CEQA/NEPA Tribal Resource Guide

Developed by Shute, Mihaly &Weinberger LLP   
for the North Coast Resource Partnership for the Small Community Toolbox



1. Environmental Documentation at the State and Federal Levels
   1. California Environmental Quality Act (CEQA) is the law that governs environmental protection and disclosure throughout California. Applies to discretionary projects that are approved and implemented at the local, regional, and State level.
   2. National Environmental Policy Act (NEPA) is the law that that governs environmental disclosure nationwide. Applies to Federal agencies proposing major Federal actions prior to making decisions.
2. When Are Tribes Involved with CEQA and NEPA?
   1. There is a Tribe-sponsored project being undertaken and the Tribe is an APPLICANT. For instance, the project may be located on private or fee land and require a conditional use permit or other approval from a local land use agency. Or the project may be located on tribal trust land and require BIA approval. In both instances, the public agency issuing the approval will need to ensure CEQA or NEPA compliance.
   2. The Tribe is interested in the outcome of a project, has been asked to consult or provide input on a proposed project, or will be impacted by a proposed project and therefore is considered a CONSULTING or INTERESTED PARTY.
   3. A Tribe’s role could be formal or voluntary depending on the issue and whether the environmental analysis process is being mandated at the State level only (CEQA), at the Federal level only (NEPA), or both (CEQA/NEPA).
   4. Tribes could also be a party to a Memorandum of Understanding with a decision-making agency and/or resource agency, specifying a particular role for the Tribe in the CEQA or NEPA process.
   5. Neither CEQA nor NEPA require Tribal compliance for tribal projects that do not involve federal, state, or local agency approval or funding.
3. Purposes of CEQA
   1. Prioritize Environmental Protection
      1. Avoid significant effects on the environment (“impacts”), where “environment” is broadly defined (includes, for instance, air, water, biological resources, cultural and historical resource, aesthetics, and visual impacts)
      2. Minimize and mitigate impacts to the extent feasible
   2. Provide Information and Disclosure
      1. Inform decisions makers about environmental consequences
      2. Disclose to the public why decisions were made (transparency).
   3. Encourage Public Participation
4. Interpreting CEQA
   1. The CEQA Statute. [Public Resources Code (“PRC”) Section 21000](https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=PRC&sectionNum=21000) et seq. sets forth most of the law. However, there are CEQA exemptions in other statutes as well for specific projects (e.g., Government Code, Water Code and other sections of the Public Resources Code).
   2. The CEQA Regulations or “Guidelines.” The Guidelines are formal regulations that must be followed, and are found in [California Code of Regulations, Title 14, Section 15000](https://govt.westlaw.com/calregs/Browse/Home/California/CaliforniaCodeofRegulations?guid=I86C9BC205B4D11EC976B000D3A7C4BC3&originationContext=documenttoc&transitionType=Default&contextData=(sc.Default)) et seq. They are also a user friendly approach to understanding the statutory requirements. They reflect the statute and established case law.
   3. Local CEQA Guidelines. Some agencies, like regional air pollution control districts, have their own CEQA Guidelines, which can be used by other local agencies as well. Examples include the San Francisco Bay Area Air Quality Management District ([BAAQMD](https://www.baaqmd.gov/plans-and-climate/california-environmental-quality-act-ceqa/updated-ceqa-guidelines)) and the San Joaquin Valley Air Pollution Control District ([SJVAPCD](https://www.valleyair.org/transportation/ceqa_idx.htm)).
   4. Court Cases. As with all laws, the courts are the ultimate arbiters of what CEQA means and court cases are often changing the specific interpretation and implementation of CEQA as time goes on. Most CEQA cases are in state court.
   5. Governor’s Office of Planning and Research (OPR). [OPR](https://opr.ca.gov/ceqa/#guidelines-updates) issues technical advisories and other guidance documents on issues that broadly affect CEQA practitioners.
5. Key roles in CEQA
   1. Lead Agency: A lead agency is the public agency that has the principal responsibility for carrying out or approving a project that is subject to CEQA.
   2. Responsible Agency: Responsible agencies are those which have *other* discretionary approval power over a project, such as the granting of a permit, lease or other approval, or approval of funding. For instance, a county may approve a development project as lead agency; if the project requires a water quality permit, the Regional Water Quality Control Board would be a responsible agency. Responsible agencies may also be involved in carrying out some aspect of the project.
   3. Trustee Agency: Trustee agencies are state agencies that, while they do not have discretionary approval over a project, have jurisdiction by law over natural resources affected by a project that are held in trust for the people of California. There are four Trustee Agencies defined in CEQA: Department of Fish and Wildlife, Department of Parks and Recreation, State Lands Commission, and the University of California.
6. When and How Does CEQA Apply?
   1. In order for CEQA to apply, there must be both an “action” and a “project” as defined by the statute.
   2. Is there an action? An “action” is a decision committing the lead agency to a definite course of action, which may ultimately lead to a physical effect on the environment. A project is the whole of an action; not each governmental approval. The definition is broad in order to maximize protection of the environment and to avoid concealing the overall cumulative effects of the project by separately focusing on isolated parts.
   3. Is the action a project as defined under CEQA? Is there a “discretionary action”? CEQA applies only to discretionary, not ministerial, projects.
      1. “Discretionary” means the agency exercises judgment in deciding whether (and how) to give the approval. Case law has determined that CEQA extends to hybrid projects of a mixed ministerial-discretionary character. Examples of hybrid project types include some types of building permits or administrative approvals. A *discretionary project* is one subject to ‘judgment controls,’ i.e., where the agency can use its judgment in deciding whether and how to carry out the project.
      2. “Ministerial” means the agency must give the approval if all the conditions are met. In other words, an agency is limited to determining conformity with applicable ordinances and regulations, and the official has no ability to exercise discretion to approve or deny if the project meets the requirements of the ordinance/regulation. For example, most (but not all) building permits, demolition permits, final parcel or subdivision maps are ministerial. Ministerial projects are typically only assessed against fixed standards or objective measurements.

