th Cir. 1986).
[456] See supra note 430, at 189 (1997).
[457] Id at.
[458] See Greenpeace, supra note 446, at 1334-35.
[459] See supra note 430, at 206.

Disclosed information which is intended to induce the publics' participation in the decision making can bring about a negative response, which sometimes places an agency in a difficult position to avoid not responding to controversial issues. The publics' participation may be an obstacle to expeditious decisions by an agency because it requires the agency to undertake additional duties of study and analysis as well as invest a lot of time and money. These administrative inconveniences discouraged public involvement.[460]

However, in an effort to simplify the administrative process, precluding public participation from decision-making process does not satisfy the purpose of NEPA to infuse the public into the making decision process. Here are necessary multi-factored tests that federal agencies and reviewing courts should consider when evaluating whether opposition to a major federal project is "highly controversial" for purposes of affecting agency duties under NEPA.[461] 21 Wm. & Mary Envtl. L. & Pol'y Rev. 175 article suggested a uniform test:

> (1) the degree of opposition, both in quantities and qualitative terms; (2) whether the disputed information is a matter of legitimate scientific debate regarding the potential environmental impacts of the project; (3) the stage or timing in which the disputed information is raised and whether it would serve a useful purpose in light of decisions remaining; (4) whether the agency has a reasoned plan of mitigation to speak to the issues raised in opposition to the action; and (5) whether the dispute involves a matter

[460] Id at 176.
[461] Id at 191.

of objective environmental effects or an issues of a subjective nature, such as aesthetics.[462]

[462] Id at.

CHAPTER 4

THE BASIC ENVIORNMENTAL PROTECTION ACT OF KOREA

4.1 Definition & Purpose of Environmental Impact Assessment (EIA)

4.1.1 Definition

Definition of an Environmental Impact Assessment (EIA) is not clearly decided in Korea. It is generally defined that impacts of the development works should be studied in advance with outcomes predicted to the fullest extent possible, and should be disclosed to the public when the development work is planned. When various development works which have significant environmental effects are planned and proceed to operate, appropriate considerations about prevention of environmental pollution and environmental protection are required. EIA, as a mechanism to be able to prevent or to minimize environmental impacts, must assess any potential harm before these development works start. An EIA is the tool or process to assess whether plans of development works are appropriate or not, and then to determine whether or not they are to be established, based on the public opinions and data which are assessed at all sources studying and predicting environmental impacts.[463]

Section 2 (1) of Korean Environmental Impact Assessment Act (EIAA) defines EIA as the measure or mechanism to mitigate the environmental impact through studying harmful effects on the environment and by planning works which are subject to having EIA in the statutes.

4.1.2 Purpose

Generally, the purpose of an EIA is to find a way to protect the environment and to avoid severe effects on the environment that development works may bring.

For the EIA's efficient performance of mitigating harmful environmental effects, the assessment should be comprehensively done before development work is taken. Developers who do development works which are expected to affect environments must consider harmony between the environment and development and have a duty to select ways that will not be harmful to the human environment. To help avoid the lack or failure of a thorough assessment, public participation should be held during the decision-making process.

4.2 The Environmental Protection Act (EPA)

4.2.1 A Short History or Korean Environmental Law

Korea's first national environmental law, the Pollution Prevention Act (PPA)[464] was enacted in 1963. In 1977, the National Assembly replaced the ineffective PPA with the Environmental Preservation Act (EPA).[465]

Shortly thereafter, in 1980, the Environmental Administration (EA) was established to "orchestrate environmental duties that were then spread out 'among a host of

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[463] Byoung-Tae Chun, Environmental Law, 161 (1999).
[464] Law no. 1436 of Nov.5, 1963 (S. Korea).
[465] Law No. 3078 of Dec. 31, 1977 (S. Korea). See generally Joseph S. Cha, Complying with International Standards for Environmental Protection: A case Study of South Korea 39-44 (1994) (unpublished paper for the International Environmental Law Clinic, New York University School of Law) (On file with author).

ministries and agencies.'"[466] Also in 1980, the Constitution of Korea was amended to provide all Korean people with the right[467] to live in a healthy and clean environment.[468]

Environmental rights were provided, but execution of a plan to establish healthy and clean surroundings was hardly expected because the EA of Korea was structurally organized to deal primarily with pollution problems while the government put priority on economic development. For the most part, the EA left non-pollution control issues, such as those concerned with parks and wildlife, to other divisions of the government.

