Practical Aspects of the EIS Process
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I. **Overview of NEPA**

The goal of the National Environmental Policy Act (“NEPA”) is to prevent environmental damage by ensuring that federal agencies take environmental factors into account when making decisions that may significantly affect the environment.\(^1\) It is frequently stated that NEPA is a procedural statute. NEPA requires federal agencies to implement procedures during their decision making processes to ensure that potential environmental impacts resulting from an agency’s decision are thoroughly considered, but NEPA does not mandate any particular result.\(^2\) Judicial review of agency compliance with NEPA is therefore limited to considering whether the agency has complied with the procedural mandates of NEPA in reaching its decision. Although this sounds relatively straightforward, judicial review under NEPA requires a court to evaluate an administrative agency’s decision making process under a statute containing a broad mandate and little guidance as to how to implement that mandate.\(^3\)

Courts have played a significant role in giving shape and substance to the NEPA’s procedural mandate, but the outcomes are often fact-specific and even more difficult to predict than is typical of litigation generally.\(^4\) As a result, members of the public who disagree with an agency decision that is subject to NEPA have found fertile ground for litigation. Most NEPA cases revolve around the environmental impact statement (EIS)—sometimes referred to as the

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1 42 U.S.C. § 4331(b), 40 C.F.R. § 1500.1(a).
3 The Council on Environmental Quality has issued regulations implementing NEPA. *See* 40 C.F.R. §§ 1500-1517.
4 Nicholas C. Yost, NEPA Deskbook (Environmental Law Inst. 3rd Ed. 2003) at 18.
“heart” of NEPA—and in particular allegations that the agency either failed to prepare an EIS or prepared an EIS that was inadequate to carry out NEPA’s mandate.5

II. Agency Compliance With NEPA

NEPA requires preparation of an EIS “in every recommendation or report on proposals for legislation and other major federal actions significantly affecting the quality of the human environment.”6 Fundamentally, an agency’s task under NEPA is to determine whether an EIS is needed before it can proceed with a particular decision and if so, to ensure that the process it undertakes for the preparation and development of the EIS is adequate to foster informed decision making on the part of the agency and informed participation on the part of the public.7

The difficulty attendant in these tasks is reflected in the high percentage of agency actions challenged under NEPA—virtually every word in the phrase “major federal actions significantly affecting the quality of the human environment” has been the subject of litigation.8

An agency initiates the decision making process under NEPA by filing a Notice of Intent in the Federal Register.9 This is the point at which the public is first invited to become engaged in the process, through meetings and/or written comments. The agency conducts a scoping process designed to identify significant issues related to a proposed action and the scope with which those issues will be treated in the EIS. If more than one agency will be involved, responsibilities are allocated among the various agencies and a lead agency is designated.10

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6 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1502.3.
7 See, e.g., Citizens for a Better Henderson v. Hodel, 768 F.2d 1051, 1056 (9th Cir. 1985).
9 40 C.F.R. § 1508.22.
10 40 C.F.R. § 1501.5.
A draft EIS is prepared and made available for public and agency comment for at least 45 days.\footnote{11} Federal agencies with jurisdiction or special expertise regarding a particular environmental impact are expected to comment.\footnote{12} The EIS must include detailed written analysis of the following: 1) the environmental impact of the proposed action, 2) any adverse environmental effects which cannot be avoided if the proposed action is implemented, 3) alternatives to the proposed action, 4) the relationship between local short-term uses of man’s environment and the maintenance and enhancement of long-term productivity, and 5) any irreversible and irretrievable commitments of resources that would be involved if the proposed action is implemented.\footnote{13} It should describe the purpose and need for the action, the affected environment, potential alternatives, the environmental effects of the proposed action and include a description of how the various alternatives, including the proposed action, will or will not meet the goal of NEPA.\footnote{14}

