DEFEND YOUR AIR

A GUIDE FOR REDUCING FREIGHT TRANSPORTATION AIR POLLUTION UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT (NEPA)

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how to use this Guide

Defend Your Air explains NEPA's requirements and is designed to help community members and organizations participate in the NEPA process as a strategy to reduce air pollution from the freight transportation system. This guide contains the following fact sheets:

Sources:
"A Citizen's Guide to the NEPA: Having Your Voice Heard, Council on Environmental Quality," (Dec. 2007).
Council on Environmental Quality NEPA Regulations, 40 CFR §§1500 et seq.

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INTRODUCTION

As our televisions, toys, and shoes are imported through our ports and transported through our rail yards, warehouses, and freeways, those who live along our nation's freight transportation corridors are subject to a toxic spew of exhaust from diesel-powered ships, trains, and trucks. They suffer health impacts like premature death, aggravated asthma, and lung cancer from this pollution. More than 13 million Americans—3.5 million of whom are children—live near a major marine port or rail yard.[1] Up to 45 million Americans live less than 300 feet from a freeway,[2] and all of these communities breathe polluted air. Freight transport helps stock store shelves nationwide and delivers packages to our homes. But hubs for freight transportation are most typically located in low-income communities of color[3]—a reality that means these communities more often pay the price for our collective shopping convenience.

Fighting this injustice takes coalitions of nontraditional allies at the local, state, and federal levels, working together to stem the environmental and public health impacts of our nation's freight transportation system. The National Environmental Policy Act (NEPA)[4] is one tool that communities can employ when concerns about freight transportation arise. NEPA is a federal law that guarantees public oversight over many government decisions and requires federal government agencies to study how proposed federal or federally funded projects—like construction projects, permit approvals, and funding decisions involving ports, rail yards, and highways—will impact the environment.

The NEPA process is designed to create public dialogue about government projects. While NEPA provides communities with an opportunity to learn about the actions federal agencies are proposing, it also offers agencies an opportunity to receive valuable input from the public. Public participants in the NEPA process are able to contribute information about a project, suggest alternatives, and argue that more needs to be done to reduce the project's negative impacts. Although NEPA does not require the government to choose the most environmentally friendly project, it does require that agencies "look before they leap," make decisions in a transparent manner, and not ignore or underestimate the negative impacts of a project. This is the strength of NEPA—it is a law that allows the public to make sure government decision-makers consider environmental and public health concerns.

When communities participate in the NEPA process, they can improve the original project proposal.

Communities can use the NEPA process to voice their concerns about the environmental and public health impacts of port, rail yard, and highway projects. They can suggest alternatives and recommend ways to reduce a project's negative impacts. NEPA allows the public to help improve projects that impact their communities.

1 U.S. Environmental Protection Agency, Regulatory Impact Analysis: Control of Emissions of Air Pollution from Locomotive Engines and Marine Compression Ignition Engines Less than 30 Liters Per Cylinder, at 2-57, available at www.epa.gov/otaq/regs/nonroad/420r08001a.pdf.

2 U.S. Environmental Protection Agency, Health Effects of Roadway Pollution: Joint Research Project by the U.S. Environmental Protection Agency and University of Michigan, available at www.epa.gov/nerl/download_files/documents/NearRoadwayTechnical_external_fact_sheet_071910.pdf.

3 U.S. Environmental Protection Agency, Regulatory Impact Analysis: Control of Emissions of Air Pollution from Locomotive Engines and Marine Compression Ignition Engines Less than 30 Liters Per Cylinder, at 2-57, available at www.epa.gov/otaq/regs/nonroad/420r08001a.pdf.

4 National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 et seq.; 40 C.F.R. §§ 1500 et seq.

NEPA: THE BASICS

WHAT IS NEPA?

NEPA stands for the "National Environmental Policy Act." NEPA is a federal law that *requires* federal agencies to analyze the environmental consequences of their proposed actions. NEPA was signed into law in 1969 and has two purposes: (1) foster informed decision-making, and (2) publicly disclose information about a proposed action's environmental effects.

NEPA requires the preparation of an environmental study for federal actions that may significantly affect the human environment. Such federal actions may include issuing a permit to construct a rail yard or deepen a shipping channel, or approving a new highway. The environmental study must be made available for the public to review and must disclose information such as how a project will affect air quality and traffic. The study is considered by the government agency that will make the decision to approve or disapprove the project. Members of the public can tell the decision-maker what they think about the study by sending in a written comment letter or speaking about their concerns in person at a public hearing.

NEPA provides community residents an opportunity to learn about the actions federal agencies are proposing and offers agencies an opportunity to receive valuable input from the public and from state or city governments. When members of the public participate in the NEPA process, they can contribute information about a project, suggest an alternative, and advocate that more needs to be done to reduce the project's negative impacts. Although the law does not require that the agency choose the most environmentally friendly option, NEPA does require that agencies "look before they leap," make sure that the effects of a project will not be ignored or underestimated, and make decisions in a transparent manner so that the public understands how a decision was made. We describe the NEPA process in How a Freight Project Moves Through the NEPA Process: A Step-by-Step Description.

WHAT KINDS OF FREIGHT TRANSPORTATION PROJECTS TRIGGER NEPA'S REQUIREMENTS?

NEPA applies to a wide variety of federal actions including federal construction projects, federal permit approvals, and funding decisions. Freight transportation projects such as the construction or expansion of rail lines and rail yards, highways, and container terminals, and channel dredging or deepening projects, are all examples of the kinds of projects that may be subject to NEPA.

WHAT KIND OF ENVIRONMENTAL STUDY DOES NEPA REQUIRE?

The kind of study required by NEPA depends on what the federal government is proposing to do and how that action will affect the environment. Generally speaking, an agency will prepare an "environmental impact statement" (EIS) and/or an "environmental assessment" (EA).

NEPA requires preparation of an EIS for federal actions that may "significantly" affect the quality of the human environment. An EIS will include information on how a project will affect the environment and public health, discuss "alternatives" to the project (such as siting the project at a different location), and consider all practical "mitigation" that would reduce the project's significant impacts (such as technologies that will reduce pollution from trucks and locomotives).

examples of actions that may trigger NEPA:

Application by a port for a permit from the U.S. Army Corps of Engineers to dredge a shipping channel.

Proposal by a railroad company to the Surface Transportation Board to build a new rail line.

Application by a port for a permit from the U.S. Coast Guard to alter a bridge so that larger vessels can enter a shipping channel.

Decision to fund a [illegible] project with federal money (such as grants under the American Recovery and Reinvestment Act).

State department of transportation proposal submitted to the Federal Highway Administration to construct a new highway.

Application by a railroad company for a permit from the U.S. Army Corps of Engineers to [illegible] in order to build a rail yard.

An EA is prepared when the agency is not sure whether the proposed action will have significant environmental effects. An EA is a concise document that briefly analyzes the need for the proposal, project alternatives, and the environmental impacts of the project. If the EA indicates that the action will not result in a significant impact, then the agency will issue a document called a "finding of no significant impact" (FONSI). If the EA reveals a potential for significant effects, the agency is usually required to prepare an EIS. An EIS is a more detailed evaluation of the project's impacts and its alternatives than an EA. Additionally, the process for developing and finalizing an EIS generally includes more opportunities for public input.

The federal agency that will decide whether to approve or disapprove the project—the decision-maker—is required to consider the contents of the EA or EIS before allowing the proposed action to proceed.

WHEN IS AN ENVIRONMENTAL IMPACT "SIGNIFICANT" UNDER NEPA?

Whether an environmental impact is "significant" is important because if an impact may be significant, then the lead agency has to prepare an EIS. Whether an environmental impact is "significant" depends on (1) the context in which the impact occurs, and (2) the intensity of the impact. "Context" refers to where the impact will occur, such as the affected region and local area. The "intensity" of an impact is analyzed based on several factors, including:

- The degree to which public health or safety is affected.
- Unique geographic characteristics of the area such as how close it is to parklands, wetlands, farmlands, rivers, or ecologically critical areas.
- The degree to which the impact is highly controversial in that there is great dispute over the size, nature, or effect of the action.
- The degree to which the effects are highly uncertain or involve unique or unknown risks.
- The degree to which the action may establish a precedent for future actions with similar effects.
- Whether the action is related to other actions with individually insignificant but cumulatively significant impacts.
- The degree to which an action threatens a violation of federal, state, or local environmental laws.

One example of a project that may have "significant" air pollution impacts is a large port expansion project that is proposed to be built in a region that already violates federal air quality standards, is close to homes and schools, and is expected to generate a level of pollution that will violate public health standards, particularly when combined with emissions from other pollution sources in the area (such as refineries or power plants).

If you think the impacts of the project will be "significant" but the lead agency disagrees, you can submit a comment letter during the comment period explaining why you think the impacts are "significant." In your comment letter, you can discuss the context and intensity of the impacts, including the above factors.

WHo PREPARES THE EA oR EIS?

The "lead agency" is in charge of preparing the NEPA document. The lead agency is generally the agency that is making the decision regarding the action that is analyzed within the EA or EIS (considering, for instance, whether to grant a permit or approve construction of a project).

Agencies that often serve as the lead agency for freight transportation projects include the U.S. Army Corps of Engineers, U.S. Department of Transportation, Federal Highway Administration, Federal Railway Administration, Surface Transportation Board, and U.S. Coast Guard.

If there are multiple federal agencies involved in a proposed action, there may be joint lead agencies, with two or more agencies sharing the responsibility of making sure all the requirements of NEPA are met.

Sometimes the lead agency or company proposing the project hires a consultant to prepare the EA or EIS. Even if a consultant is preparing the study, the lead agency is still responsible for making sure the study is accurate and that all the requirements of NEPA are met. And even if a consultant is preparing the study, the lead agency can still be sued if the NEPA document or its process does not comply with the law.

WHAT KIND oF ENvIRoNMENTAL EFFECTS IS AN EA oR EIS SUPPoSED To ANALYzE?

NEPA requires an agency to study all of the direct and indirect environmental effects of its proposed action, which includes all effects that are "reasonably foreseeable." In some instances, an agency may not be able to predict with certainty how a project will affect the environment. While NEPA does not require agencies to speculate about environmental effects, it requires that they make informed judgments and to estimate probable effects.

The common categories of environmental impacts studied in an EA or EIS include:

- Air quality
- Traffic
- Noise and vibration
- Aesthetics (e.g., the appearance of a place)
- Environmental justice (whether there are impacts on lower-income communities or communities of color)
- Socioeconomics

- Marine water quality
- Geology, groundwater, and soils
- Global climate change
- Land use
- Endangered or threatened species and habitats
- Cultural or historic resources
- Public safety/public services
- Utilities and service systems
- Hazards and hazardous materials

HOW CAN MEMBERS OF THE PUBLIC PARTICIPATE IN THE NEPA PROCESS?

Members of the public can participate in the NEPA process by providing input on the environmental and public health impacts of a proposed project, urging that an alternative be considered and that more mitigation be adopted. Any member of the public can do this by providing written comments about a project to the lead agency. If a public hearing is held, you may also be able to provide input by testifying at the hearing. Also, anyone can ask to meet with the lead agency and other agencies that have an interest in the proposed action to express their concerns and to ask questions.

> The primary ways the public can influence a project in the NEPA process is by evaluating the accuracy of the EA or EIS and proposing alternatives and mitigation measures.

HOW CAN MEMBERS OF THE PUBLIC MAKE SURE THAT THE POTENTIAL HEALTH EFFECTS OF A PROPOSED PROJECT ARE CONSIDERED IN THE NEPA PROCESS?

There is a growing trend for members of the public to request that a Health Impact Assessment (HIA) be performed for projects subject to NEPA. The World Health Organization describes an HIA as "a practical approach used to judge the potential health effects of a policy, programme or project on a population, particularly on vulnerable or disadvantaged groups. Recommendations are produced for decision-makers and stakeholders, with the aim of maximising the proposal's positive health effects and minimising its negative health effects."

For a freight transportation project, an HIA would provide a comprehensive study of the public health impacts of a proposal such as a proposed rail yard or port expansion project; impacts to public health are among the many factors a lead agency must consider pursuant to NEPA when deciding whether to approve a project. HIAs can result in a more complete disclosure of the public health consequences of a proposed project. Many communities and organizations promote HIAs because of the special attention they give to studying how a proposal will affect vulnerable populations (in terms of age, gender, ethnic background, and socioeconomic status), and because they engage and empower communities. The public can request that the lead agency prepare an HIA. Alternatively, the public or a coalition of groups can hire a consultant to prepare an HIA for them. For more information on HIAs see: www.w[illegible]a/ a[illegible] or www.[illegible]ma[illegible]mpac[illegible]g/ .