In the early 1990s the Korean government launched a concerted effort to address the country's mounting environmental concerns. The first step was to substantially rework the existing legislation and to promulgate new laws to address pollution and other environmental issues. The new environmental law system is modeled after that of the United States. For example, the most important Korean environmental law, the Basic Environmental Policy Act (BEPA)[469] is patterned after the NEPA of the United States. Further, as the United States has a number of medium-specific statutes under the NEPA, Korea also has similar statutes under the BEPA.

As one way to strengthen protection of the environment, EA was upgraded to full ministry level under the Minister of Environment (MOE). MOE has actively pursued efforts to implement new medium-based statutes. At the moment, MOE successfully maintains its ministerial status despite sweeping governmental reorganization led by the new administration of President Kim Dae Jung. As statutes and the environmental agency

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[466] Richard J. Ferris, Jr., Aspiration and Reality in Taiwan, Hong Kong, South Korea, and Singapore; An Introduction to the Environmental Regulatory Systems of Asia's Four New Dragons, 4 Duke J. Comp. & Int'lL. 125, 126, 128 (1993).

[467] It is generally called "environmental right."

[468] S. Korea Const. Art.35.

[469] Framework Act on Environmental Policy (Basic Environmental Policy Act (BEPA)), Law No. 4257 of Aug. 1, 1990 (S. Korea).

have been changed, the policies concerning the environments have helped create harmony between environments and humans.

4.2.2 The Environmental Impact Assessment Act (EIAA) under the BEPA

Immediately below the Constitution is the "backbone" of Korean environmental law, BEPA. Like NEPA in the United States, BEPA sets forth general principles, fundamental polices, and an administrative framework for environmental preservation and remediation. BEPA also authorizes the central and local governments to establish environmental quality standards to preserve the environment and to protect human health against environmental degradation.[470]As the specialization of environmental laws is still underway, new statutes such as the Environmental Impact Assessment Act (EIAA)[471] have passed the National Assembly in 1993. The new EIAA expands the existing EIA mechanism by incorporating more specific provisions.[472] The EIA is one of twenty-eight environmental statutes that are under the jurisdiction of MOE. The president, prime minister, and various ministers implement the statutes by issuing regulations in the form of decrees.

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[470] BEPA, Law No. 4257 of Aug.1, 1990, arts.4 (S.Korea).
[471] Law No. 4567 of June 11, 1993, amended by Law No. 5454 of Dec. 13, 1997 (S. Korea). The Environmental Impact Assessment (EIA) mechanism was initially introduced by BEPA.
[472]Law No. 4567 of Dec. 11, 1993 and the decree of President, No.14018.

4.3 The Environmental Impact Assessment (EIA) of Korea

4.3.1 Who prepares the EIA?

The EIAA regulations require that only development works are subject to the EIAs. Section 2 of the EIAA lists the development works which need EIAs (referred as the EIA's development works) and the EIAs' development works cannot help but impose a duty to prepare a statement on the big powerful entities who actually take charge of and take part in the works. According to section 8, the parties who take charge of planning or operating the development works (PPO)[473] listed in section 2 should prepare the EIA. In fact, parties who can prepare an EIA are only administrative agencies or the Dean of governmental sponsored agencies until 1986's amendment. The former is the actual party to take responsibility to plan or operate the EIA's development works and to prepare the EIAs. The latter is appointed to prepare EIAs by the statute. It is notable that both parties belong to the public sectors.

Since 1986's amendment, EIAA has extended the scope of PPO's to private sectors which were excluded in the past. Newly added PPO's are general enterprisers who plan or operate the EIA's development works.[474] A PPO may delegate preparation of an EIA to national or public research institutes, governmental sponsored research institutes, research centers of Universities, entities registered as contractors under Skill Contract Act (SCA), and a corporation set up for environmental protection by the MOE. In addition, enactment of the Environmental Impact Assessment Act (EIAA) regulate about the PPOs' appointment of the private parties which are delegated to prepare an EIA by the

