Chapter 8

The National Environmental Policy Act

Roadmap

- Learn the most critical provisions of the National Environmental Policy Act (NEPA).
- Understand how NEPA has been enforced in the federal courts.
- Grasp what an environmental impact statement (EIS) is and under what circumstances it must be prepared.
- Comprehend what is meant by the statutory phrase “major federal action.”
- Understand how the Council on Environmental Quality (CEQ) and the federal courts have interpreted “significantly affecting the quality of the human environment” for purposes of NEPA.
- Learn the procedures agencies must follow in deciding whether to prepare an EIS, and in actually preparing such a document.
- Comprehend how federal courts review the adequacy of an EIS.
- Grasp the potential significance of NEPA’s “Interpretation Mandate.”
- Understand the remedies commonly awarded to successful plaintiffs in NEPA litigation.

I. Introduction and Overview

The National Environmental Policy Act (“NEPA”), 42 U.S.C. §4321 et seq., was the first piece of environmental legislation enacted in the modern era of environmental law. Passed amidst a loud and broad public outcry for a governmental response to a host of serious national environmental problems, the Act includes both lofty statements of purposes and policies and certain specific action-forcing provisions that apply to all federal agencies and departments. It also creates a new entity within the Executive Branch, the Council
on Environmental Quality (CEQ), to study and report on environmental trends and advise the president on environmental issues.

This chapter first considers the key provisions of NEPA, how the statute can be enforced, and how the federal courts have determined whether the statute imposes substantive (rather than procedural) duties to protect the environment. It then focuses on a critical action-forcing mandate of NEPA: the requirement that responsible federal officials prepare an environmental impact statement ("EIS") for every major federal action that significantly affects the quality of the human environment. This chapter explores the circumstances that trigger the requirement to prepare an EIS, and what an EIS must contain to meet NEPA's requirements. Finally, it examines the remedies that courts have imposed on federal agencies to redress NEPA violations.

II. The Nature of NEPA


NEPA begins with a grandiloquent statement of purpose and a bold and far-reaching national policy. It states that the purposes of the Act are “to declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to Establish a Council on Environmental Quality.” NEPA § 2, 42 U.S.C. § 4321. The statute goes on to declare that “it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.” NEPA § 101(a), 42 U.S.C. § 4331(a).

To implement these purposes and policies, the Act contains some specific provisions that apply to all agencies of the federal government “to the fullest extent possible.” First, NEPA contains an interpretation mandate. It directs that “the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act.” NEPA § 102(1), 42 U.S.C. § 4332(1). Second, in planning and decision-making that may impact the environment, federal agencies must “utilize a
systematic, interdisciplinary approach which will ensure the integrated use of the natural and social sciences and the environmental design arts . . .” NEPA § 102(2)(A), 42 U.S.C. § 4332(2)(A). Third, all federal agencies must “identify and develop measures and procedures . . . which will ensure that presently unquantified environmental amenities and values may be given appropriate consideration in decision-making, along with economic and technical considerations.” NEPA § 102(2)(B), 42 U.S.C. § 4332(2)(B).

All federal agencies are also required to initiate and utilize ecological information in the planning and development of resource-oriented projects. NEPA § 102(2)(H), 42 U.S.C. § 4332(2)(H). They must “study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved alternative uses of available resources.” NEPA § 102(2)(E), 42 U.S.C. § 4332(2)(E). And they are directed to recognize the worldwide and long-range character of environmental problems, and “lend appropriate support to initiatives, resolutions, and programs” that will “maximize international cooperation in anticipating and preventing a decline in the quality of mankind’s world environment.” NEPA § 102(2)(F), 42 U.S.C. § 4332(2)(F).

The action-forcing provision of NEPA that has drawn the most attention, however, is the statute’s environmental impact statement requirement. NEPA mandates that all federal agencies include “in every recommendation or report on proposals for legislation,” and other “major Federal actions significantly affecting the quality of the human environment,” a detailed statement by the responsible official. This statement, commonly referred to as an EIS, must set forth five items: (i) the environmental impact of the proposed action, (ii) any adverse environmental effects that cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) the relationship between local short-term uses of the environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments of resources that would be involved in the proposed action should it be implemented. NEPA § 102(2)(C), 42 U.S.C. § 4332(2)(C).