CAN AN AGENCY APPROVE A PROJECT EVEN IF THE PROJECT WILL RESULT IN SIGNIFICANT HARM TO THE ENVIRONMENT AND PUBLIC HEALTH?

Unfortunately, yes. All NEPA requires is that a project's environmental effects be considered and disclosed before the lead agency approves the project. In other words, NEPA does not require a lead agency to reject a project even if an EIS reveals that the project may have significant environmental effects. NEPA allows the agency to make a judgment call that a project should move forward for other policy, economic, or social considerations even if the project will have negative effects on the environment.

With that said, NEPA requires agencies to "look before they leap," to make decisions in a transparent manner, and to make sure that a project's effects are not ignored or underestimated. As a result, members of the public can use the NEPA process to clean up freight transportation projects by advocating for greater environmental analysis, more mitigation, and consideration of alternatives.

IS AN AGENCY REQUIRED TO ADOPT MITIGATION TO REDUCE A PROJECT'S ENVIRONMENTAL IMPACTS?

An EIS is required to discuss "practicable" (e.g., relevant and reasonable) mitigation measures that can reduce a project's negative impacts. NEPA does not require, however, that mitigation measures actually be adopted. For example, a lead agency may thoroughly discuss mitigation measures in its EIS but decide not to adopt certain measures because of financial, technical, or legal reasons.

The requirement to adopt mitigation measures is different, however, when an agency issues an EA and a finding of no significant impact (FONSI). Where an agency issues an EA and a FONSI, the lead agency must ensure that sufficient mitigation has been adopted to reduce any significant environmental impacts

to less-than-significant levels. This means that the lead agency must describe what the mitigation is and how it will work; it cannot merely conclude—without explanation—that significant environmental impacts will be reduced. This is required because the only time an agency can issue an EA/FONSI instead of an EIS is when the proposed project will not result in any significant impacts. When an agency commits to adopting the mitigation necessary to make sure the project's environmental impacts will be insignificant, it can issue a FONSI, conclude the NEPA process, and proceed with its action without preparing the more in-depth (and often more time-consuming) EIS.

- EA refers to "Environmental Assessment"
- EIS refers to "Environmental Impact Statement"
- FONSI refers to "Finding of No Significant Impact"
- HIA refers to "Health Impact Assessment"

Regardless of whether an EA or EIS is performed for a project, members of the public can always encourage the lead agency and project proponent to include more mitigation within the project. In other words, while NEPA may not always require that mitigation be adopted, community activism and political pressure can go a long way in securing mitigation to reduce the project's environmental and public health impacts.

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- Reducing Air Pollution from Freight Transportation Projects Through Air Quality Mitigation in this community guide.
- NRDC's Clean Cargo series, which outlines a number of measures that can be adopted for ports, rail yards, and other freight transportation projects to reduce air pollution.

IS THE AGENCY REQUIRED TO CONSIDER ALTERNATIVES TO THE PROJECT?

Yes. Project alternatives are considered the heart of NEPA. NEPA requires the government to consider a "reasonable range" of alternatives to the proposed action. The range of alternatives that the agency must consider is guided by the project's "purpose and need." The agency is not required to study alternatives that do not meet the project's purpose and need. However, the agency cannot define the project's purpose so narrowly that only one option exists that would achieve the project's objectives.

The number and type of alternatives the agency should consider depend on the situation. There may be a large number of alternatives for some projects but very few in others. In the freight transportation context, an alternative might include building the project at a different location or using a different mode of transportation to ship goods (such as moving goods by barge or rail instead of by truck). The EA or EIS should discuss the environmental effects of each of the alternatives so that the public and decision-makers can evaluate whether there are more environmentally sustainable ways to fulfill the project's objectives.

The agency must also discuss a "no action" alternative, which means that the agency must discuss what the environment would be like if the project did not happen. Including a discussion of the "no action" alternative is important because it, along with the rest of the EA or EIS, allows you to compare how the environment would be affected with and without the project.

While the agency is not required to adopt a certain alternative even if it would result in fewer environmental impacts, environmental groups have won lawsuits against government agencies when the agency did not consider a reasonable alternative.

ARE SOME ACTIONS EXCLUDED FROM NEPA'S EA/EIS REQUIREMENT?

Yes. Some government actions or projects fall within what is called a "categorical exclusion" (CE). A CE applies to certain kinds of actions that an agency has pre-determined will not have a significant effect on the environment. If a CE applies to a proposed project, neither an EA nor an EIS will be performed. Each federal agency develops its own CEs, which are listed within the agency's own NEPA regulations. The NEPA regulations for a number of federal agencies can be found online at ceq.hss.doe.gov/nepa/regulations/agencies.html.

> An agency may not apply a "categorical exclusion" to an action that may result in significant environmental impacts.

For example, the CEs listed in the U.S. Army Corps of Engineers' NEPA regulations include minor maintenance dredging and the use of existing disposal sites. CEs listed in the Federal Highway Administration's regulations include installation of noise barriers, fencing, or safety signs.

There is no requirement that an agency seek comments from the public before applying a CE to a project. However, the Council on Environmental Quality (CEQ) recommended in 2010 that federal agencies increase transparency and public participation when developing and applying CEs. CEQ is a federal agency within the Executive Office of the President (the White House) that issues national regulations and policies about NEPA. If an agency concludes that a project falls within a CE, CEQ recommended that it post its reasons for its decision online.

It is important to keep in mind that CEs are supposed to be actions that do not have a significant effect on the environment. Accordingly, if an agency has applied a CE to a project that you believe could have significant environmental impacts, you should tell the agency about your concerns. In such cases, the agency may be precluded from applying a CE and may need to perform an EA or EIS.

WHAT CAN I DO IF I BELIEVE NEPA HAS BEEN VIOLATED?

If you believe that the lead agency has violated NEPA by, for example, failing to accurately portray the environmental effects of a project, study a reasonable range of alternatives, or consider all practicable mitigation, or by inappropriately applying a categorical exclusion, there are two things you can do.

First, you can tell the agency within the relevant comment period about your concerns and encourage the agency to fix its error. You can communicate your concerns in a written comment letter or by testifying at a public hearing, if a hearing is held. Because the amount of time provided to members of the public at public hearings tends to be very short (usually three minutes or less), it is best to express detailed concerns in a written letter.

Second, you can sue the lead agency in court if the project is approved. In the lawsuit, you can ask the judge to force the lead agency to comply with NEPA. However, you can sue only if you told the agency about your concerns during the comment period. In other words, [illegible] NEPA [illegible] may [illegible] NEPA [illegible]

If you succeed in court, a judge will likely order the agency to correct its NEPA violation. For example, the court may require the agency to study an impact, alternative, or mitigation measure that was overlooked, reassess whether an EIS is necessary, and reconsider the granting of a permit or project approval. The judge may order that the permit or project approval be "enjoined" or "frozen" while the agency fixes its NEPA violation.

We recommend that you obtain advice from an attorney if you are considering whether to sue an agency for violating NEPA.

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How Mistakes in NEPA Documents Could Indicate Oversights . . . and What to Do About Them in this community guide.

Online resources are available that explain NEPA's requirements. The Council on Environmental Quality (CEQ) has published a number of resources on NEPA. Additionally, most federal agencies have websites dedicated to NEPA compliance. A few resources include:

CEQ's "NEPA Regulations and Guidance"
c[illegible]q.[illegible]d[illegible]g[illegible]c[illegible]q_[illegible]gl[illegible]a[illegible]gl[illegible]a[illegible]ml

CEQ's "A Citizen's Guide to the NEPA"
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CEQ's "NEPA's Forty Most Asked Questions"
c[illegible]q.[illegible]d[illegible]g[illegible]pa/ [illegible]g/40/ 40p3.[illegible]m

CEQ's "Guidance Memorandum on Mitigation and Monitoring"
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G[illegible]da[illegible]c[illegible]_14ja2011.pd[illegible]

CEQ's "Draft NEPA Guidance on Consideration of the Effects of Climate Change and Greenhouse Gas Emissions"
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G[illegible]da[illegible]c[illegible]_finAL_02182010.pd[illegible]

U.S. Environmental Protection Agency's NEPA Website
www.[illegible]pa.g[illegible]c[illegible]mpl[illegible]a[illegible]c[illegible]/[illegible]a[illegible]d[illegible]/[illegible]pa.[illegible]ml

U.S. Department of Transportation, Federal Highway Administration, "Environmental Review Toolkit"
[illegible]m[illegible]wa.d[illegible]g[illegible]p[illegible]d[illegible]/[illegible]d[illegible]x.a[illegible]p

United States Coast Guard, U.S. Department of Homeland Security, "Overview of NEPA"
www.[illegible]cg.m[illegible]/[illegible]/ cg4/ cg47/ nePA_[illegible]w.a[illegible]p

U.S. Army Corps of Engineers "Planning Community Toolbox: NEPA"
pla[illegible]g.[illegible]ac[illegible]a[illegible]my.m[illegible]/[illegible]x/ p[illegible]c[illegible]c[illegible]m?id=231&op[illegible]=na[illegible]al%20
e[illegible]m[illegible]al%20P[illegible]cy%20Ac[illegible]

Public Participation in Environmental Assessment and Decision Making by the National Research Council
www.[illegible]ap.[illegible]d[illegible]ca[illegible]al[illegible]g.p[illegible]p?[illegible]c[illegible]d[illegible]d=12434

HOW A FREIGHT PROJECT MOVES THROUGH THE NEPA PROCESS: A STEP-BY-STEP DESCRIPTION

The National Environmental Policy Act (NEPA) requires federal government agencies to make informed decisions. It requires federal agencies to study how a proposed project will impact the environment, provide for public involvement, and respond to public comments on the project. Below, we provide a step-by-step description of how a proposed freight project would move through the NEPA process, from proposal to approval, and highlight opportunities for public participation.

STEP 1

The National Environmental Policy Act process begins when a federal action, like issuing a permit to build a rail yard or deepen a shipping channel, is proposed.

CHANCE FOR PUBLIC COMMENT

STEP 2

A question is asked:

Are the project's environmental effects potentially significant?

NO

Does the proposal fall within a Categorical Exclusion (CE)? A CE includes actions that do not have significant environmental effects and do not require an environmental study.

UNCLEAR

An Environmental Assessment (EA) determines if the proposal may result in significant impacts. The agency preparing the EA decides whether to accept public comments or hold public hearings.

Does the EA conclude that the proposal may create significant environmental effects?

YES

A notice of intent to prepare an Environmental Impact Statement (EIS) and conduct "scoping" is published. During the "scoping" process, the public can identify subjects to be studied in the EIS.

CHANCE FOR PUBLIC COMMENT

A draft EIS is released and the public has at least 45 days to submit written comments.
CHANCE FOR PUBLIC COMMENT
A final EIS and record of decision to accept or reject the proposal is released.
YES
A Finding of No Significant Impact (FONSI) is issued.
NO
NO
Does the proposal involve extraordinary circumstances that may create significant environmental effects?
YES
YES
NO
The federal agency accepts or rejects the proposal.
STEP 3

1 STEP ONE

A PROJECT OR PROPOSAL IS PLACED BEFORE A FEDERAL AGENCY

The NEPA process usually begins when a federal agency is asked to make a decision on whether to approve a permit or project. For example, when a port or railroad company submits an application for a permit to the U.S. Army Corps of Engineers to dredge a ship channel or build a rail yard that affects certain wetlands, the NEPA process would begin.

The federal agency (in this example, the Army Corps) will issue a "public notice" of the permit application that tells the public that an application has been submitted. Many agencies, including the Army Corps, post their public notices online. You can also ask to receive public notices by e-mail or regular mail. The public notice will include information about who is seeking the permit and the general location of the project. The public notice may also discuss the agency's preliminary assessment of whether the project will result in significant environmental impacts and require an environmental impact statement (EIS) or an environmental assessment (EA). The public notice may also contain information about opportunities for the public to participate, such as the deadline for written comments.