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[473] Parties who plan to take or operate development works is used "PPO". There is not an appropriate word to define them in English, because BEPA which limits the EIA to development works is differ from NEPA that requires environmental responsibility of federal agency

[474] EIA of Korea, § 26.1,or 4 §7.(1986).

order of the Prime Minister.[475] Ordinance of the MOE describes that private parties are contractors or agents who are already qualified in capabilities and facilities to assess the environmental impacts and are registered as the agent.[476] The MOE is asked to disclose the EIAs and the procedures of EIA's preparation more than once a year, to improve delegated contractors or agents' skills and achievements.[477]

4.3.2 Development Works Necessary to Have EIAs (the EIAs' Development Works)

Section 4 (1) and Enforcement Ordinance of the EIAA limit the list of works that need EIA (called the EIAs' development works) [478] to the following:

> (1) Development of a City (2) Development of an Industrial Location or Complex (3) Energy Development (4) Harbor Construction (5) Road Building (6) Water Resource Development (7) Railroading (including municipal railroading) (8) Airport Construction (9) Use and Development of Watercourses or River (10) Reclamation (11) Development of Tourist Places (12) Installation of Sports Facilities (13) Development of Mountains (14) Development of Specific Regions (15) Installation of Nuclear Waste and Sewage Disposals (16) Businesses that Affect an Environment, Required by Presidential Ordinance, (a) Installation of a Military facility (b) Quarrying of Minerals and Sands…… development works subject to the EIA are described in detail in Ordinance section 2 (2).

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[475] EIA of Korea §26 (3) , §9 (1).
[476] EIA of Korea, §11 (1997).
[477] EIA of Korea, §14 (1997).
[478] The development works which are subject to the EIAs are called "the EIAs' development works and the rest of works are called "the non-EIAs' development works."

The typical local characters, when necessary, ask the party who starts a work that does not belong to EIA's development works (the non-EIAs' development works) to prepare an EIA. Municipal or provincial regulations, which can adopt more restricted standards to protect the environment at their own discretions, make the scope of EIA's development works flexible.[479]

4.3.3 Procedures of EIA

4.3.3.1 A Draft EIA

PPOs should prepare the EIAs for the EIAs' development works before they start planning or operating the works. When the EIA is being prepared, PPOs should involve public opinions. To efficiently solicit public participation, information about the EIAs' development works are to be widely publicized, thus circulating a draft EIA to the residents and agencies concerned should be provided by the statute.[480]

(a) Contents of a Draft EIA

The Act requires a draft EIA to (1) summarize development works (2) set up regions necessary to have an EIA (3) examine environmental situations (4) study and assess the alternatives if there are alternatives (5) analyze the Environmental Assessment or Mitigation of Environmental Impact (6) study an inevitable impact on the environment.[481] Other necessary factors would be notified by the MOE.[482]

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[479] EIA of Korea, §4 (3), (4) (1997).
[480] EIA §9 (2), (3) (1997).
[481] Order §3 (1).
[482] Order §3(2).

(b) Submissions

A draft EIA should be submitted to (1) the MOE (2) Mayor or President of a Province who supervises or controls the region subject to environmental Assessment (Responsible MP) (3) Mayor or President of a Province of regions which will be affected by actions (Concerned MP) (4) Dean of Agency issuing permission (Dean of Agency Permitting) (5) Central or local Administrators of the Environment and (6) Mayors and Presidents of provinces which are associated with the works.[483]

(c) Disclosure to Public

Within 10 days after a draft EIA is submitted, the Responsible MP should publicly notify a summary of the development works' plans through central and local daily newspapers more than once from at least 30 days to at most 50 days. At the same time, the Responsible MP should notify the time and place for residents to see a draft EIA. The timing and way to ask public opinions about whether or not a public hearing is to be held are informed at the same time.[484]

(d) to Solicit Opinions for the Administrative Agencies and Public

The dean of the administrative agency concerned, such as the Environmental Minister, the Mayors or Presidents of provinces involved, Deans issuing permission on works' plans, and other deans of administrative agencies related to EIA informs or submits to the Mayors or Presidents of provinces, their opinions about environmental

[483] Order §4(1).
[484] Ordinance No. 4(2), (4).

damages expected to residential environments and economy from the actions and alternatives to mitigate those harms, within 30days of the draft being submitted. Residents[485] can submit opinions within 7 days before the public exhibitions are closed. When residents' opinions are received by Concerned MP, they should be informed by the Responsible MP within 10 days after it is possible for residents to open a draft EIA.[486]

(e) Notice and Hearing

The PPO is able to prepare a notice to receive residents' opinions.[487] When a draft EIA is disclosed to public, the PPO can ask the Responsible MP to inform about the factors , such as a place or time, concerning holding notice at the same time.