B. The Enforceability of NEPA

Initially, many federal agencies were resistant to implementing their new obligations under NEPA in a prompt and full fashion. An early example of this attitude was the Atomic Energy Commission (“the AEC”) (now the Nuclear Regulatory Commission), which was at first quite reluctant to allow the consideration of environmental impacts to impede the development of a nuclear power industry in the United States. The AEC’s approach to NEPA
implementation was challenged in an important case decided by the U.S. Court of Appeals for the D.C. Circuit, *Calvert Cliffs’ Coordinating Committee, Inc. v. U.S. Atomic Energy Commission*, 449 F.2d 1109 (D.C. Cir. 1971). In that case, the court established several principles that proved influential and subsequent judicial interpretations. It ruled that NEPA makes environmental protection “a part of the mandate of every federal agency and department,” and noted that the Act contains “very important ‘procedural’ provisions” that are “not highly flexible,” and that “establish a strict standard of compliance.” *Id.*

The D.C. Circuit also considered the purpose of an EIS. It concluded that that purpose was “to aid in the agency’s own decision-making process, and to advise other interested agencies and the public of the environmental consequences of planned federal action.” *Id.* According to the court, NEPA mandates a “careful and informed decision-making process” within federal agencies, and it creates “judicially enforceable duties.” *Id.* Environmental factors compiled in an EIS must thus be considered through agency review processes “at every important stage in the decision-making process — at every stage where an overall balancing of environmental and non-environmental factors is appropriate and where alterations might be made in the proposed action to minimize environmental costs.” This internal agency consideration process is intended to create a case-by-case balancing analysis, in which the economic and technical benefits of planned actions are to be assessed and weighed against environmental costs and possible alternatives, with the goal of ensuring that “the optimally beneficial action” is finally taken. *Id.*

Subsequent judicial interpretations of NEPA emphasized that although the statute does not expressly create a right of action, citizens concerned that a federal agency has not complied with a NEPA requirement may seek relief under the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. §§ 701 to 706. These provisions allow courts only to review “final agency actions.” Thus, citizen plaintiffs are required to wait until an agency has taken action before they may initiate litigation alleging that the agency has violated NEPA. See, e.g., *Public Citizen v. U.S. Trade Representative*, 5 F.3d 549 (D.C. Cir. 1993).

C. Substance versus Procedure in NEPA Compliance

Important as it was as a precedent that established a strict procedural requirement for federal agencies, the *Calvert Cliffs* decision did not conclusively decide another important question that arose in subsequent NEPA lawsuits: did the statute require particular substantive results after an agency
has prepared an EIS? In the 1980s, the U.S. Supreme Court handed down a series of opinions that resolved that issue in the negative.

In Strykers Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223 (1980), the Court considered a NEPA challenge to a decision by the U.S. Department of Housing and Urban Development (“HUD”) to approve a local plan to construct a high-rise apartment building, consisting entirely of low-income housing, at a site on the west side of Manhattan. The Supreme Court reversed a decision of the United States Court of Appeals for the Second Circuit that had set aside HUD’s decision to fund the building in question for failing to give environmental considerations “determinative weight.” Instead, the Court held that “once an agency has made a decision subject to NEPA’s procedural requirements, the only role for a court is to ensure that the agency has considered the environmental consequences; it cannot interject itself within the area of discretion of the executives as to the choice of the action to be taken.” *Id.*

This conclusion was reiterated by the Supreme Court, in a *per curiam* opinion in Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989), a citizens’ challenge to an EIS prepared by the U.S. Forest Service. The EIS in issue noted that significant environmental harm would result from the construction of a ski resort within a national forest, in the event that it was permitted by the Forest Service and constructed, but the statement failed to require any specific steps to mitigate that harm. Citing Stryker’s Bay, the Court stated that “an EIS merely prohibits uninformed — rather than wise — agency action.” *Id.* The Court reasoned that “it would be inconsistent with NEPA’s reliance on procedural mechanisms — as opposed to substantive, results-based standards — to demand the presence of a fully developed plan that will mitigate environmental harm before an agency can act.” *Id.* It concluded that “if the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs.” *Id.*