2 STEP TWO

THE FEDERAL AGENCY DECIDES WHETHER IT IS REQUIRED TO PERFORM AN ENVIRONMENTAL STUDY FOR THE PROJECT, AND IF SO, WHAT TYPE OF STUDY

The next step in the NEPA process requires the agency to decide whether it will prepare an EA or an EIS. The agency could also decide that no study is required at all. The outcome of these decisions will take the project down one of three very different paths:

- **Path 1: Categorical Exclusion**
- **Path 2: Environmental Assessment**
- **Path 3: Environmental Impact Statement**

Whether the project moves down the categorical exclusion path, EA path, or EIS path will dictate whether any environmental study for the project will be performed, how in-depth any studies will be, and whether there will be opportunities for the public to provide input. It is important to understand the paths a project could take, and to make sure that the path selected by the lead agency is the correct one. Each of these paths is discussed below.

Path 1: Categorical Exclusion

No environmental study is performed

A "categorical exclusion" (CE) applies to certain kinds of actions that an agency has predetermined will not have a significant effect on the environment. If a CE applies to a proposed project, neither an EA nor an EIS will be performed. Each federal agency develops its own CEs, which are listed within the agency's own NEPA regulations. The NEPA regulations for a number of federal agencies can be found online at **ceq.hss.doe.gov/nepa/regs/agency/agencies.cfm**.

For example, the CEs listed in the U.S. Army Corps of Engineers' NEPA regulations include minor maintenance dredging and the use of existing disposal sites. CEs listed in the Federal Highway Administration's regulations include installation of noise barriers, fencing, or safety signs.

There is no requirement that an agency seek comments from the public before applying a CE to a project. However, the Council on Environmental Quality (CEQ) recommended in 2010 that federal agencies increase transparency and public participation when developing and applying CEs. If an agency concludes that a project falls within a CE, CEQ recommended that the agency post its reasons for its decision online.

It is important to keep in mind that CEs are supposed to be applied to actions that do not have a significant effect on the environment. Accordingly, if an agency has applied a CE to a project that you believe could have significant environmental impacts, you should tell the agency about your concerns. In such cases, the agency may be required to prepare an EA or EIS.

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A brief environmental study is prepared

An environmental assessment (EA) is prepared when the agency is not sure if the proposed action will have significant effects on the environment. An EA is a concise document that briefly analyzes the need for the proposal, project alternatives, and the environmental impacts of the project.

If the EA indicates that the action will not result in a significant impact, then the agency will issue a document called a finding of no significant impact (FONSI). If the EA reveals a potential for significant effects, the agency is usually required to prepare an environmental impact statement (EIS). An EIS is a more detailed evaluation of the project's impacts and its alternatives than an EA.

Unlike the process for creating an EIS, there is no uniform set of legally mandated public process requirements for developing an EA. The process for preparing an EA, such as releasing drafts of the EA and accepting comments from the public, is dictated by the lead agency's internal NEPA regulations, and different federal agencies have different procedures. Generally speaking, the EA process is much shorter than the process for developing an EIS and often has fewer opportunities for public participation. The NEPA regulations for a number of federal agencies can be found at c[illegible]q.[illegible]d[illegible].g[illegible]/[illegible]pa/[illegible]g/[illegible]ag[illegible]cy/ ag[illegible]cl[illegible]c[illegible]m.

For example, the U.S. Army Corps of Engineers does not commit to providing any comment periods or public hearings when it prepares an EA. The Coast Guard seeks input from the public on EAs but does not commit to providing a minimum amount of time for public comments. However, if a public hearing is held, the Coast Guard agrees to make the EA available to the public at least 30 days before the hearing. The Federal Highway Administration provides the public up to 30 days to review and comment on an EA. The public is also given the option of having a public hearing if the project involves a state proposal to construct a highway that passes a city, town, or village and is receiving federal aid.

Pa 3: e m al impac s a m

A more in-depth environmental study is prepared, and public participation is sought

An EIS is prepared if the project may "signi cantly" affect the quality of the human environment. An EIS is required to include information on how a project will affect the environment and public health, discuss alternatives to the project (such as siting the project at a different location), and consider all practical mitigation that would reduce the project's signi cant impacts (such as technologies that reduce pollution from trucks and locomotives).

If the lead agency decides to prepare an EIS, it is required to follow a certain process created by the federal Council on Environmental Quality (CEQ). This process includes seeking input from the public on the EIS.

- First, the agency will release a short document called a "notice of intent" (NOI). The NOI will state the agency's intent to prepare an EIS for a particular proposal, application, or permit, and brie y describe the proposed action. The NOI should clearly describe the lead agency and contact information for that agency. It should also outline the agency's "scoping" process (see below) and how the public can participate.

- After the NOI is issued, the lead agency will engage the public and stakeholders in a "scoping" process. The objective of this process is to create a game plan for the creation of the EIS, including de ning the roles of the agencies involved in the preparation and review of the EIS, identifying what environmental issues should be studied in the EIS, and establishing a schedule for the preparation of the EIS.

- After the lead agency receives input on the scope of the EIS, it will prepare and release a "draft EIS" for the public to review. The agency will set a deadline for public comments on the draft EIS. The comment period for a draft EIS will be at least 45 days long. During this time, the agency may conduct public hearings and ask other federal, state, or local agencies for their input on the draft document. You can ask the lead agency for additional time to review the document, but agencies do not always grant such requests.

- After the comment period on the draft EIS ends, the lead agency will prepare a "nal EIS" that responds to all of the comments the agency received about the draft EIS. The nal EIS may also include additional analysis that was not in the draft EIS. If the agency made changes to the EIS that are minor, then it can describe those changes in a separate document called an "errata sheet" instead of making those changes to the EIS itself.

3 STEP THREE

THE FEDERAL AGENCY DECIDES WHETHER TO APPROVE OR REJECT THE PROJECT

The final step of the NEPA process is when the federal agency decides whether to approve the project. In making its decision, the agency is required to consider all of the documents and information that it collected during the NEPA process, including the EA or EIS, and all comments it received from the public. The agency's decision is embodied in a written document.

If the lead agency prepared an EIS, then a "record of decision" (ROD) is usually released at the same time as the final EIS. An exception is made if there are substantial changes to the proposed project, or if changed circumstances arise between the time the agency released the draft EIS and the final EIS that are relevant to environmental or safety concerns. In such cases, the agency cannot release the ROD at the same time as the final EIS; it must wait for the public to review the changes in the final EIS before a decision is made.

10 TIPS FOR PARTICIPATING IN THE NEPA PROCESS

Participating in the public process created under the National Environmental Policy Act (NEPA) can be overwhelming and confusing if you have not participated in the NEPA process before. The following 10 tips can jump-start your engagement in this process.

1 IDENTIFY THE LEAD AGENCY

The lead agency is your "point person." The lead agency is usually the agency making the decision or taking the action that is subject to NEPA (the agency deciding whether, for instance, to grant a permit that will enable a port or rail yard project to move forward). The lead agency is in charge of the NEPA process for the project. In some instances, there may be several lead agencies that will work jointly to oversee the NEPA process.

All comments and questions about a project should be made to the lead agency. The lead agency is responsible for preparing any environmental studies produced for the project and may set the procedures for public comment and hearings. If the environmental study or the public participation process does not comply with all the requirements of NEPA, it is the lead agency that can be sued in court.

It is important to remember that the lead agency is a governmental entity that exists to serve the public, and that NEPA was adopted so that the environmental impacts of a project are considered and disclosed before a project is approved. Accordingly, if you feel that important information is not being provided about a project, or that the public is not being listened to, it is critical that you raise your concerns to the lead agency as soon as possible. You do not need to wait for a formal comment period to begin, or to speak at a public hearing, to voice your concerns.

tiP

Common lead agencies for freight transportation projects include the U.S. Army Corps of Engineers, the U.S. Department of Transportation (and within that department the Federal Highway Administration, Federal Railroad Administration, and Surface Transportation Board), and the U.S. Coast Guard (which is a part of the U.S. Department of Homeland Security).

2 REVIEW THE LEAD AGENCY'S NEPA REGULATIONS

Every federal agency has its own regulations for implementing NEPA. These regulations may govern how much time an agency provides the public to review and comment on an EA and will designate which actions are "categorically exempt" from NEPA. Understanding these regulations and making sure the agency complies with them will enhance public participation and give you a clearer picture of what to expect from the NEPA process. The NEPA regulations for many federal agencies can be found online at ceq.hss.doe.gov/nepa/regs/agencies/agencies.html.

BE SURE YOU ARE ON THE LIST TO RECEIVE PROJECT NOTICES

3

It is critical that you contact the lead agency and make sure you are on the mailing list and/or e-mail list for any public notices related to the proposed project. These notices will inform you of when NEPA documents, such as the environmental assessment (EA) or environmental impact statement (EIS), are available for the public to review; the deadline for submitting comments; and whether the lead agency has approved the project. If the lead agency does not do so already, you may want to request that all NEPA documents be posted online so that they are widely accessible.

KNOW THE PROJECT TIME LINE

4

Some projects will move very slowly through the NEPA process, while others will move quickly. As soon as you can, you should ask the lead agency about the project's time line, including when an EA or EIS might be issued and how long the public will have to review and comment on the NEPA document. Knowing the project's timing will help you to better organize and plan your involvement. Note that it is common for time lines to be delayed. For example, an agency may release an EIS months later than originally expected because the document has taken longer to prepare than anticipated.

SHARE YOUR CONCERNS WITH "NON-LEAD" AGENCIES AND ELECTED OFFICIALS

5

You should consider sharing any concerns you have about the project with government agencies and institutions that the lead agency might listen to, or that are considered experts in the field. These agencies may include the U.S. Environmental Protection Agency (EPA), a state environmental board, a local air quality agency, or a prominent university. A comment letter from any of these entities that echoes your concerns can be very influential during the NEPA process. The lead agency may be persuaded by the comments from these entities because of their expertise. Further, if the project results in a lawsuit, a court may review a NEPA document more critically if other agencies and academic institutions highlighted errors in the EA or EIS that the lead agency did not fix.

TIP

You can find out which regional EPA office represents your community at the following website: www.epa.gov/epahome/whoyourcontact.htm. If the EPA determines that the action is environmentally unsatisfactory, it is required to alert the Council on Environmental quality (CEQ). The EPA is also required under the Clean Air Act to review EISs, and posts its comments online at www.epa.gov/compliance/nepa/eisdata.html.

You may also consider sharing your concerns with elected officials, such as members of your city council, state senators and assembly members, and your congressional representatives. Local, state, and federal elected officials may be very interested in projects that will affect their constituents, and may be able to exert considerable influence over a project given their political position.

If you plan to contact a "non-lead" agency, an academic institution, or an elected official about your concerns, you should do so as early in the NEPA process as possible. This is especially important if you plan to ask someone to submit comments about the project. The individual you reach out to may be unfamiliar with the project and may need a lot of time to get up to speed.

6 ORGANIZE AND MOBILIZE

It is very helpful to have many people with diverse backgrounds expressing the same concerns over a project. Lead agencies are sometimes more likely to do something if numerous citizens ask them to do it than if only one or a few people ask. You can reach out to other community members, government officials, public health experts, academics, business owners, workers, faith-based groups, environmental and community organizations, and anyone else who might share your concerns. You can educate them about the project and your concerns and ask them to help you work to improve or stop the project. The strength of your coalition can influence decision-makers both within and outside of the NEPA context.

7 LINE UP YOUR EXPERTS

An EA or EIS can be long and technical. It can be very helpful to work with scientific or environmental experts to help you review the EA or EIS. These experts may help you write your comment letter or submit comment letters of their own. Local universities or environmental organizations may have this kind of expert. For instance, you could ask a local university professor who specializes in air pollution to help you review the EIS for a rail yard project to determine if the air pollution impacts of the project are accurately reported. The expert's analysis of the EA or EIS could generate important information, such as whether certain negative health impacts were omitted from the study or whether additional mitigation measures could be adopted to lessen the project's negative effects. Such information could be included in your comment letter and influence the outcome of the project.

Even if you cannot find an expert to help you, you can still review the EA or EIS and submit a detailed comment letter on your own. If you live in the community where a new project is being proposed, you may have considerable expertise already on how the project will affect your health and quality of life. This community guide contains a number of fact sheets that can assist your review of an EA or EIS and draft written comments.

Comment on the EA or EIS

8

"Commenting" on an EA or EIS simply means giving your opinion on the information presented in the EA or EIS. Comments can be given in a written letter to the lead agency or by speaking at a hearing.

Your comments can influence government decision-making and improve a project. They can help the lead agency determine what environmental issues will be studied in an EIS and can inform the lead agency of any errors in the NEPA document (e.g., an underestimation of an important environmental or public health impact). Your comments can also propose an alternative or suggest mitigation measures that were not considered.

