

Overview of the National Environmental Policy Act

ELI Western Boot Camp

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Overview

- Purpose of NEPA
- What triggers NEPA?
- Key concepts:
 - Major Federal Action
 - Environmental effects
 - Reasonable Alternatives
 - Mitigation
- Options for Compliance
- California Environmental Quality Act (CEQA)
– California's "Mini-NEPA"
- Sample Projects

What is NEPA?

- A statement of national environmental policy
- Authorizing legislation for the Council on Environmental Quality (CEQ) to implement that national environmental policy
- Integrates environmental values into federal decisionmaking
- Provides information on environmental impacts to the public
- Allows public participation in federal agency decisionmaking
- Courts have long interpreted NEPA as a procedural statute that does not mandate specific environmental outcomes.

Key NEPA Objectives

- The main objectives of NEPA are to:
 - Analyze, consider, and disclose environmental information to support federal government decision making. (“Look before you leap.”)
 - Involve and inform the public to improve the quality of agency decisions affecting the environment.

When is NEPA Applicable?

- Applies to federal projects
 - Agency decisionmaking and policy
 - Federal projects and plans (e.g., offshore leasing plan; national forest plans; Solar PEIS)
 - Federal permits and approvals (e.g., energy leases (solar, wind, oil, gas, etc.), transmission, pipelines, export terminals)
 - Federal financial assistance (grants, loans, etc.)

Relevant Authority

- Statute: 42 U.S.C. sections 4321-4347
- NEPA Streamlining (e.g., FAST Act): 42 U.S.C. section 4370m et seq.
- Regulations:
 - CEQ 40 C.F.R. Parts 1500-1508
 - Federal agency-specific NEPA procedures approved by CEQ
- Case law
- CEQ guidance (e.g., Climate and GHG Guidance)

White House Council on Environmental Quality

- Coordinates Federal environmental efforts and works closely with agencies and other White House offices in the development of environmental policies and initiatives.
- Collaborates across Executive Office of the President and with Federal agencies to design and implement environmental, climate, and environmental justice initiatives.
- CEQ has primary responsibility over NEPA implementation. In this capacity, CEQ:
 - Oversees the NEPA implementation of federal agencies.
 - Issues regulations (40 CFR parts 1500 – 1508) and guidance to federal agencies regarding NEPA compliance.

CEQ NEPA Regulations

- CEQ Regulations significantly revised for the first time in 2020 during Trump Administration.
- CEQ made significant revisions during Biden Admin. (“Phase 1” rule finalized in 2022; “Phase 2” regs proposed in 2023; final in 2024).
- Entitled to “substantial deference.” *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 355 (1989)
- Other agencies (DOI, USDA/Forest Service, USACE, and FHA) have promulgated NEPA regulations.
 - 2022 CEQ regs. make clear that CEQ regulations are the floor, not ceiling for NEPA compliance.

How does it work?

Roadmap for NEPA compliance

What does
NEPA require?
42 U.S.C.
4332(C)

- Triggered by :
 - A **Major Federal Action** significantly affecting the quality of the human environment
- Requires a detailed statement by the responsible official detailing
 - (i) the environmental impact of the proposed action,
 - (ii) any adverse environmental effects which cannot be avoided . . .
 - (iii) alternatives to the proposed action

What is a Major Federal Action?

- Defined at 40 C.F.R. 1508.1, tends to include:
 - (ii) **Adoption of formal plans**, such as official documents prepared or approved by Federal agencies, which prescribe alternative uses of Federal resources, upon which future agency actions will be based.
 - (iii) **Adoption of programs**, such as a group of concerted actions to implement a specific policy or plan; systematic and connected agency decisions allocating agency resources to implement a specific statutory program or executive directive.
 - (iv) **Approval of specific projects**, such as construction or management activities located in a defined geographic area. Projects include actions **approved by permit or other regulatory decision as well as Federal and federally assisted activities.**

What are “effects”

- Effects or impacts, as defined in the CEQ regulations (as amended in 2022):

“changes to the human environment from the proposed action or alternatives that are reasonably foreseeable and include the following:

- (1) **Direct effects**, which are caused by the action and occur at the same time and place.
- (2) **Indirect effects**, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. . . .
- (3) **Cumulative effects**, which are effects on the environment that result from the incremental effects of the action when added to the effects of other past, present, and reasonably foreseeable actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative effects can result from individually minor but collectively significant actions taking place over a period of time.”