## III. Triggering the Requirement to Prepare an EIS

As noted previously, NEPA commands federal agencies to include “in every recommendation or report on proposals for legislation and other major federal actions significantly affecting the quality of the human environment” a detailed statement on, among other things, the environmental impact of the proposed action. NEPA § 102(2)(c), 42 U.S.C. § 4332(2)(c). The “trigger” that requires preparation of an EIS has several components. First, it must be
determined whether what an agency has in mind is a “proposal.” If so the agency’s proposal must be for a “major federal action.” And third, assuming those two conditions are satisfied, the agency’s proposal must “significantly affect the quality of the human environment.”

A. What Is a Proposal?

In 1978, the Council on Environment Quality published regulations that define much of the nomenclature of NEPA and guide federal agencies in its implementation. See 40 C.F.R. pt. 1502. These regulations provide that a “proposal” exists “at that stage in the development of an action when an agency subject to the Act has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the effects can be meaningfully evaluated.” 40 C.F.R. § 1508.23. CEQ’s regulations also mandate that an EIS be prepared “early enough so that it can serve practically as an important contribution to the decision making process, and will not be used to rationalize or justify decisions already made.” 40 C.F.R § 1502.5.

Courts have enforced those regulatory requirements in a number of instances. However, on infrequent occasions, some courts have held that an agency’s thinking about a contemplated project does not amount to a proposal for NEPA purposes. That was the situation in Kleppe v. Sierra Club, 437 U.S. 390 (1976), where the U.S. Department of Interior had prepared a single EIS for its nationwide coal leasing program, and had also prepared separate EISs for each individual lease. The Court rejected the contention that the Department was further required to prepare a regional EIS regarding coal leasing, stating that even if the Department had “contemplated” a regional-scale coal leasing program, “the contemplation of a project and the accompanying study thereof do not necessarily result in a proposal for major federal action.” Id.

B. What Is a Major Federal Action?

In its NEPA regulations, CEQ defined “major federal action” to include “actions with effects that may be major and which are potentially subject to federal control and responsibility.” Such actions include “the circumstance where responsible officials fail to act and that failure to act is reviewable by courts or administrative tribunals under the Administrative Procedure Act or other applicable law as agency action.” 40 C.F.R. § 1508.18.

CEQ’s regulations provide additional clarification as to when a proposal is a major federal action. They note that federal actions tend to fall within one of four categories: (i) adoption of official policies, (ii) adoption of formal
plans, (iii) adoption of programs (such as a group of actions to implement a specific policy or plan, or allocating resources to implement a statute or executive directive), and (iv) approval of specific projects. 40 C.F.R § 1508.18(b). They state that “actions” include “new and continuing activities, including projects entirely or partially financed, assisted, conducted, regulated or approved by government agencies; new or revised agency rules, regulations, plans, policies, or procedures; and legislative proposals.” On the other hand, actions that do not constitute actions for NEPA purposes include funding assistance solely in the form of general revenue sharing funds and the initiation of federal enforcement actions. 40 C.F.R § 1508.18(a). CEQ has also indicated that the term “major” reinforces but does not have a meaning independent of “significantly.” 40 C.F.R § 1508.27.

In many cases, an action is obviously “federal.” Some examples would include a federal agency building a dam, channelizing a stream, building public housing, or designing the routes commercial airliners must take. The courts have also regularly applied the EIS requirement to projects that would be undertaken by private parties, or local or state governments, where the approval of a federal agency is essential to the project.

