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Implementing the National Environmental Policy Act (NEPA) for Disaster Response, Recovery, and Mitigation Projects

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Summary

In the aftermath of a major disaster, communities may need to rebuild, replace, or possibly even relocate a multitude of structures. When recovery activities take place on such a potentially large scale, compliance with any of a number of local, state, and federal laws or regulations may apply. For example, when federal funding is provided for disaster-related activities, the agency providing those funds is generally required to identify and consider the environmental impacts of the proposed activities in accordance with the National Environmental Policy Act of 1969 (NEPA, 42 U.S.C. §4321 et seq.).

As commonly implemented, the process of identifying potential environmental impacts, as required under NEPA, serves as a framework to identify *any other* environmental requirements that may apply to that project as a result of those impacts. This use of NEPA as an "umbrella" statute can lead to confusion. For example, before the Department of Housing and Urban Development's (HUD) can grant an applicant request for Community Development Block Grant (CDBG) funds, that applicant must complete an environmental review of the proposed project. A required element of that review is the applicant's certification that compliance with any applicable requirements related to historic preservation, floodplain management, endangered species, air quality, and farmland protection have been considered. This review is required not only to meet NEPA obligations, but also to ensure that the project being funded does not violate other applicable laws. From the applicant's perspective, this may blur the distinction between what is required under NEPA and what is required under separate compliance requirements *identified* within the context of the NEPA process.

For many federal actions undertaken in response to emergencies or major disasters, NEPA's environmental review requirements are exempted under provisions of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (the Stafford Act). (The Stafford Act does not, however, exempt such projects from other applicable environmental requirements.) In the past, some Members of Congress have been interested in the NEPA process as it applies to disaster-related projects. This interest has been driven, in part, by federal grant applicants who have been confused about both their role in the NEPA process and what the law requires.

To address issues associated with the NEPA process, this report discusses NEPA as it applies to projects for which federal funding to recover from or prepare for a disaster has been requested by local, tribal, or state grant applicants. Specifically, the report provides an overview of the NEPA process as it applies to such projects, identifies the types of projects (categorized by federal funding source) likely to require environmental review, and delineates the types of projects for which no or minimal environmental review is required (i.e., those for which statutory or regulatory exemptions apply) and those likely to require more in-depth review.

Contents

Introduction 1
Overview of the NEPA Process 2
    Environmental Review 2
    NEPA as an Umbrella Statute 2
NEPA Issues Relevant to Disaster-Related Projects 4
    Disaster-Related Projects Potentially Subject to NEPA 4
    Agency and Applicant Roles 5
    Categories of Action 6
        Statutory Exemptions 7
        Categorical Exclusions 8
        Projects Requiring an EA or EIS 9
        Alternative Compliance Arrangements 10
Conclusion 10

Tables

Table 1. Projects and Funding Sources 5

Contacts

Author Information 11

Introduction

The federal government administers various programs to assist individuals and communities in responding to, recovering from, and preparing for disasters. For example, after a disaster, some level of federal assistance may be available to rebuild damaged bridges or roads, demolish and dispose of damaged buildings, rebuild schools or hospitals, or rebuild damaged levees. Such projects often have at least *some* impact on the environment, and hence may be required to comply with any of a number of local, tribal, state, or federal environmental laws—including requirements of the National Environmental Policy Act of 1969 (NEPA, 42 U.S.C. §4321 et seq.).

Among other provisions, NEPA requires federal agencies to assess the potential environmental impacts of a proposed action before proceeding. Exempted from NEPA's requirements are emergency response actions under provisions of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (the Stafford Act, 42 U.S.C. §§5121-5206). These exempted activities include providing essential relief to victims and implementing protective measures necessary to reduce immediate threats to life, property, and public health and safety. NEPA's environmental review requirements may, however, be applicable to long-term recovery projects, such as the modification, mitigation, or expansion of existing structures or the relocation of certain structures located in a floodplain.