*Side note: Courts have developed a functional test to distinguish ministerial from discretionary approvals. The functional test asks whether “the agency has the power to shape the project in ways that are responsive to environmental concerns.” If the agency can condition approval on changes responsive to environmental concerns, then the project is discretionary. If the applicant can compel project approval without making changes, then the approval is ministerial.*

* 1. If the Action is a Project, CEQA Requires Defining the Project and Avoiding “Segmenting”
     1. project even where they are not integral. For instance, a proposed home improvement center and a road realignment were not separate projects subject to separate environmental reviews because the completion of the road realignment became a condition of the center’s approval.Under CEQA, a project needs to be concrete, specific, and well defined.
     2. “Segmenting” a project is not allowed. The requirements of CEQA cannot be avoided by chopping a large project into many little ones—each with a minimal potential impact on the environment—which cumulatively may have disastrous consequences. Related activities may be part of the same CEQA
  2. If an agency determines that a proposed activity is a “project” under CEQA, it will usually take the following three steps:
     1. Determine if the project falls under a statutory or categorical exemption from CEQA;
     2. If the project is not exempt, prepare an Initial Study (IS) to determine whether the project might result in significant environmental effects; and
     3. Prepare a Negative Declaration (ND), Mitigated Negative Declaration (MND), or Environmental Impact Report (EIR), depending on the outcome of the Initial Study.
     4. Each of these steps is described in more detail below.