If you should decide to make a comment on a NEPA document, you may find it helpful to review the NEPA process. You may also find it helpful to write your comments in a way that clearly explains your concerns and allows the lead agency to understand and address your concerns.

tip

The public can provide helpful comments when a project is first proposed, during the "scoping" phase before an EIS is performed, and on draft EAs and EISs.

Comment letters should focus on proposing alternatives to the project, suggesting ways to avoid or reduce the harmful effects of the project, or identifying errors in the EA/EIS.

It is very important that you submit your comments on time. Lead agencies are not required to consider comments submitted after the deadline. Upon request, a lead agency may be willing to extend the comment period so that the public has more time to review the EA or EIS. The lead agency may be more inclined to extend the comment period if the NEPA document is long, if the proposed project has received a lot of public attention, if multiple other people have also requested an extension, and if the request is made before the deadline expires. However, you should never assume that the lead agency will agree to extend the deadline for comments.

9 GATHER AND SUBMIT EVIDENCE

In addition to providing written or oral comments, you can give the lead agency evidence to illustrate your concerns. Identifying and finding the documents you want to submit with your comment letter can take a lot of time. You may want to reserve some time early in the NEPA process to complete this task.

The documents you provide should offer information that you want the agency to consider before deciding whether to approve the project. They may include:

- Scientific studies that support your position. These studies might include articles that discuss how air pollution from diesel vehicles and equipment affects public health.
- A health impact assessment (HIA) showing how the project could impact a community's health. An HIA is a comprehensive study that judges how a project will affect health. HIAs can result in a more complete disclosure of the public health consequences of a proposed project.
- Evidence that contradicts the conclusions in the EA or EIS.
- Letters or declarations from experts.
- Examples of mitigation measures that could be adopted to avoid or reduce the project's negative impacts. See NRDC's Clean Cargo series for a list of available mitigation measures for freight transportation projects.
- Maps illustrating how close the project is to homes, parks, or schools. The EA or EIS may not have a good map that accurately displays these distances. Detailed maps can help educate lead agencies and the public on how the project will impact local neighborhoods.

tiP

The lead agency must consider all of the comments and documents provided to it during the comment period before deciding whether to approve the project. If there is a lawsuit, all of the comments and documents provided to the lead agency during the comment period will be in the record of evidence that the court considers when deciding the case.

There are a number of ways to find information that supports your comment letter. You can try to locate information online, ask your experts (see tip #7, above), or if a government agency has the documents you need, you can ask that agency for copies. If the agency resists giving the documents to you, you might be able to force them to do so by submitting an "open records" request under federal or state law. See How to write a NEPA comment letter? for further discussion of open records requests.

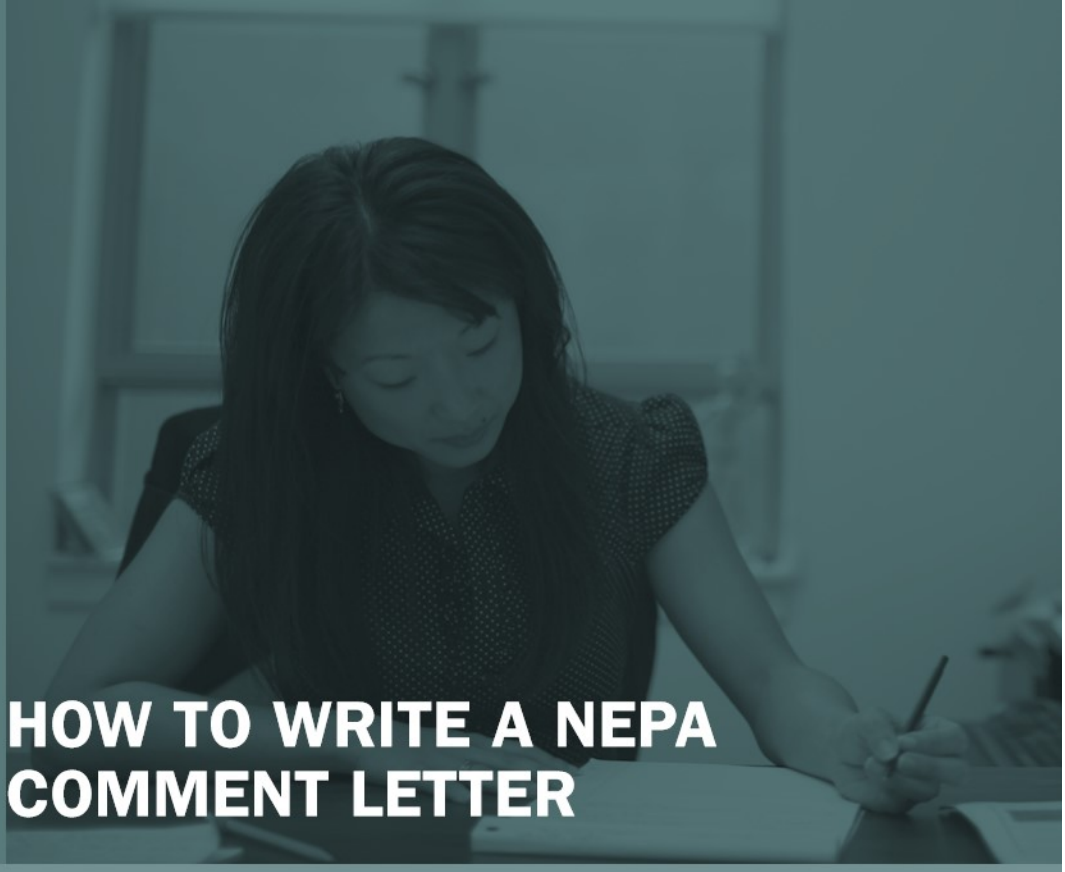
Consider Using the Media as an Advocacy Tool

10

The press, such as newspapers, radio news programs, television news programs, and online news sources, may decide to do a story on the project. You should consider asking journalists to do a news story. You should also consider using social media, such as Facebook or YouTube, to broadcast your position on a project, or creating a website that people can visit to learn more about your campaign.

Media coverage can be helpful because it can bring attention to your concerns about the project. A well-written editorial or investigative article can shape how a proposed project is perceived by the affected community and by government officials that have influence over the project. A compelling video featuring the people who will be most affected by a project could help you gain political support and enhance grassroots organizing.

Do not forget, however, that the press can also hurt your goals if the news reporters or editorial writers disagree with your concerns and write stories that are in favor of the project. As a result, whether and to what extent you choose to work with the press are important questions that are best addressed on a case-by-case basis. In some instances, particularly if the project is very controversial, the press may try to contact you, especially if you have been outspoken about the project.



HOW TO WRITE A NEPA COMMENT LETTER

"Commenting" on an environmental assessment (EA) or environmental impact statement (EIS) simply means giving your opinion on the information presented in the document. The purpose of commenting on an EA or EIS prepared in compliance with the National Environmental Policy Act (NEPA) is to influence government decision-making. Your comments may influence whether the government approves or disapproves the project, considers a new alternative, adopts more mitigation measures, or performs further studies before deciding whether to approve the project.

Comments can be made in two ways. You can provide input by writing a comment letter. You can also voice your opinion in person at a public hearing. We recommend doing both: submitting a written comment letter and, if there is a hearing, speaking at the hearing. In a comment letter, you can fully explain your concerns in detail and may attach documents that you want the lead agency to consider. At a public hearing, because the amount of time that members of the public are allowed to speak is usually very short (sometimes three minutes or less), you may have enough time to only summarize your main concerns. Nevertheless, voicing your concerns at a public hearing can be very powerful, especially if they are echoed by others. Public hearings provide you with a unique opportunity to present your concerns not only to the lead agency, but also to every individual who attends the hearing. These individuals could include like-minded members of the public, elected officials, and prominent government agencies that may have considerable influence over the project.

tiP

Anyone who believes that an agency has violated NEPA can sue the lead agency in court. However, in order to sue, you must show the court that you participated in the NEPA process by submitting oral or written comments, and that you outlined your concerns with enough detail to adequately alert the agency.

Any member of the public can provide comments when a project is first announced, during the "scoping" process for an EIS, and after reviewing a draft of an EA or EIS. How a Freight Project Moves Through the NEPA Process: A Step-by-Step Description identifies opportunities during the NEPA process when the public can submit comments to the lead agency. In addition to writing comment letters and speaking at public hearings, any member of the public can meet with the lead agency and other agencies to express concerns and to ask questions.

The following recommendations may help you prepare a comment letter.

WHAT SHOULD I INCLUDE IN MY COMMENT LETTER?

The substance of your comments is very important. If you oppose the project, it is okay to say so in your comment letter. However, your comment letter should be focused on discussing alternatives to the project, potential mitigation, or errors in the environmental analysis. Your comments should be as specific, detailed, and thorough as possible.

Below are recommendations for what to include in a comment letter:

- Identify all [illegible] This is important to preserve your right to sue in court.
- Explain why [illegible] or parts of it.
- Organize your comments [illegible] For example, you may want to divide your comment letter into sections that separately discuss air quality, water quality, traffic, alternatives, and mitigation.
- Describe any [illegible] EA or EIS. For example, if you think the EA or EIS underestimates how much air pollution the project will cause, then discuss this problem in your comment letter. See How Mistakes in NEPA Documents Could Indicate Oversights . . . and What to Do About Them for a list of potential errors in an EA or EIS, and Analyzing an EA or EIS: An Air Pollution Impacts Checklist for a series of questions that may help you comment on an EA or EIS.
- Include [illegible] page [illegible] EA or EIS [illegible] For example, if you believe the chart on page 147 of the EIS underestimates air pollution from ships, then include that page number in your comment letter when you are discussing your concerns.
- Suggest [illegible] a health impact assessment (HIA). An HIA is a study that judges the health effects of a proposed project, plan, or policy. HIAs can result in a more complete disclosure of the public health consequences of a proposed project. You can request that the lead agency conduct an HIA. You can also try to work with other agencies or organizations to pay for a consultant to prepare an HIA for you.
- Suggest [illegible] See NRDC's Clean Cargo fact sheets for a list of available mitigation measures for freight transportation projects.
- Propose a [illegible] EA or EIS [illegible] An alternative might include building the project in a different location or redesigning the project to reduce its harmful effects.
- If [illegible] lead agency [illegible] holding a public hearing, [illegible] a public hearing and explain the reasons why a public hearing should be held. A public hearing may be warranted if the proposed project is of significant public interest and is highly controversial.

- [illegible] An EIS is required if the project may cause significant environmental impacts. If you believe that the lead agency should have prepared an EIS instead of an EA, explain why the proposed project may cause "significant" environmental impacts.
- [illegible] These documents may include maps, studies, and data that illustrate your concerns. If you are attaching supporting documents, be sure to explain in your comment letter how the documents are relevant. See 10 Tips for Participating in the NEPA Process for a list of documents you may want to attach to your comment letter.
- [illegible] You may also request to meet with the lead agency.
- [illegible] (such as your mailing and e-mail address) so that the lead agency can notify you about subsequent actions taken on the proposed project.

☑ IDENTIFY

☑ EXPLAIN

☑ ORGANIZE

☑ DISCUSS

☑ INCLUDE

☑ SUGGEST

☑ PROPOSE

☑ REQUEST

☑ OFFER

☑ PROVIDE

How can I get copies of documents that I don't have, but that I want the agency to consider?

As discussed above, along with your comment letter you may want to submit studies or other data that support your position. For example, to support your argument that the EA or EIS should analyze how people living close to a proposed highway could be exposed to dangerous levels of air pollution, you may want to send the lead agency copies of scientific studies that show how communities living near busy roads experience increased health risks from air pollution. Or, for another example, if the project proponent has made statements in its marketing materials that the project is much larger than is portrayed in the EA or EIS, you may want to send the lead agency copies of those materials as a way to argue that the EA or EIS has minimized the size of the project.

You may have copies of the documents you want to provide the lead agency, or you may be able to easily locate them online. You can also work with experts in the field to find the documents, or you can submit an "open records" request.

An open records request is a written request for documents that is made by a member of the public to a government agency. There are federal and state laws that provide the public with the right to make these requests. The Freedom of Information Act (FOIA) is the federal law that grants every member of the public the right to access information from the federal government.

When a project is moving through the NEPA process, it can be helpful to submit an open records request to the lead agency and other government agencies that may have information about the project. For example, if a port operated by the state or city needs a permit from the U.S. Army Corps of Engineers to dredge a shipping channel, you can submit an open records request to the Army Corps (the lead agency in this example) and to the port. The request could ask for all documents exchanged between the Army Corps and the port during the NEPA process, and all documents about the project's environmental impacts. Such information might reveal that mistakes were made during the NEPA process or provide assurances that a thorough study was performed.