In other circumstances, however, the “federalness” of a project may be more difficult to determine. This question has arisen, for instance, where a highway project is fully funded by a state government but there is nonetheless involvement in the project by federal agencies. These were alleged to be the circumstances in Southwest Williamson County Community Association, Inc. v. Slater, 243 F.3d 270 (6th Cir. 2001), in which several federal agencies had discretion to take actions that had the potential to influence the outcome of a state-funded highway project. The U.S. Court of Appeals for the Sixth Circuit took note of a CEQ regulation that declared that a non-federally funded project may become a major federal action by virtue of the aggregate of federal involvement from numerous federal agencies, even if one agency’s role in the project may not be sufficient in and of itself to create a major federal action. 40 C.F.R §§ 1508.25 and 1508.27(b). The court then concluded that “there are two alternative bases for finding that a non-federal project constitutes a “major federal action . . . : 1) when the non-federal project restricts or limits the statutorily prescribed federal decision-makers’ choice of reasonable alternatives; or 2) when the federal decision-makers have authority to exercise sufficient control or responsibility over the non-federal project so as to influence the outcome of the project.” Id. Applying those tests to the specific facts in Slater, however, the Sixth Circuit found that neither test was satisfied, and the highway project in issue was thus not a major federal action.
Disputes sometimes also arise over whether a major federal action has been taken where an agency decides not to do something that it has the legal authority to do. The federal courts have taken differing approaches to resolve this issue. For example, in *Ramsey v. Kantor*, 96 F.3d 434 (9th Cir. 1996), the Ninth Circuit held that the failure of the U.S. Department of Commerce to disapprove a fishery management plan for the North Pacific Salmon was a major federal action for purposes of NEPA. In contrast, the U.S. Circuit Court of Appeals for the First Circuit opined that a failure of the U.S. Coast Guard to take any action with regard to a shipment of high-level nuclear waste from France to Japan that passed through the United States’ Exclusive Economic Zone off the coast of Puerto Rico was not a major federal action requiring the preparation of an EIS. See *Mayaguezanos por la Salud y el Ambiente v. United States*, 198 F.3d 297 (1st Cir. 1999).

C. When Does a Major Federal Action Significantly Affect the Quality of the Human Environment?

CEQ’s NEPA regulations divide proposals for major federal actions into three categories: (i) actions that normally require an EIS, (ii) actions that normally do not require an EIS, and (iii) actions that may or may not require an EIS. Each agency must prepare its own agency-specific regulations that define each of those categories with respect to the agency’s activities. 40 C.F.R. § 1501.4.

Agency actions that normally do not require the preparation of an EIS are classified as “categorical exclusions,” i.e., “a category of actions which do not individually or cumulatively have a significant effect on the human environment.” 40 C.F.R. § 1508.4. The purpose of these exclusions is to help agencies reduce paperwork and avoid spending resources on unnecessary environmental assessment of agency actions that will predictably have no significant environmental impact. See 40 C.F.R. §§ 1500.4 and 1500.5. However, agencies that adopt categorical exclusions must provide for “extraordinary circumstances” in which a normally excluded action may have a significant environmental effect. 40 C.F.R. § 1508.4. Where such circumstances arise, an agency must prepare an EIS or an environmental assessment, and the U.S. Court of Appeals for the Ninth Circuit has held that “where there is substantial evidence in the record that exceptions to the categorical exclusion may apply, the agency must at the very least explain why the action does not fall within one of the exceptions.” *California v. Norton*, 311 F.3d 1162 (9th Cir. 2002).

In addition to categorical exclusions, Congress and the federal courts have created other, specific exceptions to the EIS requirement. Thus, for example,
in the Energy Supply and Coordination Act of 1974, ("ESECA"), the Federal Energy Administration was permitted to issue orders temporarily requiring the burning of coal, rather than oil or natural gas, without preparing an EIS, P.L. 93-319 § 2. More broadly, ESECA provided that "no action taken under the Clean Air Act . . . shall be deemed a major federal action significantly affecting the quality of the human environment." *Id.* at § 6(b). And all actions taken by EPA under the Clean Water Act—other than providing grants or loans for the construction of sewage treatment plants and issuing discharge permits for new sources of water pollution—are expressly exempted from the EIS requirement of NEPA. 33 U.S.C. § 1371(c)(1).

Similarly, courts have concluded that certain regulatory actions required of EPA are the "functional equivalent" of an EIS, and therefore do not require the preparation of a formal statement. Thus, for example, it has been held that EPA is exempt from the duty to prepare an EIS when it promulgates Clean Air Act New Source Performance Standards, grants a permit to a TSDF under RCRA, approves or cancels the registration of a pesticide under FIFRA, and designates the critical habitat of an endangered species under the Endangered Species Act. See *Portland Cement Association v. Ruckelshaus*, 486 F.2d 375 (D.C Cir. 1973); *Alabama ex. rel. Siegelman v. Environmental Protection Agency*, 911 F.2d 499 (11th Cir. 1990); *Merrell v. Thomas*, 807 F.2d 776 (9th Cir. 1986); and *Douglas County v. Babbitt*, 48 F.3d 1495 (9th Cir. 1995).

