



# How to Avoid Common Mistakes When Implementing NEPA

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## **Why Federal Agencies Make Mistakes With NEPA**

The National Environmental Policy Act (NEPA) was the first major environmental statute, and despite its relatively simple terms as compared to other environmental laws, it remains one of the most important pieces of environmental legislation for federal agencies.

NEPA is virtually the same as it was in 1970, although Supreme Court decisions have changed modern implementation efforts. Before we discuss proper NEPA implementation, we should understand the National Environmental Policy Act is by no means a truly pro-environment document. It is a procedural document, and many common implementation mistakes are the result of a fundamental misunderstanding of NEPA's goals:

- NEPA requires federal agencies to look at the potential environmental impact of proposed actions and to consider alternatives.
- NEPA requires environmental reports, which are public documents.
- While NEPA often compels agencies to seek alternatives to actions that negatively impact the environment, it does so politically and bureaucratically, not legally. This last point confuses many professionals who have worked with other environmental laws, but who have little to no experience with NEPA. The Supreme Court has not

sided with environmentalists asking for a qualitative analysis of agency actions in accordance with NEPA.

Although it has some of the most poetic language of any environmental law, NEPA is not substantive in its environmental requirements. However, it clearly and strictly requires federal agencies to take appropriate procedures to inform the public of the environmental ramifications of actions and policies.

This is an extremely important distinction. One of the most common NEPA mistakes that agencies make is attempting to negate or downplay an environmental impact when an objective, complete environmental analysis would provide a much faster way to meet NEPA's requirements.

Below, we will address some common mistakes of action and inaction that affect NEPA time lines, delaying jobs, increasing costs and otherwise inconveniencing policies and actions.

### **General NEPA Procedural Mistakes**

Many federal agencies misunderstand the NEPA process, which can cause major delays. Provided that an agency cannot take advantage of the National Environmental Policy Act's categorical exclusions or another exemption, it needs to file a Findings Of No Significant Impact (FONSI) or file a notice of intent followed by an Environmental Impact Statement.

Environmental professionals generally understand the NEPA process, but many occasionally file a notice of intent when a FONSI statement would sufficiently answer the NEPA requirements for a given project, or more commonly, they file a FONSI when conditions necessitate a full statement.

Note that courts cannot ignore agency interpretation of an agency's duties, so an appropriate procedural approach is absolutely essential. Avoid the following when deciding on a procedural path:

- Justifying a decision rather than taking an objective approach. For instance, many professionals decide to file FONSI before assessing the potential ramifications of a project.
- Delaying an EIS through poor organization and an inappropriate understanding of NEPA time tables. Keeping an organized internal process will give professionals an easier means of deciding when a "recommendation or report on a proposal" prompts NEPA compliance, which will make it easier to avoid delays by carrying out appropriate NEPA procedures as early as possible.

### **Attempting To Avoid NEPA Oversight**

Section 102(2)(c) of NEPA requires an Environmental Impact Statement (EIS) when a federal agency's action will significantly impact the human environment. The process for filing an EIS is notoriously

complex and often difficult, so many agencies attempt to avoid filing either consciously or incidentally.

Exclusions offer the fastest way to fulfill NEPA requirements without filing an EIS. However, NEPA officials closely scrutinize exclusions. Agencies sometimes misuse or misfile exclusions, which results in major delays down the line.

Categorical exclusions are an important part of the act, but the following actions can result in additional review and potential delays:

- Using an excessively vague or inaccurate interpretation of an exclusion to avoid filing a report. There are numerous valid exclusions, which we do not have room to discuss in this paper, but professionals should understand whether their agencies fit the criteria for exclusion and why.
- Not accounting for extreme circumstances. Even if an agency or action is excluded under normal circumstances, the agency must still create an Environmental Impact Statement if the desired action can be reasonably interpreted as having an extreme impact on a human environment. An example might include a dam construction that would significantly impact daily activities in a nearby town.

FONSI mistakes include:

- Taking a soft approach to environmental impact descriptions to justify a FONSI. NEPA officials will recognize and refuse FONSI requests that do not use established thresholds to show a project's lack of significant environmental impact.

- Making claims in a FONSI that an environmental analysis (EA) does not support. Professionals should never assume that FONSI statements are in any way a formality and should show a direct link between the decision to file the FONSI and real environmental information directly related to the project.

- Insufficient explanations. Likewise, the FONSI should clearly explain all data. Omitting simple explanations of key facts, figures and analyses may cause delays.

Agencies that file EIPs also attempt to cut corners to quickly prepare reports. Some agencies attempt to simplify their Environmental Impact Statements to rush the process, breaking proposed pro-environmental actions into smaller, more impressive components will not exempt a project from NEPA oversight. NEPA officials handle hundreds of requests annually that attempt to segment jobs to avoid repercussions. Agencies can mark these prospective steps as a capricious procedural failure, which will require a remand or a complete re-preparation for approval.

## **Informing The Public**

Earlier, we noted that NEPA is a procedural document that is designed to keep the public informed of the potential environmental effects of various federal actions. Professionals should keep this in mind when preparing EIPs.

An EIP should always show input from the public along with proof that the agency has actively informed the public of the impact of a project. The agency also needs an accurate statement of purpose and need that shows the public why an action is ultimately beneficial or necessary. This statement should explain points clearly and without conjecture.

Note that suggested alternatives should also have a clear purpose and need statement. Otherwise, these plans might not fulfill the EIP requirement for an alternative. Alternatives should also show feasibility, or if they are not feasible, the report should fully explain why the alternatives are excluded from consideration.

The agency or applicant should discuss the political, social, ecological and economic repercussions of every proposal in a way that the general public can understand. One of the most common mistakes is a failure to show clear cause and effect, and any apparently arbitrary decisions made without a public consideration of alternatives will put the entire application at risk.

## Documentation Issues

As is the case with any procedural law, NEPA requires agencies to file documentation along with their reports. This documentation includes:

- Alternative proposals from members of the public and public organizations. The agency should also assess the feasibility and potential impact of these proposals. Agencies that do not appropriately consider public proposals will face denial and delays.
- Statements from cooperating organizations, which might include environmental agencies and consultants. These statements generally include advice on the project and comments on the project's impact. Agencies should document both the consultation and internal actions taken due to the consultation in order to fulfill this requirement.
- All sources for data and analysis in a comprehensive administrative record. While this seems like a basic documentation requirement, many agencies omit critical information, which can complicate an environmental assessment significantly. Include all information that contributes to a decision, including meeting records when appropriate.
- Data showing both direct and indirect environmental impact from valid sources. Many agencies neglect to consider the potential indirect consequences of a project adequately or use data that is not acceptably

accurate. Any data in an EIP should come from a recent, reliable source.

For the best chances of a quick EIP approval, agencies and businesses should keep records of everything associated with the decision to take a proposed action. However, submitting too many documents can also delay a case. Before filing, agencies should carefully call all irrelevant information from EIPs, FONSI/EAs and exclusion documents. All documents should show a clear intent to comply with NEPA and to incorporate the law as a part of the decision-making process.

Ultimately, federal agencies should work with experienced environmental advisers and keep the original intent of the National Environmental Policy Act in mind when preparing related documents. NEPA's primary purpose is to promote public knowledge, not to enforce environmentalism. To properly implement NEPA, agencies should focus on providing a comprehensive and detailed overview of each project, show alternatives, analyze the potential of alternatives and make a measured decision based on its own report. The agency should appropriately document every step of the process for the best possible chance of quick review.

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