At the conclusion of the comment period, the agency must evaluate the comment letters and prepare a final EIS that takes into account and responds to the substantive comments it received to the draft EIS.\footnote{15} The agency then gives notice of availability of the final EIS in the Federal Register and sends a copy of the final EIS to any person or entity submitting substantive comments. The agency cannot issue its decision on the proposed action until 30 days after giving notice of the availability of the final EIS.\footnote{16} The agency prepares a Record of Decision (ROD) that states what its decision is, identifies the alternative considered by the agency in making the decision, specifies which alternatives were considered environmentally preferable,
discusses factors balanced by the agency in reaching its decision, states whether all practical methods to avoid or minimize environmental harm are being adopted or if not, why not, and includes a description of any applicable enforcement and monitoring programs.\(^\text{17}\)

If an agency determines that an EIS is not necessary it will prepare an environmental assessment (EA) and finding of no significant impact (FONSI). An EA should include 1) a brief discussion of the need for the proposed action, 2) reasonable alternatives, 3) environmental impacts of the proposed action and alternatives, 4) list of agencies and persons consulted, and 5) public involvement.\(^\text{18}\) A FONSI is issued with the EA and gives the reasons why the agency’s action will not have a significant effect on the human environment.\(^\text{19}\)

An agency’s decision making process under NEPA produces an informal administrative record consisting of all documents and materials directly or indirectly considered or generated by the agency in making its decision, including public notices, comments received, drafts, correspondence, supporting documents and studies, an environmental impact statement if one was prepared, and a formal record of decision.\(^\text{20}\) If litigation is commenced, the agency compiles its record and files it with the court. Generally, the court’s review of the agency’s decision is limited to its review of the agency’s administrative record.\(^\text{21}\)

The agency may also find itself reviewing its own decision in a pseudo-judicial role or having its decision reviewed by a pseudo-judicial body such as the Interior Board of Land Appeals. Well-established principles of administrative law require that agency action be “final” before a plaintiff can seek federal court review.\(^\text{22}\) Determining when an agency’s action is

\(^{17}\) 40 C.F.R. § 1505.2.

\(^{18}\) 40 C.F.R. § 1508.9.

\(^{19}\) 40 C.F.R. § 15098.13.


“final” is not always as simple as it might seem. The agency’s organic statutes may require one or more layers of administrative appeal before the agency in order for an agency action to be considered “final” and therefore subject to judicial review.23 Even if no administrative exhaustion is required by the agency’s statutes, participation in the agency process can be important, because Courts have discretion to limit a plaintiff to the arguments plaintiff advanced before the agency during its public comment period.24 In any event, maintenance of a comprehensive and organized record of an agency’s NEPA compliance is crucial to help ensure the orderly and efficient processing of appeals challenging its decision and to help reduce any delay in the implementation of that decision.

III. The Consultant’s Role

Either a federal agency or a consultant selected by the agency can prepare an EIS. An EIS of any size is generally prepared by a consultant employed by the applicant. Multiple consultants may be employed depending on the complexity and depth of the analysis needed. Typical areas analyzed in an EIS include biological resources, cultural resources, water resources, air quality, soils, visual and aesthetic values, socioeconomic factors, and environmental justice.

Consultants may also be employed by persons or entities submitting comments to an EIS, and an agency has discretion to accept and consider information provided by any party, including the applicant, and the duty to independently evaluate that information before relying upon it. In the event of litigation, consultants will need to work closely with litigation counsel to help the attorneys and the court navigate complex technical issues. Consultants may provide expert witness testimony if a trial is held.

23 Idaho Watersheds Project v. Hahn, 307 F.3d 815, 825 (9th Cir. 2002).
IV. The Attorney’s Role

Attorneys for an applicant should get involved early in the NEPA process, particularly if a project is controversial and litigation is likely. Attendance at public meetings and review of written comments received during the EIS process helps educate the lawyer on the technical issues and helps the lawyer identification potential areas of challenge early on, while something may be done to address those matters. Agency personnel usually engage in their work without the guidance of counsel and may benefit from having counsel for an applicant involved early on. Because of the structure of NEPA litigation, this may be the only opportunity the applicant has to effectively defend the agency’s conduct and decision making.