Most agencies have implemented NEPA as an "umbrella" statute. As such, it forms a framework for the coordination or demonstration of compliance with any study, review, or consultation required by any other environmental law. The use of NEPA in this capacity has led to some confusion. The need to comply with a separate environmental law such as the Clean Water Act (CWA), Endangered Species Act (ESA), or National Historic Preservation Act (NHPA) may be *identified* within the framework of the NEPA process, but NEPA itself is not the source of the obligation. If, theoretically, the requirement to comply with NEPA were removed, compliance with each applicable law would still be required.

In the past, there has been congressional interest in the NEPA implementation process for disaster-related projects. This interest has been driven, in part, by federal grant applicants who have been confused about both their role in the NEPA process and what the law requires.

To address these issues, this report discusses the NEPA process as it applies to projects for which federal funding to recover from or prepare for a disaster may be requested by local, tribal, or state grant applicants. Specifically, the report provides an overview of the NEPA process as it applies to such projects, identifies the types of projects (categorized by the federal funding source) likely to require environmental review, and delineates both the types of projects for which no or minimal environmental review is required (those for which statutory or categorical exclusions apply) and those that likely require more in-depth review.

This report focuses on the NEPA process as it applies to projects that require grant applicants (i.e., state or local agencies) to provide certain information for their grant requests to be considered eligible for potential approval. It does not address the NEPA process as it applies to disaster-related projects that would likely involve collection of the necessary environmental review documentation by the federal agency responsible for the project (e.g., water resources projects undertaken by the Army Corps of Engineers). Two agencies that provide a significant proportion of applicant-requested funding for disaster-related projects are the Department of Homeland Security's Federal Emergency Management Agency (FEMA) and the Department of Housing and Urban Development (HUD). Therefore, this report primarily discusses the NEPA process as it applies to recovery and rebuilding projects funded under those agency programs.

Overview of the NEPA Process

NEPA is a procedural statute with twin aims that require agencies to consider the environmental impacts of their proposed actions and inform the public that environmental concerns have been accounted for in the decision-making process. The NEPA process involves the steps an agency must take to demonstrate that it has met these aims.

Environmental Review

NEPA requires all federal agencies to consider the environmental impacts of proposed federal actions before proceeding. Regulations that specify how agencies must implement NEPA's requirements were promulgated by the Council on Environmental Quality (CEQ).[1] CEQ regulations direct federal agencies to adopt and enforce their own regulations and procedures implementing NEPA's environmental review requirements in a manner specific to typical classes of actions undertaken by each agency. Two agencies that provide a significant proportion of funding for disaster-related projects are FEMA and HUD. Their NEPA regulations can be found at 44 C.F.R. Part 10 (FEMA) and 24 C.F.R. Part 58 (HUD). NEPA regulations specify environmental review requirements that must be met to demonstrate that potential environmental impacts have, in fact, been considered.

Generally, the term "environmental review" refers to a requirement to show evidence of formal consideration, evaluation, or analysis of the impacts of a proposed federal action. Most often, the use of the term is in reference to the process of complying with NEPA requirements. However, depending upon the project under consideration, an environmental review may refer to the process of identifying any environmental compliance requirements or exemptions, as applicable to a certain project.

As it has been interpreted, NEPA is a procedural statute that does not require agencies to elevate environmental concerns above others. Instead, NEPA requires only that an agency assess the potential environmental consequences of an action and its alternatives before proceeding. If adverse environmental effects of a proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding whether other benefits outweigh the environmental costs and moving forward with the action.[2]

NEPA as an Umbrella Statute

Any given disaster-related project may be subject to various legal requirements enforceable by one or more state or federal agencies. For example, the environmental impacts of a given project may trigger compliance with elements of the Clean Air Act, Endangered Species Act of 1973, National Historic Preservation Act, or Clean Water Act.

