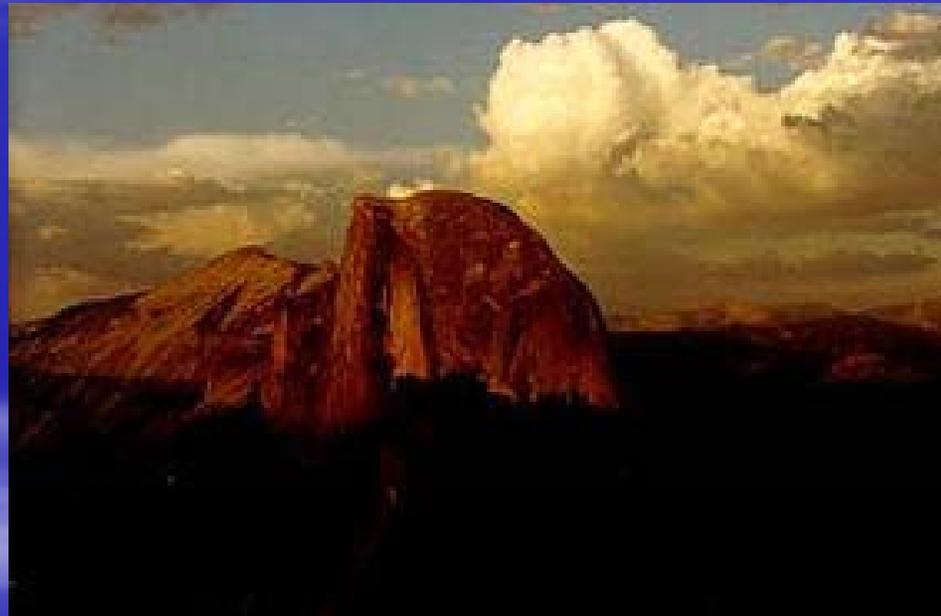


National Science Foundation  
Training on the Large Facilities Manual

Environmental Compliance



# What Is Environmental Compliance?

- Federal agencies must consider the impacts of their activities on the environment as part of their decision-making processes.
- Major federal statutes requiring environmental compliance include:
  - National Environmental Policy Act (“NEPA”)
  - National Historic Preservation Act (“NHPA”)
  - Endangered Species Act (“ESA”)
  - Coastal Zone Management Act (“CZMA”)
- Permits
- Begin environmental compliance ***early on*** in the decision-making process

# Threshold Questions

- Is there a *federal hook*?
- At what point in the process does compliance take place?
- Is there still federal agency *discretion* in the decision-making process?

# National Environmental Policy Act of 1969, 42 U.S.C. 4321

- ❖ ***Procedural*** statute requiring federal agencies to take a “hard look” at environmental impacts of proposed action and determine if it ***significantly affects*** the quality of the human environment
- ❖ Requires ***informed decision-making***, including consideration of public input ***prior*** to activities being carried out

# NEPA Compliance

- ❖ Categorical Exclusions
- ❖ Environmental Assessments
- ❖ Environmental Impact Statement

# Categorical Exclusions

- ❖ Agency determines that proposed activity has *no significant* impacts, individually or cumulatively, on the environment
- ❖ Agency's determination of no significant impacts is documented in its regulations
- ❖ NSF's categorical exclusions are set forth in 45 C.F.R. 640.3(b)

# Environmental Assessments

- ❖ Activity is neither categorically excluded nor the type of activity which is anticipated to have significant environmental impacts requiring a more rigorous environmental analysis
- ❖ Concise public document: briefly provides sufficient evidence and analysis to determine whether further analysis is warranted, or a Finding of No Significant Impact (“FONSI”) should be prepared

# Environmental Impact Statement

- ❖ Detailed written statement of the proposed activity and its anticipated impacts on the human environment
- ❖ Designed to assist agencies in planning actions and making decisions
- ❖ Prepared in accordance with CEQ regulations

# Components of an EIS

- ❖ Identify interested members of the public, affected Indian tribes, cooperating agencies, State and local agencies, and interested persons and invite participation
- ❖ Notice of Intent published in the Federal Register
- ❖ Scoping hearings to help identify significant issues

# Components of an EIS – cont.

- ❖ Agency conducts necessary studies to determine reasonable range of alternatives, including a no-action alternative
- ❖ Agency conducts additional studies to determine environmental impact (direct, indirect, and cumulative) of each alternative
- ❖ Information is set forth in Draft EIS, which is released for public comment

# Process Following Preparation of Draft EIS

- ❖ Circulate Draft EIS and solicit comments
- ❖ Conduct public hearings on the Draft EIS
- ❖ Prepare responses to comments
- ❖ Prepare Final EIS, which includes responses to comments
- ❖ Await passage of 30 day “cooling off” period before making decision on activity (comments can be accepted during this 30 day period)

# Record of Decision

- ❖ ROD follows completion of EIS process and authorizes agency action regarding the proposed activity
- ❖ Identifies all alternatives considered
- ❖ Specifies alternatives considered to be environmentally preferable
- ❖ Discusses factors, including national policy concerns, considered in making decision
- ❖ States “whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why they were not.” 40 C.F.R. 1502.2(c).

