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美国的环境影响评价程序 及对中国的借鉴

项目合作单位：

自然资源保护协会

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1979 年的《环境保护法（试行）》首次以法律的形式确立了中国的环境影响评价制度，而后，一系列环境保护单行法律，例如《水污染防治法》、《海洋环境保护法》、《大气污染防治法》、《固体废物污染环境防治法》等，也对环境影响评价制度做出了与《环境保护法（试行）》中类似的规定。2003 年 9 月，专门规定环境影响评价制度的《环境影响评价法》施行，成为我国环境影响评价制度发展进程中的里程碑。在此基础上，上述法律与《环境影响评价公众参与暂行办法》（2006）、《规划环境影响评价条例》（2009）等一系列行政法规、部门规章、地方性法规共同构成了中国的环境影响评价体系。

2014 年，新的《环境保护法》的修订对信息公开、公众参与和公益诉讼制度提出了新的要求，为通过加强公众参与完善环境影响评价制度提供了新契机。本报告旨在为完善环境影响评价相关的立法和执法工作提供支持和参考。

本报告是自然资源保护协会（Natural Resources Defense Council, NRDC）与美国环境律师学会（American College of Environmental Law, ACOEL）在合作框架下完成的项目成果。报告在哥伦比亚法学院气候变化法律中心 Michael Gerrard 教授协调下，由 Sive, Paget & Riesel 律师事务所完成。Sive, Paget & Riesel 律师事务所在其专注的环境法律和诉讼领域有超过五十年业务实践，也在环境影响评价领域有广泛经验。该所律师 Daniel Mach 和 Jonathan Kalmuss-Katz 起草了本报告，此外 Mark Chertok, David Paget, 和 Daniel Riesel 共同参与了报告的写作。北京大学资源、能源与环境法研究中心的汪劲教授和王社坤副教授为报告的完成提出了宝贵的指导和建议，在此表示诚挚的谢意。

自然资源保护协会中国项目主任钱京京女士和美国环境律师学会负责人 James Bruen 先生共同协调了自然资源保护协会和美国环境律师学会的志愿服务项目，并对项目提出了指导性的建议。NRDC 环境法律团队工作人员王彦、吴琪、张西雅、周悦霖、柯秉文、罗思瑞、马莉恬、实习生 Charles Natoli 也参与了本项目有关工作。

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一、美国环境影响评价制度简介

依据美国《国家环境政策法》(National Environmental Policy Act, 以下简称 NEPA), 美国联邦行政机关应当在所有的裁量性行政决策中实施环境影响评价(以下简称环评)程序¹。这一里程碑式的规定不仅成为美国国内各级立法的样本, 也成为国际通行的实践。在美国, 纽约、加利福尼亚以及十三个其他州都通过了类似的法律来规制州和地方行政机构的行动, 而一些其他国家也实施了类似的程序。本报告将介绍美国环评的基本程序, 并阐述美国在四十余年间依据 NEPA 和州的环评法规实施环评制度积累的经验。

本报告将分为以下几部分:

- 第二部分介绍 NEPA 和其他要求联邦和州的行政机构进行环评的美国法律;
- 第三部分描述上述法律所规定的环评程序;
- 第四部分详细介绍行政机构为主要拟议行动编制环评文件应处理的实体问题;
- 第五部分评述一些关于行政机构环评义务范围的主要法律问题;
- 第六部分描述实施和执行美国环境审查法律的一些实践经验;
- 第七部分简述美国经验对中国环评程序的实施可能提供的借鉴。

¹42 U.S.C. § § 4321 - 4370.

二、环境影响评价的法律基础

NEPA 颁布于 1969 年，是美国的首批现代环境法律之一，被称为美国“国家环境保护的基本宪章。”

²NEPA 开宗明义地创立了“一项鼓励人与环境之间富有成效且令人愉快的和谐的国家政策。”³NEPA “尽最大可能”指导联邦机构通过实施特定的方式和程序，保障自由裁量性决策符合适当的环境考虑。⁴NEPA 中关于环境影响评价的强制要求已经成为联邦行政法律中的核心原则。

NEPA 中的首要机制是要求机构为所有“立法和其他对人类环境质量有重大影响的联邦行动的提议”编制并公开发布环境影响报告书（Environmental Impact Statement，以下简称 EIS）。⁵公众对 EIS 初稿和终稿的审查，一方面可以使公众和法院能够确保机构遵守《国家环境政策法》，另一方面促使联邦机构将其行动的环境影响向公众公开。不属于有重大影响的行动不需要编制环境影响报告，但是初步确定该行动是否具有重大影响的程序本身也是 NEPA 将环保考虑纳入机构决策的一个体现。

环境影响报告需要说明当前的环境状况、拟议行动产生的合理可预见的环境影响、对拟议行动的合理替代方案、以及缓解拟议行动重大不利环境影响的减缓措施。环境影响报告为决策机构提供了信息，使其能够在确定是否批准该拟议行动时，不仅考虑其他相关因素，也考虑环境因素。

NEPA 和 EIS 都没有要求决策机构必须达成某种特定的结果。在 NEPA 的早期历史中，曾有判例指出，该法规定的是程序性要求（也就是说，机构应当评价和考虑环境影响）而不是实体性要求（例如要求机构限制、减缓或给予环境影响特殊的权重）。因此，一旦机构编制并考虑了 EIS，就可以选择做出任何它认为适当的实体性结论。⁶NEPA 也不要求对环境考虑的评估优先于其他相关的考虑。⁷相反的，一些州法中的环境审查法则要求在可行的情况下，州的机构应当在满足环境影响评价的程序之外，给予环境考虑和不利环境影响的减缓以实质性的权重。⁸但是，这些实质性的要求通常也给机关权衡环境影响留下广泛的自由裁量空间，通常，如果机关遵守了程序性要求，其作出的实质性决策就会被认为是正当的。

尽管 NEPA 篇幅短小，其中规定的程序性要求也比较简单，但还有一大批详尽的法规，对确定是否

²Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1215 (9th Cir. 1998).

³42 U.S.C. § 4321.

⁴42 U.S.C. § 4332.

⁵同上注。虽然 NEPA 并未真正使用“环境影响报告书”这一用语，但该用语来源于 NEPA 规定的机构应当制定关于环境影响的“详细的报告书”的要求：

[A]联邦政府的所有机构应当……由负责人在每一个对人类环境质量有重大影响的立法或其他重要的联邦行动提议的建议或报告中包括一份详细的报告，内容涵盖：

- (i) 拟议行动的环境影响，
- (ii) 如果提议被实施，不可避免的不利环境影响，
- (iii) 拟议行动的替代方案，
- (iv) 当地对人类环境短期使用与长期生产力维持和增强之间的关系，以及
- (v) 如果拟议行动被实施，不可逆的或不可挽回的资源投入

42 U.S.C. § 4332(2).

⁶认为 NEPA 是纯程序性要求的观点是由两个早期的解释 NEPA 的司法判例确定的：Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 227 (1980) 以及 Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 558 (1978).

⁷Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc., 462 U.S. 87, 97 (1983); Strycker's Bay, 444 U.S. at 227.

⁸参见 N.Y. Envtl. Conserv.Law. § 8-0109(8)（要求机构“仅可行的最大程度，减少或避免不利环境影响，包括环境影响评价程序中发现的影响”。）

需要编制 EIS、如何编制 EIS、必须评估的环境影响范围等问题进行规定。环境质量委员会（Council on Environmental Quality，以下简称 CEQ）是一个负责监督 NEPA 实施的联邦机构，为 NEPA 制订了一些全面的实施规则（CEQ regulations）。⁹联邦机构也可以制定自己机构的 NEPA 实施规则，但是如果该机构没有制定自己的规则，则仍然应当适用 CEQ 规则。¹⁰另外，还有大量的司法判例对 NEPA 及其程序性要求进行了解释。

法院为监督机构遵守 NEPA 及类似的州法起到了关键作用。在 NEPA 的早期历史中的一个里程碑式的司法判例中，一个上诉法院因认定机构在发布一系列法规之前，没有进行“全面和有成效的”环境审查，因此取消了这些法规。¹¹尽管在案件涉及机构如何实施其法定义务时，法院通常会尊重机构的选择，但依据 NEPA，法院要确保机构编制每个 EIS 应当具有“客观善意”，并对环境结果和替代方案采取了“严格审查”。¹²如果法院确定一个机构应编制 EIS 而没有编制，或该报告书没有充分评价某个提议的环境结果，法院应当毫不犹豫地认定该机构的决策及作为决策依据的环境审查程序无效。¹³

NEPA 中关于机构决定发放许可或提供资金时进行环境影响评价的要求经常与其他联邦和州的环境法相交叉。很多联邦机构依据其他法律规定实施许可项目，同时机构同意或拒绝发放许可的决策也取决于依据 NEPA 所做的审查。并且，当数个州和联邦机构对一项拟议项目或计划有共同的管辖权时，NEPA 和相关州的环境审查法律法规可能同时适用。在这种情况下，州和联邦的环境审查经常整合进行，仅要求提供一份 EIS。¹⁴但是，州的机关也可能选择制定一份单独的环境影响报告，仅关注必要的州的批准要求。¹⁵另外，如果州法规定了实质性减少不利环境影响的要求，州的机构可能需要遵守比 NEPA 的程序性要求更为严格的规制。

上文的总结仅仅是对环境影响评价程序的一个概括介绍，供读者熟悉该制度依据的基本法律框架。接下来的各部分将试图更深入地分析美国环境审查程序实施中的关键问题。

⁹42 U.S.C. § § 4341-4347.40 C.F.R. Part 1500; Andrus v. Sierra Club, 442 U.S. 347, 358 (1979).

¹⁰ 42 U.S.C. § 4371(c)(1); 40 C.F.R. § 1507.3.

¹¹ Calvert Cliffs' Coordinating Committee v. Atomic Regulatory Commission, 449 F.2d 1109 (D.C. Cir. 1971).

¹² Britt v. U.S. Army Corps of Engineers, 769 F.2d 84, 90 (2d Cir. 1985); Sierra Club v. Espy, 822 F. Supp. 356, 367 (E.D. Tex. 1993), rev'd on other grounds, 18 F.3d 1202 (5th Cir. 1994).

¹³例如，参见 Lands Council v. Powell, 395 F.3d 1019 (9th Cir. 2005).

¹⁴例如，参见 N.Y. Env'tl. Conservation Law § 8-0111(1) (McKinney 2011) (providing for coordination between NEPA and SEQRA review).

¹⁵参见 Town of Barnstable v. Cape Wind Associates, LLC, 27 Mass. L. Rptr. 111 (Mass. Super. 2010).

三、环境影响评价程序

简单而言，实施环境影响评价需要经过以下几个阶段：

- 确定拟议行动是否属于需要进行环境审查的类型；
- 编制环境影响报告之前的程序，包括确定主导机构（lead agency）、确定拟议行动是否可能有重大环境影响而需要编制 EIS；
- 如果该行动需要编制 EIS，则编制报告书；以及
- 编制 EIS 之后的程序，旨在确保 EIS 是充分的，并且被整合在了机构的最终决策中。

下文将对上述各个步骤进行详细介绍。

1. 筛选需要进行环境审查的拟议项目

这一阶段是环境审查程序的初始阶段，旨在确定拟议行动是否属于需要进行环境审查的范围。依据 NEPA 和相应的州法，解决该问题需要确定两个方面：做出行动的机构是否属于要遵守环境审查要求的机构；做出的行动是否属于需要进行环境审查的行动。

需要遵守 NEPA 的“联邦行动”涵盖了几乎所有联邦机构做出的行动，包括国防机构（尽管法定信息公开的例外情形免除了这类机构公开机密信息的义务）。¹⁶国会，司法机构和总统不属于本语境中的联邦机构，因此这些主体的行动是 NEPA 程序性要求适用的例外。¹⁷同样的，州长和州法院的行动也是州的环境审查法律适用的例外。¹⁸

一般而言，州的环境审查法律与 NEPA 类似，适用于所有州的机构。但是州的环境审查需要考虑一个独特的问题，即州法是否适用于地方政府的行动。一些州（包括加利福尼亚州，纽约州，华盛顿州，马萨诸塞州）将地方和市政府视为“州的机构”，对其适用州的环境审查要求。¹⁹其他州法（北卡罗来纳和印第安纳州）则免除地方政府在其辖区内的相应义务，佐治亚州则规定仅当地方政府行动涉及足够金额的财政承担时，州的环境审查要求才适用于地方政府行动。²⁰

需要遵守 NEPA 的“联邦行动”类型既包括直接的机构行动（例如建设、实施政府计划、颁布规章、或机构立法计划）²¹，也包括间接的机构行动（例如资助、提供资金、或批准私人行动的许可）。²²因此，如果间接涉及联邦审查，许多私人行动可能也需要依据 NEPA 进行审查。考虑美国到联邦法规规制的范围，许多活动都潜在地受到 NEPA 的约束。

¹⁶Weinberger v. Catholic Action of Hawaii/Peace Educ. Project et al., 454 U.S. 139, 146 (1981).

¹⁷ 5 U.S.C. § 701(b)(1); Public Citizen v. U.S. Trade Representative, 5 F.3d 549 (1993).

¹⁸例如，参见 6 N.Y.C.R.R. § 617.5(c)(37)

¹⁹ Cal. Pub. Res. Code, § § 21100, 21151; N.Y. Evtl.Conserv.Law, § 8-0105; Wash. Admin.Code, § 43.21C.020; Mass. Gen. Laws, Title III, CH. 30, § 62.

²⁰ N.C. Admin. Code, Pollution Control and Environment, § 113A-4; Ga. Code. Ann. § § 12-16-3(7)(b) (2010).

²¹40 C.F.R. § 1508.18(b).

²² 42 U.S.C. § 4332(2)(C).

但是，基于法律规定或司法裁定，有些特定的联邦行动属于 NEPA 适用的例外情形。这通常出现在适用一些已经要求机构通过其他程序考虑环境影响的法律时。例如很多依据清洁空气法、清洁水法、超级基金法等进行的行动属于法定的 NEPA 的适用例外。²³一些基于其他环境法律行动，由于法院认定其所依据的法律规定了和 NEPA 环评审查“作用同等”的环境评价程序，也依据司法判决而被排除在 NEPA 的适用范围之外。²⁴

同样，需要遵守 NEPA 的联邦行动不包括法律授权的纯粹执行性的行动（ministerial act）——机构必须落实这些行动，但对其不具有自由裁量的决策空间。²⁵例如，如果一个联邦拨款法律指出某一机构“不论其他任何法律如何规定，应当立即”建设某一通常可以自由裁量决定不建设的项目，由于该机构除了建设该项目别无选择，该行动不需要进行环境影响审查。²⁶州的环境法律也通常排除环境审查的程序性和实体性要求对纯粹执行性行动的适用。

另外，NEPA 的实施规则允许机构在紧急情况下免于适用环境审查程序。²⁷这种例外旨在防止环境审查在需要迅速行动的情况下成为官僚主义的阻碍。该问题是 *Winter* 诉自然资源保护协会（NRDC）²⁸一案中司法审查的焦点，在该诉讼中，美国海军申请将特定的海军训练活动排除在环境审查适用范围之外。

2. 初步规划和确定该行动是否需要编制EIS

对于需要适用环境审查程序的行动，环境审查程序在规划阶段的早期就发挥作用。²⁹

NEPA 适用于机构的立法及其他联邦行动的“提议（proposals）”，依据该法，一旦某机构“确定目标”并“准备对一个或多个可供达成该目标的备选方法进行决策”，就必须开始实施该法。³⁰多数州环境审查法律同样要求在机构规划的早期就开始环境审查。例如，纽约州的法律要求“尽可能早的在该行动的提议形成时”产生效力。³¹除了这些法律要求之外，机构也有尽快实施该程序的强烈动机，因为在机构满足 NEPA 程序要求之前不能做出对提议的最终决策。

根据 NEPA 和类似的州法，如果某行动被数个机构提议或者涉及数个机构，首先需要开展的工作是要由相关的机构确定一个主导机构。通常，主导机构与提议有最重要的关联，或者在需要研究的领域承担首要的义务。³²主导机构必须确定拟议行动是否需要编制 EIS。该要求包括对拟议行动潜在环境影响大小进行初步评价。

依据 NEPA，只有“对人类环境有重大影响的重要联邦行动”需要编制 EIS。³³NEPA 的实施规则将

²³15 U.S.C. § 793(c)(1); 33 U.S.C. § 1371(c)(1).