1. CEQA Exemptions – An Overview
   1. Statutory exemptions: Created by Legislature and listed in the Public Resources Code or other statutes. Some are repeated in the CEQA Guidelines. The project must fit all of the listed criteria as supported by substantial evidence. Statutory exemptions are often for projects or classes of projects deemed important by the Legislature, such as affordable housing and sports stadiums.
   2. “Common sense” exemption: Where it can be seen with certainty that there is no possibility that the activity in question will have a significant effect on the environment, the activity is not subject to CEQA. This exemption must be supported by substantial evidence in the record. An environmental checklist form (found in CEQA Guidelines, Appendix G) can be used for this purpose.
   3. Categorical exemptions: Created by the Resources Agency and found in the CEQA Guidelines. They are “narrowly construed” to protect the environment. The lead agency has the burden to demonstrate that the project falls within the categorical exemption class and ensure that there is no reasonable possibility that the activity will have a significant effect on the environment. Some common exemptions include existing facilities, ongoing operations, minor alterations to land, and certain activities to restore or improve the environment.
      1. “Exceptions” to Exemptions. Even if a project falls within a categorical exemption, they aren’t automatically exempt. Categorical exemptions are subject to the following exceptions, and an action cannot be exempted from CEQA if any one of these factors is present:
      2. Location. A project that is ordinarily insignificant in its impact on the environment may, in a particularly sensitive environment, be significant.
      3. Cumulative Impact. All exemptions are inapplicable when the cumulative impact of successive projects of the same type in the same place over time is significant.
      4. Unusual Circumstances. A categorical exemption shall not be used where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances. This exception is often litigated.
      5. Scenic Highways. A categorical exemption shall not be used for a project which may result in damage to scenic resources within a highway officially designated as a state scenic highway.
      6. Hazardous Waste Sites. A categorical exemption shall not be used for a project located on a site which is included on any hazardous waste site lists.
      7. Historical Resources. A categorical exemption shall not be used for a project which may cause a substantial adverse change in the significance of a historical resource. Historical resources in this context can include archaeological resources and tribal cultural resources.
   4. Documenting the CEQA Exemption
      1. Notice of Exemption (NOE). May be filed with County Clerk. Sets a 35 day statute of limitations for challenges. If litigation is not filed in that period, the project is safe from challenge.
      2. Documenting Basis for Determination. Show your work! The analysis determining an exemption could be used should be shown in the record.
2. Preparing an IS.
   1. If the project does not fall under an exemption, the public agency usually undertakes an “initial study.” An IS is a preliminary analysis prepared by the lead agency to determine which level of analysis (an ND, MND, or EIR) shall be prepared. The purpose of the IS is to determine whether there may be a significant environmental impact.
3. ND/MND – An Overview
   1. If the action will not have a significant effect on the environment, or when *mitigation measures can be adopted to avoid all potentially significant effects*, a ND or MND can be used.
      1. An IS must first be prepared prior to issuing a ND or a MND. The IS is optional, however, if the lead agency has already decided to prepare an EIR.
      2. IS must be based on facts not argument, speculation, unsubstantiated opinion or erroneous information.
   2. In deciding whether an ND or MND is the right level of analysis, the “fair argument standard” applies. This is whether it can be fairly argued, based on substantial evidence, that project may have a significant effect on the environment. This makes evidence a very important part of a good ND or MND.
   3. Process for ND or MND
      1. Draft the IS/ND (or IS/MND). Although the CEQA Guidelines do not dictate the precise format required for an IS, certain information is required and is considered fundamental to analyzing the potential impacts associated with a proposed project. An IS must contain the following:
         1. Information identifying the project’s environmental effects, if any, by use of a checklist, matrix, or other method, provided that entries on a checklist or other form are briefly explained to indicate that there is some evidence to support the entries. The brief explanation may be either through a narrative or reference to another information source such as an attached map, photographs, or an earlier EIR or ND/MND. A reference to another document should include a citation to the page or pages where the information is found. The typical Initial Study checklist used is found in CEQA Guidelines Appendix G..
         2. A discussion of the ways to mitigate the significant effects identified, if any.
         3. An examination of whether the project would be consistent with existing zoning, plans, and other applicable land use controls.
         4. The name of the person or persons who prepared or participated in the initial study.
      2. Publish a Notice of Intent to Adopt an ND/MND and circulate the document for 20- or 30-day public review period. Publish a Notice of Completion (NOC) to send to OPR along with the IS/ND or IS/MND.
      3. Prior to approving a project, the decision-making body of the lead agency shall consider the proposed ND or MND together with any comments received during the public review process. The decision making body shall adopt the proposed ND or MND only if it finds on the basis of the whole record before it (including the IS and any comments received), that there is no substantial evidence that the project will have a significant effect on the environment and that the ND or MND reflects the lead agency’s independent judgment and analysis.
      4. Publish a Notice of Determination (NOD) once the ND or MND is adopted.
      5. Publication of the NOD triggers 30 day statute of limitations on court challenges to the approval under CEQA.
   4. Pitfalls of ND/MNDs:
      1. Some degree of deferral is more likely to be allowed where an EIR is being prepared rather than a ND or MND.
      2. If impact is uncertain because of lack of data or information, it’s harder to demonstrate to the requisite level that there is no significant impact in a ND/MND.
4. Preparing an EIR
   1. Is there an IS? An IS is not required, but is often helpful for scoping out the EIR, figuring out what other agencies think, and may be helpful to document any topics that are left out of an in-depth analysis.
   2. The EIR Process
      1. Notice of Preparation/Scoping. The first step in preparing an EIR is to determine the scope of the EIR in consultation with agencies, the public, and the project proponent (applicant).
      2. Prepare the Draft EIR. Following the scoping process, either the agency prepares a Draft EIR or the applicant’s consultant can prepare the CEQA documents, as long as the agency independently reviews, evaluates, and exercises judgment over the document and the issues it raises and addresses. If a Tribe is an applicant, it may engage a consultant in this way.
      3. The draft EIR must be released for public comment for at least 30 days but no more than 60 days, unless there are unusual circumstances.
      4. Notice of Completion (NOC) is filed with State Clearinghouse and Notice of Availability (NOA) for DEIR is published, mailed, and posted on the agency’s website.
      5. Prepare the Final EIR. The Final EIR consists of:
         1. The Draft EIR;
         2. The public comments and recommendations received on the Draft EIR; and
         3. The responses of the lead agency to the significant environmental points raised in the review and consultation process (“Response to Comments”).
      6. Before action can be taken on the Final EIR, a 10-day notice must be provided to public agencies to allow time to the review the Final EIR.
      7. Once a Final EIR has been certified and a decision has been made on the project, the agency files a NOD with the County Clerk and the State Clearinghouse.
      8. When an agency makes CEQA findings for any project that is approved subject to mitigation measures in an EIR, or when an agency adopts a mitigated negative declaration, the agency must impose a Mitigation Monitoring and Reporting Program (MMRP) to ensure implementation of the mitigation measures and project revisions that are required by the agency.
   3. **EIR Level of Analysis**
      1. The level of analysis in the EIR need only be as great as the level of detail of the project. There are multiple forms of EIRs (program, staged, master, subsequent, supplemental, focused). The analysis should match the project and how much information is known. The level of analysis completed for a known development project (for instance, a 100,000 square foot community center powered by renewable energy with 300 parking spaces located on 10 acres at a particular intersection) is more fine grained than the analysis for a countywide Fire Adaptation Plan.
      2. Also, it is acceptable to use a program EIR and to defer project-level analysis to a future, tiered EIR when impacts or mitigation measures are not determined by the first-tier approval process. However, it should be acknowledged that the Program EIR can only do so much and that subsequent environmental review will be required and impacts mitigated at that time. This is sometimes an inefficient and ineffective approach to the environmental review process.
