

# National Environmental Policy Act ("NEPA")

2013 Environmental Law  
Workshop

Loyola Law School/Sierra Club  
Angeles Chapter

# NEPA

- ▶ 1. OVERVIEW OF NEPA STATUTE
- ▶ 2. COMPARISONS TO CEQA
- ▶ 3. RECENT DEVELOPMENTS

# NEPA - WHAT IS IT?

- ▶ **National Environmental Policy Act**, 42 United States Code sec. 4321 et seq.
- ▶ Signed into law January 1, 1970
- ▶ Set U.S. national policy promoting the enhancement of the environment
- ▶ Established the President's Council on Environmental Quality (CEQ)

# NEPA HISTORY

- ▶ NEPA signed into law by Pres. Nixon
- ▶ Along with Clean Water Act, Clean Air Act, and Endangered Species Act
- ▶ NEPA was a model for CEQA, which in turn was model for other state CEQA-like laws

# Nixon's Environmental Legacy:



# NEPA's 3 Key Sections:

1. Declaration of national environmental policies and goals
2. Action-forcing provisions for federal agencies to enforce policies and goals
3. Establishment of a Council on Environmental Quality (CEQ) in the Executive Office of the President.

# 1. Declaration of National Environmental Policies & Goals

## ► Preamble:

*"To declare national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation..."*

## 2. “Action-forcing” provisions

Evaluation of environmental effects  
of federal actions and undertakings





# 3 STEPS:

- 1. Categorical Exclusion determination
- 2. Preparation of Environmental Assessment ("EA")
- 3. Preparation of Finding of No Significant Impact ("FONSI")

OR

Preparation of Environmental Impact Statement ("EIS")

# 1. Categorical Exclusions

- ▶ Action may be categorically excluded from a detailed environmental analysis if it meets certain criteria which a federal agency has previously determined as having no significant environmental impact.
- ▶ A number of agencies have developed lists of actions which are normally categorically excluded from environmental evaluation under their NEPA regulations.

# EXAMPLE: D.O.T. CATEGORICAL EXCLUSIONS

The action does not involve the following:

- ▶ Acquisition of more than minor amounts of right-of-way for certain construction projects
- ▶ Use of properties protected by Section 4(f) of the Department of Transportation Act (49 U.S.C. 303).
- ▶ A determination of adverse effect by the State Historic Preservation Officer.
- ▶ Any U.S. Coast Guard construction permits or any US Army Corps of Engineers Section 404 permits.
- ▶ Any work encroaching on a regulatory floodway or any work affecting the base floodplain (100-year flood) elevations of a water course or lake.

## 2. Preparation of Environmental Assessment ("EA")

- ▶ Agency prepares a written environmental assessment (EA) to determine whether a federal action would significantly affect the environment.
- ▶ An EA is described in Section 1508.9 of the Council's NEPA regulations & includes brief discussions of the following:
  - the need for the proposed action
  - the environmental impacts of the proposed action
  - alternatives to the proposed action
  - listing of agencies and persons consulted

# 3. Finding of No Significant Impact ("FONSI")



### 3. Either . . .

▶ Finding of No Significant Impact (“FONSI”)

or

▶ Environmental Impact Statement (“EIS”)

# FONSI

- ▶ If the answer from EA is “no impacts,” the agency issues a finding of no significant impact (“FONSI”).
- ▶ The FONSI may address measures which an agency will take to reduce (mitigate) potentially significant impacts.

# OR Preparation of an Environmental Impact Statement (EIS).

- ▶ If EA determines environmental consequences of a proposed federal undertaking may be significant, an EIS is prepared.
- ▶ EIS = a more detailed evaluation of the proposed action and alternatives.
- ▶ The public, other federal agencies and outside parties may provide input into the preparation of an EIS and comment on the draft EIS.