²⁴*Alabama ex rel. Siegelman v. U.S. EPA*, 911 F.2d 499, 504 (11th Cir. 1990) (排除了依据《资源保护和回收法》进行的许可行为); *Merrell v. Thomas*, 608 F. Supp. 644 (D. Or. 1985), *aff'd*, 807 F.2d 776 (9th Cir. 1986) (排除了依据《联邦杀虫剂，杀真菌剂和灭鼠剂》进行的杀虫剂登记程序)。

²⁵参见 *Sierra Club v. Babbitt*, 65 F.3d 1502, 1512 (9th Cir. 1995).

²⁶参见 *Minard Run Oil Co. v. U.S. Forest Service*, 2011 WL 4389220 (3rd Cir. Sept. 20, 2011).

²⁷40 C.F.R. § 1506.11.

²⁸129 S. Ct. 365 (2008).

²⁹如果某提议关于立法而非行政行为，NEPA 实施规则规定的程序有所不同(应适用的程序规定在 40 C.F.R. § § 1506.8, 1508.17, and 1508.18)。该程序与适用于机构行动的基本程序差别不大，但是它考虑到机构对国会立法程序的控制不足。

³⁰40 C.F.R. § 1506.8(a).

³¹N.Y. *Env'tl. Conserv. Law*, § 8-0109(4).

³²40 C.F.R. § 1501.5 (NEPA); N.Y. *Env'tl. Conserv. Law*, § 8-0109(4) (New York's statute).

³³42 U.S.C. § 4332(2)(C) (2007); *Dep't of Transp. v. Pub. Citizen*, 541 U.S. at 757; *Utah v. Babbitt*, 137 F.3d 1193, 1214 (10th Cir. 1998) (认定土地管理局的公共土地清单不构成“对人类环境有重大影响的重要联邦行动”); 也可参见 *Michigan v. U.S.*, 994 F.2d 1197,

行动是否具有重大环境影响作为一个单独审查阶段。³⁴每个州的环境审查法律都包含了类似的规定，将需要编制 EIS 的活动的范围限制在可能引起“重大”环境影响的行动。

NEPA 和州法都允许机构事先通过制定规则预先确定通常不具有重大环境影响的行为类型。在联邦层面，预期不具有重大环境影响的行动被称为“除外类别”(categorical exclusions, CEs/ CATEXs)，如果机构确定其行动属于除外类别，那么就不需要继续进行 NEPA 审查。³⁵在州的层面，以纽约州为例，该州规则规定了一个简单的程序，用于指明推定不具有重大影响的“类型 II”行动。³⁶如果机构确定某拟议行动属于上述类别，那么该行动就不需要进行环境评价或编制 EIS，并且认定该机构已经履行了的环境审查义务。

除外类别和州法中类似的行动类型设置至关重要。每年全国的机构提议的行动数量是庞大的。³⁷如果每个提议都需要实施环境评价才能确定其潜在环境影响是否重大，环境审查程序耗费的金钱和时间将高得无法承担。将一些有把握认为不具有重大影响的行动排除在外，使机构能够将其资源集中用于需要认真审查的提议上。

NEPA 和州法也可以指定通常具有重大影响的行为类型。³⁸如果某行动属于该类型，则推定机构必须继续确定是否需要编制 EIS。另外，一些州的法律要求通过一些额外的程序保证机构对行动潜在环境影响的评价是全面的。³⁹但是，因为对上述类型行动的指定仅意味着机构需要进行后续程序，确定是否需要编制 EIS，因此上述类型的重要性不及除外类别和类型 II 行动，因为除外类别和类型 II 行动可以起到终止环境评价程序的作用。

如果某行动不属于上述的排除类型，那么机构必须进行环境评价 (Environmental Assessment, EA) 来确定是否需要编制 EIS。⁴⁰环境评价最初被设计为简短的“小环境影响报告 (mini-impact statement)”，⁴¹但是由于其仍然必须包含用以确定 EIS 是否必要的“充分的证据和分析”，目前也通常长达数百页。⁴²具体而言，环境评价应当包括拟议方案的必要性、考虑的替代方案、拟议方案和替代方案的环境影响、以及准备环境评价过程中咨询的机构和个人的名单。⁴³

依据 NEPA，编制 EIS 是主导机构的义务，而不是私人申请者的责任，尽管机构也可以要求私主体依据独立的机构审查要求进行环境评价。⁴⁴纽约州的环境审查法律略有不同，依据纽约州法，通过填写名为“环境评价表 (Environmental Assessment Form)”的综合性表格的方式进行环境评价。⁴⁵该表格的第一部分介绍拟议行动，由项目申请者填写。第二部分由主导机构填写，评价该行动的潜在环境影响。

在联邦和州，环境评价程序都终止于机构对拟议行动的潜在影响重大程度的确定。如果机构确定影响并不重大，就必须依据 NEPA 发布“无重大影响报告”(Finding of No Significant Impact, FONSI) 或依

1199-1200 (6th Cir. 1993).

³⁴40 C.F.R. § 1508.27.

³⁵40 C.F.R. § 1508.4.

³⁶6 N.Y.C.R.R. § 617.6(a)(1)(i).

³⁷关于联邦机构每年开展的环境审查的统计数据将在下文第五部分第一节说明。

³⁸40 C.F.R. § 1507.3(b)(2)(i).

³⁹See, e.g., 6 N.Y.C.R.R. § 617.6(a)(2).

⁴⁰40 C.F.R. § 1501.4(b).

⁴¹Hanly v. Kleindienst, 471 F.2d 823, 837 (2d Cir. 1972) (Friendly, J. dissenting).

⁴²参见 Grand Canyon Trust v. Federal Aviation Administration, 290 F.3d 399, 340 (D.C. Cir. 2002).

⁴³40 C.F.R. § 1508.9(b).

⁴⁴40 C.F.R. § 1506.5(b), 1508.9.

⁴⁵6 N.Y.C.R.R. § 617.2(m).

据州法发布“否定声明”（Negative Declaration）或类似文件来记录该决策。⁴⁶机构也可能要求该行动履行减缓措施以防止潜在的重大环境影响，作为作出无重大环境影响决定的前提条件。⁴⁷上述两种情形中，无重大影响的决定都意味着不需要编制环境影响报告，并且终结机构对该行动的环境审查程序。

如果机构确定拟议行动将要或可能产生重大影响，它必须使程序继续下去，编制 EIS。

3. 编制EIS

在需要编制 EIS 的情况下，EIS 是机构环境审查的核心。主导机构对编制 EIS 和履行其他程序要求承担首要义务，⁴⁸其他协作机构（cooperating agencies）可以“采纳（adopt）”主导机构编制的 EIS，并在它们的决策中使用该文件。⁴⁹

依据 NEPA，EIS 必须由主导机构编制，申请者和其他主体则可以提供支持性文件供机构审查和整合进自身的程序。⁵⁰这些支持性文件通常由私人咨询公司编制。在美国，没有对这类咨询公司进行资质批准的程序。

编制 EIS 的过程分为几个阶段。首先，机构发布公告，公开其编制 EIS 初稿（draft EIS，DEIS）的决定。⁵¹依据 NEPA，机构必须在联邦登记发布该公告。⁵²联邦登记是发布联邦机构公告和规则的每日出版物。除此之外，机构还可能发布其他公告（例如在报纸上发布）。在此阶段，如果其他机构有可以协助主导机构编制 EIS 的特别专业知识，也可以参与到程序中来。⁵³

“确定环评范围（Scoping）”是在 NEPA 实施规则和多数（但并不是全部）州的环境审查法律中规定的一个早期的程序。⁵⁴确定环评范围阶段要识别并关注 EIS 中将要论证的关键问题，并且通过限缩问题的范围，减少不必要的文书工作。⁵⁵机构可以举行听证会或非正式的会议来帮助它们为环境影响报告确定适当的范围、焦点、以及关注和存在争议的主要领域。⁵⁶确定环评范围过程是整个环评过程中公众可以参与的第一个重要机会。在实践中，“确定环评范围的听证会”经常变成项目支持者和反对者表达意见的论坛。

与确定环评范围相关的一项实践是 NEPA 规则支持的大型项目环境审查“分级（tiering）”。分级程序根据具体行动的特性，以不同的详细程度论证问题。⁵⁷对于政策层面或计划层面的行动，NEPA 允许编制以概括的形式论证相关问题的“笼统的（generic）”或“纲领性的（programmatic）”环境影响报告。⁵⁸笼统的环境影响报告通常在一个文件中论证一系列相关的行动；纲领性的环境影响报告则关注长期的、多

⁴⁶40 C.F.R. § 1508.13.

⁴⁷ CEQ, Final Guidance for Federal Departments and Agencies on the Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact, Jan. 14, 2011, at 7, n. 18; 6 N.Y.C.R.R. § 617.2(y).

⁴⁸同上注，§ 1508.16.

⁴⁹同上注，§ 1506.3.

⁵⁰40 C.F.R. § 1506.5(a).在包括纽约州的一些州，环境影响报告书可以由申请者在主导机构的监督下编制。

⁵¹同上注，§ 1501.7.

⁵²同上注。

⁵³同上注，§ 1501.6.

⁵⁴同上注，§ 1501.7; 6 N.Y.C.R.R. § 617.8.

⁵⁵40 C.F.R. § 1501.7.

⁵⁶同上注，§ 1506.6(b).

⁵⁷同上注，§ 1502.20.

⁵⁸同上注，§ 1502.4(b)-(d).

步骤的计划的总体影响。一个高级别的环境影响报告完成后，如果有必要，也可以为大项目的各个具体方面再制定详细的 EIS。⁵⁹

当需论证的环境问题的“范围”确定以后，机构将编制 EIS 的初稿。由于 EIS 初稿的目的是尽早将拟议行动告知公众和其他机构，并征求可能协助主导机构进行决策的意见，该初稿会向多元的主体发布，包括其他有利害关系的联邦、州和地方机构，以及公众。对初稿涉及的领域有专业知识或能力的联邦机构应当提出意见。⁶⁰NEPA 设置了至少 45 天的评论期（从公告在联邦登记公开之日起算）。⁶¹对于可能涉及争议性的环境影响的提议，可能需要就 EIS 初稿举行公众听证会。⁶²任何公众都可以在听证会中发言。这些听证会是环境审查程序中的第二个（且往往是最后一个）正式的允许公众亲身参与的机会。（听证会结束后的一段时间通常仍然接受书面意见。）

EIS 初稿进行了公开和发布，且听证会和书面评论期结束后，应当编制 EIS 的终稿（final EIS, FEIS）。终稿应包括项目的变化、新信息、以及（最重要的）必须对所有对初稿做出的实质性的评论进行回应。⁶³尽管和初稿一样，终稿也需要满足公开发布要求，但并不要求对针对终稿提出的意见再进行回应。

当主导机构的环境审查存在显著缺陷或不充分，有一个机制可以纠正这种局面：依据《清洁空气法》，美国环保署可以将其认为不符合环境方面要求的联邦行动移交 CEQ。⁶⁴尽管这种移交机制很少用到，但为防止机构不履行义务提供了基础。

最后，发布环境影响报告终稿后，机构就可以做出关于拟议行动的决策了。该决策通常以名为“决策记录（Record of Decision, ROD）”或结论声明（findings statement）的文件形式作出。⁶⁵该决策记录要说明机构在环境影响报告提出的环境问题的基础上作出实体决策的依据，包括对考虑的备选方案的论证，对可行的减轻不利环境影响的措施的解释，以及实施最终决策采用的减缓措施的计划。⁶⁶决策记录使公众能够审查机构考虑的范围，或者机构是否在作出最终决策时不当地忽略了潜在的环境影响和减缓措施。

某些情况下，公众在公众听证会或其他途径表达了对某项目非常强烈的反对，官员也会重新考虑他们对项目的支持，并且有些情况下会决定修改，转移或放弃该项目。但因为公众反对而放弃项目的情形非常少见。

4. 司法审查

当机构发布 EIS 终稿和决策记录后，它的环境审查程序义务就完成了。但是，在实践中，很多项目的环境影响评价程序还包含一个最终的阶段：如果某一受到项目影响的公众认为机构没有充分履行该义务，他/她可以提起诉讼，将该程序提交法院审查。

对联邦机构履行 NEPA 规定的司法审查权源于联邦《行政程序法》的授权。该法允许受影响的公众

⁵⁹同上注，§ 1502.20.

⁶⁰同上注，§ 1503.1 (a)(1), (2), (4).

⁶¹同上注，§ 1506.10(e). CEQ 规则要求自环境影响报告书草稿在联邦登记发布之日起的 90 天期间结束前不能做出任何决策，但是如果 90 天内发布了环境影响报告书的终稿，机构在作出决策前需要允许至少 45 天的对草稿的评议期。

⁶²同上注，§ 1503.1 (a)(1), (2), (4).

⁶³同上注，§ 1502.9.

⁶⁴42 U.S.C. § 7609.

⁶⁵40 C.F.R. § 1505.2.

⁶⁶同上注，§ 1505.2(a)-(c).

通过起诉挑战不合法的机构行动。⁶⁷相似的，对州机构的环境审查义务履行情况的司法审查由与《行政程序法》对应的州法授权。⁶⁸州和联邦关于司法审查的规则有差异，但一些基本原则同时适用于联邦和州。

法院审查环境审查要求的履行情况时，需要考虑机构是否遵守了应适用的程序、做出的不需要编制环境影响报告的结论是否合理、以及需要编制环境影响报告时环境影响评价是否充分。以上述事项为基础，法院判断机构是否在环境审查中出于“客观善意”，并对环境结果和替代方案采取了“严格审查”。⁶⁹除非机构违反 NEPA 的程序性要求，法院的审查要与所谓的“合理原则”相调和，该原则给与机构广泛的裁量空间来确定环境影响报告的内容，包括对环境影响和合理替代方案范围论证的深度这一最重要的内容。

如果质疑环境影响报告充分性的原告胜诉，对其救济通常是（但并不总是）撤销机构决策，并发布禁止令，暂停编制和发布 EIS。⁷⁰救济措施的严厉迫使机构必须制定全面的环境影响报告，并一丝不苟地遵守 NEPA 程序。

⁶⁷5 U.S.C. § 702.

⁶⁸例如，参见 N.Y. C.P.L.R. § 7801 et seq.（纽约州规制行政行为审查的法律。）

⁶⁹Britt v. U.S. Army Corps of Engineers, 769 F.2d 84, 90 (2d Cir. 1985); Sierra Club v. Espy, 822 F. Supp. 356, 367 (E.D. Tex. 1993), rev'd on other grounds, 18 F.3d 1202 (5th Cir. 1994).

⁷⁰Concerned About Trident, 555 F.2d at 817, 823 (D.C. Cir. 1976).

四、EIS 的内容

NEPA 和多数环境审查法律仅对 EIS 中应当包含的内容作了概括的描述。⁷¹因此，EIS 的格式很大程度上来源于机构制定的规则，以及数十年来的实践和相关诉讼。虽然 EIS 的具体内容依据审查机构和主要影响范围的不同而有所变化，以下介绍的是推荐使用的联邦 EIS 的结构。

1. 执行概要

根据 NEPA 规则，EIS 开篇必须有一个“充分且准确地概括本报告的概要”。⁷²该规则建议执行概要应当“突出主要的结论、有争议的领域（包括机构和公众提出的问题）和需要解决的问题（包括在备选方案中所做的选择）”，并且篇幅在 15 页之内。⁷³实践中，执行概要可能比 15 页长很多。并不是所有的州的环境审查法律都要求环境影响报告包括执行概要，但是从实践看来，为了方便机构和公众的审查，报告通常包含一个概括的执行概要部分。

2. 项目说明和目的及需求声明

EIS 必须包括对拟议行动的说明，包括“机构据以回应的深层的目的和需求……”⁷⁴项目说明应当包含充分的细节，使机构能够对项目的环境影响进行完整的审查。因此，尽管有些细节可能在环境审查程序完成之后才完成或被批准，这些要素也要在 EIS 或环境评价中阐明。

对拟议项目“目的和需求”的说明是环境影响报告书的关键部分，因为该内容决定着必须考虑的替代方案的范围。除了 NEPA 和州的环境审查法律要求的“不行动（no action）”的替代方案（将在下文介绍）之外，机构只需要考虑可以达到拟议行动预期目的的替代方案。政府机构在确定项目的目的和需求时，也可以考虑私人项目申请者的能力和目标。⁷⁵但是政府不可以把项目的目的和需求确定的过于狭窄，以至于“把拟议行动之外的‘合理替代方案’都排除在考虑范围之外”。⁷⁶

3. 受影响的环境及其现状的描述

依据 NEPA，环境影响报告通常包含一个单独的章节，提供“受影响的环境的描述”或环境现状。⁷⁷依据州的环境审查法律，对现状的描述可以分散在处理不同环境影响的 EIS 的不同章节中，也可以融入

⁷¹参见 42 U.S.C. § 4332(2)(c).