Most individual agency NEPA procedures suggest that, for a given project, compliance with *all* applicable environmental laws, executive orders, and other legal requirements should be documented within the appropriate NEPA documentation. This concept is referred to as the "NEPA umbrella." As such, as previously noted, NEPA forms a framework for the coordination and demonstration of compliance with any study, review, or consultation required by other environmental laws. For example, the need to comply with another environmental law, such as

[1] 40 C.F.R. §§1500-1508.

[2] For more information, see CRS Report RL33152, *The National Environmental Policy Act (NEPA): Background and Implementation*, by Linda Luther.

the Clean Water Act, may be *identified* within the framework of the NEPA process, but NEPA itself is not the source of the obligation. If, theoretically, the requirement to comply with NEPA were removed, compliance with each applicable law would still be required.

An example of the use of NEPA as an umbrella statute can be seen in FEMA's environmental review process. Because of the types of projects the agency is likely to fund, and the high probability that historic properties may be affected in many projects, FEMA's NEPA process is actually a Unified Federal Environmental and Historic Preservation Review (or EHP review). In its description of the EHP requirements, FEMA states:

> When an Applicant applies for Federal assistance or requires Federal permits for a proposed disaster recovery project, the project must be reviewed for compliance with EHP laws, regulations, and Executive Orders, referred to collectively as EHP requirements. These requirements are intended to protect water, air, coastal, wildlife, land, agricultural, historic, and cultural resources as well as to minimize disproportionately adverse effects to low-income and minority populations. There are more than twenty Federal EHP requirements that may be applicable to disaster recovery projects... EHP reviews are the processes used by Federal Agencies to ensure that Federal actions comply with EHP requirements. Following a disaster, you may apply for Federal assistance and permits to support a variety of disaster recovery needs. When Federal Agencies review your application, they must comply with EHP requirements before they can approve or issue your Federal assistance or permit.[3]

Another example of the use of NEPA as an umbrella statute can be seen in the HUD Office of Community Planning and Development environmental review requirements applicable to Community Development Block Grants (CDBG). Before a CDBG applicant can commit or expend funds for a given project, an environmental review of the project must be conducted. The environmental review record must, among other requirements, document compliance with applicable statutes and authorities. To meet this requirement, HUD regulations require the grantee to certify that it has considered compliance criteria applicable to historic preservation, floodplain management and wetland protection, coastal zone management, sole-source aquifers, endangered species, wild and scenic rivers, air quality, farmland protection, HUD environmental standards, and environmental justice.[4] That does not mean that all of these compliance factors will apply to a given project. The environmental review process is intended simply to identify the compliance requirements that *do* apply and ensure that the applicant will be compliant, as appropriate.

After Hurricane Katrina, some stakeholders cited NEPA as a significant challenge to state efforts to disperse CDBG funds.[5] The requirement to evaluate the various compliance criteria listed above was cited specifically as the problem. However, as stated previously, NEPA is not the source of these compliance requirements. The NEPA process simply forms the framework within which compliance with any applicable environmental law is *identified*. Still, this situation illustrates the difficulty some stakeholders have in distinguishing between what is required under NEPA and what may be required under other relevant environmental laws. It illustrates the

[3] FEMA's "Unified Federal Environmental and Historic Preservation Review Guide: For Federal Disaster Recovery Assistance Applicants" p. 3, available at https://www.fema.gov/media-library-data/1440713845421-9bdb5c0c8fe19ab86d97059ccb26e3b4/UFR_Applicant_Guide_Final_508.pdf.

[4] 24 C.F.R. §58.5.

[5] Hearing before Senate Committee on Banking, Housing and Urban Affairs, "Two Years After the Storm: Housing Needs in the Gulf Coast," Statement of Edgar A.G. Bright, III, CMB President, Standard Mortgage Corporation Member of the Residential Board of Governors of the Mortgage Bankers Association, September 25, 2007. Available at http://banking.senate.gov/public/index.cfm?FuseAction=Hearings.List&Month=0&Year=2007.

challenges that applicants face when trying to comply with the range of requirements applicable to projects for which funding is sought.