Challenges to agency action under NEPA are typically brought by a third party claiming to be injured by the agency’s decision. The third party sues the agency, and often the applicant at whose behest the decision was made is not named as a party. At least in the Ninth Circuit, an applicant not named as a party in the lawsuit faces a significant hurdle in attempting to intervene. Injunctive relief—both preliminary and permanent—is commonly sought, and even if successful, an intervenor may be forced to defend against a preliminary injunction before the administrative record on which the court must base its decision is even available. Because a court’s review is generally limited to the administrative record, once the record has been filed, most NEPA cases are disposed of on cross-motions for summary judgment.

If a trial is held, issues may arise as to what evidence outside of the administrative record may be heard at trial. Particularly if a preliminary injunction is in place, there may be very little time for discovery or other preparation in advance of trial. The interests of the government may be somewhat aligned with those of an intervenor-applicant, but cooperation between the government and the applicant in defending an agency action under NEPA may be constrained by
politics and other factors having nothing to do with the merits of the case. The matters at issue are often technically complex, requiring the court and the lawyers to get up to speed with an unfamiliar area quickly. All of which gives NEPA litigation a complexity and rapid-fire pace not often encountered in the ordinary realm of litigation.

Most NEPA cases involve allegations either that an EIS should have been prepared or that the EIS that was prepared was inadequate. In either event, judicial review arises under the Administrative Procedures Act (“APA”). Judicial review under the APA requires a court to determine whether the agency action was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” Although this is a deferential standard, in environmental cases courts are directed to conduct a “searching and careful inquiry” of the record in determining whether an agency’s conduct met the standard. Thus, while courts frequently recite the mantra that they must not substitute their judgment for that of the agency, depending on the nature of the challenge, as a practical matter an agency may find itself defending its decisions down to the most minute technical detail.

Typically, NEPA litigation is commenced when a plaintiff files a complaint in federal district court seeking declaratory and injunctive relief. The complaint names as defendants the federal agency and the federal official responsible for the agency that rendered the decision. Private applicants need not be named in the complaint. Venue is determined under the general venue statute for suits against the United States. The agency has 60 days to answer. The

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25 NEPA Deskbook at 23.
27 Id.
29 See Vermont Yankee, 435 U.S. at 558.
30 Some agencies’ organic statutes require that challenges be filed in a circuit court of appeals. NEPA Deskbook at 18.
Department of Justice, usually through the local United States Attorney, represents the federal agency. The agency prepares and files its administrative record with the district court, and that record generally forms the basis for the court’s review of the agency’s action. Most NEPA cases are resolved by the filing of cross-motions for summary judgment based on the administrative record.

It is one of the peculiarities of NEPA litigation that a private party at whose behest an agency has taken action—granted a permit, right-of-way, or other approval—generally is not a necessary party in a case challenging the agency’s action under NEPA. Intervention in a NEPA case requires an applicant to demonstrate that the relief sought by plaintiff will have direct, immediate and harmful effects upon the applicant’s legally protectable interests. Private parties often have a great deal at stake financially in assuring that the agency’s action is upheld, but at least in the Ninth Circuit, such interests generally are considered inadequate to warrant intervention as of right in a NEPA case. The rationale for denying intervention on such grounds is that economic interests are not sufficiently related to the claims at issue, which involve an agency’s alleged failure to comply with procedures designed to protect the environment. Although the applicant may be worse off economically if the agency is forced to comply with NEPA, courts may not consider such interests legally protectable under NEPA. Some cases have distinguished contractually protected economic interests from bare allegations of economic harm and held that the former are legally protectable interests warranting