⁷²42 U.S.C. § 1502.12.

⁷³40 C.F.R. § 1502.12.

⁷⁴同上注，§ 1502.13.

⁷⁵*Alaska Survival v. Surface Transp. Bd.*, 705 F.3d 1073, 1085 (9th Cir. 2013).

⁷⁶*Simmons v. United States Army Corps of Eng'rs*, 120 F.3d 664, 666 (7th Cir. 1997); *Colorado Environmental Coalition v. Michael Dombeck*, 185 F.3d 1162 (10th Cir. 1999).

⁷⁷42 C.F.R. § 1502.14.

“不行动”方案（下文将介绍）的说明中。

对受影响的环境的描述（例如，当前的空气质量，水质和物种丰度）说明了拟议项目不存在时的环境状况，为分析项目的环境影响提供了基准。“环境”一词在 NEPA 和州的环境审查法律中有广泛的含义，不仅涵盖了传统的环境考虑（例如空气和水的污染），也包括有历史和考古资源、交通和社区特点等等。因此，对受影响的环境的描述通常要论证周边地区的人口特征、选址的历史背景和考古历史、以及任何可能受到拟议行动影响的选址地之外的资源（off-site resources）（例如下游水体）。

4. 项目落成后的未来影响分析

选择环境基准之后，EIS 的核心就是分析拟议方案和其他替代方案的环境影响。该分析往往分为很多章节，每个章节论证不同的影响领域。

环境影响报告中涉及的具体主题依据项目特点有所变化，但是通常需要考虑的主题包括（顺序不代表重要程度）：

- 土地使用，分区规划和公共政策
- 美学与视觉特征
- 土壤，坡度和侵蚀
- 有害物质
- 动植物
- 湿地
- 地下水
- 地表水
- 公用事业和基础设施
- 能源
- 空气污染
- 气候变化
- 固体废物和回收利用
- 交通运输
- 停车
- 噪音和振动
- 光污染
- 社区设施和服务
- 财政和社会经济影响
- 环境正义
- 文化，历史和考古资源

上述许多主题需要技术和专家分析。例如对交通影响的分析通常需要交通专家来确定需要分析的相关道路和路口，汇总现存的交通数据或进行新的交通统计，并通过高度专业的软件对存在和不存在拟议行动条件下的未来交通状况进行建模。如果拟建设施将带来重大空气污染影响，其环境影响报告可能需

要大气扩散模型来确定顺风受体所受的严重程度，以及项目是否会引起或导致任何该地区适用的空气质量标准的不达标。这些分析的支持数据可能长达成千上万页，通常包含在 EIS 的附录里。

确定环评范围程序可用于确定项目在哪些领域不会造成潜在重大的环境影响，并将这些领域排除在环境影响报告的进一步分析之外。另外，EIS 中分析的深度应与影响的大小成比例，例如对于一项偏远地区新建发电厂的项目，需要对空气质量影响而非交通影响进行更详细分析；而对于城市中心大型住宅发展项目，则通常比起自然资源损失应更重视对交通运输的影响。⁷⁸

5. 替代方案分析

EIS 中必须考虑对拟议行动的合理的替代方案的论证；事实上，这种分析已被认为是该文件的“关键”。⁷⁹一般而言，替代方案分析的范围包括：替代选址、设计、规模和技术。机构应当考虑可以达成拟议行动基本目的替代方案，即使该目标可能超出行动机构的管辖范围。⁸⁰

作为替代方案分析的一部分，机构通常必须考虑“不行动”的替代方案，该方案说明的是在没有拟议项目的条件下，合理预见的可能存在的环境状况。⁸¹

由 NEPA 规定的“不行动”的替代方案并不一定和加州的法律规定的“现状”基准相同。相反，它反映了在没有拟议项目的条件下合理预见的未来变化的影响。因此，如果某开发项目预期五年内不能建成，那么“不行动”替代方案中的交通分析应该包括在拟议项目建成之前附近可能建设的其他开发项目产生的交通流量。

当私主体申请联邦许可时，如果申请者对某些替代选址没有所有权或控制权，但这些选址也可以达成拟议行动的基本目的，那么 NEPA 也要求该许可行动的 EIS 论证这些选址方案。⁸²与此相反，纽约州的环境审查法仅要求公共机构考虑可能通过行使征用权取得的替代选址，它不要求申请人（私主体）考虑其不具有所有权或控制权的替代选址。⁸³

NEPA 要求该机构在可行的最大范围内考虑可以达成目标和需求并且减少不利环境影响的项目规模和布局的替代方案。⁸⁴例如，如果拟议的开发行动将需要填平漫滩，应采取努力调整开发位置或修改其设计，以消除或减少这种影响。同样，应当考虑可以减少交通及相关空气质量和噪音影响的道路的布局修改。通常，可以实现拟议行动目标的不同技术手段也应当作为替代方案进行研究，例如考虑采用回收或堆肥代替填埋或焚烧手段处理城市固体废弃物。

NEPA 要求分析的替代方案范围也有一些限制。最高法院重申替代方案分析的司法审查应参照的合理性原则，认为“不能仅仅因为机构没有考虑所有可想象的替代设备和想法，就认为环境影响报告是不充分的。”⁸⁵相反，环境影响报告中仅需要讨论那些足以支撑做出合理决策的替代方案。⁸⁶

⁷⁸40 C.F.R. § 1502.15 (“报告书中的数据和分析应当和影响的重要性相适应……”)

⁷⁹*Dubois v. U.S. Dep’t of Agriculture*, 102 F.3d 1273, 1286–87 (1st Cir. 1996); *Ctr. for Biological Diversity v. U.S. Dep’t of the Interior*, 581 F.3d 1063, 1071 (9th Cir. 2009).

⁸⁰*Natural Res. Def. Council, Inc. v. Morton*, 458 F.2d 827, 834 (D.C. Cir. 1972); *Natural Res. Def. Council v. Fed. Aviation Admin.*, 564 F.3d 429, 557 (2d Cir. 2009).

⁸¹40 C.F.R. § 1502.14(d); CEQ, NEPA’s Forty Most Asked Questions, 46 Fed. Reg. 18026 (March 16, 1981).

⁸²*Roosevelt Campobello Int’l Park Comm’n v. U.S. EPA*, 684 F.2d 1041, 1046–47 (1st Cir. 1982).

⁸³6 N.Y.C.R.R. § 617.9; *Horn v. Int’l Bus. Machines Corp.*, 110 A.D.2d 87, 95 (1985).

⁸⁴40 C.F.R. § 1508.20(a), (b).

⁸⁵*Vermont Yankee Nuclear Power Corp. v. Nat’l Res. Def. Council*, 435 U.S. 519, 551 (1978).

6. 减缓措施分析

为了确保环境影响已被充分评价，EIS 中必须论证减轻重大不利影响的措施。⁸⁷减缓措施可包括：道路改造，以适应增加的交通量的影响；异地湿地的恢复，以抵消对选址地湿地干扰的影响；建筑工程的布局调整，以限制腐蚀、不良的噪音或空气污染的影响；洪水管理措施，以收集和处理径流；以及其他措施。⁸⁸虽然 NEPA 没有要求机构实施任何特定的减缓措施，机构仍然必须对潜在的减缓措施采取“严格审查”，并且该机构可以将减缓措施作为其拨款或核准的条件。⁸⁹有些州（例如纽约）的环境审查的法律比 NEPA 更进一步，直接要求审查机构将采取可行的减缓措施作为其批准的条件。⁹⁰

根据 NEPA，机构可以通过减少潜在重大不利环境影响（即通过采取减缓措施使本来具有重大环境影响的项目变为不具有重大影响的项目），以避免编制 EIS 的费用和拖延，由此制定所谓的“经过减缓无重大影响报告（mitigated FONSI）”。除非机构能够“合理预见有足够可用的资源来执行或确保减缓措施的落实”，机构不能将实施缓解措施作为规避编制 EIS 的手段。⁹¹

减缓措施被提出后，应当和可衡量的履行标准或预期达到的结果一起，记录在 EIS 或拟议行动的批准文件中。NEPA 的实施条例还建议机构监督减缓承诺的执行情况，并且，如果该承诺没有落实，需要评估是否有必要补充进行环境审查。⁹²机构可能只需要补充环境审查，但是，在仍需要采取一些额外机构行动的情况下，如果该机构已经完成了它的批准、许可、或拨款，它无权要求对其过去的行为进行新的分析。⁹³

⁸⁶ *Airport Neighbors Alliance v. United States*, 90 F.3d 426, 431–32 (10th Cir. 1996); *Monroe County Conservation Council v. Adams*, 566 F.2d 419, 425 (2d Cir. 1977), *cert. denied*, 435 U.S. 1006 (1978).

⁸⁷ *Methow Valley*, 490 U.S. 332, 351–52 (1989) (“环境影响报告中的一个重要成分是对可以减少不利环境结果的步骤的论证。”)

⁸⁸ 参见 40 C.F.R. § 1508.20 (将减缓措施定义为包括但不限于“通过限制行动及其实施的范围和规模将环境影响最小化”，“通过修复，重建或恢复纠正环境影响”，以及“通过替换或提供替代资源或环境补偿环境影响”。)

⁸⁹ *Northern Alaska Envtl. Ctr. v. Kempthorne*, 457 F.3d 969 (9th Cir. 2006); *Northwest Indian Cemetery Protective Ass’n v. Peterson*, 764 F.2d 581, 588 (9th Cir. 1985), *rev’d on other grounds*, 485 U.S. 439 (1988).

⁹⁰ 6 N.Y.C.R.R. § 617.11(d)(5).

⁹¹ CEQ《联邦部门和机构对无重大影响报告中减缓措施的合理使用，以及监督并阐明对经减缓无重大影响报告的合理使用的最终指导》(Final Guidance for Federal Departments and Agencies on the Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact) (《CEQ 减缓指南》) 第 7 页，2011 年 1 月 14 日。

⁹² 同上注，第 14–15 页。

⁹³ 同上注。

五、项目分析中的关键问题

1. 分割项目

根据 NEPA 及其他环境审查法规，一个关键的问题是受审查的活动的范围。如果拟议的行动对环境有潜在重大影响，但办理机构将对该行动的环境审查“分割（segment）”为较小的部分或阶段，使其在独立情况下不会构成重大影响，这种分割会破坏 EIS 的客观性。虽然分割项目本身并不是违法的行为，但法院对意图将项目分割的做法持怀疑的态度，视该做法是为了规避 NEPA。⁹⁴

因此，界定“拟议行动”是为环境审查的范围设立合理的限制的关键。所以 NEPA 实施规则要求机构在确定审查的范围时，应考虑“关连行动（connected actions）”的连带影响。关连行动是指下列类型的拟议行动：“(i) 自动触发其他可能需要 EIS 的行动；(ii) 在该行动前或同时需要有其他行动，否则该行动将不能或不会继续进行；[或](iii) 该行动是另一更大行动的相互依存的部分或其正当性取决于另一更大的行动”。⁹⁵根据这个标准，项目的独立效用对两个行动是否有足够的关联性而需要一个共同的 EIS 在很大程度上起到决定性的作用。⁹⁶

界定机构需要考虑的“行动”，以及相应的环境范围的审查，也需要明确一个时间方面的问题：何时一个行动可以被视为“提议”⁹⁷从而触发 NEPA 规制，又或者该行动仅仅是“预期的”或“假设的”，因而不能适用 NEPA？有关这个问题，需要考虑的内容包括：

- 机构对该行动可能产生环境影响的确信程度；
- 在行动时，机构是否能够充分详细地说明这些环境影响，以使他们的考虑有用；
- 在机构坚定地致力于该项目，以至于更多的环境知识对其决策不能产生任何影响之前，该机构是否有后续的机会，把这些影响考虑在内。⁹⁸

2. 累积影响

NEPA 实施规则要求的环境影响报告关注“累积影响”，即机构所审查的行动与其他合理可预见的行动合并产生的影响。⁹⁹例如，一个购物中心的累积影响可能包括由沿相同的路径建立的单独的办公设施所产生的交通流量。正如一个判例中指出的，累积影响分析必须包括“过去，现在，和未来足够详细的项目目录，并且必须充分分析这些项目和及其差异如何影响环境。”¹⁰⁰

相对于过去的行为累积影响，CEQ 的指导性文件的指导机构考虑“机构提议的行动及其替代方案的

⁹⁴*North Carolina v. City of Virginia Beach*, 951 F.2d 596, 603 (4th Cir. 1991)（为确定是否出现了违法的项目分割，法院询问第一个行动的完成是否有“直接和实质性的可能性”影响第二个行动的决策）。

⁹⁵ 40 C.F.R. § 1508.25(a)(1).

⁹⁶例如，参见 *Coalition on West Valley Nuclear Wastes v. Chu*, 592 F.3d 306, 310–11 (2d Cir. 2009)（该案中的环境影响报告书论证了短期废弃物处理问题，但是没有论证长期关闭问题，因为废弃物处理有“独立的效用”）。

⁹⁷40 C.F.R. § 1508.23.

⁹⁸*Sierra Club v. Marsh*, 768 F.2d 868, 878 (1st Cir. 1985).

⁹⁹40 C.F.R. § 1508.7.

¹⁰⁰*Lands Council v. Powell*, 395 F.3d 1019, 1028 (9th Cir. 2005).

合理预见的影响是否可能与累积影响有持续的、叠加的和显著的关系。”¹⁰¹换句话说，如果过去行为当前的影响与拟议行动直接或间接产生的影响有显著的因果关系，机构就应当考虑过去的行为。

由于累积影响分析可能将环境审查的范围扩展到无法控制或无力负担的规模，CEQ 制定的规则指导机构对累积影响“限缩关注焦点”。¹⁰²尽管有规则承认有必要对累积影响限缩关注，但是机构经常面临的指责是未能充分评估累积影响（而不是过度评价累积影响）。有一个重要的方法可以用来确定机构评估累积影响的合理范围，并确保据此做出的决策能够经受司法审查的考验——就是利用上文介绍的确定环评范围程序（scoping process），重点审查最可能被认为是重大影响的累积影响。

3. 对域外行动及其影响的考虑

一个问题已经得到高度重视，并已诉讼的焦点：当机构在美国边界之外采取行动时，NEPA 要求的机构进行何种程度的环境影响评价？另一个相关的问题是机构进行可能产生域外影响的国内活动时，应当进行的环境影响评价的程度。这个问题可能越来越重要，因为国内项目会产生温室气体并导致气候变化这一全球性的环境问题。

监管和司法方面为明确 NEPA 对域外行动及其影响的适用所做的努力已经使法律文本（该文本规定没有将国际活动排除在审查范围之外）和适应外交日程与外国主权的需求达成了大致的平衡。¹⁰³例如，一个法院认为，美国国家科学基金关于在南极运作科学站的决策需要受到 NEPA 的规制，因为决定本身是国内行动，而且科学站在南极的运营并不牵涉外交政策考虑或侵犯任何外国国家的主权。¹⁰⁴相反，另一法院认为，NEPA 不适用与联邦机构对位于菲律宾的核反应堆组件发放许可的行为，理由是 NEPA 不应干涉国外的环保标准或美国与这些国家谈判的外交政策议程。¹⁰⁵

4. 对温室气体排放及气候变化影响的考虑

NEPA 的文本没有明确提到气候变化问题，但由于该法涉及广泛的范围，当事人已经开始挑战未充分地分析气候变化相关影响的环境影响评价，而他们往往会胜诉。¹⁰⁶

法院越来越多地接受当事人的观点，认可有关气候变化的影响应纳入需评估的环境影响范围。例如，一个联邦上诉法院因为某机构未能妥善评估与法规相关的温室气体排放的“渐进影响”，而认定联邦机动车燃油效率标准无效。¹⁰⁷在此判决中，法院解释道：“温室气体排放对气候变化的影响正是 NEPA 要求分析的累积影响。”¹⁰⁸

2010 年，CEQ 公布了一份关于联邦机构依据 NEPA 考虑气候变化和温室气体排放的指导文件草案。

¹⁰⁹该文件要求，当将对气候变化影响的论证“可以为决策者和公众提供有意义的信息时”，应将该分析作

¹⁰¹CEQ《在累积影响分析中考虑过去行动的指导》，（2005 年 6 月 24 日），http://www.nepa.gov/nepa/regs/Guidance_on_CE.pdf。

¹⁰²同上注。

¹⁰³例如，参见 Executive Order 12,114, 44 Fed. Reg. 1957（1979 年 1 月 4 日）（确立了一个关于在国外的联邦行动中适用 NEPA 的总统政策）。

¹⁰⁴Environmental Defense Fund, Inc. v. Massey, 986 F.2d 528 (D.C. Cir. 1993).

