

Environmental Impact Statements



Key 3: Use the "scoping" process for its intended purpose and get to the point.

Focus on significant environmental issues.

The NEPA implementing regulations provide for a scoping process, which applies by its terms to the environmental impact statement (EIS) process, although a less formal type of scoping is conducted for the environmental assessment process and for documented categorical exclusions (discussed subsequently in this handbook). NEPA "scoping" (40 C.F.R. § 1501.7) has specific and fairly limited objectives: (a) to identify concerns of the affected public and other agencies; (b) to facilitate an efficient environmental impact statement preparation process, through assembling the cooperating and participating agencies, assigning writing tasks, ascertaining related permits and reviews that should be scheduled concurrently, and setting time or page limits, as appropriate; (c) to identify the significant issues associated with alternatives that will be examined in detail in the document, while simultaneously limiting consideration and development of issues that are not truly significant; and (d) to save time in the overall process by helping to ensure that draft statements adequately address relevant issues, reducing the possibility that new comments will cause a statement to be rewritten or supplemented.

Scoping helps insure that real problems are identified early and properly studied; that issues that are of no concern do not consume time and effort...

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Although all of the objectives listed above contribute to an efficient environmental impact statement process, the objective described in (c) is probably the most helpful insofar as facilitating preparation of a focused, meaningful document is concerned. The question remains, however, "How does one gauge whether or not an impact is 'significant?'" With respect to this question, an illuminating point of view was articulated by Federal Circuit Court Judge Richard Posner in a 1985 opinion, which, for ease of reading, is paraphrased below.

In determining what constitutes a "significant" impact, one that would prompt preparation of an environmental impact statement, we can get little help either from the NEPA implementing regulations or from precedent. So varied are the federal actions that affect the environment—so varied are the environmental effects of those actions—that the decided cases compose a distinctly disordered array, as shown by Professor Rodgers' illustrative comparison of cases in which environmental impact statements were and were not held to be required. In Rodgers' handbook we read, for example, that an environmental impact statement is required for a government loan to build a golf course and park but not for a mock amphibious assault by a battalion of marines on a state park, or for a train shipment of nerve gas, or for certain exploratory mining operations. ⁵

It is in the NEPA scoping process that potentially significant environmental impacts—those that give rise to the need to prepare an environmental impact statement—should be identified; impacts that are deemed not to be significant need not be developed extensively in the context of the impact statement, thereby keeping

the statement focused on impacts of consequence. The significance of some impacts may be easier to gauge than that of others. For example, there are "thresholds" associated with some impact areas—air quality and noise levels, among others—beyond which unhealthful effects (a "significance" criterion) may be experienced. Courts have endorsed use of thresholds in the environmental process, as long as they are not rigidly applied.

As Judge Posner suggests, it is difficult to determine at what point, if any, along the magnitude-of-effect continuum an impact should be deemed "significant;" this is especially true at the early stage—scoping-of document/issue development. Environmental issues involved in a proposed project under review for which a concrete significance determination cannot be made early in the process require careful, continued consideration.

There is a tendency on the part of some document preparers to address every conceivable area of impact that could be associated with transit projects whether or not the area is involved in the project under study. This practice adds needlessly to the length of the document and tends to confuse readers. If an environmental value—historic properties, for example—is not involved, then there is no need to develop (basically target and explain away) the issue in the context of the document. If fear of litigation is a motivating factor in addressing non-issues, then a listing of issues "investigated," but found not to be substantially involved can be included somewhere in the administrative record.

Once the scope of the environmental document, including, in the case of environmental impact statements, significant environmental issues to be addressed, is settled, an annotated outline of the document should be prepared and shared with interested agencies and the public. The outline serves at least three worthy purposes, including (1) documenting the results of the scoping process, whether formal or, in the case of environmental assessments, informal; (2) contributing to the transparency of the process; and (3) providing a clear roadmap for concise development of the environmental document.

Preparation of annotated outlines of impact statements or assessments following formal or informal "scoping" is the best means of assuring development of focused, meaningful environmental documents.

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Section 102(2)(C)(ii) of NEPA (42 U.S.C. § 4332(2)(C)(ii)) requires that impact statements identify "adverse" environmental effects that cannot be avoided should the proposed action be implemented, but this does not require exhaustive development of every aspect of every negative impact that may be generated by the proposed action; impacts to the quality of the human environment deemed not to be significant, but sufficiently adverse to warrant attention and not otherwise mitigated, may be noted.

Transit projects may also generate environmental benefits; these should be highlighted as well—an impact statement or environmental assessment should draw attention to positive impacts, not just negative impacts.

It is also true that Congress seeks to foster in public transportation law the development and revitalization of public transportation systems that, among other goals, "minimize environmental impacts." This refrain, however, was not intended to be rights-creating language. Moreover, development and revitalization of public transportation systems, including the minimization of environmental impacts, is a shared responsibility among Federal, State, and local governments and the people.

Much can and should be done in the transportation planning process to ensure development of sound, safe, public transportation systems that promote a high-quality environment long before they become

"Federalized" for purposes of the NEPA process. The money saved in developing focused environmental documents can go a long way toward the Congressional goal of minimizing any adverse environmental impacts associated with transit projects.

5. River Road Alliance v. Corps of Engineers, 764 F.2d 445, 450 (7th Cir. 1985), *cert. denied* 475 U.S. 1055 (1985).

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