Requesting documents from the government through open records laws can be time consuming. It can take a long time for the appropriate agency to provide the requested documents, or it may refuse to comply with your request by arguing that the documents are "exempt" from disclosure (it might, for instance, claim they are confidential). For this reason, it is important to send any open records requests as soon as possible to increase your chances of having the documents you need before comments on the EA or EIS are due. It is also important to know that some government agencies will charge you for copies of documents. You can request that the charges be waived or reduced, but the agency may not always agree to do so. For more information about FOIA, see www.[illegible]a.g[illegible]a[illegible]ml or www.[illegible]a.g[illegible]w-[illegible]ml.

How Long Do I Have To Comment on a NEPA Document, and Is the Lead Agency Required To Hold Public Hearings?

When the lead agency prepares an EIS, it must provide at least 45 days for the public to comment on a draft EIS.

A lead agency is not required under NEPA to provide a public hearing to discuss the draft or final EIS. However, a public hearing may still be provided, particularly if the proposed project is controversial or captured significant public interest, and if there are multiple requests for a hearing from the public and government officials.

When an EA is prepared, the lead agency gets to determine how long the public has to review and comment on the EA and if a public hearing will be held. The amount of public participation allowed varies greatly by federal agency and is generally outlined within each agency's internal NEPA regulations.

For example, the U.S. Army Corps of Engineers does not commit to providing any comment periods or public hearings when it prepares an EA. The Coast Guard seeks input from the public on EAs but does not commit to providing a minimum amount of time for public comments. However, if a public hearing is held, the Coast Guard agrees to make the EA available to the public at least 30 days before the hearing. The Federal Highway Administration provides the public up to 30 days to review and comment on an EA. The public is also given the option of having a public hearing if the project involves a state proposal to construct a highway that passes a city, town, or village and is receiving federal aid.

The NEPA procedures for a number of federal agencies can be found at ceq.hss.doe.gov/nepa/nepa_links/agency/agencies.html. Many agencies also have NEPA guidebooks online that include additional information about their respective internal NEPA procedures.

The best way to make sure you know about the opportunities for public comment and participation is to tell the lead agency that you want to be on the mailing list for any public notices about the proposed project.

For a diagram of the steps involved in preparing an EA or EIS and when the public can provide comments, see How a Freight Project Moves Through the NEPA Process: A Step-by-Step Description.

WHAT IF I CANNOT MEET THE DEADLINE FOR SUBMITTING WRITTEN COMMENTS?

It is very important that your comments be submitted before the end of the comment period. Lead agencies are not required to consider comments submitted after the deadline. If you feel that you cannot write comments by the deadline, you can ask the lead agency for an extension. However, you should never assume that your request will be granted. A lead agency may be more willing to extend the comment period if the NEPA document is long and other members of the public have expressed a need for more time to review it, if the project is controversial, and if the request was made early in the comment period.

WILL THE LEAD AGENCY RESPOND TO MY COMMENTS?

Yes. Where an EIS is performed, the lead agency is required to respond to all the comments it receives. The agency's response will be provided in the final EIS and may include the agency's rationale for accepting or rejecting the project. For projects that do not require an EIS (such as where an EA is prepared), an agency may include its response to comments in its record of decision, final EA, or finding of no significant impact.

ANALYZING AN EA OR EIS: AN AIR POLLUTION IMPACTS CHECKLIST

An environmental assessment (EA) or environmental impact statement (EIS) prepared under the National Environmental Policy Act (NEPA) for a proposed freight transportation project, such as a new port, rail yard, or highway, should include information about how the project would affect the environment and public health. Reading and understanding an EA or EIS will help you determine if the government has accurately analyzed all of the negative effects of the project, considered a reasonable range of alternatives, and adopted sufficient mitigation.

Generally, an EA or EIS is divided into chapters, with each chapter covering a different environmental impact (such as air quality, water quality, and traffic). The EA or EIS may also include appendices that have more detail about specific environmental effects and that discuss the methodologies, data, and assumptions used to study the project.

Below is a series of questions to keep in mind when reading an EA or EIS. These questions were designed to draw out important information from the EA or EIS about how the lead agency believes the proposed project will affect air quality and climate change.

When reviewing the EA or EIS, you may find that you disagree with how the lead agency has reported the environmental impacts of the project. If that is the case, you should raise your concerns in a comment letter to the lead agency or at a public hearing. You may request that the errors in the EA or EIS be corrected. Significant errors within the EA or EIS could signal that the lead agency did not conduct a thorough enough analysis of the proposed project and may have violated NEPA.

For additional information on drafting comment letters and what to do if you detect errors in an EA or EIS, see How to Write a NEPA Comment Letter and How Mistakes in NEPA Documents Could Indicate Oversights...and What to Do About Them.

WHERE IS THE PROJECT? 1

The EA or EIS must include a description of the proposed action and its location and the scope of the project may include a description of the environmental impact. For example, a highway construction project proposed in a rural area may include a description of the impact on a small town located away from the highway and the transportation impact on a residential neighborhood.

- Where is the project located?
- What is the physical size of the project (how many acres, miles, or square feet)?
  - Is the EA or EIS description of the size and nature of the project similar to its description elsewhere (such as in promotional documents created by the project proponent or in the press)? If the project has been described differently, you can ask the lead agency which description is correct.
- What is the existing environmental landscape of the site, before the project is built? For example, is the project site currently an open field, an industrial area, a residential neighborhood?

TIP

Information about the project's location may be found in the "Project Description" chapter of the EA or EIS.

WHAT POLLUTING ACTIVITIES WILL OCCUR AT THE SITE? 2

The EA or EIS must include a description of the proposed action and its location and the scope of the project may include a description of the environmental impact. For example, a proposal to build a new power plant that will run 24/7 may include, and the public and agencies will want to know, what kind of equipment will be used to generate the power, and the fuel that will be used to generate the power may be a source of air pollution from the plant and the fuel.

- What kind of vehicles and equipment (e.g., ships, locomotives, trucks, cargo-handling equipment, automobiles) will be used at the site or travel to and from the site?
- Will the vehicles and equipment be powered by diesel fuel? The exhaust from an engine burning diesel fuel is a form of air pollution that is harmful to human health.

- What kind of operations will be performed at the site, and what is the intensity of those operations?
  - How many ships, locomotives, trucks, and cars? How many ship "calls," how many car and truck "trips"?
  - How much cargo will be handled at the site? How many cargo containers or TEUs ("twenty-foot equivalent units") will be handled?
  - If the proposed project is an intermodal rail yard, how many container "lifts" will the yard handle? A "lift" is the moving of a container from a truck to a train, or vice-versa.
- What is the site's "maximum capacity," and when will that capacity be reached? For a port or rail yard project, the project's maximum capacity represents the maximum amount of cargo the site is designed to handle.
- Will operations occur 24 hours a day and 7 days a week?
- How long will construction take? Construction operations can create a lot of air pollution and dust. Many vehicles and equipment used for construction activities are diesel-powered and tend to be older, which means they can emit a lot of air pollution.

tip

The activities proposed for the project site are usually described in the "Project Description" chapter of the EA or EIS. other chapters will discuss how these activities affect, for example, air quality, traffic, and land use. The appendices to the EA or EIS may go into more detail about the level of activities at the project site (such as how many truck trips per day, annual ship calls, etc.).

3 WHo WILL BE AFFECTED BY THE PRoJECT?

People will live, work, play, go to school, worship, and participate in activities that may expose them to pollution from the project. The EA or EIS should clearly describe who and how many people may be affected by the project. Some communities may be more negatively impacted by the project.

- Do people live close to the project site?
  - How close do people live? Is it 500 feet….1,000 feet….2,500 feet? How many people live at these various distances? The closer an individual lives, works, or plays next to a pollution source, the greater the chance that he or she may be exposed to dangerous levels of pollution.

- Do people live close to the roads, ship channels, or rail lines that will be used by the trucks, ships, or trains traveling to the project site? Communities along truck and car routes, rail lines, and shipping channels can be greatly affected by a project even if those communities are not directly adjacent to the proposed project site—the actual rail yard or port—because ships, trains, trucks, and cars emit air pollution along their entire journey.

  - How close do people live to the roads, ship channels, or rail lines that will be used by the trucks, ships, or trains traveling to the project site? Is it 500 feet….1,000 feet….2,500 feet? How many people live at these various distances?

- Are there schools, day care facilities, parks, hospitals, nursing homes, or senior citizen centers nearby? If yes, how close and how many? Children, the elderly, and individuals who are sick are more likely to be harmed by air pollution than healthy young adults.

- Is the project being proposed in or near a community that is already facing public health or environmental problems? Are there other air pollution sources nearby, such as power plants, refineries, factories, waste incinerators, rail yards, distribution centers, warehouses, airports, port terminals, rail lines, highways, or busy roads? Building or expanding a project in a community that already suffers from environmental burdens may significantly worsen the health of that community.

- Does the EA or EIS discuss all the communities that may be affected by the project?

- What is the "region" or "air basin" in which project operations will occur? The United States is divided into different regions, and each region must meet air quality standards set by U.S. EPA called the National Ambient Air Quality Standards (NAAQS).

- What is the air quality in the region where the project is proposed? Does the region currently meet or violate federal air quality standards (the NAAQS)?

tip

Information about how close the project's operations would be to communities may be dispersed throughout the EA or EIS, such as in the "Project Description," "Traffic," and "Land Use" chapters.

You may find that the EA or EIS does not have a good map showing how close various communities are to the project. If that's the case, you may want to provide one to the lead agency with your comment letter during the comment period.

4 How much air pollution will the project create?

[illegible]

How much pollution will be created each day and year by the construction of the project? The air quality chapter of an EA or EIS often separates its reporting of "construction" emissions from its discussion of "operational" emissions.

- What levels of "criteria pollutants" (i.e., carbon monoxide, particulate matter, lead, sulfur dioxide, ozone, and nitrogen dioxide) will be emitted by the construction of the project? The U.S. EPA has established air quality standards (the NAAQS) for all the criteria pollutants.

- What levels of toxic air pollutants will be emitted by the construction of the project? "Air toxins" are pollutants known or suspected to cause cancer or other serious health effects, but for which air quality standards have not been set by EPA. The primary air toxins that are of concern for projects involving diesel pollution include diesel particulate matter (or diesel exhaust), acetaldehyde, acrolein, benzene, 1,3-butadiene, and formaldehyde.

How much pollution will be created each day and year by the operation of the project?

- What levels of criteria pollutants will be emitted?

- What levels of toxic air pollutants will be emitted?

Does the air quality analysis report how the project will affect regional and local air quality? Some pollutants affect regional air quality; for example, NOx and VOCs emitted in a region react together to form smog. Another example is that when NOx and SOx mix in the atmosphere they form PM (this is sometimes called secondary formation of PM). Other pollutants, like diesel exhaust, have significant localized impacts close to where they are emitted. Both the regional and local air quality impacts must be included in the air quality analysis.

What is the "geographic scope" of the air quality analysis? Does the EA or EIS analyze only emissions produced on site, or does it also analyze emissions produced off site? For example, air pollution from trucks traveling to and from a proposed rail yard is produced off site, but should still be analyzed.

Will the project result in the construction of other facilities that will also generate air pollution? For example, the construction of rail yards and port terminals may result in the construction of nearby distribution centers and warehouses that will attract diesel-powered trucks and other polluting equipment to a local area. The air pollution from these kinds of facilities must be analyzed.

- Will the project enable the region or facility to handle more cargo? For example, channel deepening projects at ports may enable the port to handle more cargo. Increases in cargo throughput at a port can result in more trucks, trains, and ships visiting the facility, and hence more air pollution. This increase in air pollution must be analyzed.

- Will the project create fugitive dust? Fugitive dust is particulate matter that becomes airborne and can adversely affect human health. Fugitive dust can be created, for example, during construction activities (when piles of dirt are moved) and when trucks and cars drive on a road, kicking up into the air particulate matter that was on the road. The amount of fugitive dust created by a project should be analyzed.

- Does the document discuss the project's "cumulative impacts"? That is, does it assess how much pollution will be generated by the project in addition to other past, present, and reasonably foreseeable future projects in the area? The EA or EIS must include an analysis of the project's cumulative impacts.

- What is the cancer risk created by the project's emissions for people who live nearby and people who work at the facility?