¹⁰⁵Natural Resources Defense Council v. Nuclear Regulatory Comm'n, 647 F.2d 1345 (D.C. Cir. 1981).

¹⁰⁶哥伦比亚法学院气候变化法律中心制订了一个表格，包含美国所有与气候变化问题相关的诉讼：<http://web.law.columbia.edu/climate-change/resources/us-climate-change-litigation-chart>。

¹⁰⁷Center for Biological Diversity v. NHTSA, 508 F.3d 508, 550 (9th Cir. 2007).

¹⁰⁸同上注。

¹⁰⁹CEQ，《考虑气候变化和温室气体影响的 NEPA 实施指南（草案）》（2010 年 2 月 18 日）。

为初步确定环评范围程序的一部分。¹¹⁰该文件也要求机构除了考虑项目对未来温室气体排放的影响之外，也考虑气候变化对特定项目的潜在影响。¹¹¹

根据联邦和州的环境审查的法律，审查机构有一个难以确定的问题，即当受审查的拟议行动会导致气候变化相关的影响时，如何确定影响重大到足以需要编制 EIS。尽管 NEPA 的指导文件规定，如果一个项目的直接排放量超过 25000 吨/每年，气候变化影响的评估可能是有意义的，但它并没有指出这种排放是否是构成“重大”的必要条件，从而需要准备环境影响报告。¹¹²事实上，无论是 NEPA 还是州法目前都没有确定一个数值，规定超过该数值温室气体排放量必须被认定为有重大影响。然而，有一种方法是通过评估项目对州的温室气体减排目标的影响来确定影响是否重大，该方法已受到一些州法院的支持。¹¹³该领域目前还是美国环境影响评价法有待发展的领域。

概括而言，迄今州在环境审查程序中对气候变化影响的整合比联邦做得更充分。例如，一些州已经颁布了关于量化需要环境影响评价的温室气体排放标准的正式政策。¹¹⁴在纽约州，负责实施一般环境审查法规的机构修订了环境评价表，把有关的温室气体排放的信息整合到表格中。¹¹⁵同样，马萨诸塞州，纽约市，和西雅图市都明确指示其机构在环境影响评价的过程中评价气候变化的影响。¹¹⁶但是，和联邦规则一样，上述努力一般都未能提供具体的指导，以确定温室气体项目的排放量达到何种程度时必须被认为是“重大”，从而需要编制 EIS。但是无论如何，大部分有大量的温室气体排放的项目也同时有其他重大的环境影响，因而需要编制 EIS。大型化石燃料的发电厂就是典型的例子。州的机构正越来越多地在其的决策过程中考虑气候变化。¹¹⁷随着时间的推移，NEPA 规则很可能会采用这些州级创新措施，正如 CEQ 在尝试将气候变化影响纳入环评影响程序，从而使 NEPA 更加现代化。

一个联邦和州的机构都需要关注的问题是，除了分析项目对产生气候变化的影响之外，环境审查程序是否要求它们分析气候变化（例如，温度升高，海平面上升，以及恶劣的天气）对拟议项目可能的影响。在纽约州，正式的指导意见指出，各机构应考虑气候变化对项目的这种影响，而在加州，至少有一个法院认为，不需要这种分析。¹¹⁸如果环境影响评价需要在一个努力适应气候变化的社会中发挥作用，整个美国州和联邦机构有必要采用纽约的领先做法。

由于气候变化影响受到日益广泛的关注，并且公众和政治家持续对行政机构施压，迫使其对这些环境风险做出反应，上述与气候变化相关的事项可能在州和联邦机构的环境审查中占据越来越重要的地位。

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

¹¹⁰同上注，第 1 页。

¹¹¹同上注，第 6-8 页。

¹¹²同上注，第 2-3 页。

¹¹³例如，参见 *Cleveland Nat'l Forest Found. v. San Diego Ass'n of Gov't's*, Case No. 2011-00101593 (Dec. 3, 2012).

¹¹⁴联邦、州和地方关于在环评中考虑气候变化的法律法规列表请参见哥伦比亚法学院 NEPA 和州 NEPA 环境影响报告书资源中心：<http://www.law.columbia.edu/centers/climatechange/resources/eis>（2010 年 9 月 20 日最后访问）加州南岸空气质量管理区确定温室气体排放“重大影响”范围的方法可参见：<http://www.aqmd.gov/hb/2008/December/081231a.htm>.

¹¹⁵纽约州环境保护部，全本环境评价表，第一部分：http://www.dec.ny.gov/docs/permits_ej_operations_pdf/feafpart1.pdf.

¹¹⁶马萨诸塞州温室气体排放政策和协定修正案，2010 年 5 月 5 日生效，第 1 页，参见：<http://www.mass.gov/eea/docs/mepa/ghg-policy-final.pdf>；纽约市市长环境协调办公室，《市环境质量审查技术手册》（2014），第 18 章：http://www.nyc.gov/html/oec/downloads/pdf/2014_ceqr_tm/18_Greenhouse_Gas_Emissions_2014.pdf；Seattle City Ordinance No. 122574, passed Dec. 3, 2007.

¹¹⁷同上注，第 5 页，也可参见 Mark A. Chertok and Ashley S. Miller, *Environmental Law: Climate Change Impact Analysis* 59 Syracuse L. Rev. 763 (2009)（解释了气温升高、海平面上升等形式的气候变化影响如何对拟议行动产生影响）。

¹¹⁸参见纽约州环境保护部，长官政策 49，《气候变化和环境保护部行动》（2010 年 10 月 22 日）：http://www.dec.ny.gov/docs/administration_pdf/commisclimchpolicy.pdf；*Ballona Wetlands Trust v. City of Los Angeles*, 201 Cal. App. 4th 455 (2nd Dist. 2011).

六.实施环境影响评价制度的美国经验

1. 环境影响评价的数量和费用

由于环境影响评价适用于数量庞大的活动，它涉及政府大量投入的关注和资源。用数字说明，大约每年要依据 NEPA 进行 50,000 个环境评价，其中有大约 400–500 个行动最终需要编制 EIS。¹¹⁹此外，由于多数机构行动属于 NEPA 适用的除外情形，NEPA 每年还要审查无数的终止于申请除外类别阶段的行动。¹²⁰这些 NEPA 的统计数据仅体现了美国所有的环境审查活动中的一小部分，因为许多州的机构的行动不涉及任何联邦的介入，但需要依据州法编制环境评价或 EIS。这些环境影响评价文件的庞大数量揭示了环境影响评价在美国政府中的重要作用。

要充分认识到美国政府为环境影响评估做出的巨大的努力，必须要考虑准备这些文件时间和费用。一份 2003 年的 CEQ 报告指出，通常一份 EIS 需要 1 到 6 年的时间才能完成，并耗费 25 万到 200 万美元的成本。¹²¹对于某些机构，这些估计可能仍然太低。例如，美国能源部 2003 年和 2012 年间在每个 EIS 上平均花费 660 万美元，其中一个主要的核废料处理设施的整治和关闭行动的环境影响报告耗资惊人，达 8500 万美元。¹²²

关于准备 EIS 需要多长时间的信息非常少，但是一个 2013 年的研究发现，2012 年依据 NEPA 编制的 197 份 EIS 终稿，平均每份耗费了 4.6 年的时间。¹²³

环境评价（EA）通常可以更快地完成，且比起 EIS 成本更低。CEQ 估计即使“大型的环境评价”通常也可以用 5 万美元至 20 万美元的成本，在 9 至 18 个月内完成。¹²⁴能源部所做环境评价花费的中间值（6.5 万美元）也在该范围内，但能源部成本最高的环境评价也花费了超过 100 万美元。¹²⁵考虑到每年进行的环境评价的数量，这些数字代表了大量的政府支出。

大多数从业者可能会同意，NEPA 和州的环境审查法律已经成功地增加了机构对拟议行动环境影响的考虑。正如由于 CEQ 规则指出的，“更重要的不是好的文件，而是好的决策。”¹²⁶并且，毫无疑问，机构编制全面的环境审查文件的义务在很多情况下改善了机构的决策过程。然而，即使是环境审查的支持者也不得不承认，机构（尤其是在州一级）经常有人员和资源不足的问题，以至于无法及时完成充分的审查。

¹¹⁹参见国家保护研究所，《环境评价》：<http://www.npi.org/NEPA/assessment>（2014 年 6 月 9 日最后访问）；CEQ，《截止到 2012 年的环境影响报告书》：https://ceq.doe.gov/nepa/EISs_by_Year_1970_to_2012.pdf。

¹²⁰参见 CEQ，《联邦部门和机构依据 NEPA 设立、适用和修改除外类别的最终指导》，75 Fed. Reg. 75,632（2010 年 12 月 6 日）。

¹²¹NEPA 特别行动组，《给 CEQ 的报告：使用现代化方法实施 NEPA》，第 66 页，（2003 年 9 月）：

<http://ceq.hss.doe.gov/ntf/report/finalreport.pdf>。

¹²²美国政府审计署，《国家环境政策法：少有关于 NEPA 分析的信息存在》，第 13 页，（2014 年 4 月）：

<http://www.gao.gov/assets/670/662546.pdf>。

¹²³同上注。

¹²⁴<http://ceq.hss.doe.gov/ntf/report/finalreport.pdf>。

¹²⁵同上注。

¹²⁶40 C.F.R. § 1500.1(c)。

很难从现有的统计数据来证明环境影响评价程序在何种程度上改善了联邦和州机构的实质性决策。因为 NEPA 和相关法律的主要规定的是程序性而非实体性的要求，一些批评人士指出，可能进行环境影响评价或编制 EIS 之后，机构仍可能采用考虑环境因素之前无论如何都会采取的方案。还有一些人则认为，即使环境影响评价改善了机构的决策定，这种审查的成本和时间拖延过大，以至于不能证明它们存在边际收益。这种担忧已经引发了国会辩论和法规改革，以限缩环境评价和 EIS 的长度，并使其关注重点更突出。¹²⁷

同样重要的是，统计数据是无法衡量许多环境影响评价程序带来的无形的但非常实在的益处，包括对机构及其工作人员灌输环境伦理，以及其他更微妙的益处，例如在环境审查程序中设置了一些期间，使不明智的行为可以被重新考虑。本文第七部分将对这些益处进行更详细的说明。

2. 司法审查和环评诉讼

在美国，依据 NEPA 的诉讼构成了对政府提起的环境诉讼的一个重要组成部分。依据 CEQ 收集的统计数据，2011 年，有 94 个诉讼是原告诉称政府机构未能遵守 NEPA。¹²⁸其中，近三分之一（29 个）的诉讼中政府败诉，因为法院发现该机构对 NEPA 义务的履行存在缺陷。原告胜诉的案例中，机构违规发生在 NEPA 过程中的几乎每一个阶段——从确定行动是否属于审查范围，到审查 EIS 的终稿。¹²⁹当然，这些 NEPA 统计数据仅代表环境影响评价相关诉讼的一小部分，因为有更多的诉讼依据州的环境审查法律提起。

另一个从 CEQ 的数据中明显可见的事实是，非营利组织和公民团体对促使机构遵 NEPA 起到了至关重要的作用。上述 2011 年提起的 94 起诉讼中，60-80 个由公益团体，公民团体，相关个人起诉，或者它们共同起诉。¹³⁰这些团体在 NEPA 执法中发挥的作用强调了透明度和公众宣传在环境影响评价过程中的重要性，因为如果机构的活动不为公众所知，这样的执法是不可能存在的。

NEPA 的一些批评人士质疑是否公众对执行 NEPA 和相关的州法的需求造成了诉讼产生的成本和程序延迟。即使机构行动因不遵守环境审查程序被法院废除，它也可能仅仅纠正程序失误后，重新作出同样的对环境有害的行动。相反，有策略的因非环保原因反对项目的当事人在理论上可以利用轻微的程序错误，依据环境审查法律起诉，以阻止或延缓机构行动，即使这些行动的环境影响是合理的。虽然目前仍不清楚这些担忧是否成立，它们已经引起了一些改革 NEPA 的努力，以阻止批评者认为是无价值的或无关紧要的诉讼。

已经建立的限制某些公民寻求 NEPA 和相关法规的司法强制执行能力的一个原则是起诉的“资格（standing）”。根据这一原则，除非原告有法律上承认的利益，原告不能提起诉讼。为了证明这种利益，原告必须证明他或她可能遭受实际的或即将发生的损害、该机构的行动是该损害的原因、并且如果胜诉能够对该损害进行救济。¹³¹此外，原告必须证明他或她在诉讼中的利益落入 NEPA 或相关州法的“利益

¹²⁷例如，参见 40 C. F. R. § 1500.4（标题为“减少书面工作”的 CEQ 规则章节）。

¹²⁸CEQ，2011 年 NEPA 诉讼调查：http://ceq.hss.doe.gov/nepa/2011_NEPA_Litigation_Survey_Final.pdf。

¹²⁹同上注

¹³⁰同上注

¹³¹*Monsanto Co. v. Geertson Seed Farms* (“Monsanto”), 130 S.Ct. 2743, 2752 (2010).

范围 (zone of interest)” 之内。¹³²虽然 NEPA 的利益范围很广，但法院已经裁定，纯粹经济损失不在该范围内。¹³³换言之，如果原告唯一的损失是机构行动造成的经济影响，那么原告不能仅凭这个理由起诉该行动。¹³⁴这一原则可以帮助将 NEPA 诉讼限制在对威胁真正的环境利益的项目提起的诉讼。

尽管公民通过诉讼强制执行 NEPA 或相关州法受到一些限制，公众提起的诉讼仍然是促进机构守法的重要手段。由于公众在执法中的重要作用，司法救济的可及性和公益组织具有就技术复杂的科学问题起诉的资金和专业资源，对成功实施环境影响评价程序有关键作用。在美国，诉讼双方当事人通常承担自己的律师费，在 NEPA 诉讼中败诉的一方很少支付对方的费用。因此，与其他国家不同，在美国，承担被告律师费的担忧并不会减少此类诉讼的提起。

¹³²Bell v. Bonneville Power Admin., 340 F.3d 945, 951 (9th Cir. 2003).

¹³³Ashley Creek Phosphate Co. v. Norton, 420 F.3d 934 (9th Cir. 2005).

¹³⁴例如，参见 Mall Props. Inc. v. Marsh, 672 F. Supp. 561, 566 (D. Mass. 1987), app.dismissed, 841 F.2d 440 (1st Cir. 1988), cert. denied, 488 U.S. 848 (1988).

七、在中国实施环境影响评价

1. 借鉴美国经验

NEPA 是美国的第一部“信息化 (informational)”的环境法律，它制定的基础是相信透明度和公众的意见输入可以补充传统的“命令-控制”规制方法。这种“信息化”的做法的前提假定是，对机构评估环境信息的要求会造成内部压力，迫使机构采取对环境有利的结果，并且公开披露信息的要求将创造外部压力。

大多数观察者可能会认为，美国的经验已经证实这种信息-强制 (information-forcing) 方法的价值。NEPA 能取得成功效果，其中一个措施是在多种具体的环境问题中采用类似的信息公开的法律。例如，NEPA 颁布 16 年后，美国国会建立了有毒物质排放清单 (Toxics Release Inventory, TRI)，该清单是一个公开超过一定阈值的化学品排放的在线数据库。¹³⁵最近，美国环境保护署建立规则，要求许多公司公开其温室气体排放的，并且此前该机构试图直接规制温室气体排放。¹³⁶

广泛的司法审查以多种方式促进了有效的环境影响评价。首先，法院撤销机构未经充分环境审查的行动的风险激励了机构遵守 NEPA 和类似法律的条文和精神。此外，由于诉讼可能会导致延迟和费用，司法救济的可及性给予了受到不利环境影响的一方谈判优势，使其可能在环境审查程序的早期通过谈判促成环境影响较小的项目方案。

鉴于在这一过程中公众意见投入和参与的重要性，信息化的法律 (例如 NEPA) 的成功依赖于以公民容易吸收的形式提供有关资料。因此，许多环境审查法律要求的关键文件的公告刊登在当地报纸上或翻译成周边社区通用的语言。目前也有要求将环评报告书和其他重要文件的公布在网上的趋势。环境审查法律还规定了公民提出书面意见和召开听证会的阶段，以方便公众贡献意见。

但是，仅提供公告和发表意见的机会，并不一定足以促进有意义的公众参与。很多的 EIS 有高度的技术性，可能包含成千上万的支持性材料，因此，即使作为依据的数据是可得，受影响的公众仍然难以评价或对机构的结论作出回应。促进公众贡献意见的一种方式向受影响的社区团体提供资金，让他们聘请有能力审查 EIS 并且协助准备公众意见的技术顾问。虽然 NEPA 没有规定这样的资金援助义务，一些州的法律却有这样的规定。¹³⁷

即使公共机构不提供资金支持，环境影响评价程序也为公众集中可利用的资源来研究项目的环境影响提供了条件。NEPA 已经帮助推动建立了许多重点关注诉讼的环保非营利组织，它们经常与受拟议行动影响地区的社区组织合作。这些全国的环保组织也可以帮助克服环境审查文件的技术特性所造成的障碍，因为这些组织往往会给环境审查过程带来专业知识和更多的资源。

¹³⁵参见 42 U.S.C. § 11023.