Also, the comprehensive reviews, documentation, and analysis sometimes required by agencies such as the U.S. Army Corps of Engineers (the Corps), the U.S. Fish and Wildlife Service, the Coast Guard, and the Environmental Protection Agency (EPA), as well as various state regulatory and review agencies (such as the office of a State Historic Preservation Officer), may add to the perception that project delays are related to the NEPA process. What may be perceived by the applicant as a NEPA-related delay may actually stem from an agency's need to complete a permit process, consultation, or analyses required under separate statutory authority (e.g., the Clean Water Act or Endangered Species Act), over which the agency preparing the NEPA documentation has no authority.

NEPA Issues Relevant to Disaster-Related Projects

When a community is devastated by a disaster, it may be overwhelmed by the number of projects that need to be undertaken. Under normal conditions unrelated to a disaster, when a local, tribal, or state agency participates in the NEPA process for projects, projects proposed to receive federal funding have generally been planned or, at least to some degree, anticipated. In the wake of a disaster, however, when entire neighborhoods, towns, or regions may be substantially damaged and in need of repair or reconstruction, agencies can quickly become overburdened by the task of navigating applicable compliance requirements. Coupled with the potential difficulty of determining the various federal funding sources available to recover from damages, local agencies responding to a disaster may become confused about their environmental compliance obligations. If those obligations are not met, funding will be slowed.

From the federal agency perspective, the commitment to assist in rebuilding structures and facilities and restoring land must be done in a way that will result in greater protection from future disasters. That is, federal agencies do not want to spend money that may have to be spent again when another disaster strikes. Elements of the NEPA process, such as the requirement to demonstrate flood-plain management considerations, help federal agencies meet this goal.

To understand what is required of applicants, it is helpful to understand the types of disaster-related projects associated with various funding sources and the levels of environmental review that may be required for proposed projects.

Disaster-Related Projects Potentially Subject to NEPA

NEPA's environmental review requirements apply to any project potentially subject to federal control or responsibility. Such actions include projects and programs entirely or partly funded, assisted, conducted, regulated, or approved by federal agencies.[6] With regard to disaster recovery, rebuilding, or mitigation projects, NEPA most generally applies if federal funds will be used for a project.[7] **Table 1** summarizes several potential funding sources for disaster-related projects, the types of projects potentially eligible to receive those funds, and the agencies authorized to provide funding.

[6] 40 C.F.R. §1508.18(a). Further, the term "federal agency" is defined as all agencies of the federal government, but does not mean the Congress, the Judiciary, or the President (40 C.F.R. §1508.12).

[7] If a project is undertaken purely by using city or state funds, NEPA's environmental review requirements do not apply. However, depending on the nature of the project, compliance with other environmental laws may be required. Also, some cities and states have their own NEPA-like requirements.

Table 1. Projects and Funding Sources

Funding source	Types of projects[a]	Funding agency
Hazard Mitigation Grant Program (HMGP)	Projects that will reduce or eliminate the losses from future disasters, such as the acquisition of real property from willing sellers and demolition or relocation of buildings to convert the property to open space use; retrofitting of structures and facilities to minimize damages from high winds, earthquake, flood, wildfire, or other natural hazards; elevation of flood-prone structures; development and initial implementation of vegetative management programs; minor flood control projects; and localized flood control projects designed specifically to protect critical facilities.	FEMA
Flood Mitigation Assistance (FMA) Program	Projects or measures to reduce flood losses, such as elevation, acquisition, or relocation of National Flood Insurance Program (NFIP)-insured structures.	FEMA
Public Assistance (PA) Grant Program	Projects intended to help a community respond to and recover from major disasters or emergencies declared by the President. Such projects include: debris removal; emergency protective measures; and the repair, replacement, or restoration of disaster-damaged, publicly owned facilities (such as roads, bridges, water control facilities, utilities, and critical buildings and equipment) and the facilities of certain private nonprofit organizations. Such projects are likely exempt from NEPA.	FEMA
Community Development Block Grant (CDBG) Program	Short-term disaster relief, such as debris removal or the emergency restoration of essential services, such as water, sewer, electrical, and telecommunications; mitigation activities intended to lessen the impact of a future disaster, such as the construction of levees to protect against flooding, buildings designed to withstand earthquakes, or the buy-out of properties prone to a recurrence of disaster events; and long-term recovery activities, such as infrastructure improvements.	HUD