The PPO responsible for the EIA "can" hold a hearing to accept public opinion. Section 9 (1) of EIA requires the PPO to hold a public hearing only when residents, who belong to the affected regions, are provided by Presidential Ordinance and have direct interests related to the EIAs' development works, ask a hearing. The PPO allows the residents to be able to recommend experts who delegate residents. Recommended experts represent the agencies concerned and residents, and then must faithfully express their opinions about the EIA.[488] The PPO has to then consider, respond, and include opinions from residents and concerned agencies in the EIA.[489]

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[485] PPO is not required to listen to public opinions and public participation which is defined by NEPA is not actually allowed . Only residents who live in the regions affected by works can show their opinions about it.
[486] Ordinance No. 5(1) of the Ministry of Environment (1997).
[487] EIA §9 (1), and Ordinance No. 6of the Ministry of Environment (1997).
[488] Ordinance No. 8 (2) of the Ministry of Environment (1997).
[489] Ordinance No. 8 (1), (2) of the Ministry of Environment (1997).

4.3.3.2 The Environmental Impact Assessment (the EIA)

A Statement of Environmental Impact Assessment, (called "Statement)[490], is completed after going through consultation with the MOE. The EIA, prior to consultation with the MOE, should 1) precisely analyze contents of a draft EIA, 2) study and assess opinions from the residents or concerned administrative agencies where the PPO has done an EIA, and the PPO should submit it to the responsible agency with conclusions from hearings, 3) cover the work plan reflecting an EIA determination, and 4) have a plan to assess the environmental impact expected after development works start or are completed.[491]

4.3.4 Procedures after the EIA

4.3.4.1 Consultation

An EIA done by the PPO should be submitted to the Deans of Agencies, who are responsible for issuing permission (Deans of Agencies Permitting), when required. [492] In this case, Deans of Agencies Permitting can submit it to MOE, adding their opinions. An Statement, which does not need permission, is directly submitted to the MOE for consultations.

While the Act regulates that a submitted EIA should be subject to a consultation with the MOE, definition f "consultation" has clearly not been decided. It is supposed to imply from present statutes that MOE can unitarily require the PPO to make the Statement, which are made following the MOE's consultations and to comply with the consultations.

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[490] The statement is distinguished from EIA which is prior to consultation with MOE.
[491] Ordinance No. 8 (2) of the Ministry of Environment (1997).

Therefore, Korean legal professors learn consultation used here is not to mediate different opinions[493] and insist that the word of "consultation" should be replaced with "inspection" or "screening" by the MOE.[494]

The MOE studies the submitted EIA. When the MOE decides the EIA does not properly assess the environmental impacts and is required to be corrected, it comments on the EIA and requires the PPOs or the Deans of Agencies Permitting to take actions recommend in the consultations. When studying EIA, the MOE also has to listen to the director of the Korean Environmental Policy · Assessment (KEPA) researchers or the experts recommended by residents whose interests the President Ordinance admits on the actions. [495] If needed, the MOE can ask the PPO or the concerned or responsible agencies to submit the documents pertaining to the projects.[496] Where the PPOs and the Responsible MP do not have any special reasons to object to the MOE's consultation, they should faithfully perform the agreed consultations' contents.[497]

4.3.4.2 Notice

The MOE should inform the Deans of Agencies Permitting and experts who submitted opinions about EIAs of its decisions within 60 days of when an examination and implementation are done. The Deans of Agencies Permitting should immediately inform the PPOs of the MOE's decisions and informed that PPOs should take appropriate actions following consultations.[498]

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[492] EIA of Korea, §16(1), (2) (1997).
[493] Byung-Tae Chun, Environmental Law 165 (1999).
[494] Id at.
[495] Residents who can participate to submit opinions are regulated by the Presidential Decree.
[496] EIA of Korea, §17 (1997).b
[497] § 17 (1997).
[498] EIA of Korea, §18, Ordinance No. 11 of the Ministry of Environment (1997).