What are reasonable alternatives?

- **Reasonable alternatives** means “a reasonable range of alternatives that are technically and economically feasible, and meet the purpose and need for the proposed action.” See § 1508.1.
- While the core provision was revised in 2020, the Biden Admin proposed generally restoring Section 1502.14 to its longstanding form, to state:
 - “The alternatives section is the **heart of the environmental impact statement**. The alternatives section should identify the reasonably foreseeable environmental effects of the proposed action and the alternatives in comparative form based on the information and analysis presented in the sections on the affected environment (§ 1502.15) and the environmental consequences (§ 1502.16). In doing so, the analysis should sharply define the issues for the decision maker and the public and provide a clear basis for choice among options.
 - In this section, agencies shall:
 - (a) Rigorously explore and objectively evaluate reasonable alternatives to the proposed action, and, for alternatives that the agency eliminated from detailed study, briefly discuss the reasons for their elimination. The agency need not consider every conceivable alternative to a proposed action; rather, it shall consider a reasonable range of alternatives that will foster informed decision making....

What is Mitigation?

- Where an impact is determined to be significant, mitigation is a measure that can be imposed on a project to reduce the severity of that impact.
- Examples:
 - Biological surveys, avoidance and minimization measures
 - Archaeological/tribal monitoring and recovery plans for cultural resources