   4. **Significant Impacts/Thresholds of Significance**
      1. An EIR must use thresholds of significance that are supported by substantial evidence to determine whether an impact is significant. Sources of thresholds of significance include:
         1. Locally Adopted: Agencies are encouraged to develop/publish thresholds that are relevant to local conditions.
         2. CEQA Guidelines, Appendix G is the default list of issues, which are often further interpreted by numerical standards.
         3. Air district and other regional agency thresholds.
         4. State thresholds apply to some impact categories:
            1. Vehicle miles traveled (VMT) refers to the amount and distance of automobile travel attributable to a project, and is related to promoting the reduction of GHG emissions, development of multimodal transportation networks, and a diversity of land uses. For land use projects, VMT is the only appropriate measures of transportation impacts.
            2. For roadway capacity projects, agencies have discretion to choose the most appropriate measure of transportation impacts, including roadway delay or level of service (LOS).
            3. A lead agency has discretion to determine its methodology to evaluate VMT, including whether to express the change in absolute terms, per capita, per household or in any other measure.
            4. Aesthetic impacts are not considered significant impacts on the environment for select development projects within infill areas with nearby frequent transit service.
            5. Parking impacts are not an issue covered by CEQA.
      2. An EIR must consider *all* phases of a project when determining whether impacts are significant.
      3. Likewise, an EIR must evaluate *direct* and *indirect* effects when determining whether impacts are significant.
5. EIR Contents
   1. Project Description
      1. Precise location and boundaries shown on both detailed map and regional map.
      2. Statement of objectives that includes the underlying purpose.
      3. General description of project’s characteristics including technical, economic, environmental.
      4. Description of intended use of the EIR that includes a list of agencies, permits/approvals, related environmental review, and consultations. All of the agency’s decisions on a project that are subject to CEQA should be listed.
      5. A proper Project Description is accurate, stable, and describes *all* of the project.
   2. Environmental Setting
      1. Describe the physical environment as it exists at time of NOP or when EIR commences. Real conditions on the ground *normally* constitutes baseline, although there are situations in which the existing conditions at the time the NOP is issued is not the appropriate baseline.
      2. Regional setting is critical. Special emphasis on resources that are “rare or unique to the region” and would be affected by the project.
   3. Growth Inducing Impacts
      1. Whether the project could foster economic or population growth or construction of additional housing, including by removing obstacles to growth (e.g., access). It’s not enough for EIR to say that project is growth inducing – the EIR must analyze how. Must provide information on the likely location and likely amount of future development, so that responsible bodies can plan for it.
   4. Cumulative Impacts
      1. Defined as “two or more individual effects which, when considered together, are considerable or which compound or increase other environmental impacts.”
      2. Cumulative impacts can result from individually minor but collectively significant projects taking place over a period of time.
      3. The main purpose of assessing cumulative impacts is to make sure a community doesn’t approve a series of small projects without considering overall effect.
   5. Economic and Social Changes
      1. An EIR should contain analysis of economic and social impacts of project only when those impacts result from a physical change in the environment.
      2. Economic and social changes are not considered significant effects by themselves.
      3. Economic and social effects of project can be used to determine significance of physical changes.
   6. Mitigation Measures
      1. Under CEQA, public agencies should not approve a project as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of the project.
      2. EIR shall identify feasible mitigation measures, even if they will not mitigate the impact to a less-than-significant level.
      3. Mitigation measures need to be clear and implementable.
      4. Mitigation measures may be deferred but require specific performance standards unless specificity is impossible.
      5. Fee-based mitigation programs have been found to be adequate mitigation measures under CEQA if there is evidence that mitigation will actually occur. For example, fee-based traffic mitigation measures have to be specific and part of a reasonable, enforceable plan or program that is sufficiently tied to the actual mitigation of the traffic impacts at issue.
      6. Compliance with standards can be adequate mitigation. For example, the U.S. Secretary of Interior’s Standards for the Rehabilitation and Guidelines for Rehabilitating Historic Buildings are used as the benchmark that CEQA uses to establish whether a project will have a significant adverse impact to a history property. Impacts to historic buildings to be reused in project are considered as mitigated to a level of less than a significant impact on the historical resource where alterations comply with the Secretary’s Standards.
      7. Mitigation measures must be fully enforceable through permit conditions, agreements or other legally binding instruments.
      8. If the lead agency concludes that no mitigation can be imposed, the EIR and the adoption documents have to explain the reasons.
   7. Alternatives
      1. The EIR must identify a reasonable range of potentially feasible alternatives. The alternatives must achieve *most* of the basic project objectives while avoiding or substantially reducing *any* (i.e., one or more) significant effects of the project. An EIR can’t include worse alternatives just to make the project look better.
      2. An EIR is not invalid if project alternatives selected to be studied as part of the EIR prove to be infeasible.
      3. The portion of EIR discussing “considered but rejected” alternatives is very important. The EIR should identify any alternatives that were considered by the lead agency but were rejected as infeasible during the scoping process and briefly explain the reasons underlying the lead agency’s determination.
      4. The “No project” alternative must address existing conditions plus what can reasonably expected to occur in the foreseeable future if the project is not approved, considering current plans and consistent with available infrastructure and community services.
6. EIR – Special Topics
   1. The Effects of *Existing* Environmental Conditions on a Project’s Future Users. With a few exceptions, CEQA does not require review of the effects of bringing people to an existing hazard rather than creating a new hazard (with some exceptions). But CEQA review of the ways in which a project could exacerbate existing environmental hazards is required.
   2. Energy Efficiency and CEQA Guidelines, Appendix F and Appendix G. An EIR must include a statement concerning mitigation measures proposed to minimize significant effects on the environment, including, but not limited to, measures to reduce the wasteful, inefficient, and unnecessary consumption of energy. Energy is also included on the list of “environmental factors potentially affected” on Appendix G: Environmental Checklist Form.
   3. Water Supply Assessment (“WSA”)
      1. Some projects over a certain size threshold require a WSA before approval.
      2. Water supplier has 90 days to complete the WSA after being requested to do so by the lead agency.
      3. Various supply and demand scenarios need to be evaluated over a 20 year time period: normal conditions, dry years, droughts (i.e. multiple dry years).
      4. Water supplier must determine, based on the entire record, whether projected water supplies will be sufficient to satisfy the demands of the project, in addition to existing and planned future uses.
   4. Greenhouse Gas (GHG) Emissions
      1. Requires a good-faith effort, based to the extent possible on scientific and factual data, to describe, calculate or estimate the amount of GHG emissions resulting from a project. The agency may use a quantitative or qualitative analysis and should explain why the type of analysis was chosen.
      2. The CEQA Guidelines do not provide details on how to determine a significant impacts and they do not include:
         1. Specific guidance on what constitutes a significant climate change impact.
         2. A standard of significance for greenhouse gas emissions or a significance threshold. Most local agencies use State standards in the California Air resource Board (CARB)’s most recent Scoping Plan. The 2022 Scoping Plan lays out a path to achieve targets for carbon neutrality and reduce greenhouse gas emissions by 85% below 1990 levels no later than 2045.
      3. A qualitative GHG analysis leaves more room to challenge because how does one fully disclose the potential environmental impacts of a proposed project without quantifying? As a result, most agencies quantify GHG emissions from projects, and there are accepted methodologies for making such calculations.
      4. An EIR must discuss any inconsistencies between the proposed project and regional blueprint plans and plans for GHG emission reduction.
      5. CEQA affords lead agencies discretion to select thresholds of significance for GHG emissions. Many regional air districts have set GHG thresholds. It is risky for the EIR when a GHG analysis deviates from air district standards, but it can be done.
7. Different Types of EIRs and Other CEQA Documentation