# National Historic Preservation Act

- Is there an “undertaking”?
- If yes, identify scope of undertaking’s effect
- Determine Area of Potential Effects
- Identify parties for consultation
- Identify historic properties and determine significance
- Evaluate effects of undertaking
- Consult on effects with all interested parties and SHPO/THPO
- If no effects, document finding
- If effects, determine if adverse
- If no adverse effects, document finding and consult with SHPO/THPO and interested parties
- Resolve adverse effects through MOA and allow ACHP to comment
- Issue final decision to proceed with undertaking

# Endangered Species Act

- Requires agencies to consider impacts of their activities on endangered and threatened species, and their habitat.
- Agencies are to consult with the U.S. Fish and Wildlife Service/National Marine Fisheries Service regarding whether the proposed activity is likely to jeopardize the continued existence of any endangered or threatened species or result in the adverse modification of habitat of such species.
- Consultation with USFWS/NMFS can be informal or formal.
  - Informal: Not likely to have adverse effects. Get concurrence from USFWS *in writing*.
  - Formal: Likely to have adverse effects. Agency prepares biological assessment and USFWS/NMFS prepares biological opinion. If USFWS/NMFS issues “jeopardy” opinion, reasonable and prudent alternatives are to be suggested by USFWS/NMFS, if there are any.

# Coastal Zone Management Act

- Federal Statute requiring federal agencies to determine whether proposed federal activity is likely to have “effects” on coastal uses or resources
- If effects are likely, federal agency must comply with the “consistency” provisions of the CZMA and consult with the coastal state to ensure that the proposed activity is “consistent to the maximum extent practicable” with the enforceable policies of the coastal state’s coastal management plan

# Streamlining Environmental Compliance

- ❖ Similarities exist in requirements of planning statutes such as NEPA and the NHPA
- ❖ Environmental review under NEPA can be used to comply with other statutes such as the NHPA, ESA, and the CZMA, provided all requirements of all statutes are met

# Anatomy of a Lawsuit

- Lawsuits are typically brought under the APA
- Plaintiffs often use “kitchen sink” approach
- Declaratory and injunctive relief usually sought

NGO v. U.S.



# Administrative Procedure Act

## 5 U.S.C. 701, *et seq.*

- APA serves as waiver of sovereign immunity
- Requires final agency action
  - Record of Decision
  - Issuance of federal license or permit
  - Decision to issue federal funds

# Administrative Procedure Act

## 5 U.S.C. 701, *et seq.*

- Scope of judicial review limited to administrative record
- Standard of judicial review: agency action upheld unless arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, or contrary to statutory right or authority

# Administrative Record

- ❖ Definition: The “paper trail” leading up to and including the final decision presented in an organized manner (i.e., chronological, topical, etc.).
- ❖ Contents: Memoranda, correspondence (including letters and e-mails), technical studies, records of public participation, public comments, notes, and other documents relied upon by the agency in making the decision.
- ❖ Privileged documents: Can be excluded, but a privilege log must be prepared.

# Applying the Standard of Review

- Agencies entitled to presumption of validity
- Deference accorded to agency's technical expertise
- Court cannot substitute its judgment for that of the agency
- Agency decision must be upheld unless there is no "rational connection between the facts found and the choice made."  
*Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 105 (1983)
- If violation found, remedy is remand

# Resources

- ❖ NSF: Caroline M. Blanco, Assistant General Counsel, [cblanco@nsf.gov](mailto:cblanco@nsf.gov), (703) 292-4592
- ❖ NEPA: Council on Environmental Quality ([www.whitehouse.gov/ceq](http://www.whitehouse.gov/ceq))
- ❖ NHPA: Advisory Council on Historic Preservation ([www.achp.gov](http://www.achp.gov))
- ❖ CZMA: NOAA's Ocean and Coastal Resource Management Office ([www.coastalmanagement.noaa.gov](http://www.coastalmanagement.noaa.gov))