# EIS Filings

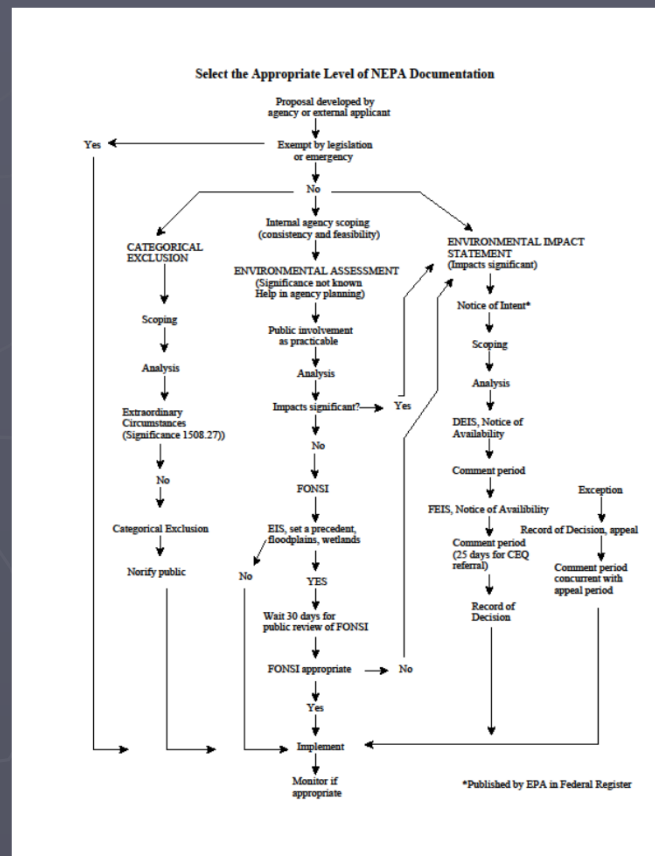
- ▶ EPA is responsible for receipt and filing of EISs prepared by Federal Agencies (per October 28, 1977 Memorandum of Agreement between CEQ and EPA)

- ▶ EPA publishes Notices of Availability of all EISs filed during the previous week:

[http://www.epa.gov/compliance/nepa/eisdata.html?](http://www.epa.gov/compliance/nepa/eisdata.html)

# NEPA Flowchart

(<http://www.epa.gov/reg3esd1/nepa/pdf/nepaflowchart.pdf>)



# NEPA is Procedural

- ▶ NEPA is a purely procedural statute.
- ▶ Even if the analysis reveals significant negative environmental impacts, the agency may go forward with project as long as it fully discloses the negative effects.

# 3. Implementation of NEPA

## Council on Environmental Quality (CEQ)

- ▶ In the Executive Office of the President.
- ▶ In 1978, CEQ promulgated regulations [40 CFR Parts 1500-15081] implementing NEPA.
- ▶ Regulations address administration of the NEPA process, including preparation of EISs.

# Some Key Differences Between NEPA & CEQA

- ▶ 1. Comparison of Environmental Documentation
- ▶ 2. NEPA is narrower than CEQA in process and in practice

# 1. NEPA versus CEQA Documents

NEPA Document Type	NEPA Document	CEQA Document Type	CEQA Document
Categorical exclusion	Categorical exclusion	Categorical exemption	Categorical exemption
Environmental Assessment (EA)	Finding of No Significant Impact (FONSI)	Initial Study (IS)	Negative Declaration (ND) or Mitigated Negative Declaration (MND)
Environmental Impact Statement (EIS)	Record of Decision (ROD)	Environmental Impact Report (EIR)	Notice of Determination (NOD)
Reevaluation	Reevaluation	Addendum	Addendum
Supplemental		Supplemental or Subsequent	

# JOINT EIR/EIS

- ▶ If major federal project, or project using federal funds, seeks approval in California, lead agency must prepare both an EIS and an EIR.
- ▶ Can be combined into one document (since EIS and EIR have same elements, for the most part).
- ▶ If separate documents, challengers can get two “bites at the apple”

## 2. NEPA = Narrower Than CEQA

### ▶ A. Scope and application:

- NEPA: applies only to projects receiving federal funding or work
- CEQA: applies to projects receiving any state/local approval, permit, or oversight

→ Development projects in CA funded only by private sources are exempt from NEPA but likely subject to CEQA.



## NEPA = Narrower Than CEQA (cont'd)

### B: CEQA is more “action-forcing”

- NEPA: agency can list all reasonable alternatives and their impacts, then choose the worst one for the environment.
- CEQA:
  - ▶ Requires lead agency to identify ways to reduce/avoid impacts
  - ▶ Agencies must implement alternatives or mitigation measures if feasible and would substantially lessen significant environmental effects
  - ▶ Agency can approve a project without mitigation or alternatives **only** if it adopts “Statement of Overriding Considerations” which details overriding economic, legal, social, technological, or other considerations that outweigh the project's significant, unmitigated impacts.