CEQA provides several optional tools for streamlining environmental review when there is a series of projects or activities the agency is considering.

* 1. Master EIRs are designed to provide for analysis of broad policy issues, such as cumulative and growth-inducing impacts, to limit the environmental review of subsequent projects.
  2. Program EIRs generally can be used for the same types of actions as master EIRs, though this streamlining device is reserved for related actions that can be characterized as one large project such as a General Plan or Specific Plan.
  3. Project EIRs are for a defined project such as a new commercial center or new transportation infrastructure.
  4. Typically, only one EIR or negative declaration is prepared for a project. A Supplemental or Subsequent EIR (SEIR) may be required if another discretionary approval is being considered and:
     1. There are substantial changes to the project;
     2. There are substantial changes in the project’s circumstances; or
     3. New information that could not have been known at the time the EIR was certified becomes available and such changes or new information require major revisions to the previous EIR due to new significant environmental effects or a substantial increase in the severity of previously identified significant effects.
  5. CEQA Addenda are for documenting if there are changes to the project that will not trigger requirements for further CEQA review. The lead agency must provide a reasoned basis supporting its conclusion that project changes would not result in new or substantially more severe significant impacts and that conclusion can be captured in a CEQA Addendum. A CEQA Addendum does not need to be circulated for public review and is typically approved by the agency when changes to the project are approved.

1. Purposes of NEPA
   1. NEPA requires federal agencies to undertake an assessment of the environmental effects of their proposed actions prior to making decisions. Two major purposes of the environmental review process are better informed decisions and citizen involvement, both of which should lead to implementation of NEPA’s policies.
   2. NEPA requires Federal agencies to consider environmental effects that include, among others, impacts on social, cultural, and economic resources, as well as natural resources. NEPA documents will describe what the Federal agency is proposing and allows public input on alternative ways for the agency to accomplish what it is proposing as well as input on the agency’s analysis of the environmental effects of the proposed action and possible mitigation of potential harmful effects of such actions.
   3. Unlike CEQA, NEPA does not require the decisionmaker to select the environmentally preferable alternative or prohibit adverse environmental effects. Indeed, decisionmakers in Federal agencies often have other concerns and policy considerations to take into account in the decision-making process, such as social, economic, technical or national security interests. But NEPA does require that decisionmakers be informed of the environmental consequences of their decisions.
2. Interpreting NEPA

Three Federal agencies have particular responsibilities for NEPA:

* 1. Primary responsibility is vested in the Council on Environmental Quality (CEQ), established by Congress in NEPA. CEQ oversees implementation of NEPA, principally through issuance and interpretation of NEPA regulations that implement the procedural requirements of NEPA. CEQ also reviews and approves Federal agency NEPA procedures, approves of alternative arrangements for compliance with NEPA in the case of emergencies, and helps to resolve disputes between Federal agencies and with other governmental entities and members of the public.
  2. The Environmental Protection Agency’s (EPA) Office of Federal Activities reviews environmental impact statements (EIS) and some environmental assessments (EA) issued by Federal agencies. The EPA provides comments to the public by publishing summaries of them in the Federal Register, a daily publication that provides notice of Federal agency actions. The EPA’s reviews are intended to assist Federal agencies in improving their NEPA analyses and decisions.
  3. The U.S. Institute for Environmental Conflict Resolution assists in resolving conflict over environmental issues that involve Federal agencies.