  - Does the air quality analysis specifically report what the cancer risk would be from the project's diesel particulate matter emissions?

  - Does it characterize the highest health risk situation (such as the person most exposed, or "maximally exposed individual")? This information should be included in the EA or EIS.

- What are the non-cancer health risks (such as asthma) created by the project's emissions for people who live nearby and people who work at the facility, and particularly those who would be most exposed to air pollution from the project? This information should also be analyzed.

- Will the proposed project replace or expand an existing facility? If so, are air pollution levels expected to get better or worse after the project is built?

- How will air pollution from the project affect the region's ability to meet or maintain compliance with the NAAQS? The Clean Air Act makes it illegal for a federal agency to approve a project that would result in a region's violating the NAAQS.

- Do you think the EA or EIS underestimates the air quality and public health impacts of the project? How so?

tip

Information about how the project will affect air quality will be discussed in the "Air quality" chapter of the EA or EIS and any related appendices. Relevant information may also be located within the "Cumulative Impacts" chapter.

5 How much global warming pollution will the project create?

A [illegible] global warming pollution. An EIS or EA should consider the project's contribution to global climate change. [illegible]

- How much energy will the project use, and what is the source of that energy? For example, is the project getting power from coal-fired power plants or other energy sources that emit high levels of greenhouse gases (GHG)?
- What are the levels of GHG emissions created by the construction and operation of the project? What are the levels of GHG emissions created by vehicles traveling to or from the project?

tip The "Air quality" and/or "Cumulative Impacts" chapters of an EA or EIS will likely contain any discussion of a project's effect on global warming.

6 Does the project include mitigation measures to reduce air pollution and global warming impacts from the project?

[illegible] may [illegible] mitigation measures. [illegible]

- What measures are proposed to reduce the project's air pollution impacts?
- Does the EA or EIS discuss how the mitigation measures will avoid, minimize, or compensate for the impact?
- Given the levels of air pollution created by the project, does the proposed mitigation seem adequate? Are there other technologies, programs, or clean air initiatives that should be considered? For example, if the EIS reports that large amounts of pollution will be created by ships, is sufficient mitigation proposed to address that pollution source?

tip Mitigation measures designed to reduce air pollution will likely be discussed in the "Air quality" or "Mitigation" chapters of an EA or EIS.

- Are the mitigation measures "required," or are they "voluntary" or "non committal"? Mitigation measures that are imposed as permit conditions, have clear timetables for performance (such as a commitment to reduce a certain amount of air pollution by a particular date), and have some level of oversight are stronger than measures that are voluntary or deferred to some later time.

- Do the mitigation measures go beyond what is already required by existing laws? For example, a commitment to utilize low-sulfur diesel fuel in heavy-duty equipment may not be meaningful, since the U.S. EPA has already phased in low-sulfur diesel fuel throughout the nation.

- Is there a monitoring or oversight plan to help ensure that mitigation measure commitments will be implemented and enforced?

  - Who will monitor completion of the mitigation measures?
  - Will the monitoring results be made available to the public?
  - Is there an opportunity for the public to help oversee the monitoring?

- If a mitigated FONSI (finding of no significant impact) was issued, does the EA discuss how the mitigation measures will reduce potentially significant impacts to less-than-significant levels? NEPA requires this analysis.

- If an EIS was issued, did the agency consider "all practicable" mitigation measures, including those that the lead agency may not have the authority to adopt (but that other agencies could)? NEPA requires this discussion.

For a discussion of ways to clean up freight transportation projects, see NRDC's Clean Cargo Fact Sheets.

tip

IS A REASONABLE RANGE OF ALTERNATIVES CONSIDERED? 7

The EA or EIS must include a "reasonable range" of alternatives to the proposal. For big projects, a range of alternatives may include different sizes and locations, and different ways of conducting the project. A different way may apply to an EA or EIS as well as to a quasi-judicial process.

- Are there alternatives that would meet the project's stated purpose and need that have not been considered?

  - Has a smaller project been considered? A smaller project might cover less acreage or involve less activity (i.e., fewer ship calls, less cargo throughput).
  - Has a different location been considered?
  - Is there a less-polluting way the project's operations could be performed (i.e., moving cargo by rail instead of by truck)?

- Is the project's "purpose and need" defined so narrowly that only the proposed project would meet it, thereby preventing a reasonable range of alternatives from being considered?
  - ▷ What is the stated purpose and need of the project?
  - ▷ Is the stated need for the project supported by data?
- Is a "no action" alternative discussed? The EA or EIS must discuss a "no action" alternative, which is the alternative of not implementing the project.
- Are the environmental effects of each of the alternatives discussed so the public can determine which alternative is the least damaging?

tiP An EA or EIS will usually have an entire chapter dedicated to discussing alternatives.

8 HOW WAS THE EA OR EIS DEVELOPED, AND WAS THERE ADEQUATE PUBLIC PARTICIPATION?

A [illegible] EA or EIS [illegible] should [illegible] be [illegible] independently and [illegible] objectively prepared. [illegible] Agencies should accurately document, [illegible] analyze, [illegible] and [illegible] document the [illegible] process [illegible] and [illegible] the [illegible] document. [illegible] EA or EIS [illegible]

- Who wrote the EA or EIS? If a consultant wrote the document, did the lead agency independently review the document and make sure it is accurate? Under NEPA, the lead agency is responsible for meeting all the requirements of NEPA, even if the EA or EIS was written by somebody else.
- Did the lead agency exercise sufficient independence from the project proponent during the NEPA process by, for example, carefully reviewing the EA or EIS and holding itself accountable for the document's conclusions?
- Are the conclusions in the EA or EIS supported by data (such as the findings of scientific studies)? Does the analysis in the EA or EIS make sense, or does it seem to be contrary to common sense?
- Was the evidentiary support for the EA or EIS made available to the public? Sometimes the lead agency will not make the data underlying the EA or EIS available unless a member of the public asks to see it. We encourage agencies to post the EA or EIS and its supporting documentation on the Internet, and also to make it available in hard-copy form upon request.
- Were government agencies with special expertise consulted as the EA or EIS was developed, and were their comments incorporated into the EA or EIS? Agencies that should be consulted might include U.S. EPA and state and local air quality, environmental, and health agencies.

- Did the lead agency wait until the EA or EIS was complete before reaching a conclusion about the significance of the project's environmental impacts? Conversely, did the lead agency hastily conclude that the project would not result in any significant impacts before a thorough environmental study was performed? Lead agencies may not conclude that a project will have no significant impacts before completing an EA or EIS.

- Did the lead agency wait until the EA or EIS was complete before deciding whether to approve the proposed action? The EA or EIS is intended to help the lead agency decide whether to approve or reject the project. A lead agency that approves a project before fully considering the contents of the EA or EIS violates NEPA.

- Was the EA or EIS developed in accordance with the lead agency's regulations? Every federal agency has its own NEPA implementing regulations that govern how the agency meets the requirements of NEPA. The NEPA regulations for a number of federal agencies can be found at ceq.hss.doe.gov/nepa/regulations/agencies.html.

- Did the lead agency give the public enough notice of the proposed project and the release of the EA or EIS? Ways in which the lead agency can notify the public include sending letters in the mail or e-mail to everyone that might be concerned about the project, posting and distributing flyers in public places in the area around the proposed project site, and alerting the local media, including newspapers and radio stations.

- Did the lead agency give the public enough time to review and comment on the EA or EIS? An agency may grant the public additional time to review and comment on an EA or EIS if a request is made before the end of the comment deadline. The agency is more likely to grant a request for an extension if the EA or EIS is long and there is widespread interest in the project.

If adequately addressing global warming, the EA or EIS should also analyze the environmental impacts, including the following:

- Traffic
- Noise and vibration
- Aesthetics (the appearance or view)
- Environmental justice (whether there are impacts on lower-income people or people of color)
- Socioeconomics
- Marine water quality
- Geology, groundwater, and soils
- Land use
- Endangered species and habitats
- Cultural or historic resources
- Public safety/public services
- Utilities and service systems
- Hazards and hazardous materials

REDUCING AIR POLLUTION FROM FREIGHT TRANSPORTATION PROJECTS THROUGH AIR QUALITY MITIGATION

Freight transportation projects including port expansions, channel deepening projects, and new rail yards and highways may increase cargo traffic and air pollution. This pollution is associated with negative public health impacts including premature death, aggravated asthma, and lung cancer. Fortunately, technologies are available to dramatically reduce air pollution from the freight transportation industry.

The National Environmental Policy Act (NEPA) provides an opportunity for community members to advocate for mitigation to reduce a project's negative impacts. Even if you oppose a project and believe that no amount of mitigation could make it acceptable, you may still want to advocate for mitigation through the NEPA process in case the project gets approved despite your opposition. Below are the answers to several common questions about securing mitigation through the NEPA process.

WHAT RESPONSIBILITY DOES AN AGENCY HAVE TO CONSIDER AND/OR ADOPT MITIGATION UNDER NEPA?

An environmental impact statement (EIS) is required to include a detailed discussion of "all practicable" mitigation measures that can reduce the project's negative impacts. This discussion must include mitigation measures that the lead agency has the authority to adopt as well as measures that the lead agency does not have the expertise or jurisdiction to implement. Including a broad discussion of "all practicable" mitigation measures encourages other governmental bodies to implement mitigation, even if the lead agency cannot. A lead agency's failure to include a reasonably complete discussion of possible mitigation measures in its EIS violates NEPA.

Importantly, while the lead agency must discuss mitigation in detail, NEPA does not require that mitigation measures actually be adopted. Accordingly, you may find a situation in which a lead agency performs a reasonably thorough discussion of mitigation measures in its EIS but concludes that certain measures cannot be adopted for financial, technical, or legal reasons.

The lead agency's responsibility to adopt mitigation is different, however, when an agency issues an environmental assessment (EA) and finding of no significant impact (FONSI). When issuing an EA and FONSI, the lead agency must ensure that mitigation has been adopted that will reduce any significant environmental impacts to less-than-significant levels. This means that the lead agency must describe what the mitigation is and how it will work; it cannot merely conclude, without explanation, that significant environmental impacts will be reduced. This requirement exists because an EA and FONSI can be issued only if the proposed project will not result in any significant impacts. When an agency commits to adopting mitigation to support a FONSI, the agency can conclude the NEPA process and proceed with its action without preparing the more in-depth (and often more time-consuming) EIS.

Regardless of whether an EA or EIS is performed for a project, advocates can always encourage the lead agency and project proponent to include more mitigation in the project. In other words, while NEPA may not always require that mitigation be adopted, community activism and political pressure can go a long way in securing mitigation to reduce the project's environmental and public health impacts.

TIP

For a discussion of ways to clean up freight transportation projects, see NRDC's Clean Cargo Fact Sheets.

WHAT MITIGATION MEASURES SHOULD I ADVOCATE FOR THAT WILL REDUCE AIR POLLUTION FROM FREIGHT TRANSPORTATION PROJECTS?

There are a number of technologies and initiatives available for reducing air pollution from freight transportation projects, such as replacing older diesel trucks with newer, cleaner models and requiring ships to use cleaner fuels. NRDC's Clean Cargo series describes specific mitigation measures for trucks, ports, rail yards, distribution centers, and construction activities. This series also includes examples of places where clean air measures have been successfully implemented. You can include this information in the comments you make during the NEPA process. Advocating for specific technologies and other mitigation measures in your comments can improve the project.

WHO CAN HELP ME PERSUADE THE AGENCY AND PROJECT PROPONENT TO ADOPT MITIGATION MEASURES?

As discussed in 10 Tips for Participating in the NEPA Process, it is important to reach out to other stakeholders during the NEPA process who can help advocate for additional mitigation. Lead agencies are political bodies that can be persuaded by a swell of community voices; other government entities, including federal, state, and local environmental agencies; and city, county, state, and federal politicians who may have influence over the lead agency or project proponent.

