

**Determining Whether a Proposal is Subject to the National Environmental Policy
Act (NEPA) Section 102
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This paper presents some key thresholds to consider when determining whether a proposal is subject to the procedural requirements of Section 102 (2) of the National Environmental Policy Act (NEPA) 42 U.S.C. 4332 (2). If a proposal is subject to Section 102 (2) Council on Environmental Quality (CEQ) regulations (40 CFR 1500-1508) provide several ways for agencies to comply with the “NEPA process” (40 CFR 1508.21) by preparing environmental documents. These regulations include guidance on how to prepare file and circulate an Environmental Impact Statement (EIS); use of Environmental Assessments (EAs) to determine whether to prepare an EIS or a finding of no significant impact; and provisions for agency procedures to establish categories of actions (categorical exclusions or CEs) for which neither an EA or an EIS is required. If a proposal is not subject to Section 102 (2), none of these environmental documents are applicable.

When considering a proposed action the following thresholds should be taken into account to determine whether or not the Forest Service is obligated to prepare any environmental analysis or documentation in compliance with NEPA Section 102 (2) and the CEQ regulations.

1. Are the proposed action and effects subject to Forest Service control and responsibility? (40 CFR 1509)
2. Is the Forest Service at a stage where it is ready to decide whether it intends to undertake an activity to accomplish a goal? (40 CFR 1508.23)
3. Does the proposed action have effects that can be meaningfully evaluated? (40 CFR 1508.8, 1508.14, 1508.23)
4. Are the effects that can be meaningfully evaluated related to the natural and physical environment? (40 CFR 1508.14)

Since NEPA has been passed court cases or subsequent legislation have resulted in additional parameters to consider when determining whether the Forest Service must perform a NEPA analysis, therefore the following three questions should also be addressed.

5. Would completing NEPA analysis conflict with or duplicate the requirements of other Federal laws?
 6. Is the Forest Service merely implementing an action for which NEPA analysis has already been completed?
 7. Is the Forest Service action occurring outside of the United States?
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1. Are the proposed action and effects subject to Forest Service control and responsibility?

The NEPA process applies to proposed “Federal” actions. A non-Federal activity may be subject to the NEPA process when it requires a permit, regulatory decision, or funding from a Federal agency. The following considerations may be useful when determining if a proposed action is subject to Forest Service control and responsibility and therefore if NEPA analysis and documentation is required.

Is a non-Federal entity taking action on National Forest System lands?

There are currently few situations where a non-Federal entity may take action on National Forest System lands without Forest Service authorization, or a proposal for Federal action. Thus, a state, local, or private activity may be subject to NEPA 102 (2) if Forest Service action, approval or authorization is required (40 CFR 1508.18(b)(4)). If a permit or other type of Forest Service authorization is required, or if the Forest Service can impose conditions that must be met by the non-Federal entity, then NEPA 102 (2) analysis and documentation is required.

When NEPA is required for state or private activities to occur on NFS lands, it is important to remember that the proposed action is only the action that is subject to Forest Service control and authority. If there are additional activities proposed by the non-Federal entity that are outside of Forest Service control and authority then these other activities will probably need to be analyzed as connected actions.

Is the proposed action being carried out by another Federal agency?

When another Federal agency is acting on National Forest System lands and the action does not need Forest Service authorization, most likely that agency is required to prepare appropriate environmental analysis and documentation in accordance with NEPA 102 (2). The pertinent question is what obligation does the Forest Service have to prepare NEPA analysis and documentation when the action is being decided by another Federal agency? The answer depends on what, if any, actions are controlled by the Forest Service. The degree of Forest Service responsibility for NEPA analysis is proportionate to the degree of Forest Service control.

It helps in framing that responsibility to ask the following questions: Can the other Federal agency act without any consent, approval or control by the Forest Service? Or is it a situation where the Forest Service does have some degree of control over how the action is carried out either by withholding consent to prevent the action altogether, or by imposing terms and conditions with which the other agency must comply? When the Forest Service does have some degree of control over how the action is carried out then the Forest Service should coordinate with the other Federal agency to determine the best method for the agencies to comply with their NEPA Section 102 (2) responsibilities.

Is the Forest Service only providing non-binding advice or recommendations?

When the Forest Service is providing non-binding advice or recommendations, it is not controlling the activity and therefore providing advice or recommendations is likely not subject to NEPA Section 102 (2) for Forest Service decision making. However, these situations may require the Forest Service to provide analysis and expertise as a cooperating agency when another agency has decision authority subject to Section 102 (2). The Forest Service often provides scientific data, evaluations, or opinions to other agencies and individuals.