¹³⁶参见 40 C.F.R. Part 98.

¹³⁷例如，在向纽约州公共服务委员会申请的某些程序中，提议建设输电或发电项目的申请人必须提供资金，向受影响的组织和公益组织支付，保障它们有能力参与项目环境影响的审查。N.Y. Pub. Serv. L. § 122(5)(a), 164(6)(a).

最后，NEPA 等环境审查法律的最重要的影响之一是将政府机构对内部任务的考虑扩张到了多元化的机构工作。NEPA 明确要求所有联邦机构依据该法规定“审查其...法定权限，行政法规和现行政策和程序”，¹³⁸并且早期的司法判决确认了 NEPA 的 EIS 的要求适用于范围广泛的机构行动，包括历史上没有从环境角度考虑过的行动，例如军事演习。建立“鼓励人与环境之间富有成效和令人愉快的和谐的国家政策”必须由所有政府机构考虑，并且虽然国家环境政策法并没有规定任何具体决策的实体内容，它对机构决策仍有重要影响。此外，NEPA 首次要求很多机构雇用专门的环保工作人员，或将新的环境相关工作重新分配给现有员工，以编制和审查 EIS。在许多情况下，在机构的专业队伍中增加生物学家，环境工程师，环境律师和其他环境专业人才对机构的文化有着深远的影响，进一步推进了 NEPA 确立的国家政策。¹³⁹

2. 以渐进的方式实施环境影响评价

由于其开放式的措辞和一系列广泛地解释其条款的早期司法判决，在美国，NEPA 已经对政府的决策产生了深远的影响。一些州的环境审查的法律在范围上与 NEPA 相比比较有限，并且一些同时涉及联邦和州的提议试图精简环境审查程序中的要素。在中国政府系统中引入环境影响评价程序可能从逐步采纳类似 NEPA 的程序中获益，并且在实现环境审查程序的最大益处的同时避免其最大的成本。

本部分将讨论中国以渐进的方式应用环境审查制度可供选择的方案，此过程可以先从一部比 NEPA 范围更窄的法律开始，并随着时间发展逐步进行评估和修改。

(1) 环境审查涵盖的行动范围

如上所述，由于对“行动”的广泛定义，NEPA 适用于范围广阔的政府部门的批准、拨款决定、以及其他自由裁量行为。然而马里兰州环境政策法案，仅限于“对立法拨款或其他立法行为的请求”，而不适用于发放许可证和其他监管行动。¹⁴⁰此外，一些近期的联邦法律已经通过建立新的“除外类别”（纳入更多类型的公路项目，能源项目，以及其他项目）限缩 NEPA 的适用范围。¹⁴¹为了逐步分阶段实施环境审查程序，中国可以将需要审查的行动限制在预期有最大的环境影响的项目（例如，电厂，主要生产设施，环境敏感区建设项目等），而后依据初步经验，扩大审查的行动类型。

(2) 需评价的环境影响的范围

NEPA 不仅对“行动”定义广泛，对“人类环境”的解释也很宽泛，这增加了进行环境影响评价的项目数量和评价中的分析范围。NEPA 的批评者认为，这种宽泛的定义已经导致 EIS 过长，并且不适当地强调了相对较小的影响。在最近提出的监管改革中，纽约州已经提出，要求在制定环评报告书之前进行正式的“确定环评范围”程序，以界定 EIS 中将要涉及和详细分析的对象。¹⁴²确定环评范围可以用来

¹³⁸42 U.S.C. § 4333

¹³⁹对于这种转变的更详细的分析，请参阅 Paul J. Culhane, *NEPA's Impacts on Federal Agencies, Anticipated and Unanticipated*, 20 *Envtl. L.* 681, 690-91 (1990); Michael B. Gerrard, *The Effect of NEPA Outside the Courtroom*, 39 *Envtl. L. Rep.* 10615 (2009).

¹⁴⁰Md. Regs. Code, Title 8, § 1-301.

¹⁴¹例如，参见 2014 年《农业法》(Agricultural Act)，Pub. Law 113-79；2005 年《安全，可靠，灵活，高效的交通运输公平法》(Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, SAFETEA-LU)，Pub. Law 109-59.

¹⁴²参见纽约州环境保护部，州环境质量审查法 (State Environmental Quality Review Act, SEQRA) 修改提议中的概括的环境影响报告书的最终范围 (Final Scope for the Generic Environmental Impact Statement, GEIS)，第 10 页 (2012 年 11 月 28 日)。

筛选出较小的影响，将 EIS 关注的重点集中在最有可能造成重大环境影响的对象上。

除了界定环评范围，中国可以在其环境审查法律中对“环境影响”进行更具体的定义，或将对环境有利的项目明确排除在环境审查的范围之外。例如，加利福尼亚州在该州最近修订的环境审查法中宣布，某些在指定的“预留用地（infill site）”和“公交优先区（transit priority areas）”建设的项目所产生的审美影响和对停车的影响不能再被认为是需要制定完整 EIS 的重大影响。¹⁴³

（3）环境审查程序的时效和司法审查

如上所述，大型项目的环境审查程序可能长达数年，而随后往往还伴随着耗时漫长的诉讼。虽然诉讼不会自动使被诉的项目中止，但该诉讼得到解决之前，项目发起人可能很难保障争议项目的融资和进展。NEPA 诉讼适用为期六年的诉讼时效，这增加了项目拖延的可能性，因为原告可能等待数年再起诉。2005 年，美国国会缩短了该诉讼时效，将对高速公路和公共交通项目的诉讼时效改为 180 天，¹⁴⁴并且最近的立法缩短了对 EIS 的评议期和对航道疏浚等水利工程的诉讼时效。¹⁴⁵还有一些立法努力试图为 NEPA 审查过程的总长度设定限制，但这些提议都没有被采纳。¹⁴⁶除了设置较短的诉讼时效和限制环境审查过程的长度之外，中国也可以采纳纽约提出的计划，即要求主导机构在认可 EIS 草稿后的六个月内制定 EIS 的终稿。¹⁴⁷

¹⁴³参见 SB-743 (enacted Sept. 27, 2013).

¹⁴⁴参见 2005 年《安全、可靠、灵活、高效的交通运输公平法》，23 U.S.C. § 139(l)(1).

¹⁴⁵参见 2014 年《水资源改革和发展法》(Water Resources Reform and Development Act)，33 U.S.C. § 2348(g)(2), (h)(5).

¹⁴⁶参见 2014 年《负责任地和专业地振兴发展法》(Responsible And Professionally Invigorating Development Act)，H.R. 2641 (2014 年 3 月 6 日由众议院通过)。

¹⁴⁷参见纽约州环境保护部，州环境质量审查法修改提议中的概括的环境影响报告书的最终范围，第 12 页 (2012 年 11 月 28 日)。

八、结论

在 NEPA 实施的 45 年间，环境影响评价已深深扎根于美国的行政决策过程。虽然美国环境审查程序的细节及其相对的长处和短处仍存在争议，毫无疑问的是，NEPA 和类似的法律成功地实现了它们的基本目标：使环境因素得到研究，并且公开披露重大政府行动。世界各国在制定自己的类似制度时参考美国的制度。我们希望，本报告提供的对环境审查程序的评述将为中国建立相应制度提供有益的参考。

The Environmental Impact Assessment Process in the United States

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I. Introduction

The National Environmental Policy Act (“NEPA”) requires United States federal administrative agencies to implement procedures for the assessment of the environmental impacts in all discretionary agency decision-making.¹ This landmark statute has served as a legislative model both within the United States, where New York, California, and thirteen other states have adopted analogous laws that govern state and local agencies, and across the world, as other nations have implemented similar procedures. This white paper sets forth the basic process of environmental impact assessment in the United States and describes lessons learned from over forty years of experience under NEPA and under state environmental assessment statutes.

The following sections proceed as follows:

- Section II introduces NEPA and other laws in the United States which require federal and state agencies to conduct environmental impact assessments.
- Section III describes the procedures by which environmental impact assessment is conducted under those statutes.
- Section IV details the substantive issues that agencies must address in preparing environmental assessment documents for a major proposed action.
- Section V reviews major legal questions that arise in relation to the scope of agencies’ obligations to assess environmental impacts.
- Section VI describes the practical experience of implementing and enforcing environmental review laws in the United States.
- Section VII outlines how lessons from the United States’ experience may inform efforts to implement environmental impact assessment procedures in China.

¹ 42 U.S.C. §§ 4321–4370.

II. Fundamentals of Environmental Impact Assessment and Legal Authorities

Enacted by Congress in 1969, NEPA was the first among the major modern environmental statutes in the United States and has been described as the country’s “basic national charter for protection of the environment.”² In its opening sentence, NEPA establishes “a national policy which will encourage productive and enjoyable harmony between man and his environment.”³ “To the fullest extent possible,” NEPA directs federal agencies to implement methods and procedures designed to accord environmental factors appropriate consideration in discretionary agency decision-making.⁴ NEPA’s procedural mandates of environmental impact assessment have become a central tenet of federal administrative law.

NEPA’s primary mechanism is a requirement that agencies prepare and publicly circulate an environmental impact statement (“EIS”) on all “proposals for legislation and other major Federal actions significantly affecting the quality of the human environment.”⁵ Public review of the EIS, in both its draft and final form, serves the dual purposes of enabling the public and the courts to ensure that agencies comply with NEPA and of providing public disclosure of the environmental ramifications of federal agency actions. Actions that do not meet this threshold of significance do not require an EIS, but the initial determination of whether an action may have significant environmental impacts is itself an important aspect of NEPA’s insertion of environmental considerations into agency decision-making.

The EIS describes existing environmental conditions, the reasonably foreseeable environmental effects of a proposed action, reasonable alternatives to the proposed action, and measures to mitigate the proposed action’s significant adverse environmental impacts.

² Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1215 (9th Cir. 1998).

³ 42 U.S.C. § 4321.

⁴ 42 U.S.C. § 4332.

⁵ Id. Although NEPA does not actually use the term, “Environmental Impact Statement,” the phrase derives from the statute’s requirement that agencies prepare a “detailed statement” on environmental impacts:

[A]ll agencies of the Federal Government shall . . . include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

- (i) the environmental impact of the proposed action,
- (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
- (iii) alternatives to the proposed action,
- (iv) the relationship between local short-term uses of man’s environment and the maintenance and enhancement of long-term productivity, and
- (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

42 U.S.C. § 4332(2).

Through the EIS, the agency is provided with information that allows it to consider environmental concerns along with other factors that may be relevant in deciding whether to approve the proposed action.

Neither NEPA nor the EIS dictates that the agency must reach any particular result. Early in NEPA's history, judicial decisions clarified that the statute set forth procedural requirements—i.e., that the agency assess and consider environmental impacts—rather than substantive mandates, such as a rule that agencies eliminate, mitigate, or give special weight to environmental impacts. Thus, once the agency has prepared and considered the EIS, it can choose any substantive result that it deems appropriate.⁶ Nor does NEPA require the elevation of environmental concerns over other pertinent considerations.⁷ By contrast, some state-law environmental review statutes require, in addition to the procedural assessment of environmental impacts, that state agencies give some substantive weight to environmental considerations and mitigate adverse impacts, if feasible.⁸ However, those substantive mandates typically give agencies wide discretion in weighing environmental impacts, and if the agency complies with a statute's procedural requirements, its substantive decision usually will be deemed valid.

Although NEPA is a short statute with a simple procedural mandate, a larger world of detailed regulations governs the procedures for determining whether an EIS is required, how an EIS must be prepared, and the scope of environmental impacts it must assess. The Council on Environmental Quality (“CEQ”), a federal agency with responsibility for oversight of NEPA, has promulgated general regulations for implementing NEPA.⁹ Federal agencies may also issue their own NEPA regulations, but if they do not, the CEQ regulations control.¹⁰ In addition, a large amount of judicial precedent exists interpreting NEPA and its procedural requirements.

The courts play a critical role in policing agencies' compliance with NEPA and its state-law equivalents. Early in NEPA's history, in a landmark judicial decision, an appellate court vacated a set of agency regulations after determining that the agency had not undertaken a “full and fruitful” environmental review before issuing them.¹¹ Although courts generally defer to agencies' choices as to how they implement their statutory mandates, under NEPA courts will ensure that agencies prepare every EIS with “objective good faith” and take a “hard look” at environmental consequences and alternatives.¹² If a court determines that an agency has failed to prepare an EIS when it should have, or that an EIS did not adequately

⁶ This understanding of NEPA as a purely procedural mandate was confirmed in two early judicial decisions interpreting the statute: *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227 (1980) and *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 558 (1978).

⁷ *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983); *Strycker's Bay*, 444 U.S. at 227.

⁸ See N.Y. Env'tl. Conserv. Law. § 8-0109(8) (requiring that agencies “to the maximum extent practicable, minimize or avoid adverse environmental effects, including effects revealed in the environmental impact statement process.”).

⁹ 42 U.S.C. §§ 4341-4347; 40 C.F.R. Part 1500; *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979).

¹⁰ 42 U.S.C. § 4371(c)(1); 40 C.F.R. § 1507.3.

¹¹ *Calvert Cliff Coordinating Committee v. Atomic Regulatory Comm'n*, 449 F.2d 1109 (D.C. Cir. 1971).

¹² *Britt v. U.S. Army Corps of Eng'rs*, 769 F.2d 84, 90 (2d Cir. 1985); *Sierra Club v. Espy*, 822 F. Supp. 356, 367 (E.D. Tex. 1993), *rev'd on other grounds*, 18 F.3d 1202 (5th Cir. 1994).

assess the environmental consequences of a proposal, it will not hesitate to invalidate the agency's decision and the underlying process of environmental review that supports that decision.¹³

NEPA's requirement that agencies assess the environmental impact of permitting decisions and funding decisions frequently intersects with the legal framework of other federal and state environmental laws. Various federal agencies implement permit programs under those statutes, and their decisions to grant or deny permits are subject to NEPA review. And, where state and federal agencies have concurrent jurisdiction over a proposed project or program, both NEPA and the involved state's environmental review statute may be implicated. In such cases, the state and federal environmental review processes are often coordinated, requiring just one EIS.¹⁴ However, the state agency may choose to perform a separate EIS focused solely on the necessary state approvals.¹⁵ Furthermore, state agencies may be subject to stricter requirements than their federal counterparts if state law imposes a substantive mandate to reduce adverse environmental impacts, in addition to the procedural requirements of NEPA.

The preceding summary is only an overview of the process of environmental impact assessment to provide an elemental familiarity with the underlying legal framework. The following sections attempt to provide a more in-depth perspective on the most prominent issues that arise in the implementation of environmental review procedures in the United States.

¹³ See, e.g., Lands Council v. Powell, 395 F.3d 1019 (9th Cir. 2005).

¹⁴ See, e.g., N.Y. Evtl. Conservation Law § 8-0111(1) (McKinney 2011) (providing for coordination between NEPA and SEQRA review).

¹⁵ See Town of Barnstable v. Cape Wind Associates, LLC, 27 Mass. L. Rptr. 111 (Mass. Super. 2010).

III. Environmental Impact Assessment Procedures

Environmental impact assessment is conducted in phases which, in short, require:

- A determination whether the proposed activity is of a type that is subject to environmental review;
- Pre-EIS procedures, which include the identification of a lead agency and the determination of whether the action is sufficiently likely to have environmental impacts that require the preparation of an EIS;
- If it is required, the preparation of an EIS; and
- Post-EIS procedures to ensure that the EIS was adequate and that it is incorporated into the final agency decision.

In the following sections, each of these steps is described in greater detail.

A. Determining Whether the Action is Subject to Environmental Review

The initial step in the environmental review process is to determine whether the proposed activity is within the scope of actions for which environmental review procedures are required. Under both NEPA and analogous state laws, this question requires a determination of both whether the agency involved is subject to environmental review requirements and whether the action falls within the scope of activities subject to those procedures.