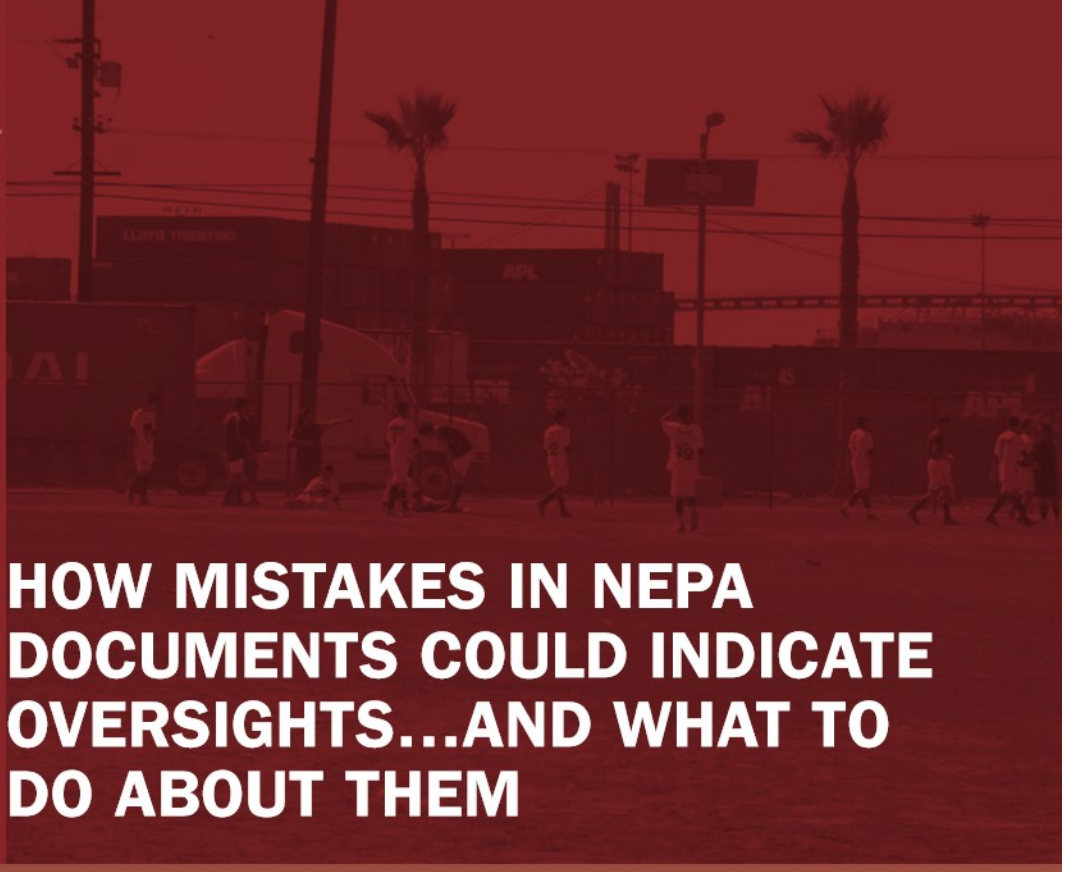
CAN I HELP MAKE SURE THAT THE AGENCY FOLLOWS THROUGH WITH ITS MITIGATION COMMITMENTS?

Yes. There are several steps you can take:

- See if the lead agency's NEPA regulations require a mitigation monitoring program. If they do, then the agency must comply with its own regulations for monitoring. Even if the agency's internal regulations do not require a monitoring program, if an EIS is performed, the agency's record of decision for the proposal must include information about mitigation monitoring and enforcement.

- Request monitoring results from the lead agency or the agency overseeing the mitigation. If the agency does not want to give you the information, you may be able to get it by making a request through the Freedom of Information Act (FOIA) or a state public records statute. See the discussion on "open records" requests in How to Write a NEPA Comment Letter for more information.

- Request that the public assist with monitoring via a public-private partnership program.



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HOW MISTAKES IN NEPA DOCUMENTS COULD INDICATE OVERSIGHTS…AND WHAT TO DO ABOUT THEM

The National Environmental Policy Act (NEPA) has two main purposes: (1) fostering informed decision-making by the government, and (2) publicly disclosing information about a proposed action's environmental effects. If an environmental study contains errors, then a project may be approved on the basis of incomplete information, and communities may be denied important information about how a project will affect their health.

Below, we provide examples of errors that a lead agency may make in its environmental assessment (EA) or environmental impact statement (EIS), and advice on what you can do about them. You may also want to review *Analyzing an EA or EIS: An Air Pollution Impacts Checklist* in this community guide, which includes information that can assist you to critically review an EA or EIS.

WHAT CAN I DO IF I BELIEVE NEPA HAS BEEN VIOLATED? CAN I SUE THE LEAD AGENCY?

If you believe that the EA or EIS contains mistakes, such as failing to accurately describe the environmental effects of a project, study a reasonable range of alternatives, or consider all practicable mitigation, you can encourage the lead agency to fix the errors. You can discuss them in your written comment letter to the lead agency, or at a public hearing, if a hearing is provided.

If the lead agency does not fix the mistakes and the project is approved, you may have a legal claim to challenge the EA or EIS in court and argue that NEPA was violated. However, you can sue the lead agency only if you told the agency during the comment period about the mistakes in the EA or EIS. In other words, you can sue an agency only if you participated in the NEPA process by providing timely comments. Further, the issues you may raise in your lawsuit will be limited to those that you raised in your comments during the NEPA process. Thus, if you think there is any chance—even a small one—that you might sue the lead agency for a NEPA violation, you should participate in the NEPA process and submit a written comment letter explaining your concerns in detail.

CASE STUDY

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In the lawsuit, the judge will have access to all of the comments and documents that were provided to the lead agency during the comment period. The judge may rely on these documents in deciding whether NEPA was violated. This underscores, once again, the importance of submitting comprehensive comments on the NEPA study as well as documents that support your position.

When deciding your case, the judge is required to give "deference" to the lead agency's conclusions in the EA or EIS. This means that the judge must assume that the agency acted properly, and it will be your job to prove that the agency violated the law. Although it can be difficult, there are many cases in which concerned community residents and organizations were able to prove in court that an agency violated NEPA.

A lawsuit against an agency about a possible NEPA violation can take years. If you believe substantial harm to the environment or the public may occur before the judge will rule in your case, then you may need to ask the court for a "preliminary injunction" to stop the construction and operation of the project while your case is being decided.

If you win in court, the judge will likely order the agency to "fix" its NEPA violation. This may involve requiring the agency to study an impact, alternative, or mitigation measure that was overlooked, reassess whether an EIS is necessary, and reconsider the granting of a permit or project approval. The judge may order that the permit or project approval be "enjoined" or "frozen" while the agency fixes its NEPA violation.

We strongly recommend that you obtain advice from an attorney if you are contemplating a lawsuit against an agency based on a NEPA violation. Filing a lawsuit may not always be necessary or feasible, but it is an important strategy to consider when a NEPA violation has occurred.

WHAT ARE EXAMPLES OF POTENTIAL ERRORS IN AN EA OR EIS?

Below are a number of potential errors that can occur in an EA or EIS for a freight transportation project. If an EA or EIS has any of these errors, then the lead agency may have violated NEPA.

⊗ failure to analyze all direct and indirect impacts

The EA or EIS is required to discuss all of the direct and indirect effects of a project. This includes effects that are less than certain to occur, but still reasonably foreseeable. This requirement is important because if the EA or EIS ignores or underestimates the project's environmental impacts, then the lead agency may approve the project on the basis of incomplete information. An EA or EIS that fails to thoroughly discuss a proposed project's environmental impacts may also prevent the public from obtaining an accurate account of how the project will affect their well-being.

CASE STUDY

A [illegible] Ocean Advocates v. U.S. Army Corps of Engineers, 402 F.3d 846 (9th Cir. 2005).

⊗ failure to prepare an eis

NEPA requires the lead agency to prepare an EIS if the proposed project may result in significant environmental effects. If significant environmental effects may exist but the lead agency performs an EA instead of an EIS, then it is violating NEPA. In some cases, the lead agency may mistakenly conclude that the proposed project's impacts are less than significant and that an EIS is not required.

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The EA or EIS is required to estimate how much air pollution will be created by the project. Because this is a projection of what will happen in the future, the agency has to make some assumptions. For example, to calculate how much air pollution will be created by a port container terminal expansion project, the lead agency will likely make assumptions about the type of fuel used by ships that will call at the terminal in the future, and the model year of the truck engines that will haul cargo in and out of the terminal. These assumptions will influence the air pollution estimates for the project. Indeed, if the EA or EIS assumes that the ships will use the cleanest grade of fuel and that all of the trucks operating at the port terminal will have new engines that meet stringent emissions standards, then the air pollution estimates for the project may be much lower than estimates that rely on different assumptions.

If the lead agency's assumptions do not reflect real-world conditions, the environmental analysis may be inaccurate. It is therefore important to understand the assumptions and methodologies that the agency uses in its EA or EIS. This can be a very difficult task and may require technical expertise. You may want to work closely with an expert in the field who can assist you.

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An agency may violate NEPA if it limits its environmental analysis to a geographic area that is too small, so that potentially significant impacts are not considered. For example, if an EIS for a port expansion project analyzes only the air pollution generated by ships while they are docked at the proposed port terminal, and does not consider ship emissions as they are traveling to and from the port, then the geographic scope of the EA or EIS may be too narrow to provide an accurate assessment of the proposed project's air pollution.

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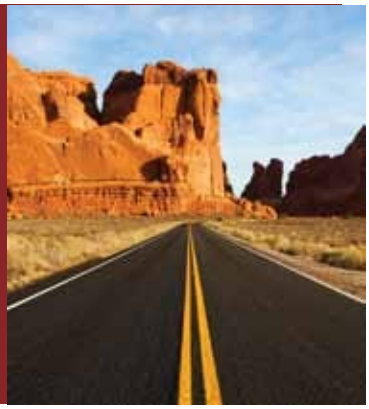

⊗ Failure to consider all practicable mitigation measures

The lead agency must show in its EIS that it has considered all practicable means to mitigate potentially significant impacts. If there are mitigation measures that an agency has not considered, you should bring those measures to the agency's attention in oral or written comments. NRDC's Clean Cargo series provide examples of mitigation measures that are available to reduce air pollution from the freight transportation system.

⊗ Failure to prepare an EIS when mitigation adopted and an EA and finding of no significant impact (FONSI) would reduce impacts to insignificant levels

An EIS is generally necessary if an agency determines that a federal action may result in significant impacts. However, a lead agency can avoid preparation of an EIS and prepare an EA and a finding of no significant impact (FONSI) instead if it shows that mitigation measures have been adopted that will reduce any potentially significant impacts to less than-significant levels. If the agency takes this route, it must explain in the EA how the mitigation measures will work to reduce the project's impacts to levels of insignificance. The agency cannot merely claim—without any supporting data or analysis—that the mitigation will work.

CASe STUDY

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⊗ Conflicting statements about the size and nature of the project

You may find that the EA or EIS contains inconsistent statements. Conflicting statements about the size and nature of the project may indicate that the EA or EIS does not accurately report the project's impacts. For example, the traffic section of an EA may report that the project would create 10,000 new vehicle trips per day, while the air quality section studies the air pollution associated with 5,000 vehicle trips per day. Or a project proponent's marketing materials (such as brochures about the project) or grant applications may describe the project as being much larger than how it is described in the NEPA study. In such a case, the project proponent may have inflated the size of the project to highlight its economic benefits, such as the number of new jobs created, while minimizing the size of the project in the EA or EIS to reduce the appearance of environmental impacts. You may need to ask the lead agency to reconcile these discrepancies.

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The EA or EIS must consider a "reasonable range" of alternatives. An alternative might include building the project at a different location or reducing the size (acreage) of the project. The EA or EIS should discuss the environmental effects of each of the alternatives so that the public and decision-makers can evaluate whether there are more environmentally sustainable ways to develop the project. The EA or EIS must also describe a "no action" alternative, which is the alternative of not doing the project at all.

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The range of alternatives that the agency must consider is guided by the project's "purpose and need." The agency is not required to study alternatives that do not meet the project's purpose and need. However, the project's purpose and need cannot be so narrow that there would be only one option for fulfilling them. For example, it may violate NEPA to narrowly define a project's purpose as "building a new near-dock rail yard within 4 miles of the port" when the overall objective is really to move future cargo more efficiently, which may be attained just as well by building out a port's capacity for on-dock rail.

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The project proponent may be a company, such as a railroad company that wants to build a new rail yard. It is legal for the project proponent to help prepare the EA or EIS, for instance by hiring a consultant to draft the EA or EIS, paying for the consultant, providing data to the consultant, and reviewing drafts of the study. However, the lead agency has the ultimate responsibility for the conclusions within the EA or EIS and for complying with NEPA. As a result, while a project proponent may be heavily involved in the NEPA process, it cannot be leading the process or dictating the outcome of the EA or EIS. Lead agencies may not rubber-stamp a study created by the project proponent.