Is the Forest Service only performing an evaluation?

Evaluation of title claims made against National Forest System (NFS) land does not constitute a proposal for Federal action under NEPA. For example, when a party asserts that it owns a right-of-way across to construct, maintain, or use a road across NFS land, the Forest Service, in conjunction with the Office of the General Counsel, must determine if a valid right of way exists, and what the scope of that right of way is. The Forest Service is not making a decision to convey a property interest, but is simply making an assessment of the property rights that already exist. The courts have found in such cases, there is no proposal for Federal action requiring environmental analysis under NEPA 102 (2).

Is the Forest Service involvement limited to funding, without substantial control over the funded activities?

When a Federal agency provides funding for nonfederal activities, the action may be “federalized” and subject to NEPA analysis. The courts have applied a sliding scale test to evaluate the level of Federal control over a funded activity, considering both the level of funding and the degree the Federal agency conditions the use of the funds. The key to determining whether or not the Forest Service is responsible for performing NEPA analysis is determining whether the Forest Service exercises control over the implementation of the action to be funded and to what degree implementation of the action is dependent on Forest Service funding.

Where the Forest Service provides funds for programs generally, such as for ecological restoration, but it does not control the specific projects the funds will be used for, it is unlikely that this will be deemed Federal action for purposes of NEPA. Similarly, where the Forest Service provides only a small percentage of the funding for a project, it is unlikely that environmental analysis will be required under NEPA 102 (2) due to limited control and responsibility.

Does the Forest Service have discretion in how it takes action?

There are some ministerial actions which a Federal agency is required by law to undertake, and the agency does not have discretion not to act, or to control the action. Occasionally, Congress may direct the Forest Service to take certain actions, such as sale, exchange, or disposal of land, and the Forest Service has no discretion whether or how to take the action. In these cases it is not likely that the Forest Service is obligated to perform analysis and documentation under NEPA 102 (2). The specific statutory wording is key in these circumstances and therefore it is important to consult with an

Office of General Counsel attorney to verify whether or not NEPA applies in each specific situation.

2. Is the Forest Service at a stage where it is ready to decide whether it intends to undertake an activity to accomplish a goal?

According to the CEQ regulations, 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 CFR 1508.23).

An operative term in the CEQ definition of proposal is the term “stage.” Most mid-level analyses, for example watershed analyses, are simply a stage where the Forest Service identifies what possible management actions can be taken to move the Agency towards its desired future condition or “goals.” However, the results of these analyses generally are a description of the existing condition and a myriad of possible management actions. It is not until the Agency determines that it wants to move forward with one or more possible actions that the Agency is at a stage where a NEPA “proposal” exists. Therefore it is unlikely that NEPA 102 (2) analysis and documentation is required until the Agency is at a stage where the Agency is ready to decide what activity it will take to accomplish a goal.

3. Does the proposed action have effects that can be meaningfully evaluated?

The timing and location of the action and whether the action will result in tangible effects are important considerations when determining if an action has effects that can be meaningfully evaluated.

Would the proposed action result in actual on-the-ground actions with known geographic locations and timing such that the agency can understand what the effects will be?

This question is similar to the earlier question about the “stage” of the process. If the agency does not know where or when an activity will occur or even if it will occur at all then the effects of that action can not be meaningfully evaluated. Additionally if the proposed action does not compel any direct action or inaction then it would be very difficult to meaningfully evaluate the effects of that proposed action, including alternatives and mitigations.

Will the action result in tangible effects to the human environment?

If a proposed action results in no tangible or perceptible effects on the environment then the effects of that action could not be meaningfully evaluated and it is unlikely that NEPA 102 (2) would apply.

4. Are the effects that can be meaningfully evaluated related to the natural and physical environment?

Section 102 of NEPA requires Federal agencies to prepare detailed statements on the environmental impacts of proposed major Federal actions significantly affecting the quality of the human environment [42 U.S.C. 4332(2)(C)]. The CEQ regulations at 40 CFR 1508.14 state that the term Human Environment, as used in the Act, shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment. The regulations further clarify that economic or social effects are not intended by themselves to require preparation of an environmental impact statement. While the definition of human environment specifically refers to an EIS, almost all of the procedural requirements of the CEQ regulations serve to determine if there are significant effects requiring the generation of an EIS. Consequently an action that results only in economic or social effects does not trigger the procedural requirements of Section 102 (2) of NEPA.