## NEPA = Narrower Than CEQA (cont.)

### C. CEQA = “easier to litigate”

As initial matter, with both CEQA and NEPA:

- ▶ Citizen lawsuits are the main way laws are enforced
- ▶ Judicial review almost always based only on the “administrative record”
- ▶ Courts look for: facts and reasoning to support conclusions (“analytical route”)

# *Limitations on Judicial Review*

- ▶ Standing to sue: sometimes a defense under NEPA, less so under CEQA
- ▶ Ripeness: sometimes a defense under NEPA, less so under CEQA
- ▶ Exhaustion of administrative remedies: similar under both laws
- ▶ Mootness: similar under both laws

# *Limitations on Judicial Review*

## *(cont'd)*

### ▶ Statutes of limitations

- CEQA: 30–180 days (depending on what's challenged)
- NEPA: 6 years under Administrative Procedure Act (but subject to “laches” doctrine)

# *Limitations on Judicial Review (cont'd)*

## ▶ Attorneys Fees

- CEQA: governed by Cal. Code of Civil Procedure § 1021.5
- NEPA: governed by Equal Access to Justice Act  
→ tougher standard

# Cal. Code of Civ. Proc. § 1021.5

“[A] court may award attorneys' fees to a successful party against . . . opposing parties in any action which has resulted in the **enforcement of an important right affecting the public interest** if: (a) **a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons** [and] (b) **the necessity and financial burden of private enforcement**, or of enforcement by one public entity against another public entity, are such as to make the award appropriate . . . .”

# Equal Access to Justice Act 28 USC sec. 2412(d)(91)(A):

- ▶ “[A] court shall award to a prevailing party other than the United States fees and other expenses . . . incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States . . . **unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust**” (emphasis added)

# COMPARISON

- ▶ CEQA advantages over NEPA:
  - More liberal standing rules
  - More favorable legal standard (“fair argument”)
  - Better attorneys fees statute
- ▶ Joint documents typically sued under CEQA, not NEPA



# Legal Remedies (under both NEPA and CEQA)

- ▶ – Void the agency action
- ▶ – Injunctions: temporary or permanent
- ▶ – Order agency to comply with NEPA/CEQA by redoing environmental document
- ▶ – But **no** order to approve or disapprove project