When works need permissions, Deans of Agencies Permitting should supervise whether the consultation is included in the Statements. If not, after the Deans recognize that the PPO follows the consultation, Deans of Agencies Permitting should issue permissions.[499] The PPO who does not need to have permissions or admissions from the Deans should inform the MOE that they consider and include the consultation in the statement.[500]

When the PPO cannot comply with the decisions of the consultation, they can submits their disagreement to the consultations, following the same procedures to apply for consultation. By the way, factors about disagreements should be limited to those not being dealt with in the draft EIAs.[501]

4.3.4.3 Two Institutions to Enforce the Compliace with Consultations

As noted above, the PPOs have the duty to faithfully perform the consultations. A Management Register Document [502] (MRD) is a kind of statement which to show that PPOs operate the works complying with the consultations, and is required to be placed at the site of the works. In addition, the statute requires the appointment of the supervisor, who takes charge of examining and reporting on whether the contents of the consultations are being operated by the PPOs.[503]

To strengthen enforceability of the consultation, the EIAA introduced two kinds of fines; one is a responsibility fee as a measurement to make sure for the PPOs to perform

[499] EIA of Korea, §19(1).
[500] EIA of Korea, §19(2).
[501] EIA of Korea, §20 (1), Ordinance No. 12(1) of the Ministry of Environment (1997).
[502] Management Register is like a Record of Decision.

their duties and the other is a fine for failure to pay the former. The latter is to guarantee the enforceability of the former. Under BEPA which regulates the standards to emit pollution, the PPOs who are regulated by the Air Environment Preservation Act (AEPA),[504] the Water Environment Preservation Act (WEPA),[505] the Noise and Vibration Control Act (NVCA),[506] the Waste Management Act (WMA),[507] and the Toxic Chemicals Control Act (TCCA)[508] are subject to fees and fines.

4.3.4.4 Reassessing Environmental Impacts by the Minister of Environment

After national or local governments or the PPOs start the EIAs' development works, effects not expected in EIAs or Statements would happen. The MOE can require only the Dean of the KEI to reassess environmental impacts. The KEI is under a duty to inform the MOE or the Deans of Agencies Permitting of the re-consultations' results within 1 year when reassessment is requested. The MOE or Deans of Agencies Permitting can ask the Deans concerned or PPOs to take necessary actions for unexpected effects. [509]

An EIA, before consultations or re-consultations if necessary, falls short of a verified document to show that all environmental impacts are considered and that proper actions

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[503] EIA of Korea, §23 (1), (2).
[504] Law No. 4262 of Fb.1, 1991, amended by Law No. 5454 of Dec. 13, 1997 (S. Korea). AEPA regulates the emission of pollutants and odor into the air.
[505] Law No. 4260 of Feb. 1, 1991, amended by Law No. 545 of Dec.13, 1997 (S. Korea). WEPA regulates effluents released into surface waters. WEPA does not regulates groundwater contamination, which is regulated by BEPA.
[506] Law NO. 4259 of Feb. 1, 1991, amended by Law No. 545 of Dec, 13 1997 (S. Korea) NVCA regulates levels of noise and vibration.
[507] Waste Control Act (Waste Management Act), Law No. 4363 of Mar. 8, 1991, amended by Law No. 5529 of Feb. 28 1998 (S. Korea).
[508] Law No. 5221 of Dec. 30, 1996, amended by law No. 5453 of Dec. 13, 1997 (S. Korea). TCCA regulates the manufacture, transportation, and importation of virtually all chemicals, whether harmful or not.
[509] Ordinance No. 26(2) and No. 14(2) of the Ministry of Environment (1997).

for EIAs' development works are suggested by the MOE. PPOs cannot start works except parts of works which would not be affected or changed by the consultations or the re-consultation, until the consultations or the re-consultations are completed. Nonetheless, if the PPO start works with the EIA or the Statement which needs the re-consultation, the Deans of Agencies Permitting should impose the injunction to stop the works or the MOE can ask the Deans to impose injunctions on the PPO.[510]

[510] Ordinance No. 27(2)of the Ministry of Environment (1997).