Where an agency action may or may not require the preparation of an EIS, the CEQ regulations require that it prepare an "Environmental Assessment," i.e., a "concise public statement" that "briefly provides sufficient evidence for determining whether or not to prepare an EIS . . ." 40 C.F.R. § 1508.9(a). This document must include brief discussions of the need for the proposal, the environmental impacts of the proposed action and alternatives to it, and a listing of the agencies and persons consulted in its preparation. 40 C.F.R. § 1508.9(b).

Where an Environmental Assessment concludes that an agency proposal will have a significant effect on the human environment, a full EIS must be prepared with respect to it. On the other hand, where the Assessment determines that no significant effect on the human environment is to be expected from the agency action contemplated, the agency is required to prepare and publish a Finding of No Significant Impact ("FONSI") that briefly presents its reasons for concluding that its action will not have a significant effect on the human environment, and for which no EIS will be prepared. 40 C.F.R. § 1508.13.

CEQ's regulations define the statutory term "significantly in terms of both the "context" and the "intensity" of a proposed agency action. "Context"
means that “the significance of an action must be analyzed in several contexts, such as society as a whole (human, national), the affected region, the affected interest, and the locality.” 40 C.F.R. § 1508.27(a).

Intensity refers to the severity of the impact. 40 C.F.R. § 1508.27(b). The regulations mandate that agencies take 10 factors into account in evaluating the intensity of a proposed action: (i) impacts that may be both beneficial and adverse, (ii) the degree to which the proposed action affects public health or safety, (iii) unique characteristics of the geographic area, (iv) the degree to which the effects on the quality of the human environment are likely to be controversial, (v) the degree to which the possible effects on the human environment are uncertain, (vi) whether the action is related to other actions with individually insignificant but cumulatively significant impact, (vii) the degree to which the action may adversely affect historical, scientific or cultural resources, (viii) the degree to which the action may establish a precedent for future actions with significant effects, (ix) the degree to which the action may adversely affect an endangered or threatened species or its critical habitat, and (x) whether the action threatens a violation of federal, state, or local environmental law. Id.

However, the U.S. Supreme Court has held that psychological damage from the mere risk of a future environmental harm is not an “environmental effect” or an “environmental impact” as to which an EIS must be prepared. See Metropolitan Edison Co. v. People Against Nuclear Energy, 460 U.S. 766 (1983).

Where an EIS must be prepared, the CEQ’s regulations require that “connected actions” be considered together in a single EIS. These are defined as actions that “automatically trigger other actions which may require environmental impact statements, cannot or will not proceed unless other actions are taken previously or simultaneously, [or] are independent parts of a larger action and depend on the larger action for their justification.” 40 C.F.R. § 1508.21(a)(1). They also direct that “cumulative actions,” meaning “actions which when viewed with other proposed actions have cumulative significant impacts,” must be considered together in a single EIS. 40 C.F.R. § 1508.25(a)(2).

**IV. Adequacy of the Environmental Impact Statement**

CEQ’s NEPA regulations prescribe procedural steps that agencies must take to complete an EIS, as well as some minimal substantive criteria that an
EIS must meet. Agencies are required to begin preparing an EIS “early enough so that it can serve practically as an important contribution to the decision-making process.” 40 C.F.R. § 1502.5. Once it has been determined that an EIS must be written, an agency must first decide on the range of actions, alternatives, and impacts that the EIS will consider, in a process known as “scoping.” 40 C.F.R. §§ 1502.5, 1501.7, and 1508.25. As a component of scoping, the agency must solicit the participation of others, including affected state, local, and tribal governments, the proponent of the proposed action in question (if any), interested persons who might object to the action on environmental grounds (if any), and the general public. 40 C.F.R. §§ 1501.7(a)(1) and 1506.6.