Source: Table prepared by CRS based on an evaluation of federal funding sources available for disaster response, recovery, and mitigation activities.

a. This list is not intended to be exhaustive. In particular, it identifies categories of projects that would be initiated by local, state, or tribal agency grant applicants (as opposed to federal projects that may be initiated a federal agency, such as a flood-control project developed by the Army Corps of Engineers).

For more information about these federal programs, see CRS Report RL33330, *Community Development Block Grant Funds in Disaster Relief and Recovery*, by Eugene Boyd, CRS Report RL34537, *FEMA's Pre-Disaster Mitigation Program: Overview and Issues*, by Jared T. Brown, and CRS Report R43990, *FEMA's Public Assistance Grant Program: Background and Considerations for Congress*, by Jared T. Brown and Daniel J. Richardson.

Agency and Applicant Roles

Generally, there are three entities that play a significant role in the NEPA process for disaster-related projects: the lead agency, which is responsible for preparing the NEPA documentation;[8] cooperating agencies, which may include any local, tribal, state, or federal agencies that have jurisdiction by law or special expertise regarding any environmental impact involved in a proposal;[9] and the project applicant (who may also be referred to as a responsible entity or

[8] 40 C.F.R. §1508.16.

[9] 40 C.F.R. §1508.5.

grantee under different agency requirements), such as local, tribal, or state entities requesting federal funds.

For disaster-related projects, the lead agency coordinates environmental reviews for projects funded under that agency's programs. For example, FEMA would be the lead agency for debris removal operations involving PA Grant Program funds. In a disaster-stricken area, it is possible that multiple funding sources may be available for a single project. If more than one federal agency proposes or is involved in the same action, the agencies must determine which agency will serve as the lead and which will serve as cooperating agencies. If there is disagreement among agencies involved, factors including the magnitude of each agency's involvement and project approval/disapproval authority determine the designation of the lead agency.

A cooperating agency is one that has jurisdiction by law or special expertise regarding any environmental impact involved in a proposal.[10] This may include a tribal, state, or federal agency. For example, depending on the impacts associated with a given project, the following agencies may serve as cooperating agencies to develop appropriate NEPA documentation:

- EPA or state environmental protection agencies—to determine if the proposal would be subject to air or water quality standards.
- Advisory Council on Historic Preservation and/or state or tribal historic preservation officer—to determine whether the proposal is subject to compliance with the National Historic Preservation Act.
- The Corps—to determine whether a permit is required for proposals that may affect certain U.S. waters.
- The U.S. Fish and Wildlife Service—to determine whether or the extent to which the proposal may adversely affect threatened and endangered species.
- The U.S. Department of Agriculture—to ensure that impacts to farmlands are considered.

Although the lead agency (such as FEMA or HUD) may be ultimately responsible for ensuring that NEPA documentation is complete, the project applicant plays a significant role in the NEPA process. The project applicant, such as a state or local agency, will likely be required to develop substantive portions of the environmental document, while the lead agency is responsible for its scope and overall content. For example, project applicants are required to provide information to support FEMA's Environmental and Historic Preservation compliance process. Funds will not be awarded, and the applicant may not initiate the project, until FEMA has completed its environmental review. Therefore, it is in the applicant's interest to gather and present all information necessary to assist the funding agency with meeting its environmental review requirements.