“Federal actions” subject to NEPA include actions undertaken by almost any federal agency, including military defense agencies (although statutory disclosure exemptions relieve such agencies from the need to publicly disclose classified information).¹⁶ Congress, the judiciary, and the President are not considered federal agencies for these purposes, so actions by those entities are exempt from NEPA’s procedural requirements.¹⁷ Similarly, state environmental review statutes typically exempt the state governor and state courts from their requirements.¹⁸

Generally, state environmental review statutes are analogous to NEPA in that they apply to all state agencies. However, one question that is unique to state environmental review is whether the statute applies to the actions of local governments. Some states (including California, New York, Washington, and Massachusetts) treat local and municipal

¹⁶ *Weinberger v. Catholic Action of Hawaii/Peace Educ. Project et al.*, 454 U.S. 139, 146 (1981).

¹⁷ 5 U.S.C. § 701(b)(1); *Public Citizen v. U.S. Trade Representative*, 5 F.3d 549 (1993).

¹⁸ *See, e.g.*, 6 N.Y.C.R.R. § 617.5(c)(37)

governments as “state agencies” subject to environmental review requirements.¹⁹ Other state statutes (North Carolina and Indiana) exclude local government from their ambit, and one (Georgia) applies to local government actions only if the action involves a sufficiently large financial commitment.²⁰

The category of “federal actions” subject to NEPA includes both direct agency action (such as construction, implementation of a government program, the promulgation of regulations, or an agency proposal for legislation)²¹ and indirect agency action (such as funding, financing, or permit approval for a private action).²² Thus, many actions undertaken by private entities may require NEPA review if they indirectly involve federal review. In light of the extent of federal regulation in the United States, many activities are potentially subject to NEPA.

However, certain federal actions have received statutory or judicial exemption from NEPA compliance. This is particularly common among statutes that inherently require the agency to consider environmental concerns through other processes. For example, various actions under the Clean Air Act, Clean Water Act, and the Superfund law are statutorily exempt from NEPA.²³ Agency actions under certain other environmental statutes have been excluded from NEPA’s scope based on judicial determinations that those statutes provide environmental assessment procedures that constitute the “functional equivalent” of NEPA review.²⁴

Likewise, federal actions subject to NEPA do not include ministerial action mandated by law—that is, actions which agencies must implement but with respect to which they have no discretionary decision-making role.²⁵ For example, if a federal appropriations statute directs that an agency “shall, notwithstanding any other provision of law, immediately” construct a project that the agency might otherwise have discretion not to build, no environmental impact review will be required for the project because the agency has no choice but to proceed.²⁶ State environmental statutes also generally exempt ministerial actions from their procedural and substantive requirements.

In addition, NEPA regulations allow an agency to dispense with environmental review procedures under emergency circumstances.²⁷ This exception, which intended to prevent environmental review from becoming a bureaucratic barrier in situations demanding swift

¹⁹ Cal. Pub. Res. Code, §§ 21100, 21151; N.Y. Envtl. Conserv. Law, § 8-0105; Wash. Admin. Code, § 43.21C.020; Mass. Gen. Laws, Title III, CH. 30, § 62.

²⁰ N.C. Admin. Code, Pollution Control and Environment, § 113A-4; Ga. Code Ann. §§ 12-16-3(7)(b) (2010).

²¹ 40 C.F.R. § 1508.18(b).

²² 42 U.S.C. § 4332(2)(C).

²³ 15 U.S.C. § 793(c)(1); 33 U.S.C. § 1371(c)(1).

²⁴ *Alabama ex rel. Siegelman v. U.S. EPA*, 911 F.2d 499, 504 (11th Cir. 1990) (exempting permitting under the Resource Conservation and Recovery Act (“RCRA”)); *Merrell v. Thomas*, 608 F. Supp. 644 (D. Or. 1985), *aff’d*, 807 F.2d 776 (9th Cir. 1986) (exempting pesticide registration process under the Federal Insecticide, Fungicide and Rodenticide Act (“FIFRA”)).

²⁵ See *Sierra Club v. Babbitt*, 65 F.3d 1502, 1512 (9th Cir. 1995).

²⁶ *Minard Run Oil Co. v. U.S. Forest Service*, 2011 WL 4389220 (3rd Cir. Sept. 20, 2011).

²⁷ 40 C.F.R. § 1506.11.

action, was a focus of judicial scrutiny in Winter v. Natural Res. Def. Council,²⁸ a lawsuit involving the United States Navy's request for exemption for certain naval training exercises.

B. Initial Planning and Determining Whether the Action Requires an EIS

For actions to which environmental review procedures apply, those procedures take effect early in the planning process.²⁹

In the case of NEPA, which applies to agency "proposals" for legislation and other federal actions, an agency must begin to implement the statute as soon as it "has a goal" and is "preparing to make a decision on one or more alternative means of accomplishing that goal."³⁰ Most state environmental review statutes similarly require environmental review to begin at the early stages of agency planning. For example, New York's statute takes effect "[a]s early as possible in the formulation of a proposal for an action."³¹ In addition to these statutory mandates, there is a strong incentive to undergo these procedures promptly, simply because the agency may not reach a final decision on the proposal until it has complied with the NEPA process.

Under both NEPA and analogous state statutes, if an action is proposed by or involves more than one agency, an initial task is for the involved agencies to identify a lead agency—generally, the agency with the principal involvement in the proposal or which has taken primary responsibility in the subject area to be studied.³² The lead agency must then determine whether the proposed action requires preparation of an EIS. This inquiry consists of an initial assessment of the significance of the proposed action's potential environmental impacts.

In the case of NEPA, the preparation of an EIS is required for "major Federal actions significantly affecting the quality of the human environment."³³ NEPA regulations treat this standard as a single inquiry as to whether the environmental impacts of the action may be significant.³⁴ Each state environmental review statute includes comparable language limiting the requirement to prepare an EIS to those actions that have the potential to cause "significant" environmental impacts.

Both NEPA and state laws permit agencies to pre-determine, by regulation, classes of actions that typically do not have significant environmental impacts. On the federal level,

²⁸ 129 S. Ct. 365 (2008).

²⁹ When the proposal at issue is for legislation, instead of an administrative action, NEPA regulations provide for somewhat different procedures. (The applicable regulations are contained at 40 C.F.R. §§ 1506.8, 1508.17, and 1508.18.) Those procedures do not differ greatly from the basic process applicable to agency actions, but they account for the agencies' lack of control over Congressional legislative processes.

³⁰ 40 C.F.R. § 1506.8(a).

³¹ N.Y. Envtl. Conserv. Law, § 8-0109(4).

³² 40 C.F.R. § 1501.5 (NEPA); N.Y. Envtl. Conserv. Law, § 8-0109(4) (New York's statute).

³³ 42 U.S.C. § 4332(2)(C) (2007); Dep't of Transp. v. Pub. Citizen, 541 U.S. at 757; Utah v. Babbitt, 137 F.3d 1193, 1214 (10th Cir. 1998) (BLM inventory of public lands does not constitute a "major federal action significantly affecting the quality of the human environment"); see also Michigan v. U.S., 994 F.2d 1197, 1199-1200 (6th Cir. 1993).

³⁴ 40 C.F.R. § 1508.27.

actions that are not expected to have significant impacts are called “categorical exclusions” (“CEs” or “CATEXs”), and if an agency determines that a CE applies to its action, no further NEPA review is required.³⁵ On the state level, New York regulations, to take one example, provide for a similar process for designating “Type II” actions that are presumed not to have significant impacts.³⁶ If an agency concludes that a proposed action falls into one of these categories, the action does not require an EA or an EIS and the agency’s environmental review obligations are complete.

The importance of CEs and their state-law analogs cannot be overstated. The number of agency actions that are proposed across the country each year is enormous.³⁷ If every one of those proposals required the preparation of an EA to determine its potential environmental significance, environmental review would prove prohibitively expensive and time-consuming. Exempting actions that can be safely assumed not to have significant impacts allows agencies to focus their resources on those proposals that require a closer look.

Both NEPA and state laws also permit the designation of classes of actions that typically do have significant impacts.³⁸ When an action falls into one of those categories, the agency presumptively must proceed to determine whether an EIS is necessary. In addition, some state statutes require certain additional procedures to ensure that the agency’s assessment of the action’s potential environmental impacts is thorough.³⁹ However, because designation as such an action simply requires the agency to proceed to the next step of determining whether it must prepare an EIS, these categories are less important than CEs or Type II actions, which have the effect of ending the environmental assessment process.

If an action is not categorically excluded from further environmental assessment, the agency must prepare an Environmental Assessment (“EA”) to ascertain the need for an EIS.⁴⁰ Originally intended as a brief “mini-impact statement,”⁴¹ an EA nevertheless must contain “sufficient evidence and analysis” for determining whether an EIS is necessary and is now often hundreds of pages long.⁴² Specifically, an EA should include discussions of the need for the proposed action, alternatives considered, the environmental impacts of both the proposed action and those alternatives, and a list of the agencies and persons consulted in preparing the EA.⁴³

Under NEPA, preparation of the EIS is the responsibility of the lead federal agency, not of a private applicant, although an agency may request that a private entity prepare an EA, subject to independent agency review.⁴⁴ New York’s environmental review statute operates somewhat differently. Under New York’s law, EAs are prepared using a general form known

³⁵ 40 C.F.R. § 1508.4.

³⁶ 6 N.Y.C.R.R. § 617.6(a)(1)(i).

³⁷ Statistics on the number of environmental reviews conducted by federal agencies each year is provided in Part VI.A, below.

³⁸ 40 C.F.R. § 1507.3(b)(2)(i).

³⁹ See, e.g., 6 N.Y.C.R.R. § 617.6(a)(2).

⁴⁰ 40 C.F.R. § 1501.4(b).

⁴¹ *Hanly v. Kleindienst*, 471 F.2d 823, 837 (2d Cir. 1972) (Friendly, J, dissenting).

⁴² See *Grand Canyon Trust v. Federal Aviation Administration*, 290 F.3d 399, 340 (D.C. Cir. 2002).

⁴³ 40 C.F.R. § 1508.9(b).

⁴⁴ 40 C.F.R. § 1506.5(b), 1508.9.

as an Environmental Assessment Form.⁴⁵ Part 1 of the form describes the proposed action and is prepared by the project applicant. Part 2 is prepared by the lead agency and assesses the action's potential environmental impacts.

At both the federal and state level, the EA process concludes when the agency reaches a determination as to the significance of the proposed action's potential impacts. If the agency determines that those impacts will not be significant, it must memorialize that decision—by issuing a Finding of No Significant Impact (“FONSI”) under NEPA or a “Negative Declaration” or similar document under state law.⁴⁶ The agency may require, as a condition of its determination of no significant impact, that the action is subject to mitigation measures that avoid otherwise potentially significant impacts.⁴⁷ Either way, the determination of no significant impact renders an EIS unnecessary and concludes the agency's environmental review.

If, on the other hand, the agency determines that the proposed action will or may have a significant environmental impact, it must proceed to prepare an EIS.

C. Preparing the EIS

When its preparation is required, the EIS is the heart of an agency's environmental review. The lead agency has primary responsibility for the preparation of the EIS and for compliance with other procedural requirements,⁴⁸ while other cooperating agencies may “adopt” the EIS prepared by the lead agency and utilize that document in their decision-making.⁴⁹

Under NEPA, the EIS must be prepared by the lead agency, although applicants and other entities may provide supporting documents for the agency to review and incorporate into its process.⁵⁰ These supporting documents are generally prepared by private consulting firms. There is no licensing process in the United States for these types of consultants.

The process of preparing an EIS itself proceeds in stages. Initially, the agency provides public notice of its decision to prepare a draft EIS (“DEIS”).⁵¹ Under NEPA, the agency must publish this notice in the Federal Register, a daily publication of federal agency notices and regulations.⁵² In addition, other types of notice (such as newspaper publication) may be required. At this stage, other agencies may become involved in the EIS process if they have special expertise that will provide the lead agency with assistance in preparing the EIS.⁵³

⁴⁵ 6 N.Y.C.R.R. § 617.2(m).

⁴⁶ 40 C.F.R. § 1508.13.

⁴⁷ CEQ, Final Guidance for Federal Departments and Agencies on the Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact, Jan. 14, 2011, at 7, n. 18; 6 N.Y.C.R.R. § 617.2(y).

⁴⁸ *Id.* § 1508.16.

⁴⁹ *Id.* § 1506.3.

⁵⁰ 40 C.F.R. § 1506.5(a). In some states, including New York, the EIS may be prepared by the applicant under the supervision of the lead agency.

⁵¹ *Id.* § 1501.7.

⁵² *Id.*

⁵³ *Id.* § 1501.6.

One initial procedure, which is mandatory under NEPA regulations and is generally preferred (though not always required) under state environmental review statutes, is “scoping.”⁵⁴ Scoping is a process to identify and focus on key questions to be discussed in the EIS and, by narrowing the issues, reduce unnecessary paperwork.⁵⁵ Agencies may hold hearings or informal conferences to aid them in determining the appropriate extent and focus of the EIS and the principal areas of concern and controversy.⁵⁶ This scoping process is the first major opportunity for public participation in the process. In practice, “scoping hearings” often become forums for project supporters and opponents to voice their views on the underlying project.

Relevant to scoping is the practice, which is endorsed by NEPA regulations, of “tiering” environmental review of large projects. Tiering involves addressing issues at differing levels of detail based on the specificity of the specific action that is the subject of the EIS.⁵⁷ For policy-level or program-wide actions, NEPA allows for the preparation of “generic” or “programmatic” EISs that discuss related actions in a generalized format.⁵⁸ A generic EIS generally discusses a series of related actions in one document; whereas a programmatic EIS addresses the overall impacts of long-term, multistep programs. After a high-level EIS is complete, more detailed EISs may be undertaken later if necessary for specific aspects of the larger action.⁵⁹

Once the “scope” of the environmental issues has been determined, the agency prepares a DEIS. Since the purpose of the DEIS is to inform the public and other agencies as early as possible about the proposed action, and to solicit comments which will assist the lead agency in the decision-making process, it is circulated for commenting to a variety of entities, including other interested federal agencies, state and local agencies, and the public. Federal agencies with expertise in subject areas addressed in the DEIS are supposed to comment.⁶⁰ NEPA sets a minimum 45-day period for commenting on the DEIS (measured from the notice of publication in the Federal Register).⁶¹ Public hearings on the DEIS may be held for proposals that are likely to involve controversial environmental effects.⁶² Any member of the public may speak at the hearings. These public hearings are the second – and often the last – formal opportunity for in-person public participation in the impact review process. (Written comments are typically accepted for a period after the hearings close.)

After the publication and circulation of the DEIS and the closing of any hearing and written comment period, a final EIS (“FEIS”) is prepared. The FEIS includes project changes and new information and, most importantly, must respond to all substantive comments on the

⁵⁴ *Id.* § 1501.7; 6 N.Y.C.R.R. § 617.8.

⁵⁵ 40 C.F.R. § 1501.7.

⁵⁶ *Id.* § 1506.6(b).

⁵⁷ *Id.* § 1502.20.

⁵⁸ *Id.* § 1502.4(b)-(d).

⁵⁹ *Id.* § 1502.20.

⁶⁰ *Id.* § 1503.1 (a)(1), (2), (4).

⁶¹ *Id.* § 1506.10(c). The CEQ regulations require that no decision can be made until 90 days have elapsed from the time notice of the DEIS was published in the Federal Register. However, if within those 90 days a final EIS is issued, the agency is required to allow not less than 45 days for comments on a DEIS before making a decision.

⁶² *Id.* § 1503.1 (a)(1), (2), (4).

DEIS.⁶³ Although a FEIS is subject to circulation requirements similar to those for a DEIS, there is no requirement to respond to comments on that document.

In the event that the lead agency's environmental review is significantly flawed or inadequate, there is one mechanism for correction. Under the Clean Air Act, the United States Environmental Protection Agency may refer to CEQ any agency action that it deems environmentally unsatisfactory.⁶⁴ Though rarely used, referral provides a backstop against agency noncompliance.

Finally, after it has issued the FEIS, the agency is permitted to make a decision regarding the proposed action that was the subject of the EIS. This decision is generally set forth in a document called a Record of Decision ("ROD") or findings statement.⁶⁵ The ROD articulates the basis for the agency's substantive decision in the context of the environmental issues raised by the EIS. It includes a discussion of the alternatives considered, an explanation of practicable mitigation measures to ameliorate adverse environmental impacts, and a program to implement any mitigation measures that were adopted in the final decision.⁶⁶ The ROD enables the public to review the extent to which the agency considered or, alternatively, impermissibly ignored potential environmental impacts and mitigation measures in reaching its final decision.