CHAPTER 5

THE NEED TO IMPLEMENT THE EIA OF KOREA WHEN COMPARED TO THE NEPA OF THE UNITED STATES

5.1 Extension of the Scope of the Actions which Need to Have the EIA

NEPA was enacted in recognition of the need for appropriate treatment of America's natural resources,[511] views government, as trustee, as having a continuing role to protect and preserve the American environment.[512] A trustee doctrine created to benefit the American people put responsibility on the government to improve the structure and methods for environment. NEPA requires agencies to consider all federal actions affecting environments. As of now, Korean has no comprehensive legal theory like the public trust doctrine that successfully functions to protect valuable natural resources like the NEPA. Furthermore, the constitutional right to a clean environment is not self executing. Therefore, a special statute must be enacted in order to protect certain natural resources.[513]

Governments have the first responsibility and duty to protect the environment. On the other hand, the difficulties of performing an EIA in the beginning and failure to introduce the comprehensive trustee theory that the public sector, that is, government should act as a trustee to protect environment let Korean Environmental Law partially

[511] Judicial Review of Compliance with the NEPA: An Opportunity for the Rule of Reason, 12 B.C. Envtl. Aff. L. Rev. 743, n124.
[512] 42 U.S.C. §§ 4321, 4331 (a)(b) (1976).d

admit governments' responsibilities by listing the specific development works in statute, which are necessarily subject to EIAs and share its responsibility with the private sectors in preparing EIAs. It also means that even though MOE has authority to publish administrative rules to aid in the interpretation of environmental laws, specific envrionmetnal responsibility is still distributed among the different ministries.[514] Even when the non-EIAs' development works bring about harmful effects on the environment, they are not statutorily regulated, thus letting significant effects which are, sometimes, more harmful than the EIAs' development works happen. It is an example to show the present situation that the BEPA or EIAA is at the end of its tether about the non-EIAs' development works.[515] For example, designation of national park or recession of limited development regions are not listed as needing an impact assessment, but their significant effects are easily speculated. [516] Local governments as well as central governments are authorized to require not only the PPOs but also parties, who take part in or take charge of non-EIAs' development works which are expected to have significant impacts, to prepare EIAs. However, most works to need EIAs' preparations are closely related with local interests so that local governments avoid asking parties who are take charge of non-EIAs' development works to prepare the EIAs. In the past, the federal agencies were unlikely to delegate the EIS's preparations to the state agencies, because the agencies are easily affected by their own interests in the United States. The same reason applies that the EIA preparation should not be delegated to the local governments.

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[513] See Dae-bup-won (DEW) (Supreme Court) 95 da 23378 (Sept. 15, 1995) (S.korea); DBW 96 da 56513 (July 22, 1997) (S.Korea).

[514] Richard J. Ferris, Jr., Aspiration and Reality in Taiwan, Hong Kong, South Korea, and Singapore: An Introduction ot the Environmental Regulatory Systems of Asia's Four New Dragons, 6 Duke J. Comp. & INT'LL. 125, 126, 128 (1993).

[515] Section 4 (1) and Enforcement Ordinance of EIAA

[516] BEPA, Law No. 4257 of Aug. 1, 1990, art. 4. (S. Korea).

Many Korean legal researchers recognize that the scope of the EIA's development works need to be extended and should done as soon as possible, However, most of all, to substantially protect environments and to satisfy the real purpose of the EIA, the BEPA should prepare the legal mechanism like an EA of the NEPA, which, at first, is able to determine whether or not all kinds of works or governmental development projects have negative environmental effects and how effects, if so, they have like an EIS of the NEPA. Rather than being satisfied with adding one more list of the EIAs' development works to section 2, the BEPA have to prepare a legal mechanism to basically protect environments. Moreover, effects considered in an EIA should be assessed in all aspects. Although the BEPA regulates the PPO should comprehensively assess environmental impacts, the definition on the word "comprehensively" is not clearly determined and is disputed on whether cumulative or connective effects are considered in one EIA. Statute does not requires PPOs to consider those effects but considering not only site-specific but also programmatic effects in one EIA seems to be the PPO's duty. Legal mechanism which forces the PPO to consider programmatic effects in one EIA should be also prepared.