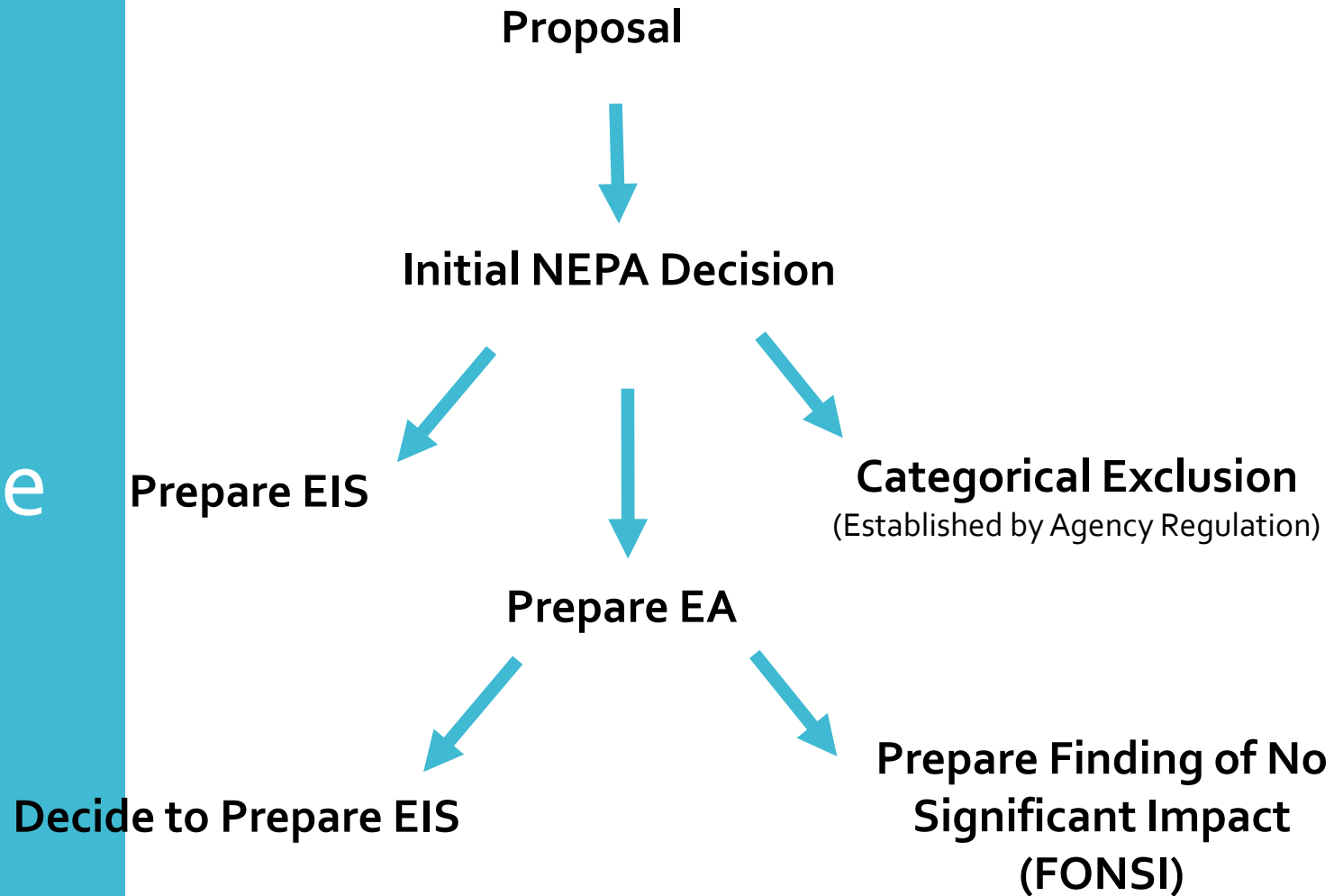
“Tiering” & Programmatic Review

- NEPA reviews may be on a site- or project-specific level or on broader – programmatic – level.
- Programmatic analyses can then be relied upon when agencies make subsequent project-level decisions related to the program (i.e. “tiering”)
- “Tiering” refers to an approach where federal agencies first consider the broad, general impacts of proposed program, plan, policy, or large scope project – or at the early stage of a phased proposal – and then conduct subsequent, narrower, decision focused reviews. See 40 CFR §§ 1502.20 and 1508.28.
- Recent examples: Dept. of Interior’s Draft Solar PEIS; Department of Commerce Draft Programmatic EA for semiconductor projects.

Path to Compliance

- Once you've determined there is a major federal action with potential for a significant environmental effect, you determine which level of NEPA review is appropriate, depending on nature and severity of impacts.

The NEPA Analysis Decision Tree



Categorical Exclusion

- Applicable where proposed action falls within an established category of excluded actions and no exception applies
- Categories are agency-specific
 - BLM: Small tree harvesting
 - BIA: Trust acquisition without change in land use
 - FTA: Rehab of bridges, tunnels, etc. without change in footprint
 - DOE: New categorical exclusion for certain energy storage systems (added in 2024).
- Specific procedures/documents vary
- Most common method of compliance

Environmental Assessment

- Where impacts of a proposed action are less than significant or uncertain
- Brief analysis of impacts/alternatives
- Mitigation likely addressed
- Public comment not strictly required
- Most often results in Finding of No Significant Impact (FONSI); can result in EIS if effects remain unknown or are significant

Environmental Impact Statement (EIS)

- Required where proposed action may have significant environmental consequences
- Comprehensive analysis of impacts and alternatives
- Discussion of mitigation
- Mandatory public involvement
- Waiting period after Final EIS is prepared
- Agency decision memorialized in a Record of Decision (ROD)

Supplemental EA/EIS

- Prepared where project or circumstances change
- Also applicable where analysis is manifestly inadequate