It sometimes occurs that the public opposition to a project, as voiced at the public hearing and elsewhere, is so strong that public officials rethink their support for the project, and occasionally they decide to modify, move or even abandon the project. Abandonment of projects for this reason, however, is rare.

D. Judicial Review

Once the agency has issued the FEIS and ROD, it has completed the required environmental review procedures. However, as a practical matter, the environmental assessment process for many projects entails one last stage: if a member of the public who is affected by the project believes that the agency's compliance with those procedures was deficient, he or she may sue to have the process reviewed by a court.

Judicial review of federal agencies' compliance with NEPA is authorized by the federal Administrative Procedure Act ("APA"), a general statute that allows affected members of the public to challenge unlawful agency action.⁶⁷ Similarly, judicial review of state agencies' compliance with state environmental review statutes is authorized by state-law equivalents of

⁶³ *Id.* § 1502.9.

⁶⁴ 42 U.S.C. § 7609.

⁶⁵ 40 C.F.R. § 1505.2.

⁶⁶ *Id.* § 1505.2(a)-(c).

⁶⁷ 5 U.S.C. § 702.

the APA.⁶⁸ There are some differences between state and federal rules for judicial review, but certain basic principles apply on both the federal and state level.

In reviewing agencies' compliance with environmental review requirements, courts will consider whether an agency complied with applicable procedures and whether it either reasonably concluded that an EIS was not required or, if an EIS was prepared, that the EIS was adequate. With respect to those issues, courts examine whether the agency conducted its environmental review with "objective good faith" and took a "hard look" at environmental consequences and alternatives.⁶⁹ Unless the agency violated a procedural requirement of NEPA, though, the court's review is tempered by application of a so-called "rule of reason," which gives agencies extensive latitude in determining the substance of the EIS, including, most importantly, the depth of discussion of environmental effects and the scope of reasonable alternatives.

The remedy for a successful challenge to the sufficiency of an EIS is usually, but not always, revocation of the agency decision and an injunction pending the preparation and issuance of an adequate impact statement.⁷⁰ The severity of the remedy makes it imperative that the EIS be thorough and that the agency comply scrupulously with NEPA's procedures.

⁶⁸ See, e.g., N.Y. C.P.L.R. § 7801 et seq. (New York's statute governing review of administrative actions).

⁶⁹ Britt v. U.S. Army Corps of Eng'rs, 769 F.2d 84, 90 (2d Cir. 1985); Sierra Club v. Espy, 822 F. Supp. 356, 367 (E.D. Tex. 1993), rev'd on other grounds, 18 F.3d 1202 (5th Cir. 1994).

⁷⁰ Concerned About Trident, 555 F.2d at 817, 823 (D.C. Cir. 1976).

IV. Contents of an Environmental Impact Statement

The text of NEPA, and most state environmental review statutes, contains only a general description of the required contents of an EIS.⁷¹ The format of an EIS, therefore, is largely dictated by agency regulations, as well as by decades of practice and litigation under NEPA and state environmental review laws. Although the specific contents of an EIS will vary based upon the reviewing agency and the primary areas of impact, the recommended structure of a federal EIS is described below.

A. Executive Summary

Under NEPA regulations, an EIS must begin with a “summary which adequately and accurately summarizes the statement.”⁷² The regulations recommend that this Executive Summary, which “stress[es] the major conclusions, areas of controversy (including issues raised by agencies and the public), and the issues to be resolved (including the choice among alternatives),” should be less than 15 pages.⁷³ In practice, the Executive Summary may be considerably longer than that. Not all state environmental review laws require an EIS to contain an executive summary, but as a matter of practice a general summary is typically included for the benefit of the reviewing agency and the public.

B. Project Description and Statement of Purpose and Need

An EIS must also contain a description of the proposed action, including its “underlying purpose and need to which the agency is responding”⁷⁴ The project description should be sufficiently detailed to enable a complete review of the project’s environmental impacts. Therefore, although certain details may be finalized or approved after the completion of the environmental review process, the central elements of the project must be set forth in the EIS or EA.

The description of a proposed project’s “purpose and need” is a critical component of the EIS, because it dictates the range of alternatives that must be considered. Aside from the “no action” alternative, which, as discussed below, is required under NEPA and state environmental review laws, an agency need only consider alternatives that achieve the

⁷¹ See 42 U.S.C. § 4332(2)(c).

⁷² 42 U.S.C. § 1502.12.

⁷³ 40 C.F.R. § 1502.12.

⁷⁴ *Id.* § 1502.13.

purpose contemplated for the proposed action. A government agency may also consider a private project applicant's capabilities and objectives in defining the project's purpose and need.⁷⁵ The government may not, however, define the purpose and need of the project so narrowly as to "define competing 'reasonable alternatives' out of consideration."⁷⁶

C. Description of the Affected Environment and Current Conditions

Under NEPA, an EIS typically contains a separate chapter providing a "description of the affected environment," or current environmental conditions.⁷⁷ Under state environmental review laws, this description of current conditions may be divided among the chapters of an EIS dealing with different environmental impacts, and it may also be merged with the description of the "no action" alternative, discussed below.

The description of the affected environment provides context in which to analyze a project's impacts by describing environmental conditions as they currently exist, in the absence of the proposed action. For example, current levels of air quality, water quality and species abundance are described. The term "environment" is defined broadly under NEPA and state environmental review laws, covering not only traditional environmental concerns like air and water pollution but also historic and archeological resources, traffic and community character. Therefore, the description of the affected environment will often discuss the demographics of the surrounding area, the historical context and archeological history of the Site, and any off-site resources (e.g., downstream water bodies) that may be impacted by the proposed action.

D. Analysis of Future Conditions with the Project

Once an environmental baseline is selected, the core of the EIS is the analysis of the environmental impacts from the proposed action and its alternatives. This analysis is typically divided into numerous chapters, each of which covers a different area of impact.

The specific topics covered in an EIS will vary depending upon nature of the project, but topics that are often considered include (in no particular order):

- Land Use, Zoning and Public Policy
- Aesthetics and Visual Character
- Soils, Slopes and Erosion
- Hazardous Materials
- Flora and Fauna
- Wetlands
- Groundwater

⁷⁵ *Alaska Survival v. Surface Transp. Bd.*, 705 F.3d 1073, 1085 (9th Cir. 2013).

⁷⁶ *Simmons v. United States Army Corps of Eng'rs*, 120 F.3d 664, 666 (7th Cir. 1997); *Colorado Environmental Coalition v. Michael Dombeck*, 185 F. 3d 1162 (10th Cir. 1999).

⁷⁷ 42 C.F.R. § 1502.14.

- Surface Water
- Utilities and Infrastructure
- Energy
- Air Pollution
- Climate Change
- Solid Waste and Recycling
- Traffic and Transportation
- Parking
- Noise and Vibration
- Light Pollution
- Community Facilities and Services
- Fiscal and Socioeconomic Impacts
- Environmental Justice
- Cultural, Historical and Archeological Resources

Many of these subjects require technical, expert analysis. For instance, an analysis of traffic impacts generally requires traffic engineers to identify relevant roads and intersections for analysis, compile existing traffic data or perform new traffic counts, and model future conditions with and without the project through the use of highly specialized software. If a proposed facility poses significant air pollution impacts, its EIS may require air dispersion modeling to determine the severity of impacts on downwind receptors and whether the project will cause or contribute to non-attainment of any applicable air quality standards. The support for these analyses can be thousands of pages long, and is typically included in appendices to the EIS.

The scoping process may be used to identify those areas where a project does not pose potentially significant environmental impacts and to screen those subjects out from further analysis in the EIS. Moreover, the depth of analysis in an EIS should be proportionate to the significance of the impact, such that a new power plant in a remote area would require more detailed analysis of air quality than traffic impacts, while a large residential development in an urban center would typically place greater emphasis on traffic and transportation impacts than on losses of natural resources.⁷⁸

E. Analysis of Alternatives

An EIS must consider a discussion of reasonable alternatives to a proposed action; indeed, this analysis has been deemed the “linchpin” of the document.⁷⁹ The scope of the alternatives analysis includes, as a general matter, alternative sites, designs, sizes and technologies. The agency should consider alternatives that would serve the essential purpose

⁷⁸ 40 C.F.R. § 1502.15 (“Data and analyses in a statement shall be commensurate with the importance of the impact....”).

⁷⁹ *Dubois v. U.S. Dep’t of Agriculture*, 102 F.3d 1273, 1286-87 (1st Cir. 1996); *Ctr. for Biological Diversity v. U.S. Dep’t of the Interior*, 581 F.3d 1063, 1071 (9th Cir. 2009).

of the action, although that goal may be attained by means that go beyond the jurisdiction of the acting agency.⁸⁰

As part of the alternatives analysis, the agency typically must consider a “no action” alternative that describes reasonably likely environmental conditions in the absence of the proposed project.⁸¹

The “no action” alternative required by NEPA is not necessarily the same as the “current conditions” baseline required under California’s law. Instead, it reflects the impacts of change that are reasonably anticipated in the absence of the proposed project. Therefore, if a development project is not expected to be completed for five years, the no action traffic analysis should include traffic generated by other, nearby developments that are likely to be constructed before the proposed action would be complete.

NEPA requires the EIS for a federal permitting action to discuss alternative sites that are not owned or controlled by a private applicant as long as these sites would allow achievement of the basic goals of the proposal.⁸² In contrast, while New York’s state environmental review law requires public agencies to consider alternative sites that could be acquired through the use of eminent domain, it does not require private applicants to consider alternative sites that are not within their ownership or control.⁸³

NEPA requires that the agency consider, to the maximum extent practicable, alternative sizes and configurations of an action that would achieve the project’s purpose and need and could limit adverse environmental impacts.⁸⁴ For example, if a proposed development would require filling of floodplains, attempts should be made to situate the development, or to modify its design, so as to eliminate or minimize that impact. Likewise, modifications in roadway configuration that could reduce traffic and associated air quality and noise effects should be considered. Different technologies which would achieve the goals of an action—such as recycling or composting rather than landfilling or incinerating municipal solid waste—are commonly studied as alternatives.

There are limits to the extent of alternatives that NEPA requires agencies to analyze. Thus, reaffirming the reasonableness standard that guides judicial review of the alternatives analysis, the Supreme Court has held that an EIS “cannot be found wanting simply because the agency failed to include every alternative device and thought conceivable by the mind of man.”⁸⁵ Rather, the EIS need only discuss a range of those alternatives which are sufficient to permit a reasoned choice.⁸⁶

⁸⁰ *Natural Res. Def. Council, Inc. v. Morton*, 458 F.2d 827, 834 (D.C. Cir. 1972); *Natural Res. Def. Council v. Fed. Aviation Admin.*, 564 F.3d 429, 557 (2d Cir. 2009).

⁸¹ 40 C.F.R. § 1502.14(d); CEQ, NEPA’s Forty Most Asked Questions, 46 Fed. Reg. 18026 (March 16, 1981).

⁸² *Roosevelt Campobello Int’l Park Comm’n v. U.S. EPA*, 684 F.2d 1041, 1046-47 (1st Cir. 1982).

⁸³ 6 N.Y.C.R.R. § 617.9; *Horn v. Int’l Bus. Machines Corp.*, 110 A.D.2d 87, 95 (1985).

⁸⁴ 40 C.F.R. § 1508.20(a), (b).

⁸⁵ *Vermont Yankee Nuclear Power Corp. v. Nat’l Res. Def. Council*, 435 U.S. 519, 551 (1978).

⁸⁶ *Airport Neighbors Alliance v. United States*, 90 F.3d 426, 431-32 (10th Cir. 1996); *Monroe County Conservation Council v. Adams*, 566 F.2d 419, 425 (2d Cir. 1977), cert. denied, 435 U.S. 1006 (1978).

F. Analysis of Mitigation Measures

In order to ensure that environmental impacts have been sufficiently evaluated, an EIS must contain a discussion of measures to mitigate significant, adverse impacts.⁸⁷ Mitigation measures may include road improvements to accommodate the impacts of increased traffic; off-site wetlands restoration to offset the impacts on site wetland disturbances; the phasing of construction work to limit erosion and adverse noise or air pollution impacts; the installation of stormwater management practices to capture and treat runoff; and more.⁸⁸ While NEPA does not require the implementation of any particular mitigation measures, an agency must nonetheless take a “hard look” at potential mitigation, and the agency may require mitigation measures as a condition of its funding or approval.⁸⁹ Some state environmental review laws, such as New York’s, go further than NEPA and require a reviewing agency to adopt practicable mitigation measures as conditions of its approval.⁹⁰

Under NEPA, an agency may mitigate potentially significant adverse impacts in order to avoid the expense and delay of preparing an EIS, resulting in what is known as a “mitigated FONSI.” An agency cannot commit to mitigation measures as a means of avoiding an EIS, however, unless it is “reasonable to foresee the availability of sufficient resources to perform or ensure the performance of the mitigation.”⁹¹

Where mitigation measures are proposed, they should be documented in the EIS or the approval documents for the proposed action, along with measureable performance standards or expected results. NEPA regulations also recommend that agencies monitor the implementation of mitigation commitments, and, if such commitments are not implemented, evaluate whether supplemental environmental review is warranted.⁹² An agency may only require supplemental environmental review, however, in circumstances where there remains some additional agency action to be taken; if the agency has already completed its approval, permitting or funding role, it is not authorized to require new analysis of its past actions.⁹³

⁸⁷ *Methow Valley*, 490 U.S. 332, 351-52 (1989) (“[O]ne important ingredient of an EIS is the discussion of steps that can be taken to mitigate adverse environmental consequences.”).

⁸⁸ See 40 C.F.R. § 1508.20 (defining mitigation to include, *inter alia*, “minimizing impacts by limiting the degree or magnitude of the action and its implementation,” “rectifying the impact by repairing, rehabilitating, or restoring the affected environment,” and “compensating for the impact by replacing or providing substitute resources or environments.”).

⁸⁹ *Northern Alaska Env'tl. Ctr. v. Kempthorne*, 457 F.3d 969 (9th Cir. 2006); *Northwest Indian Cemetery Protective Ass'n v. Peterson*, 764 F.2d 581, 588 (9th Cir. 1985), *rev'd on other grounds*, 485 U.S. 439 (1988).

⁹⁰ 6 N.Y.C.R.R. § 617.11(d)(5).

⁹¹ CEQ, *Final Guidance for Federal Departments and Agencies on the Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact* (“CEQ Mitigation Guidance”) at 7 (Jan. 14, 2011).

⁹² *Id.* at 14-15.

⁹³ *Id.*

V. Key Issues in Project Analysis

A. Segmentation

A critical issue under NEPA and other environmental review statutes is the scope of the action that is subject to review. If a proposed action has potentially significant environmental impacts, but the agency “segments” its environmental review of the action into small subparts or phases that individually do not pose significant impacts, this segmentation will undermine the objective of environmental impact assessment. Although segmentation *per se* is not unlawful, courts are skeptical of attempts to divide projects into segments in order to circumvent NEPA.⁹⁴

The definition of the proposed action is therefore critical to establishing reasonable limits on the scope of environmental review. NEPA regulations accordingly require agencies, in determining the scope of review, to consider the joint impacts of “connected actions.” Connected actions are defined as proposed actions that: “(i) [a]utomatically trigger other actions which may require environmental impact statements; (ii) [c]annot or will not proceed unless other actions are taken previously or simultaneously; [or] (iii) [a]re interdependent parts of a larger action and depend on the larger action for their justification.”⁹⁵ Under this standard, a project’s independent utility is thus largely determinative of whether it is sufficiently “connected” that the two actions may require a collective environmental impact assessment.⁹⁶

The definition of the “action” subject to the agency’s consideration—and the resulting scope of environmental review—also has a temporal aspect: when is an action a “proposal,”⁹⁷ and thus subject to NEPA, or merely “contemplated” or “hypothetical,” so that NEPA does not apply? Considerations relevant to this question include:

- With what confidence can the agency say that environmental impacts are likely to occur as a result of the action;
- Whether the agency can describe those impacts at the time of the action with sufficient specificity to make their consideration useful; and
- Whether the agency will have a subsequent opportunity to take those impacts into account before it is so firmly committed to the project that further environmental knowledge, as a practical matter, will prove irrelevant to its decision.⁹⁸

⁹⁴ *North Carolina v. City of Virginia Beach*, 951 F.2d 596, 603 (4th Cir. 1991) (in determining whether illegal segmentation has occurred, courts ask whether the completion of the first action has “direct and substantial probability of influencing [the] decision” of the second).

⁹⁵ 40 C.F.R. § 1508.25(a)(1).