If there are effects related to the natural and physical environment triggering the procedural requirements of NEPA, then any interrelated economic or social effects must also be analyzed. Refer to the definition of effects contained at 1508.8 for a full explanation of the direct, indirect, cumulative, ecological, aesthetic, historic, cultural, economic, social, or health effects that must be analyzed.

5. Would completing NEPA analysis conflict with or duplicate other Federal laws?

NEPA requires that its requirements be met “to the fullest extent possible” 42 U.S.C. 4332. NEPA’s requirements are not applicable to Federal agencies if there are clear and unavoidable conflicts of statutory authority. The following considerations can help to determine if there are unavoidable conflicts of statutory authority or if performing NEPA 102 (2) analysis and documentation would be duplicative with other procedures.

It is quite rare to find a situation where completing NEPA 102 (2) analysis and documentation will conflict with or duplicate other statutory requirements. Check with an Office of General Counsel attorney whenever it is possible that performing NEPA analysis and documentation for a proposed action would conflict with or duplicate another Federal law.

Has Congress created an express statutory exemption from NEPA?

The 2003 Interior and Related Agencies Appropriations Act provided that the issuance of special use authorizations for organizational camps is not subject to NEPA if the authorization is issued upon a change in control of the holder of an existing authorization, an authorization is renewed, or the authorization is amended to effectuate administrative changes or to include nondiscretionary environmental standards to conform to current law. Other examples of express statutory exemptions from NEPA have included: specific timber salvage exemptions and certain fire and fuels management projects. An exemption may be local or regional in application, so it is important to check with the Regional Office or Office of the General Counsel to determine whether a statutory

exemption applies on your Forest.

Is there another statutory process that provides the functional equivalent of a NEPA process?

Process and analyses for removal and remediation actions under CERCLA have been deemed to supersede requirements for environmental analysis under NEPA 102 (2). This is in part because the CERCLA process has been deemed a functional equivalent of NEPA 102 (2), and in part because compliance with NEPA processes may frustrate the purposes of CERCLA to complete environmental cleanups in time to avoid complications from additional environmental degradation.

Is there other legislation that required the Forest Service to act in a time frame that does not permit compliance with NEPA?

In some circumstances, Congress has enacted other legislation that requires Federal agencies to act in a time frame that does not permit compliance with NEPA 102 (2). Courts have required agencies to show that it is “impossible” and not just “difficult” to comply with NEPA under such circumstances.

6. Is the Forest Service merely implementing an action for which NEPA analysis has already been completed?

Is there is a prior, existing, or ongoing analysis that may be relied upon, including analyses performed by other agencies? The question is not whether or not there is a proposed Federal action that NEPA applies to, but whether or not there is a new proposal for Federal action that triggers the need for additional NEPA analysis.

The CEQ regulations impose a duty to supplement existing analyses when there is significant new information or circumstances relevant to environmental concerns and bearing on the proposed action or its impacts after completion of an initial analysis, at a point when the agency has discretion and authority to alter the course of action. 40 CFR § 1502.9(c). However, although the obligations imposed by NEPA 102 (2) are ongoing, those obligations are not interminable. Activities which merely implement a decision previously analyzed under NEPA are not new Federal actions which require independent analysis, unless the analysis was programmatic and therefore not adequate for site specific implementation or the requirements for supplementation are present.

Many enforcement decisions, and decisions to administer contracts or authorizations, fall within this category because compliance with the terms and conditions of the decision, contract or authorization was considered in the NEPA effects analysis.

7. Is the Forest Service action occurring outside of the United States?

The courts have ruled that NEPA does not apply to U.S. Federal activities in other nations. However, the courts have ruled that NEPA applies to United States government activities that occur in, or affect, the global commons outside the jurisdiction of other nations (e.g. Antarctica or the oceans). Although NEPA does not apply to U.S. Federal

activities in other nations, Executive Order 12114 extended the purposes of NEPA abroad by requiring that Federal agencies implement special procedures for considering the environmental effects of major Federal actions outside the boundaries of the United States. Under this Executive Order (EO), agencies may prepare EISs, EAs, bilateral or multilateral environmental studies, or other types of environmental reviews with other nations. E.O. 12114, Environmental Effects Abroad of Major Federal Actions, 3 C.F.R. 356 (1980). Therefore although NEPA does not apply to U.S. Federal activities occurring abroad, the EO does require some type of environmental analysis.