Litigating NEPA Claims

NEPA Litigation

- NEPA claims proceed under the APA
- Common issues:
 - Segmentation
 - Pre-determination
 - Methodological issues – underlying science; procedural issues
- Venue in District Courts

Supreme Court & Other NEPA Cases

- Supreme Court NEPA opinions
 - Early opinions provide analytical framework
 - Characterize NEPA as a “procedural statute”
 - Eliminated more substantive role in agency decision-making (as opposed to CEQA, discussed later)
- Recent NEPA litigation focused on:
 - Climate change analysis - indirect impacts, social cost of carbon, etc.
 - Sensitive habit or cultural resources

Revisions to NEPA and Implementing Regulations

NEPA Amendments: Generally Codify Longstanding Practice

- Analysis limited to “reasonably foreseeable environmental impacts” and reasonable range of alternatives that are “technically and economically feasible” and meet the purpose and need.
- Codifies EIS/EA distinction.
- Codifies practice of allowing project sponsors to prepare NEPA documentation, with agency review and approval of final document.
- Codifies practice of designating a “lead agency” to establish and enforce schedule and reduce duplication.

NEPA Amendments: Timelines and Page Limits

Timelines:

- Two-year limit on Environmental Impact Statements (EISs)
- One-year limit on Environmental Assessments (EAs)
 - Deadline may be extended, in consultation with the applicant, to provide “only so much additional time as is necessary to complete” the review.
 - Generally consistent with NEPA regulations

Page limits:

- EIS: 150 pages; 300 pages for action of “extraordinary complexity” – not including appendices
- EAs: 75 pages, not including appendices

Background: Permitting Resources

- The Inflation Reduction Act provided \$1 billion to Federal agencies and the Federal Permitting Improvement Steering Council to conduct environmental reviews.

NEPA Amendments: New Avenue for Judicial Review

- Creates a new avenue to petition a court if a deadline is missed.
 - (A) RIGHT TO PETITION. A project sponsor may obtain a review of an alleged failure by an agency to act in accordance with an applicable deadline petitioning to a court of competent jurisdiction seeking an order under subparagraph (B).
 - (B) COURT ORDER.—If a court of competent jurisdiction finds that an agency has failed to act in accordance with an applicable deadline, the court shall set a schedule and deadline for the agency to act as soon as practicable, which shall not exceed 90 days from the date on which the order of the court is issued, unless the court determines a longer time period is necessary to comply with applicable law. ([FRA Sec. 107\(g\)\(3\)](#))

CEQ Permitting Updates

- Inflation Reduction Act (2022): Permitting resources to agencies (over \$1B)
- Permitting Action Plan (May 2022)
- “Phase 1” NEPA final regulations (April 2022)
- Updated GHG Emissions Guidance (Jan. 2023)
- “Phase 2” Rule (Proposed Rule 2023; Final Rule April 30, 2024)

California Environmental Quality Act (CEQA)

CEQA – Similar but Different

- Similar framework
 - Project description
 - Analysis of impacts to determine significance
 - Imposition of mitigation
 - Alternatives Analysis
- Similar options for compliance
 - Initial Study
 - (Mitigated) Negative Declaration
 - Environmental Impact Report
- Far more litigation – 25-35 published cases per year on average