After scoping is complete, the agency—often with assistance from a contractor or permit applicant—must produce a draft environmental impact statement (“DEIS”). This document must be made available to, and request comments from, the public, the project application (if any), other interested persons, other federal agencies with expertise regarding or jurisdiction over any relevant environmental impact, and appropriate environmental agencies at every level of government. See 40 C.F.R. §§ 1502.9, 1502.19, 1503.1, 40 C.F.R. 1503.2, and NEPA § 102(2)(C), 42 U.S.C. § 4332(2)(C). A provision of the Clean Air Act requires EPA to comment on every EIS and to evaluate the environmental effects of each action studied in an EIS. Clean Air Act § 309, 42 U.S.C. § 7609.

After receiving and considering comments on its DEIS, an agency must prepare, circulate, and file with EPA a final EIS (“FEIS”), which must include the agency’s responses to the comments it received. 40 C.F.R. §§ 1502.19, 1502.9(b), and 1503.4. The agency may not take any action on the proposal that is the subject of the FEIS that would limit its choice of alternatives, or have an adverse environmental effect, until 30 days after it has published notice of the complete FEIS. At that point, however, the agency is free to make a final decision respecting its proposal for a major federal action. It must inform the public of that decision in a publicly available “record of decision,” following which it may proceed to implement the action it has chosen to pursue. 40 U.S.C. §§ 1506.1, 1506.10(b)(2), and 1505.2.

Courts have long accepted the notion that plaintiffs with standing to sue may seek judicial review of the adequacy of a final environmental impact statement. Plaintiffs may base their challenges on procedural or substantive grounds, or both. In the context of such challenges, reviewing courts generally apply a “rule of reason” standard, focusing on whether the FEIS in question reflects an abuse of agency discretion. See, e.g., Utahns for Better Transportation v. U.S. Department of Transportation, 305 F.3d 1152 (10th Cir. 2002); and Marsh v. Oregon Natural Resources Council, 440 U.S. 360 (1989)
(in which the U.S. Supreme Court ruled that a decision by the U.S. Army Corps of Engineers not to supplement its FEIS based on new information was not arbitrary or capricious).

V. The Interpretation Mandate of § 102(1):
NEPA’s Sleeping Giant

As noted above, NEPA § 102(1) provides that Congress “authorizes and directs that, to the fullest extent possible, the policies, regulations and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this [Act].” This “interpretation mandate” has received very limited application in NEPA litigation. Nonetheless, given its directive language and potentially broad reach, this provision has the potential to significantly influence federal law and policy.

One legal scholar has argued that the interpretation mandate extends to federal judges as well as Executive Branch officials. See Joel A. Mintz, Taking Congress’s Words Seriously: Towards a Sound Construction of NEPA’s Long Overlooked Interpretation Mandate, 38 ENV’T. L. 103 (2008). To the extent that is true, federal courts are compelled by statutory directive to interpret federal statutes and agency policies and regulations consistent with NEPA’s policy of encouraging “productive and enjoyable harmony between man and his environment” and of promoting “efforts which will prevent or eliminate danger to the environment and biosphere” and stimulating “the health and welfare of man.”

Even if that expansive reading of § 102(1) is not accepted by courts, however, NEPA’s interpretation mandate may nonetheless be held to apply to the president and federal Executive Branch agencies and departments. Those federal institutions obviously include (but are not limited to) EPA, the Department of Interior, and other federal entities responsible for regulating environmental pollution or managing federally owned resources. If that is the case, the interpretation mandate’s ultimate impact may be vast. Whether that will occur remains to be seen. Until then, NEPA § 102(1) remains a sleeping giant of federal law.

VI. Remedies for NEPA Violations

As we have seen, the U.S. Supreme Court has interpreted NEPA’s primary action-forcing provision, the EIS requirement, as purely procedural. As a
result of this authoritative interpretation, typical judicial remedies for procedural violations of NEPA tend to require additional procedural measures. Courts, for example, may order agencies to prepare Environmental Assessments where a categorical exclusion has been improperly used. They may direct an agency to prepare a new Environmental Assessment, or draft an EIS where a first environmental assessment is deemed inadequate; or they may require preparation of a new EIS, or a supplementary EIS, where a first EIS was procedurally flawed or incomplete.