1. Key Roles in NEPA
   1. Lead Agency. The NEPA process begins when a federal agency proposes to take an action. If there is only one Federal agency involved, that agency will automatically be the “lead agency,” which means it has the primary responsibility for compliance with NEPA.
   2. Joint Lead Agency. Some large or complex proposals involve multiple Federal agencies along with State, local, and Tribal organizations. If another Federal, State, local, or Tribal organizations has a major role in the proposed action and also has NEPA responsibilities or responsibilities under a similar NEPA-like law, that agency may be a “joint lead agency.”
   3. Cooperating Agency. Other Federal, State, Tribal, or local government agencies may have a decision or special expertise regarding a proposed action, but less of a role than the lead agency. In that case, such a Federal, State, Tribal, or local government agency may be a “cooperating agency.”
   4. Consulting Party. Federal agencies are required to consult with federally recognized Tribes during the NEPA process, often concurrently with their Section 106 consultation obligations under the National Historic Preservation Act. Such Tribes may be referred to as a “consulting party.”
2. When does NEPA apply?
   1. NEPA applies to a Federal agency’s decisions for actions, including financing, assisting, conducting, or approving projects or programs; agency rules, regulations, plans, policies, or procedures; and legislative proposals. NEPA applies when a Federal agency has discretion to choose among one or more alternative means of accomplishing a particular goal. The NEPA process must be completed before an agency makes a final decision on a proposed action.
   2. Private individuals or companies can become involved in the NEPA process when they need a permit issued by a Federal agency. When a company applies for a permit (for example, for crossing federal lands or impacting waters of the United States) the agency that is being asked to issue the permit must evaluate the environmental effects of the permit decision under NEPA.
   3. NEPA applies to a project if there is federal funding involved in project implementation/execution.
   4. In rare situations there are Congressional Exemptions from NEPA:
      1. If an agency needs to take an action that would typically require preparation of an environmental impact statement in response to an emergency, and there is insufficient time to follow the regular NEPA process, then the agency can proceed immediately to mitigate harm to life, property, or important resources, and work with CEQ to develop alternative arrangements for compliance with NEPA.
      2. A NEPA analyses and document may involve classified information. If the entire action is classified, the agency will still comply with the analytical requirements of NEPA, but the information will not be released for public review. If only a portion of the information is classified, the agency will organize the classified material so that the unclassified portions can be made available for review.
3. Categorical Exclusions
   1. Like CEQA, there are situations where NEPA does not apply even though the activity meets the definition of an “action” under NEPA. Where CEQA has several types of exemptions, NEPA has one type: a Categorical Exclusion (CE).
   2. A CE is a category of actions that an agency has determined does not individually or cumulatively have a significant effect on the quality of the human environment. Examples include issuing administrative personnel procedures, making minor facility renovations (such as installing energy efficient lighting), and reconstruction of hiking trails on public lands. Agencies develop a list of CEs specific to their operations when they develop or revise their NEPA implementing procedures in accordance with CEQ’s NEPA regulations.
   3. A CE is based on an agency’s experience with a particular kind of action and its environmental effects. The agency may have studied the action in previous EAs, found no significant impact on the environment based on the analyses, and validated the lack of significant impacts after the implementation. If this is the type of action that will be repeated over time, the agency may decide to amend their implementing regulations to include the action as a CE. In these cases, the draft agency procedures are published in the Federal Register, and a public comment period is required. This is a way for the general public to be involved in the development of a particular CE.
4. Environmental Assessment (EA)

An EA is similar to an Initial Study (IS) under CEQA in that it is a checklist of sorts to determine what level of environmental documentation is required. Like an IS, the EA is optional if the lead agency has determined that an EIS is required.

* 1. The purpose of an EA is to determine the significance of the environmental effects and to look at alternative means to achieve the agency’s objectives. The EA is intended to be a concise document that:
     1. Briefly provides sufficient evidence and analysis for determining whether to prepare an EIS;
     2. Aids an agency’s compliance with NEPA when no Environmental Impact Statement is necessary; and
     3. Facilitates preparation of an Environmental Impact Statement when one is necessary.
  2. An EA should include brief discussions of:
     1. The need for the project/proposal.
     2. Alternative courses of action for any project/proposal which involves unresolved conflicts concerning alternative uses of available resources.
     3. The environmental impacts of the proposed action and alternatives.
     4. A listing of agencies and persons consulted during the preparation of the document.
  3. When preparing an EA, the agency has discretion as to the level of public involvement. The CEQ regulations state that the agency shall involve environmental agencies, applicants, and the public, to the extent practicable, in preparing EAs. *Side note: Not all agencies systematically provide information about individual EAs and there are specific implementing procedures for the proposing agency. Alternatively, one can ask the local NEPA point of contact working on the project about the process and let the appropriate agency representative know of anyone interested in being notified of all NEPA documents or NEPA processes related to a particular type of action.*

1. Finding of No Significant Impact (FONSI)/Mitigated Finding of No Significant Impact (Mitigated FONSI)
   1. The EA process concludes with either a Finding of No Significant Impact (FONSI) or a determination to proceed to preparation of an Environmental Impact Statement (EIS). A FONSI is a document that presents the reasons why the agency has concluded that there are no significant environmental impacts projected to occur upon implementation of the action. The EA is either summarized in the FONSI or attached to it.
   2. There are situations where a FONSI (or Mitigated FONSI) would need to be available for public review for 30 days:
      1. The type of proposed action hasn’t been done before by the particular agency.
      2. The action is something that typically would require an EIS under the agency NEPA procedures.
   3. If the FONSI requires public review, it is usually published in the Federal Register and the notice of availability of the FONSI will include information on how and where to provide comments. If the requirement for a 30 day review is not triggered, the FONSI often will not be published in the Federal Register. It may be posted on the agency’s website, published in local newspapers or made available in some other manner.
2. Environmental Impact Statement (EIS) – Process and Content

A Federal agency must prepare an EIS if it is proposing a major federal action significantly affecting the quality of the human environment. Like its partner EIR in the CEQA process, the regulatory requirements for an EIS under NEPA are more detailed than the requirements for an EA or Categorical Exclusion. Steps in the EIS process are:

* 1. Notice of Intent. The EIS process begins with publication of a Notice of Intent (NOI), stating the agency’s intent to prepare an EIS for a particular project/proposal. The NOI is published in the Federal Register, and provides some basic information on the proposed action in preparation for the scoping process. The NOI provides a brief description of the proposed action and possible alternatives. It also describes the agency’s proposed scoping process, including any meetings and how the public can get involved. The NOI will also contain an agency point of contact who can answer questions about the proposed action and the NEPA process.
  2. Project Scoping. This is the time to define the scope of issues to be addressed in depth in the analyses that will be included in the EIS. Specifically, the scoping process will:
     1. Identify people or organizations who are interested in the proposed action;
     2. Identify the significant issues to be analyzed in the EIS;
     3. Identify and eliminate from detailed review those issues that will not be significant or those that have been adequately covered in prior environmental review;
     4. Determine the roles and responsibilities of lead and any cooperating agencies;
     5. Identify any related EAs or EISs;
     6. Identify gaps in data and informational needs;
     7. Set time limits for the process and page limits for the EIS, though this requirement is often ignored;
     8. Identify other environmental review and consultation requirements so they can be integrated with the EIS; and
     9. Indicate the relationship between the development of the environmental analysis and the agency’s tentative decision-making schedule.
  3. As part of the scoping process, agencies are required to identify and invite the participation of interested persons. The agency will identify communication methods that are best for effective involvement of communities, whether local, regional, or national, that are interested in the proposed action. Video conferencing, public meetings, conference calls, formal hearings, or informal workshops are among the legitimate ways to conduct scoping. The agency will also request comments from other Federal, State, Tribal, and local agencies that may have jurisdiction or interest in the matter.
  4. Draft EIS Contents:
     1. “Purpose and Need” statement. One key aspect of a Draft EIS is the statement of the underlying purpose and need. Agencies draft a “Purpose and Need” statement to describe what they are trying to achieve by proposing an action. The purpose and need statement explains why an agency action is necessary, and serves as the basis for identifying the reasonable alternatives that meet the purpose and need.
     2. Alternatives. The identification and evaluation of alternative ways of meeting the purpose and need of the proposed action is the heart of the NEPA analysis. The lead agency or agencies must objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated. Reasonable alternatives are those that substantially meet the agency’s purpose and need. If the agency is considering an application for a permit or other federal approval, the agency must still consider all reasonable alternatives. Reasonable alternatives include those that are practical or feasible from the technical and economic standpoint and using common sense, rather than simply desirable from the standpoint of the applicant. Agencies are obligated to evaluate all reasonable alternatives or a range of reasonable alternatives in enough detail so that a reader can compare and contrast the environmental effects of the various alternatives.
        1. No Action Alternative. Agencies must always describe and analyze a “no action alternative.” The “no action” alternative is simply what would happen if the agency did not act upon the proposal for agency action. For example, in the case of an application to the U.S. Army Corps of Engineers for a permit to place fill in a particular area, the “no action” alternative is no permit. But in the case of a proposed new management plan for the National Park Service’s management of a national park, the “no action” alternative is the continuation of the current management plan.
        2. Preferred Alternative. If an agency has a preferred alternative when it publishes a draft EIS, the draft must identify which alternative the agency prefers. All agencies must identify a preferred alternative in the final EIS, unless another law prohibits it from doing so.
     3. The lead agency must analyze the full range of direct, indirect, and cumulative effects of the preferred alternative, if any, and of the reasonable alternatives identified in the draft EIS. For purposes of NEPA, “effects” and “impacts” mean the same thing. They include ecological, aesthetic, historic, cultural, economic, social, or health impacts, whether adverse or beneficial. It is important to note that human beings are part of the environment (Congress specifically used the phrase “human environment” in NEPA), so when an EIS is prepared and economic or social and natural or physical environmental effects are interrelated, the EIS should discuss all of these effects.
        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. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.
     4. The Draft EIS will contain a description of the environment that would be affected by the various alternatives.
     5. The Draft EIS will also have a list of who prepared the document and their qualifications, a table of contents, and an index. The agency may choose to include technical information in appendices that are either circulated with the Draft EIS or readily available for review.
  5. Review and comment period. These are typically 30 or 60 days, with official notice published in the Federal Register.
  6. Final EIS
     1. The agency will respond to the substantive comments received from other government agencies and members of the public. The response can be in the form of changes in the Final EIS, factual corrections, modifications to the analyses or the alternatives, new alternatives considered, or an explanation of why a comment does not require the agency’s response.
     2. Often the agency will meet with other agencies that may be affected by the proposed action in an effort to resolve an issue or mitigate project effects. A copy or a summary of substantive comments and the response will be included in the Final EIS.
  7. Notice of Availability (NOA) of the Final EIS is filed with the EPA and published in the Federal Register.
  8. The Notice of Availability marks the start of a 30-day (minimum) waiting period before the agency can make a decision on their proposed action. This provides time for the agency decisionmaker to consider the purpose and need, weigh the alternatives, balance their objectives, and make a decision.
  9. Record of Decision (ROD). The ROD states what the decision is; identifies the alternatives considered, including the environmentally preferred alternative; and discusses mitigation plans, including any enforcement and monitoring commitments. Some RODs are published in the Federal Register or on the agency’s website.