NEPA Projects

Pier Wind, Port of Long Beach

Joint EIR/EIS

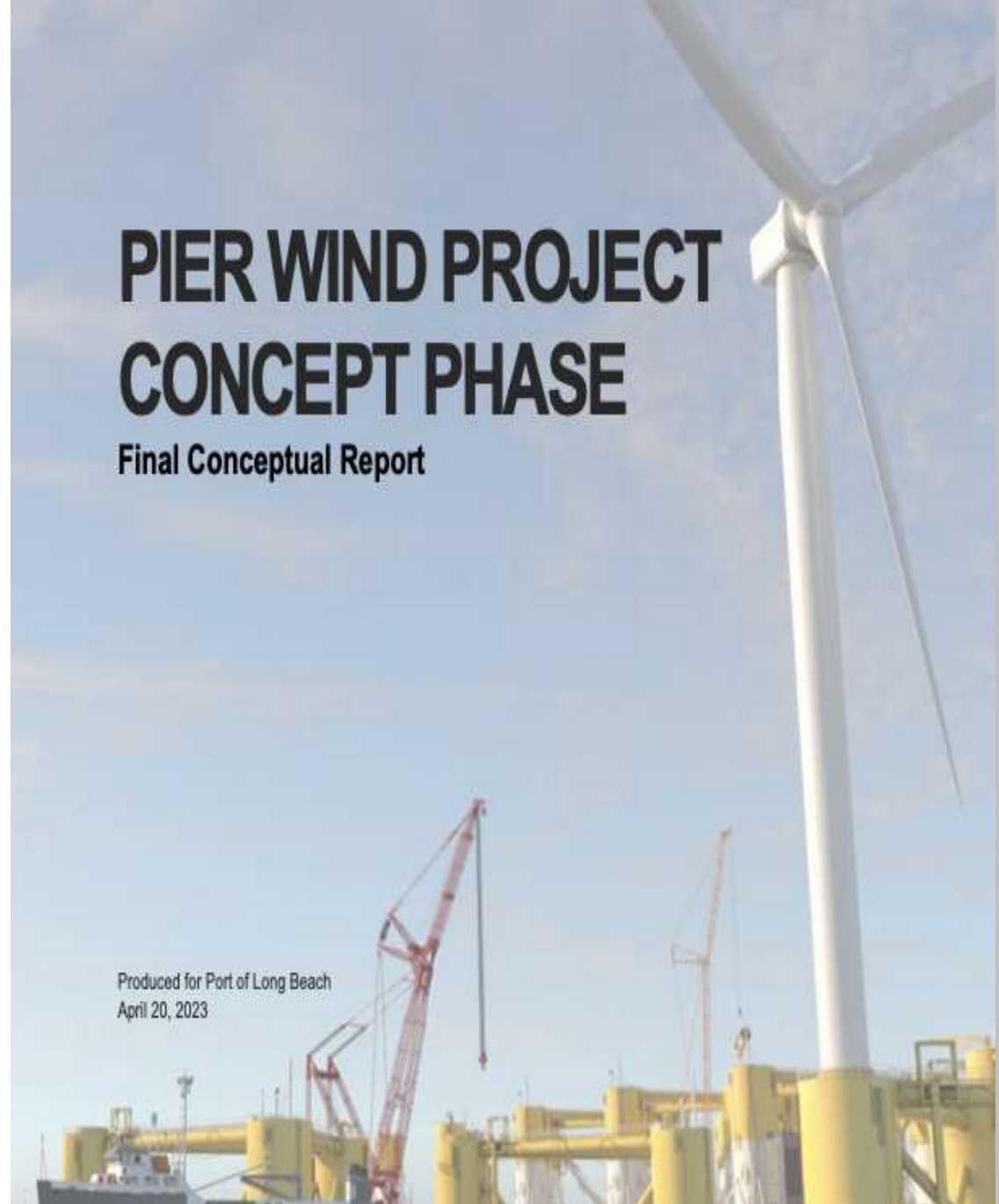
CWA Section 404 Permit

Various state and local entitlements

PIER WIND PROJECT CONCEPT PHASE

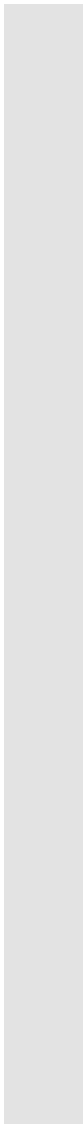
Final Conceptual Report

Produced for Port of Long Beach
April 20, 2023



Trinity National Forest ROW Expansion





Questions?