Categories of Action

Determining *whether* NEPA applies is generally not a complicated process. Determining what level of review is required for a project (i.e., whether its environmental impacts are significant) may not be as clear, and must be determined on a case-by-case basis. First, certain FEMA-funded projects authorized under the Stafford Act are statutorily exempt from compliance with NEPA. For any nonexempt proposals, the level of NEPA review will depend on the proposals impacts. Specifically, NEPA review will involve one of the following:

[10] 40 C.F.R. §1508.5.

- Approval as a categorical exclusion—applicable to actions that normally do not individually or cumulatively have a significant effect on the human environment and that the agency has determined from past experience have no significant impact.
- Preparation of an Environmental Impact Statement (EIS)—required for actions will potentially have a significant environmental impact.
- Preparation of an Environmental Assessment (EA)—when the significance of environmental impacts is uncertain and must be determined.

The requirement to produce an EIS is probably the most familiar element of NEPA compliance. However, actions requiring an EIS account for a small percentage of all federal actions proposed in a given year—and generally none of those associated with disaster response and recovery. For example, considering the types of projects funded by FEMA, the overwhelming majority are likely to be statutorily exempt or approved as categorically exclusions.

When a project that involves potentially significant effects is implemented under emergency conditions, alternative compliance arrangements may be considered when determining how an environmental review may be carried out. These alternative arrangements and the various categories of action potentially subject to NEPA are discussed below.

Statutory Exemptions

In responding to emergencies and major disasters, existing provisions of the Stafford Act statutorily exempt certain FEMA-funded activities from NEPA. Statutory exclusions generally apply to actions that are emergency in nature or are necessary for the preservation of life and property. They apply to most Public Assistance actions funded by FEMA, but do not apply to hazard mitigation, flood mitigation, unmet needs projects, or FEMA grant programs. Specifically, response actions excluded from NEPA by the Stafford Act (at 42 U.S.C. §5159) include the following:

- General federal assistance—such as the utilization of personnel, equipment, supplies, technical and advisory services in support of disaster assistance. (See actions specified under 42 U.S.C. §5170a.)
- Essential federal assistance—including actions to meet immediate threats to life and property resulting from a major disaster, such as: the use of federal resources (e.g., equipment, supplies, and facilities), medicine, food, and other consumables; and work and services to save lives and protect property (e.g., debris removal, search and rescue, clearance of roads, demolition of unsafe structures, warning of further risks and hazards). (See actions specified under 42 U.S.C §5170b.)
- Repair, restoration, and replacement of damaged buildings—generally, this means restoring the facility to the same function, capacity, and footprint. (See actions specified under 42 U.S.C. §5172.)
- Debris removal—exempt debris removal activities include clearance of debris and wreckage resulting from a major disaster from publicly and privately owned lands and waters after a major disaster (long-term debris removal activities, such as decisions on landfill locations, may not be exempt from NEPA). (See actions specified under 42 U.S.C. §5173.)
- Federal emergency assistance—such as the utilization of personnel, equipment, supplies, technical and advisory services in support of disaster assistance; and

> assistance in support of medicine, food, and other consumable supplies and emergency assistance. (See actions specified under 42 U.S.C. §5192.)

It is important to understand that, as with actions categorically excluded (discussed below), an action statutorily excluded from NEPA is not exempt from the requirements of *other* environmental statutes. FEMA would still be responsible for complying with all other applicable local, state, tribal, and federal laws and regulations relating to health, safety, and the environment.[11] This could encompass federal environmental statutes including, among others, the Clean Air Act, Clean Water Act, Endangered Species Act, National Historic Preservation Act, Resource Conservation and Recovery Act, Coastal Zone Management Act, and the Coastal Barrier Resources Act.