5.2 Involvement of the Public Participation in each stage toward the Final Decision and Substantive Aspects

In fact, the Korean public is not guaranteed the right to participate in all steps to complete EIAs. While the public can participate in all steps from threshold decisions to ROD in the United States, only residents who belong to regions affected by works are allowed to participate in only a draft EIA. Even given a limited opportunity to participate

is not guaranteed. Residents not public can submit their opinions in the draft EIAs by the administrative ordinances during short period decided by the statute, and are actually blocked from participating in the EIA. The EIAA required the PPO consider and summarize the contents of the draft EIAs in the EIA. However, as long as there is no institutional preparation for residents to watch their opinions accepted, or at least considered in an EIA and to guarantee their actual participation in preparing a Statement, the even residents' participation partially guaranteed in an draft EIA is inclined to make useless.

Another major factor to impede the residents' participation is that an EIA before consultation and a Statement done by following the consultations are not disclosed. Moreover, preparation of an EIA is not a legal duty. A MRD is asked to be placed at the site of construction or work places, but is the document to show whether or not development works start or that PPOs operate works by complying with the Statements. It is not to show how the decision is made or whether or not effects expected from the works are properly appreciated. As the EIS of the NEPA is not replaced with the ROD, the EIA cannot be with the MRD.

Residents' lack of experience concerning the Administrative Procedures Act and Free Information Act and Conveniences of Administrative Agencies can often discourage resident's participation. A few hearings were difficultly prepared but were destroyed by residents' intrusion to the hearing places.[517] After a local self-governing system is adopted, local governments do not welcome the public hearing prepared by the central

[517] Public hearing for the comprehensive policies of Nac-dong River was supposed to be held in three big cities in Oct. 1999 but was destroyed. Another public hearing for dam Paldang was terminated by residents' intrusion and so was improvement of Greenbelt.

government and keep silent about local residents' intrusion into hearing places held by the central governments.[518] The MOE also gave up holding public hearings when a hearing was criticized as only a formal procedure. Instead, it prepared alternatives to listen to the opinions from the forum of NGO.[519] Governments can be expected to have opposition from residents when they plan to operate unpopular works such as nuclear power plant construction. The Government should offer sufficient information to residents, and should consider and accept their opposition when oppositions are based on the reasonable data and are supported by scientific evidence. The NEPA seldom to admit the public opposition by deferring the federal agencies' decisions, but scientific controversy is a quite persuasive for the federal agencies to re-consider the EISs and, has, at practice, been admitted. Limiting subjects who can participation in the notice and hearing on residents not public does not expect more developments of the BEPA, because this limitation stems from the administrative convenience and legislatures' prejudice that public opposition is not based on the scientific data but on their own interests or their ignorance. The reasons above to restrict the public participation in environmental issues or the EIA preparation makes the BEPA blind not to see which way is better to protect environments in a long–term and blocks the bigger benefits that public participation might create to the environments.

5.3 Requirement of Consultation

The CEQ requires that the EIS should be done before federal actions are taken. The EIAA requires the works can start after the MOE or the Deans of Agency Permitting

[518] Editorial ,Josun daily newspaper, Nov.1, 1999.
[519] Water management of river Nac-dong by Pusan and Kyung-Nam citizens, Josun daily. Nov. 5, 1999.

identify the PPOs comply with the consultations. On the contrary, consultation, at practice, starts or is completed when planning of the works or works are already launched with an EIA. An EIA under the consultation is not a completed one which assessed the environmental impacts. In situation where a professional agency like the EPA or the CEQ does not exist in Korea, the consultation is the least way to implement EIAs, which will be made by the PPO's discretion or interests. It has been disputed about the MOE's qualification, however, it is not deniable the MOE has the big control power of determining whether or not EIA's development works launch and whether EIAs are adequate for assessing environmental effects.

Statutes prepare the fee system to constrain the enforceability of PPO's compliance with consultations, but unless the BEPA provide the regulation that consultation should be done before PPOs start planning or operating the EIAs' development works, consultation is falling into the formal procedures.

Another problem about consultation is that the MOE can delegate the right of consultation to local governments by the special acts. Delegated consultation right makes environmental assessment meaningless by putting priority on the local development.