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33 Administrative appeals that precede an action in federal district court are handled by the U.S. Solicitor’s Office. Appeals to federal circuit courts of appeal are handled by attorneys at “main” Justice in Washington D.C. Friends of Endangered Species, Inc. v. Jantzen, 589 F. Supp. 113, 118 (N.D. Cal. 1984).
34 NEPA Deskbook at 19.
36 Forest Conservation Council v. U.S. Forest Serv., 66 F.3d 1489, 1494 (9th Cir. 1995).
37 Sierra Club v. EPA, 995 F.2d 1478, 1485 (9th Cir. 1993).
intervention, while the latter are not. Private third parties seeking to intervene in a NEPA case should strive to make a showing of harm to concrete contractual or other property interests.

Most plaintiffs in NEPA cases seek preliminary injunctive relief, and many NEPA cases are won or lost at the preliminary injunction stage of the proceedings. The Ninth Circuit uses two tests to determine whether a plaintiff is entitled to preliminary injunctive relief. Under the “traditional test” a plaintiff must show (1) a strong likelihood of success on the merits, (2) the possibility of irreparable harm to plaintiff if preliminary relief is not granted, (3) a balance of hardships favoring the plaintiff, and (4) advancement of the public interest. Under the “alternative test” the court considers whether the plaintiff has shown either a combination of probable success on the merits and the possibility of irreparable injury, or that serious questions are raised and the balance of hardships tips sharply in favor of the moving party. If the plaintiff in a NEPA case establishes a substantial likelihood that NEPA has been violated, a preliminary injunction will issue with only a minimal showing that irreparable injury is likely to result.

If the court grants a preliminary injunction, it may require plaintiff to post a bond. Courts in NEPA cases are reluctant to impose a substantial bond when, as is often the case, plaintiff is a nonprofit interest group and requiring it to post a substantial bond would effectively deny access to judicial review.

Denial of a preliminary injunction is immediately appealable, and plaintiff may seek a stay pending appeal. The test for determining whether to grant or deny a stay pending appeal is

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39 See Forest Conservation Council, 66 F.3d at 1496-97 (summarizing cases).
40 NEPA Deskbook at 19.
41 Earth Island Institute v. U.S. Forest Serv., 351 F.3d 1291, 1298 (9th Cir. 2003).
42 Beardslee v. Woodford, 395 F.3d 1064, 1067 (9th Cir. 2005).
44 Rule 65(c), Fed. R. Civ. P.
45 Friends of the Earth v. Brinegar, 518 F.2d 322, 323 (9th Cir. 1975).
similar to that for injunctive relief in the court below. The appellate court will consider: (1) whether the movants established a strong likelihood of success on the merits, (2) whether the balance of irreparable harm favors the movants, and (3) whether the public interest favors granting an injunction.47

The test for permanent injunctive relief is the same as that for preliminary injunctive relief, except that once a plaintiff has actually prevailed on the merits by establishing a NEPA violation, the balance of harms generally will be weighted more heavily in favor of the plaintiff and absent unusual circumstances an injunction tailored to remedy the particular violation is the favored vehicle for relief.48 For the applicants and the agency, as a practical matter this may mean preparing a new or supplemental EIS. In either event, the procedure will be the same as preparation of an EIS “from scratch,” although scoping will not be necessary.49 The resulting delay and expense are significant, and may only be avoided, or at least minimized, through cooperation among the agency, the applicant, the consultant and the lawyer from the beginning of the process.

47 Warm Springs Dam Task Force v. Gribble, 565 F.2d 549, 551 (9th Cir. 1977).
48 High Sierra Hikers Ass’n v. Blackwell, 390 F.3d 630, 642 (9th Cir. 2004); Thomas v. Peterson, 753 F.2d 754, 764 (9th Cir. 1985); see also Amoco, 480 U.S. at 544-45; NEPA Deskbook at 20.
49 40 C.F.R. § 1502.9(c).