Also, these exemptions are specific to designated FEMA-funded activities authorized under the Stafford Act. Similar statutory exemptions do not exist for HUD-funded programs such as CDBG disaster assistance. In fact, under the CDBG funding program, states are allowed to seek waivers of certain program requirements, *except* those related to environmental review (and fair housing, nondiscrimination, and labor standards).

Categorical Exclusions

If a project is of a type that falls within an established category of activities the agency has previously determined to have no significant environmental impacts, it is categorically excluded from the requirement to prepare an EA or EIS. Sometimes such actions are referred to as being categorically excluded or exempt from NEPA. However, NEPA *does* apply to such actions; they are excluded only from the requirement to prepare an EA or EIS.

Individual agencies are required to specifically list, in their respective NEPA regulations, those projects likely to be considered categorical exclusions.[12] For example, FEMA has identified, among others, the following actions as generally classifiable as categorical exclusions: upgrades to codes and standards, removal of structures after addressing historic preservation needs, and minor improvements or minor hazard mitigation measures at existing facilities, such as placing riprap at a culvert outlet to control erosion.[13] An example of a HUD-identified categorical exclusion is the "acquisition, repair, improvement, reconstruction, or rehabilitation of public facilities and improvements (other than buildings) when the facilities and improvements are in place and will be retained in the same use without change in size or capacity of more than 20 percent (e.g., replacement of water or sewer lines, reconstruction of curbs and sidewalks, repaving of streets)."[14] Note that this categorical exclusion is similar to the Stafford Act's statutory exemption for projects that would repair, restore, or replace damaged buildings. Most agencies have identified similar activities in their list of categorical exclusions.

Whether or what types of documentation may be required to demonstrate that a project is categorically excluded will depend on whether the project involves extraordinary circumstances that may cause a normally excluded action to have a significant environmental effect.[15] Also, the fact that a project does not have a significant impact as defined under NEPA does not mean that it

[11] Local, state, and federal environmental laws and regulations may still provide some exemption or regulatory allowance in the event of an emergency.

[12] 40 C.F.R. §1507.3.

[13] 44 C.F.R. §10.8(d)(3).

[14] 24 C.F.R. §58.38.

[15] 40 C.F.R. §1508.4.

will not trigger statutory requirements of other environmental laws. For example, if historical sites, endangered species habitat, wetlands, or property in minority neighborhoods, to name a few, would be affected by a proposed federal action, compliance with related environmental laws or requirements, in addition to NEPA, may be required.

Even though categorically excluded projects do not have significant environmental impacts, an agency may require a certain level of documentation to prove that the CE determination is appropriate. For example, FEMA's NEPA regulations identify three levels of categorical exclusions and the types of documentation necessary for each.[16]

If there are unresolved extraordinary circumstances that may have a significant adverse environmental impact, such as the potential to affect protected natural or cultural resources, the proposed action cannot be categorically excluded, and an EA is required.

Projects Requiring an EA or EIS

If a project is not statutorily exempt from NEPA or does not fit the criteria applicable to a categorical exclusion, it must be determined whether the environmental impacts of such a project will be significant, and hence require the preparation of an EIS. An EIS may be required for projects intended to facilitate long-term recovery of an affected region. Examples may include disaster-related flood-control or hurricane protection projects (e.g., new wetlands restoration projects or levee repair projects); construction of roads, bridges, storm water management projects, tornado shelters, temporary housing, fuel modification projects, and public facilities (e.g., schools, libraries, utilities); debris storage, staging, and removal; and building acquisition, relocation, and demolition.