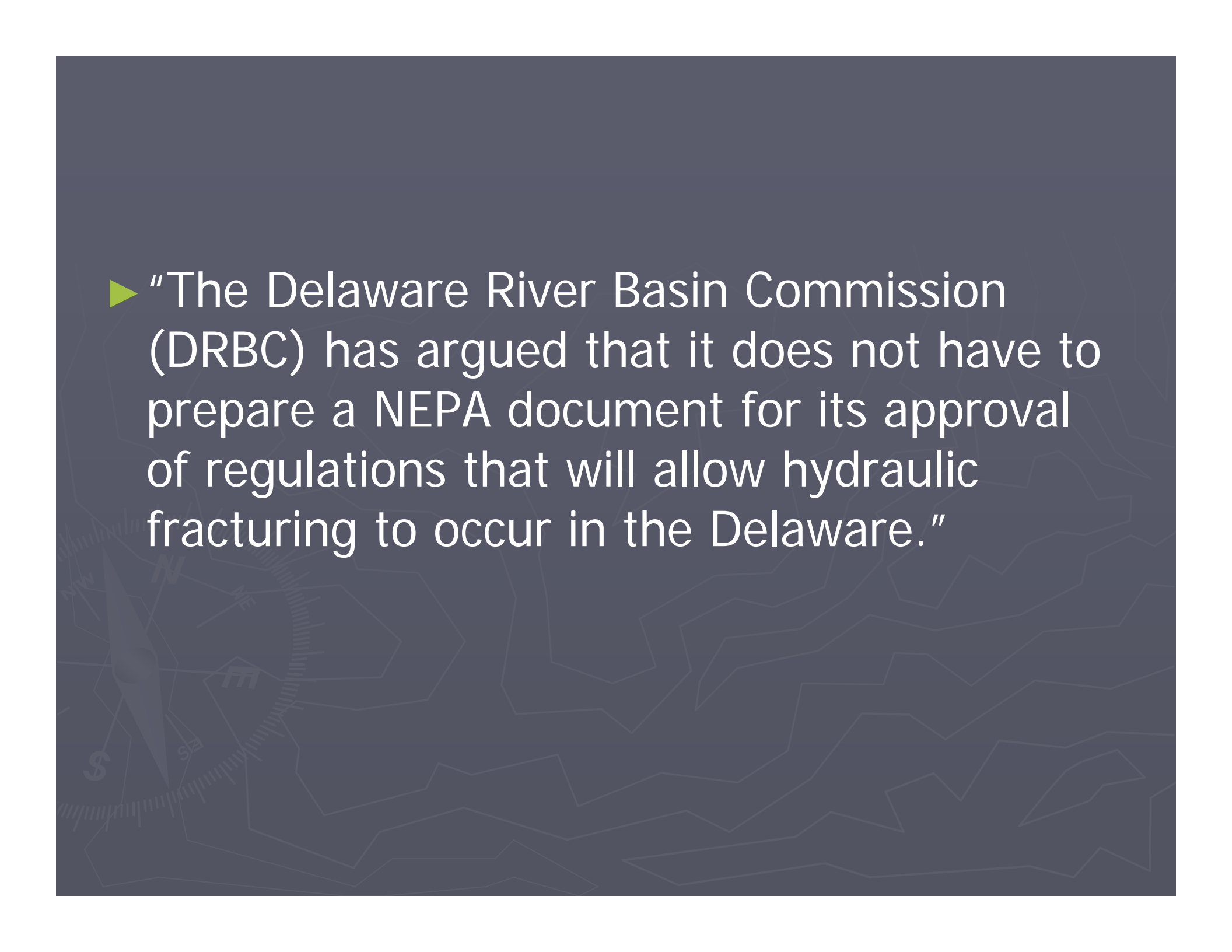
# NEPA ISSUES

*Hydraulic Fracturing and the National Environmental Policy Act (NEPA): Selected Issues* (April 25, 2012)

<http://www.fas.org/sgp/crs/misc/R42502.pdf>

“This report provides an overview of two situations in which agencies are arguing that they do not need to conduct a comprehensive environmental review of hydraulic fracturing under NEPA.”

“On March 21, 2012, the U.S. Department of Agriculture Rural Development agency reaffirmed its use of a CE to exempt from further NEPA review the loans it makes for the purchase of singlefamily homes on properties leased for drilling. The agency stated that, by itself, the existence of a drilling lease on a property is not an extraordinary circumstance that will prevent the agency from using a CE

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- A dark blue background with a faint, light-colored topographic map showing contour lines and some symbols like a dollar sign and a compass rose.
- ▶ “The Delaware River Basin Commission (DRBC) has argued that it does not have to prepare a NEPA document for its approval of regulations that will allow hydraulic fracturing to occur in the Delaware.”

# GREENHOUSE GAS CASES



# *Friends of the Earth v. Mosbacher*

488 F. Supp. 2d 889 (N.D. Cal. 2007)

- ▶ Environmental groups challenged OPIC and Export-Import Bank for funding international fossil fuel projects that contribute to climate change
- ▶ Although projects are located abroad, Court finds effects on domestic environment & financing decisions made within U.S
- ▶ Court rejects argument that impact of global warming is too remote and speculative to be considered under NEPA
- ▶ Case later settled with agencies agreeing to study impacts
- ▶ Case did not establish clear legal rules on merits of climate change lawsuits under NEPA

*Center for Biological Diversity v.  
Nat'l Highway Traffic Safety Admin.,*  
508 F.3d 508 (9th Cir. 2007)

- ▶ Challenge to EA for NHTSA rule setting CAFE standards for light trucks for model years 2008-2011
- ▶ Court rejects argument that CAFE rule impact on global warming is “too speculative to warrant NEPA analysis”
- ▶ Impact of greenhouse gas emissions on climate change is precisely the kind of cumulative impacts analysis that NEPA requires agencies to conduct
- ▶ FONSI was arbitrary and capricious for failure to evaluate “incremental impact” that expected emissions would have on climate change
- ▶ EIS was required “because the evidence raises a substantial question as to whether the Final Rule may have a significant impact on the environment”

# CEQ DRAFT GUIDANCE ON GHG

- ▶ <http://www.whitehouse.gov/sites/default/files/microsites/ceq/20100218-nepa-consideration-effects-ghg-draft-guidance.pdf>

“The draft guidance explains how Federal agencies should analyze the environmental impacts of greenhouse gas emissions and climate change when they describe the environmental impacts of a proposed action under NEPA. It provides practical tools for agency reporting, including a presumptive threshold of 25,000 metric tons of carbon dioxide equivalent emissions from the proposed action to trigger a quantitative analysis, and instructs agencies how to assess the effects of climate change on the proposed action and their design.”



<http://ceq.hss.doe.gov/>

## **Current Developments**

[CEQ Issues Handbooks](#)

[CEQ Modernization Efforts](#)

[NEPA's 40th Anniversary](#)

[New Agency NEPA Procedures](#)

[EIS Filings](#)

## **CEQ Publications**

[NEPA - NHPA Section 106 Handbook](#)

[Citizens Guide to NEPA](#)

[Collaboration Handbook](#)

[NEPA & Environmental Management Systems](#)

[Cumulative Effects](#)

[Incorporating Biodiversity](#)

[Modernizing NEPA Implementation](#)

[NEPA Effectiveness Study](#)