In a unanimous decision, the Ninth Circuit found that a NEPA study for a highway project was actually inadequate because the agency's EA and conclusions failed to properly consider the environmental impacts by a certain date that NEPA prohibited "prejudged" and was inadequate as an impartial agency and failed to consider a reasonable range of alternatives under the EA. Davis v. Mineta, 302 F.3d 1104 (10th Cir. 2002).

CAse stuDY

Prejudging the outcome of NEPA process

NEPA's sole purpose is to ensure that decision-makers and the public are informed of the environmental consequences of a project before the agency decides to allow the project to move forward. Once resources are committed and construction begins, it can be difficult, and in some cases impossible, to reverse environmental degradation. Accordingly, the lead agency must consider the findings of the EA or EIS before approving a project, issuing a permit, or taking whatever other federal action triggered NEPA. Similarly, the lead agency may not "prejudge" the conclusions of an environmental document. For instance, there could be strong political pressure to expedite the environmental review for a project, and a desire on the part of the project proponent that the lead agency quickly perform an EA, issue a "finding of no significant environmental impact," and approve the application for a permit to begin construction. The lead agency's decisions, however, cannot be tainted by that pressure.

GLOSSARY OF COMMON NEPA AND AIR QUALITY TERMS

CATEGORICAL EXCLUSION (CE)

A category of actions that a federal agency has determined do not have a significant effect on the human environment, and therefore do not need to be analyzed in an EA or EIS. However, an agency can still decide to do an EA, even though it is not required to do so. Also, the agency has to include in its procedures what to do if there is an extraordinary circumstance in which an action that is normally covered by a categorical exclusion may actually have a significant environmental effect.

COOPERATING AGENCY

Usually an agency, other than the lead agency, that can offer expertise on a particular environmental impact. The cooperating agency will provide input on the EA or EIS and work closely with the lead agency. For example, if the proposed action may significantly affect air quality, the cooperating agencies may include the U.S. Environmental Protection Agency, the state's environmental protection agency, the state's agency responsible for air quality, and the local agency responsible for the air quality of the district.

COUNCIL ON ENVIRONMENTAL QUALITY (CEQ)

A federal agency that issues regulations and policies about NEPA. The CEQ is a branch within the Executive Office of the President (the White House).

CRITERIA POLLUTANTS

Six air pollutants for which the U.S. Environmental Protection Agency has set national air quality standards, called the National Ambient Air Quality Standards (NAAQS). The six pollutants are carbon monoxide, lead, nitrogen oxides (NOx), ozone, particulate matter (PM), and sulfur oxides (SOx). There are two different kinds of particulate matter regulated under the standards: PM2.5 and PM10. Freight transportation projects usually generate large amounts of the criteria pollutants NOx, ozone, PM2.5, PM10, and SOx.

CUMULATIVE IMPACT

An impact on the environment that results from the proposed action plus other past, present, and reasonably foreseeable future actions, regardless of what agency or person is responsible for the other actions. Cumulative impacts can comprise individual actions that are each small but are significant when added all together over time. An EA or EIS must analyze the project's cumulative impacts.

DRAFT ENVIRONMENTAL ASSESSMENT (DEA) OR DRAFT ENVIRONMENTAL IMPACT STATEMENT (DEIS)

The draft version of an EA or EIS. EA and EIS are defined below. The lead agency may release a DEA for the public to review. The lead agency is required to release a DEIS for public review and provide at least 45 days for the public to provide written comments. After receiving the comments, the agency releases a final EIS.

DIESEL PARTICULATE MATTER (DPM)

An air pollutant emitted by engines that burn diesel fuel, such as locomotive or truck engines. DPM, sometimes called diesel exhaust or soot, is one kind of particulate matter (PM). It contains solid particles of hazardous substances, including arsenic and lead. The particles enter people's lungs when inhaled, causing serious health problems including asthma, lung cancer, and cardiovascular illnesses. The World Health Organization concluded that DPM causes cancer.

EFFECTS

There are two kinds of effects—direct effects and indirect effects. Direct effects are caused by the project and occur at the same time and place as the project. Indirect effects are caused by the project but are later in time or farther removed in distance from the project, though they are still reasonably foreseeable. Indirect effects may include growth-inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems. An EA or EIS must examine all of the direct and indirect effects of a project.

ENVIRONMENTAL ASSESSMENT (EA)

A concise document which a federal agency is responsible for preparing, that determines whether a project may significantly affect the quality of the human environment. If the project may indeed significantly affect the quality of the human environment, then the lead agency must prepare an environmental impact statement (EIS). If the project will not significantly affect the quality of the human environment, then the lead agency usually issues a finding of no significant impact (FONSI). The EA must include brief discussions of the need for the proposal, alternatives to the proposal, the environmental impacts of the proposed action and alternatives, and a listing of the agencies and the people that have been consulted. EAs are usually not as detailed as EISs.

ENVIRONMENTAL IMPACT STATEMENT (EIS)

A detailed document that analyzes the environmental impact of a proposed action, any adverse environmental effects that cannot be avoided, alternatives to the proposed action, and any irreversible and irretrievable commitments of resources that would be involved in the proposed action. An EIS is required for any federal action that may significantly affect the quality of the human environment.

FINDING of No SIGNIFICANT IMPACT (FONSI)

If a federal agency determines that an action will not have a significant effect on the human environment, then it issues a document called a finding of no significant impact (FONSI). This document must briefly present the reasons why the action will not have a significant effect on the human environment and must also identify any other environmental documents related to the action, such as an EA if one was performed.

FREEDOM of INFORMATION ACT (FOIA)

A federal law that grants every member of the public the right to access information from the federal government. States have similar open records laws.

GREENHOUSE GAS (GHG)

Gases in the air that absorb radiation from the sun and heat up Earth's atmosphere. The heating up of the Earth's atmosphere is called climate change or global warming. Carbon dioxide (CO_2) is a GHG that is emitted into the air by engines or power plants burning fossil fuels, such as coal, diesel fuel, and gasoline.

HEALTH IMPACT ASSESSMENT (HIA)

A study of the potential effects of a proposed project on the health of a population and the distribution of those effects within the population. An HIA can be conducted by the lead agency, or groups can hire a consultant to prepare one.

HUMAN ENVIRONMENT

In NEPA documents, the "human environment" is very comprehensive and includes the natural and physical environment and the relationship of people to that environment.

LEAD AGENCY

An agency or multiple agencies responsible for preparing the EA or EIS and ensuring that the proposed project complies with NEPA.

MITIGATION

Measures taken to limit an action's harmful impacts. Mitigations may avoid an impact altogether, as when a certain action or parts of an action are not taken; minimize impacts by limiting the degree or magnitude of the action and its implementation; rectify an impact by repairing, rehabilitating, or restoring the affected environment; reduce or eliminate an impact over time by preservation and maintenance operations during the life of the action; or compensate for the impact by replacing or providing substitute resources or environments. For example, air quality mitigation for a rail yard might include requiring locomotives to use cleaner engines, ensuring that there are adequate buffers between the routes trucks use to visit the facility and residential areas, and creating an air quality mitigation fund to help pay for air filtration systems to be installed in nearby schools.

Mobile Source Air Toxins

Compounds emitted from vehicles and equipment which are known or suspected to cause cancer or other serious health and environmental effects. Examples of mobile source air toxins are diesel particulate matter, benzene, and formaldehyde.

National Ambient Air Quality Standards (NAAQS)

Standards set by the U.S. EPA for the six criteria pollutants. These standards are set at levels that are supposed to protect public health, including the health of "sensitive" populations such as people with asthma, children, and the elderly. NAAQS are also supposed provide protection against visibility impairment and damage to animals, crops, vegetation, and buildings.

National Environmental Policy Act (NEPA)

A federal law adopted in 1969 that requires all federal agencies to properly consider the environment before undertaking any major action that could significantly affect the environment.

Notice of Intent (NoI)

A public notice released by an agency announcing that an EIS will be prepared and considered. The notice must describe the proposed action and possible alternatives, describe the agency's proposed scoping process, including whether, when, and where any scoping meetings will be held, and the name and address of a person within the agency who can answer questions about the proposed action and the EIS.

Nitrogen oxides (NOx)

A group of gases that form from emissions from cars, trucks, buses, ships, trains, power plants, and off-road equipment. NOx mixes with volatile organic compounds (VOCs) to form ground-level ozone (commonly referred to as smog) and is linked to a number of adverse effects on the human respiratory system, including asthma. NOx also mixes with sulfur oxides (SOx) in the atmosphere to form PM (this is sometimes called secondary formation of PM). NOx is one of the criteria pollutants for which U.S. EPA has established NAAQS.

Ozone (O_3)

A gas that is found in two regions of Earth's atmosphere: at ground level and in the upper regions of the atmosphere. Ozone in the upper regions of the atmosphere protect Earth from the sun's harmful rays. Ozone at the ground level is commonly referred to as smog and is created by a chemical reaction between NOx and VOCs. In areas that have high levels of NOx and VOCs, the amount of ozone created can reach unhealthy levels. Breathing ozone can cause negative health effects, including asthma. Ground-level ozone is a criteria pollutant.

PARTICULATE MATTER (PM)

A complex mixture of extremely small particles and liquid droplets, including chemicals, metals, and dust. Diesel particulate matter (DPM) is one kind of PM, is emitted by vehicles and engines that burn diesel fuel. PM can also be created when vehicles travel on a road and kick up the particles that were resting on the road's surface; this is called fugitive dust. There are two kinds of particulate matter that are regulated as criteria pollutants: PM2.5 and PM10. PM2.5 are 2.5 microns in diameter or smaller, and PM10 are 10 microns in diameter or smaller. PM2.5 and PM10 are so small that when they are inhaled, they can pass through the throat and nose and enter the lungs.

RECORD OF DECISION (ROD)

A document issued by the lead agency as the final step of the NEPA process. Where an EIS is prepared, the ROD must state whether the agency approves or disapproves the project, what alternatives were considered, whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted (and if not, why not), and mitigation plans, if any.

SCOPING

The process that takes place before an EIS is prepared, during which the agency determines the scope or range of actions, alternatives, and impacts that will be considered in the EIS.

SULFUR OXIDES (SOx)

A group of gasses that are emitted when fossil fuels are burned by trains, ships, non-road equipment, power plants, and other sources. Breathing SOx causes health effects including asthma. SOx also mixes with nitrogen oxides (NOx) in the atmosphere to form PM (this is sometimes called secondary formation of PM). SOx is a criteria pollutant.

SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT (SEIS)

A document that must be prepared by the lead agency if, after a draft or final EIS is produced, the agency made substantial changes to the proposed action or if there are significant new circumstances or information related to environmental impacts.

SIGNIFICANT IMPACT

An impact is considered to be a significant impact based on the context and intensity of the impact. If the environmental impacts of a project may be significant, the lead agency must prepare an EIS. Significance must be analyzed in several contexts, such as society as a whole, the affected region, the affected interests, and the locality. Analyzing the intensity or severity of an impact requires consideration of the following:

- impacts that may be both beneficial and adverse, because a significant effect may exist even if the agency believes that on balance the effect will be beneficial;
- the degree to which the proposed action affects public health or safety;
- unique characteristics of the geographic area, such as proximity to historic or cultural resources, parklands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas;
- the degree to which the effects on the quality of the human environment are likely to be highly controversial;
- the degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks;
- whether the action is related to other actions with individually insignificant but cumulatively significant impacts;
- the degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places, or the degree to which it may cause loss or destruction of significant scientific, cultural, or historical resources;
- the degree to which the action may adversely affect an endangered or threatened species, or habitat of the species that has been determined to be critical under the Endangered Species Act;
- whether the action threatens a violation of federal, state, or local law or requirements imposed for the protection of the environment.

TIERING

An environmental analysis is tiered when an EIS broadly analyzes a general matter, such as a national program or policy, and a subsequent EIS, EA, or FONSI focuses on a related, specific issue.

U.S. ENVIRONMENTAL PROTECTION AGENCY (EPA)

A federal agency that aims to protect human health and the environment. The EPA develops and enforces regulations, publishes information, and has expertise on air pollution, water pollution, climate change, and many other environmental issues. EPA is often a cooperating agency in the preparation of an EA or EIS and is required by the Clean Air Act to review EISs.

VOLATILE ORGANIC COMPOUNDS (VOCs)

Air pollutants emitted by cars, trucks, ships, trains, and non-road vehicles and equipment, as well as by many paints, industrial coatings, and household products. VOCs react with nitrogen oxide to form ground-level ozone, which is sometimes called smog.

NoTES

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