If past disasters can serve as a gauge, a disaster-related project will not likely require an EIS. However, the preparation of an EA may be required. CEQ regulations define an EA as a concise public document that serves to briefly provide sufficient evidence and analysis for determining whether to prepare an EIS or a finding of no significant impact (FONSI); aid agency compliance with NEPA when no EIS is required; and facilitate preparation of an EIS when one is necessary.[17]

The CEQ regulations require no standard format for EAs, but do require agencies to include a brief discussion of the need for the proposal, alternatives, impacts of the proposal and alternatives, and a list of agencies or individuals consulted.[18] Individual agency regulations and/or guidance may include more specific requirements. Some agencies suggest that the process for developing an EA should be similar to the process for developing an EIS. For example, the applicant should consult interested agencies to scope the project to determine the potential for social, economic, or environmental impacts; briefly discuss the project's purpose and need; identify project alternatives and measures to mitigate adverse impacts; and identify any other environmental review requirements applicable to the project (e.g., permitting requirements under the Clean Water Act). Public participation in the EA process is left largely to the discretion of the lead agency.

If at any time during preparation of the EA it is determined that a project's impacts are significant, EIS preparation should begin. If it is ultimately determined that impacts are not significant, the lead agency must prepare a FONSI. The FONSI serves as the agency's

[16] See "FEMA Categorical Exclusions (CATEX)" at http://www.fema.gov/plan/ehp/regionviii/catex.shtm.

[17] 40 C.F.R. §1508.9(a).

[18] 40 C.F.R. §1508.9(b).

administrative record in support of its decision regarding a project's impact. The FONSI also must be available to the affected public.[19]

Alternative Compliance Arrangements

In addition to categorical and statutory exclusions to NEPA, both CEQ and individual agencies have specified "Alternative Arrangements" for complying with NEPA's requirements in the event of an emergency.[20] Alternative arrangements are available where emergency circumstances make it necessary to take an action with significant environmental impacts (i.e., a project that would otherwise require an EIS) without observing the provisions of the applicable NEPA regulations. In such circumstances, the federal agency taking the action should consult with CEQ about what those arrangements may be and the time frame within which they must be completed. Exactly what those arrangements involve and how they would be implemented would vary according to the nature of the disaster. Generally, their intent is to expedite the NEPA process when an EIS would otherwise be required.

These Alternative Arrangements do not waive the requirement to comply with NEPA regulations, but establish an alternative means of compliance. Agencies and CEQ are to limit such arrangements to actions necessary to control the immediate impacts of the emergency.

On September 8, 2005, CEQ released a memorandum that provides guidance on emergency alternative arrangements under NEPA.[21] That guidance was specific to Hurricane Katrina, but could be applicable to any disaster response activities undertaken by federal agencies. For example, CEQ lists activities that could be considered for analyses in accordance with alternative arrangement provisions, such as the disposal of unsorted disaster debris (waste that includes both hazardous and nonhazardous constituents) at a specific site or the permanent replacement of certain major facilities when the agency expects that significant environmental affects will occur.

Although alternative arrangements are an option after a disaster, they have rarely been used for disaster response, recovery, or mitigation projects. However, that is likely the case because alternative arrangements can be invoked for projects that require an EIS and most disaster-related projects will not require the preparation of an EIS.

Conclusion

When a community is devastated by a disaster, all at once it may be faced with the need to rebuild roads, bridges, private homes, and public buildings. Such projects, when undertaken under normal circumstances, may not qualify for federal funding, but when they do, as in the case after a disaster, the federal government must be assured that certain criteria are met before those funds are made available. Among other factors, the federal government needs confirmation that those funds will not be used in a way that increases the likelihood that their investment will be lost if and when another disaster strikes the same area. Further, before a federal agency will provide funds for disaster recovery or rebuilding, it must gain assurance that the project complies with applicable regulations, laws, and executive orders. The NEPA process is a vehicle by which that assurance can be obtained.

[19] 40 C.F.R. §1501.4(e)(1).

[20] 40 C.F.R. §1506.11. The Corps has regulatory provisions similar to CEQ's that address emergency actions. FEMA's regulations reference statutory exemptions provided under the Stafford Act.

[21] See "Memorandum for Federal NEPA Contacts: Emergency Actions and NEPA," https://energy.gov/nepa/downloads/memorandum-federal-nepa-contacts-emergency-actions-and-nepa-ceq-2005.

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