1. Different Types of EISs
   1. Project-level EIS. Analyzes a specific project with a defined scope and description.
   2. Programmatic EIS. The level of detail in a Programmatic EIS is sufficient to allow informed choice among planning-level alternatives and to develop broad mitigation strategies. Collaboration among Federal, State, and local agencies and Tribes is especially important. A programmatic EIS evaluates the effects of broad proposals or planning-level decisions that may include any or all of the following:
      1. A wide range of individual projects;
      2. Implementation over a long timeframe; and/or
      3. Implementation across a large geographic area.
   3. Supplemental EIS. An agency must prepare a supplement to either a draft or final EIS if it makes substantial changes in the proposed action that are relevant to environmental concerns, or if there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts. A supplemental EIS is prepared in the same way as a draft or final EIS, except that scoping is not required.
2. How and When do CEQA and NEPA overlap?
   1. CEQA and NEPA compliance can both be required when a project requires both local or state *and* federal permits, or a project only needs local or state permits but has a federal source of funding.
   2. CEQA and NEPA determine significance and the need to do a full EIR/EIS differently.
      1. CEQA: EIR required if substantial evidence supports a fair argument that the project may have a significant impact.
      2. NEPA: Deference is given to the agency’s determination of whether an EIS is required based on its assessment of the context and intensity of the potential impacts.
      3. In a combined CEQA/NEPA process, it is best if the level of review is the same. However, that is not required – for instance, a federal agency could prepare an EA while a state agency could prepare an EIR. A joint document should explain why one agency has identified a potential significant impact while the other has not.
   3. CEQA and NEPA have different requirements for determining mitigation requirements.
      1. CEQA:
         1. An EIR must describe feasible mitigation measures for significant adverse impacts.
         2. An agency must adopt feasible mitigation measures or alternatives to substantially lessen the significant effect before approving the project.
         3. A mitigation monitoring program must also be adopted to ensure measures are implemented.
      2. NEPA:
         1. Mitigation includes avoiding, minimizing, rectifying, reducing over time, or compensating for an impact.
         2. All relevant, reasonable mitigation measures that could improve the project are to be identified, including those outside the agency’s jurisdiction.
         3. An agency is not limited to considering mitigation only for significant impacts. It should identify feasible measures for any adverse environmental impacts, even those that are not considered significant.
      3. CEQA requires that any feasible mitigation measures that can reduce a significant impact be adopted, while NEPA does not (as long as the agency justifies its decision not to adopt feasible measures).
      4. CEQA mitigation requirements apply only to adverse environmental impacts found to be significant, while NEPA’s regulations apply to any adverse impacts, even if not significant.
   4. Joint document can be published that addresses both CEQA and NEPA requirements (Joint EIR/EIS or Joint EA/IS). In this case, a joint mitigation monitoring program may be beneficial.
   5. Agencies need to be very specific about agreeing to enter into a joint CEQA/NEPA process in order to make sure that the requirements of both processes are met in the joint effort.
   6. Some issues are specific to CEQA that are not required under NEPA:
      1. GHG emissions analysis
      2. Growth-Inducing Impacts analysis
   7. Some issues are more precisely studied under NEPA than CEQA:
      1. Cumulative Impact Analysis level of detail is more robust under NEPA
      2. Environmental Justice impacts are specifically evaluated in a NEPA analysis.
   8. A Memorandum of Understanding (MOU) regarding a combined CEQA/NEPA process is a useful tool. A MOU will:
      1. Define shared agency goals.
      2. Define environmental review roles and responsibilities.
      3. Address issues of mutual concern.
      4. Identify appropriate sets of data for both CEQA and NEPA analysis.
      5. Determine schedule for review and analysis.

Resources:

EPA Process flowchart from the Citizen’s Guide to NEPA: Page 23

CEQA Process Flow Chart from OPR: Page 24

NEPA Guidance: <https://ceq.doe.gov/> A wealth of resources including:

The NEPA Statute

Executive Orders

CEQ Regulations for Implementing NEPA

Individual Federal Agency Procedures for Implementing NEPA\*

CEQ Guidance on specific topic areas

Access to the Federal Register: [www.federalregister.gov/](http://www.federalregister.gov/)

For more information about the North Coast Resource Partnership (NCRP) and programs visit [North Coast Resource Partnership — NCRP](https://northcoastresourcepartnership.org/)

* NCRP Resources: [Resources — North Coast Resource Partnership](https://northcoastresourcepartnership.org/resources/)
* NCRP Tribal Engagement and Technical Assistance contact Sherri Norris, Tribal Engagement Director at the NCRP [sherri@cieaweb.org](mailto:sherri@cieaweb.org), or call 510 848-2043.

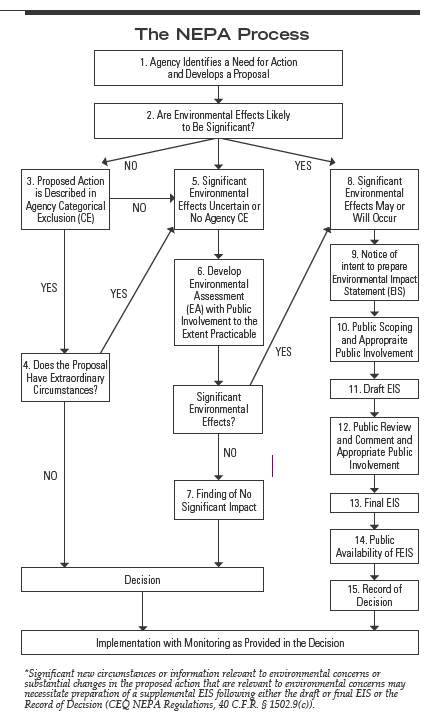
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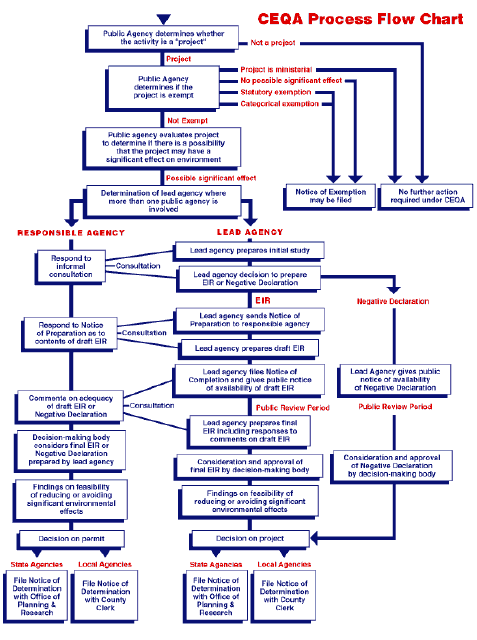
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Access to the Federal Register: [www.federalregister.gov/](http://www.federalregister.gov/)

NEPA Process flowchart from the Citizen’s Guide to NEPA:

CEQA Process Flow Chart from OPR:



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