5.4 Consideration about the Alternatives and Mitigation

Consideration of alternatives is required for all actions whether or not actions need EISs under NEPA. As much as the CEQ described that alternatives to actions are the heart of EISs, considering alternatives to all federal actions is inevitable. Nevertheless, KEA (Korean Environmental Law) requires the PPO to study or analyze alternatives in

only a draft EIA and only if necessary. The PPO simply considers alternatives dealt with in a draft EIA[520] but does not separately consider alternatives in the EIA or the Statement.

The consultation with the MOE actually results in prohibiting the PPOs to consider alternatives in EIA stages. When the MOE determines an EIA needs to be implemented to execute works, the MOE does not ask the PPOs to find the better options among alternatives which PPOs consider in the draft EIAs and EIAs and whose effects are already assessed, but the MOE's unitary notifications or comments on the EIAs, which are determined to be inadequate, force PPOs to comply with the consultations. In light of goals of considering alternatives, which lead PPOs to have better determination not limiting to assessing environmental effects of works, alternatives and mitigations should be considered in the draft EIA, the EIA and the Statement. Public opinions about alternatives should be also received and considering alternatives for the non-EIAs' development works should be prepared in the planning stages.

5.5 Need for the Agency to Review or Comment on the Statement

The MOE serves as a supervisor to review substantive contents and procedures of the EIA's preparation, but Korean legal researchers have appealed the necessity to prepare an agency who can more knowledgeably and fairly supervise than the MOE. The KEIA, as an advisory agency to reassess the environmental effects, helps the MOE to reassess the statement when necessary and to implement BEPA, but its function is not distinguishable. To assess the environmental effects requires a reasonable scientific determination to define the environmental impacts and must result in a reasonable decision suitable for the

[520] Order §3(2).

public welfare. The EPA and the CEQ of the United States play good roles of meeting two things above. Both of them can review and comment on the EIS procedures. The EPA controls not only procedures but also substantive contents. The CEQ, implementing NEPA, issues regulations binding on all federal agencies. The MOE's roles or abilities are not tantamount to those of the EPA or the CEQ. While members of the EPA and the CEQ are experts in the various parts such as legal or science parts, Korea does not yet prepare the professional agency and goes through difficulties from the lack of qualified experts who can prepare the EIA and agency which can study, examine and appreciate EIA. As one of efforts to overcome these difficulties, some governmental sponsored agencies or the KEI were created and take positively part in EIAs preparations. However, comprehensive and responsible assessments are hardly still expected. Therefore, professional agency who, such as the CEQ or the EPA, controls and examines the reasonable and scientific EIA preparation in the administrative interdisciplinary procedures should be prepared.

5.6 Prerequisite Factor

Preparing EIAs should not be decided by depending on administrative execution and should be forced by legal duties. The Responsible MP takes charge of preparing EIAs and its preparations, at least, need to be from responsibility to protect people's health and to preserve the environment.

When agencies autonomously deal with preparing EIAs, the judicial mechanism should be prepared to prevent their discretionary treatment. The Korean Court tries to attain preliminary prevention of environmental degradation and protection of people's

environmental benefit through injunction, an action for nullity or order for performance of duty. Judicial measures range from recovery of pollution damages to permanent injunctions for environmental preservation. Permanent injunction is the surest way to protect environments, but only limited cases benefited from permanent injunction remedies. As a matter of fact, the Korean courts seldom grant permanent injunctions against large-scale corporate or governmental projects for environmental reasons. These obstacles must be overcome, soon. Given the high level of public awareness about the significance of environmental protection, the courts' activitism and creativity may make a difference in Korea's environmental quality by filling a void in the law.

CHAPTER 6

CONCLUSION

Korean legal scholars have recognized institutional problems of environmental laws. Comparisons of environmental law differences between the BEPA and the NEPA identify significant problems and suggest the way Korean environmental laws go forward. To implement institutional needs, Korean government has made efforts to follow the environmental law systems of the United States by reworking existing environmental laws, promulgating new laws, and raising the environmental agency to a ministerial level. Modernizing the environmental law of Korea is the homework of our Korean environmental scholars.

However, legal and institutional reform may fall short of making changes in governmental and business practices that affect environmental quality. To keep the public interested in environmental protection and to transform the public consciousness into a realistic impetus for a change toward sustainable development, the court should be a forum in which the public may play a contributory role with viable and innovative legal theories.

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