NEPA litigation is often initiated to stop, or at least delay, a federal project that the plaintiffs believe will harm the environment. To keep such a project from becoming a fait accompli while their NEPA lawsuit is still pending, such plaintiffs often move for a preliminary injunction to temporarily halt the project until the legal issues before the court have been resolved. Plaintiffs who seek preliminary injunctive relief must satisfy a four-factor test. They must demonstrate that: (i) they will have an adequate remedy at law or will be irreparably injured if an injunction is not granted, (ii) the threatened injury to the plaintiff outweighs the harm the injunction may inflict on the defendant, (iii) plaintiff has at least a reasonable likelihood of success on the merits, and (iv) granting an injunction will serve the public interest. Federal Rule of Civil Procedure Rule 65. Preliminary injunctions are not granted lightly. Moreover, because of the requirement that the plaintiff prove a reasonable likelihood of success on the merits, motions for preliminary injunctions in NEPA cases often lead to a sort of “mini-trial-on-the-merits,” with both plaintiffs and defendants introducing much of the evidence that would normally be offered in a plenary trial.
Checkpoints

- NEPA contains broad, strongly pro-environmental statements of purposes and policies.

- NEPA includes an “interpretation mandate” that directs that “policies, regulations and public laws of the United States” be interpreted in accordance with the Act’s broad policies. This sub-section has vast potential as a mechanism for eliciting environmentally sensitive interpretations of a range of federal laws.

- The statute has several “action-forcing” provisions, the most significant of which is its requirement that federal agencies and departments prepare a detailed environmental impact statement (“EIS”) for every proposal for a “major federal action” significantly affecting the quality of the human environment.

- Courts have generally held that the procedural provisions of NEPA established a “strict standard of compliance” for federal agencies. This judicial rule is intended to compel agencies to advise and inform other interested agencies, and the public, of the environmental consequences of planned federal actions, and also to aid the agency’s own decisionmaking.

- EISs must be considered at every important stage of an agency’s decisionmaking process.

- Citizen plaintiffs may bring suit through the Administrative Procedure Act to challenge an agency’s failure to follow NEPA’s procedural mandates and/or the adequacy of a final EIS.

- The U.S. Supreme Court has ruled that while reviewing courts may review agencies’ compliance with EIS procedures, the substantive decisions reached by agencies following procedurally appropriate preparation of EISs—including decisions regarding possible mitigation measures—are not subject to judicial review under NEPA.

- NEPA created a Council on Environmental Quality (“CEQ”) in the Executive Branch that has published regulations that guide federal agencies in the implementation of the Act.

- CEQ’s regulations, and judicial interpretations, have fleshed out the meaning of the statutory phrases “major federal action” and “significantly affecting the quality of the human environment.”

- “Major federal actions” generally involve federal actions that deal with the adoption of official policies, form a plan or program, or approve specific public or private projects.

- CEQ’s regulations require agencies to divide their proposals for major federal actions into those that normally require an EIS, those that normally do not require an EIS, and those that may or may not require an EIS.

- Agency actions that normally do not require preparation of an EIS because they will predictably have no significant environmental impact are classified as “categorical exclusions.”
• In circumstances where an agency action may or may not require preparation of an EIS, the agency must prepare a brief “Environmental Assessment” to determine whether or not to prepare an EIS.

• Environmental Assessments must lead to either the preparation of a full EIS or a “Finding of No Significant Impact.”

• CEQ’s regulations define the statutory term “significantly” in terms of both the context and intensity (i.e., severity of impact) of a proposed action.

• In preparing EISs, agencies must follow procedures set forth in detail in CEQ’s regulations, which include “scoping” what the EIS will contain, circulating a draft EIS for comments from stakeholders, and preparing, circulating, and filing a final EIS.

• Typical judicial remedies for procedural violations of an EIS tend to require agencies to take additional procedural measures.

• NEPA litigation frequently involves motions for preliminary injunctions under Federal Rule of Civil Procedure 65. The proponents of those motions must satisfy four conditions to succeed in persuading courts to issue preliminary injunctions, including a showing that they are likely to succeed on the merits of the case. Such injunctions are not granted lightly.