⁹⁶ See, e.g., *Coalition on West Valley Nuclear Wastes v. Chu*, 592 F.3d 306, 310-11 (2d Cir. 2009) (finding no impermissible segmentation where EIS addressed short-term waste management issues but not long-term closure issues given “independent utility” of waste management).

⁹⁷ 40 C.F.R. § 1508.23.

⁹⁸ *Sierra Club v. Marsh*, 768 F.2d 868, 878 (1st Cir. 1985).

B. Cumulative Impacts

NEPA regulations require that an EIS address “cumulative impacts”—that is, the combined impact of the action under consideration with those impacts that will result from other reasonably foreseeable actions.⁹⁹ For example, the cumulative impacts of a shopping center could include traffic generated by a separate office facility that is proposed to be built along the same access routes. As one court has ruled, cumulative impact analysis must include “a sufficiently detailed catalogue of past, present, and future projects, and must provide adequate analysis about how these projects, and differences between these projects, are thought to have impacted the environment.”¹⁰⁰

With respect to analysis of cumulative impacts from past actions, CEQ guidance documents direct agencies to consider “whether the reasonably foreseeable effects of the agency proposal for action and its alternatives may have a continuing, additive and significant relationship to those effects.”¹⁰¹ In other words, an agency must consider past actions if the present effects of such actions have a significant cause-and-effect relationship with the direct and indirect effects of the current proposed action.

Because cumulative impact analysis has the potential to expand the scope of environmental review to an unmanageable or burdensome scale, CEQ instructs agencies to “narrow the focus” of cumulative effects.¹⁰² Despite this recognition for the need to maintain a narrow focus with regard to cumulative impacts, however, agencies frequently face accusations that they failed to assess cumulative impacts adequately. An important tool for deciding the appropriate scope of such assessment—and for ensuring that such a decision withstands judicial scrutiny—is for the agency to use the initial EIS scoping process, described above, to focus its review on the cumulative effects that are most likely to be viewed as significant.

C. Consideration of Extraterritorial Actions and Impacts

A question that has received considerable attention and has been a focus of litigation is the extent to which NEPA requires agencies to assess the environmental impacts of actions that they undertake outside United States borders. A related question is the extent of agencies’ obligations to assess impacts of actions that, though undertaken in domestic territory, may have environmental impacts abroad. This question may be of increasing importance with respect to domestic projects that result in greenhouse gas emissions, as such emissions result from many projects and contribute to the inherently international environmental problem of climate change.

⁹⁹ 40 C.F.R. § 1508.7.

¹⁰⁰ *Lands Council v. Powell*, 395 F.3d 1019, 1028 (9th Cir. 2005).

¹⁰¹ CEQ, *Guidance on the Consideration of Past Actions in Cumulative Effects Analysis* (June 24, 2005) [available at](http://www.nepa.gov/nepa/regs/Guidance_on_CE.pdf) http://www.nepa.gov/nepa/regs/Guidance_on_CE.pdf.

¹⁰² *Id.*

Regulatory and judicial efforts to clarify the application of NEPA to extraterritorial actions and impacts have struck a rough balance between the statute's text—which makes no exception for agencies' international activities—and the need to accommodate diplomatic agendas and the laws of foreign sovereigns.¹⁰³ For example, one court has held that decisions by the National Science Foundation relating to its operation of a science station in Antarctica were subject to NEPA because the decisions themselves were domestic actions and because the operation of the station in Antarctica did not implicate foreign policy concerns or impinge the sovereignty of any foreign nation.¹⁰⁴ By contrast, another court has held that NEPA was inapplicable to a federal agency's decision to license components of a nuclear reactor in the Philippines, reasoning that NEPA should not interfere with foreign countries' own environmental standards or the foreign policy agenda of the United States in negotiating with those countries.¹⁰⁵

D. Consideration of Greenhouse Gas Emissions and Climate Impacts

The text of NEPA does not explicitly address climate change, but given its broad scope, litigants have begun to challenge environmental impact reviews that do not adequately analyze climate change-related impacts, and they have often succeeded.¹⁰⁶

Courts have increasingly accepted litigants' argument that impacts related to climate change are within the range of environmental effects subject to environmental review. In one example, a federal appeals court invalidated federal vehicle fuel-efficiency standards on the grounds that the agencies failed to properly assess the potentially significant “incremental impact” on greenhouse gas emissions associated with the regulations.¹⁰⁷ In so ruling, the court explained: “The impact of greenhouse gas emissions on climate change is precisely the kind of cumulative impacts analysis that NEPA requires.”¹⁰⁸

In 2010, CEQ released a draft guidance document addressing federal agencies' consideration of climate change and greenhouse gas emissions under NEPA.¹⁰⁹ The guidance calls for a discussion of climate change impacts as part of the initial scoping process when such analysis “may provide meaningful information to decision makers and the public.”¹¹⁰ It also calls for consideration of the potential effects of climate change on a particular project, in addition to the project's impact in causing further greenhouse gas emissions.¹¹¹

¹⁰³ See, e.g., Executive Order 12,114, 44 Fed. Reg. 1957 (Jan. 4, 1979) (establishing a presidential policy relating to the application of NEPA to Federal actions abroad).

¹⁰⁴ *Environmental Defense Fund, Inc. v. Massey*, 986 F.2d 528 (D.C. Cir. 1993).

¹⁰⁵ *Natural Resources Defense Council v. Nuclear Regulatory Comm'n*, 647 F.2d 1345 (D.C. Cir. 1981).

¹⁰⁶ The Columbia Law School Center for Climate Change Law maintains a catalog of all lawsuits relating to climate change issues that are filed in the United States. It is available at <http://web.law.columbia.edu/climate-change/resources/us-climate-change-litigation-chart>.

¹⁰⁷ *Center for Biological Diversity v. NHTSA*, 508 F.3d 508, 550 (9th Cir. 2007).

¹⁰⁸ *Id.*

¹⁰⁹ CEQ, *Draft NEPA Guidance on Consideration of the Effects of Climate Change and Greenhouse Gases* (Feb. 18, 2010) available at <http://www.whitehouse.gov/sites/default/files/microsites/ceq/20100218-nepa-consideration-effects-ghg-draft-guidance.pdf>.

¹¹⁰ *Id.*, at 1.

¹¹¹ *Id.*, at 6-8.

Under both federal and state environmental review laws, a major source of uncertainty that agencies currently face is how to determine when climate change-related impacts caused by the action under review are sufficiently significant to warrant preparation of an EIS. Although NEPA guidance indicates that if a project's direct emissions exceed 25,000 metric tons annually, assessment of climate change impacts may be meaningful, it does not state that such emissions are necessarily "significant" so as to require preparation of an EIS.¹¹² Indeed, neither NEPA nor state law currently defines a numerical threshold above which greenhouse gas emissions must be considered significant for these purposes. However, one approach to determining significance that has received some support among state courts is to assess a project's likely impact on the state-wide targets for carbon emissions reductions.¹¹³ This is an area in which the law of environmental impact assessment in the United States is currently developing.

Generally, states have thus far been more thorough than federal authorities in integrating climate change impacts into their environmental review procedures. For example, several states have issued formal policies regarding how to quantify greenhouse gas emissions for purposes of environmental impact assessment.¹¹⁴ In New York, the state agency charged with implementing general environmental review regulations has revised the environmental assessment forms that agencies prepare to incorporate information about greenhouse gas emissions.¹¹⁵ Similarly, Massachusetts, New York City, and the City of Seattle have all specifically instructed their agencies to assess climate-change impacts in the course of environmental impact assessments.¹¹⁶ Like federal regulations, though, these efforts have generally failed to provide specific guidance as to how great a project's emissions of greenhouse gases must be to be considered "significant" and therefore require preparation of an EIS. However, most projects that would have large greenhouse gas emissions would also have other significant environmental impacts and require an EIS anyway. Large fossil fuel-fired power plants are the classic example. State agencies are increasing and improving their consideration of climate change in their decision-making processes.¹¹⁷ In time, NEPA regulations are likely to follow the lead of those state-level initiatives as CEQ attempts to modernize NEPA to account for climate change impacts.

A related issue, which both federal and state agencies will need to address, is whether their environmental review procedures require them to analyze how climate change impacts—

¹¹² *Id.* at 2–3.

¹¹³ See, e.g., *Cleveland Nat'l Forest Found. V. San Diego Ass'n of Gov'ts*, Case No. 2011-00101593 (Dec. 3, 2012).

¹¹⁴ For a complete list of federal, state and local regulations governing the consideration of climate impacts in environmental assessments, see Columbia Law School, *NEPA and State NEPA EIS Resource Center*, <http://www.law.columbia.edu/centers/climatechange/resources/eis> (last visited Sept. 20, 2010). California's South Coast Air Quality Management District's resolution governing the GHG significance threshold for stationary sources is available online at <http://www.aqmd.gov/hb/2008/December/081231a.htm>.

¹¹⁵ New York State Department of Environmental Conservation, Full Environmental Assessment Form, Part 1, [available at](http://www.dec.ny.gov/docs/permits_ej_operations_pdf/feafpart1.pdf) http://www.dec.ny.gov/docs/permits_ej_operations_pdf/feafpart1.pdf.

¹¹⁶ Revised MEPA Greenhouse Gas Emissions Policy and Protocol, at 1, effective May 5, 2010, [available at](http://www.mass.gov/eea/docs/mepa/ghg-policy-final.pdf) <http://www.mass.gov/eea/docs/mepa/ghg-policy-final.pdf>; New York City Mayor's Office of Environmental Coordination, *CEQR Technical Manual* (2014), Ch. 18, [available at](http://www.nyc.gov/html/oec/downloads/pdf/2014_ceqr_tm/18_Greenhouse_Gas_Emissions_2014.pdf) http://www.nyc.gov/html/oec/downloads/pdf/2014_ceqr_tm/18_Greenhouse_Gas_Emissions_2014.pdf; Seattle City Ordinance No. 122574, passed Dec. 3, 2007.

¹¹⁷ *Id.* at 5. See also Mark A. Chertok and Ashley S. Miller, *Environmental Law: Climate Change Impact Analysis* 59 *Syracuse L. Rev.* 763 (2009) (explaining how climate change impacts—in the former of increased temperatures, sea level rise, and more—are likely to affect a proposed project. New York Under SEQRA.)

for example, increased temperatures, sea level rise, and severe weather—are likely to affect a proposed project, in addition to assessing the impact of the project on the forces that cause climate change. In New York, formal guidance indicates that agencies should take account of such impacts of climate change on a project, whereas at least one court in California has held that such analysis is not required.¹¹⁸ If environmental impact assessment is to play a role in society’s efforts to adapt to a world influenced by climate change, however, it will be necessary for state and federal agencies across the United States to follow New York’s lead.

These and other issues related to climate change are likely to play an increasingly prominent role in state and federal agencies’ environmental reviews as climate change impacts become of more widespread concern and as the public and politicians increase pressure on agencies to respond to those environmental risks.

¹¹⁸ See New York State Dep’t of Env’tl. Conservation, Commissioner’s Policy 49 – Climate Change and DEC Action (Oct. 22, 2010), available at http://www.dec.ny.gov/docs/administration_pdf/commisclimchpolicy.pdf; *Ballona Wetlands Trust v. City of Los Angeles*, 201 Cal. App. 4th 455 (2nd Dist. 2011).

VI. The U.S. Experience in Implementing Environmental Impact Assessment Processes

A. The Volume and Expense of Environmental Impact Assessment

Environmental impact assessment involves a substantial commitment of government attention and resources because of the vast number of activities to which its procedural requirements apply. By the numbers, approximately 50,000 federal EAs are prepared under NEPA each year, out of which about 400–500 EISs are ultimately required.¹¹⁹ In addition, NEPA review for countless actions concludes with the application of a categorical exclusion, as the majority of agency actions fall within the class of excluded actions.¹²⁰ These NEPA statistics represent only a fraction of the total environmental review activities in the United States because many state agency actions do not involve any federal involvement but require an EA or EIS under state law. The large volume of environmental impact assessment documents reveals the important role of environmental impact assessment in American government.

To fully understand the immense effort that goes into environmental impact assessment in American government, it is important to consider the time and expense that go into preparing those documents. A 2003 report from CEQ found that EISs typically require from 1 to more than 6 years to complete and cost between \$250,000 and \$2,000,000.¹²¹ For certain agencies, those estimates may be too low. For example, the United States Department of Energy spent an average of \$6.6 million per EIS between 2003 and 2012, and the EIS for one action, the remediation and closure of a major nuclear waste facility, cost an incredible \$85 million.¹²²

Little information is available about how long it takes to prepare an EIS, but one 2013 study found that the 197 final EISs prepared under NEPA in 2012 took an average of 4.6 years to prepare.¹²³

¹¹⁹ See National Preservation Institute, *Environmental Assessment*, <http://www.npi.org/NEPA/assessment> (last visited July 9, 2014); CEQ, *Environmental Impact Statements Filed Through 2012*, available at http://ceq.hss.doe.gov/nepa/EISs_by_Year_1970_to_2012.pdf.

¹²⁰ See CEQ, *Final Guidance for Federal Departments and Agencies on Establishing, Applying, and Revising Categorical Exclusions Under the National Environmental Policy Act*, 75 Fed. Reg. 75,632 (Dec. 6, 2010).

¹²¹ The NEPA Task Force, *Report to CEQ: Modernizing NEPA Implementation* at 66 (Sept. 2003), available at: <http://ceq.hss.doe.gov/ntf/report/finalreport.pdf>.

¹²² U.S. Gov't Accountability Office, *National Environmental Policy Act: Little Information Exists on NEPA Analyses* at 13 (Apr. 2014), available at: <http://www.gao.gov/assets/670/662546.pdf>.

¹²³ *Id.*

Environmental Assessments can generally be completed more quickly and at a lower cost than EISs. CEQ estimates that even “large EAs” can typically be completed in nine to 18 months at a cost of \$50,000 to \$200,000.¹²⁴ The median cost for a Department of Energy EA fell within that range (\$65,000), although the most expensive Department of Energy EA cost more than \$1 million.¹²⁵ In light of the volume of EAs prepared each year, these figures represent substantial government expenditures.

Most practitioners would likely agree that NEPA and state environmental review statutes have succeeded in improving an agency’s consideration of the environmental impacts of proposed actions. As CEQ regulations state, “it is not better documents but better decisions that count,”¹²⁶ and undoubtedly agencies’ mandate to prepare thorough environmental review documents has improved agencies’ decision-making processes in many cases. Even supporters of environmental review, however, acknowledge that agencies (especially at the state level) often have insufficient personnel and resources to complete adequate reviews in a timely manner.

It is difficult to prove from available statistics the degree to which environmental impact assessment procedures improve federal and state agencies’ substantive decisions. Because NEPA and related statutes are predominately procedural rather than substantive, some critics have noted the possibility that, after preparing an EA or EIS, an agency might simply adopt the same course it would have taken anyway. Others argue that, even if environmental impact assessments do improve agency decisions, the cost and delay of that review is too great to justify their marginal influence. This concern has sparked both congressional debate and regulatory reforms to limit the size and focus the scope of EAs and EISs.¹²⁷

It is also important to keep in mind that statistics are unable to measure many intangible but very real benefits generated by the EIS process. Those benefits include the inculcation of an environmental ethic among agencies and their personnel as well as other more subtle benefits such as the creation of a temporal hiatus during the period of environmental review, during which ill-advised actions may be reconsidered. Those benefits are described in somewhat more detail in Section VII, below.

B. Judicial Review and EIS Litigation

NEPA litigation constitutes a substantial portion of environmental litigation against the government in the United States. According to statistics gathered by CEQ, 94 lawsuits were filed against the United States in 2011 in which the plaintiffs alleged that an agency had failed to comply with NEPA.¹²⁸ Of those, almost a third—29 cases—resulted in dispositions that were adverse to the government because the court found some defect in the agency’s

¹²⁴ <http://ceq.hss.doe.gov/ntf/report/finalreport.pdf>.

¹²⁵ *Id.*

¹²⁶ 40 C.F.R. § 1500.1(c).

¹²⁷ See, e.g., *id.* § 1500.4 (CEQ regulation entitled “Reducing Paperwork”).

¹²⁸ CEQ, 2011 NEPA Litigation Survey, [available at](http://ceq.hss.doe.gov/nepa/2011_NEPA_Litigation_Survey_Final.pdf/) http://ceq.hss.doe.gov/nepa/2011_NEPA_Litigation_Survey_Final.pdf/.

NEPA compliance. Successful challenges included claims of agency noncompliance at nearly every stage of the NEPA process, from determining whether the action was subject to review to review of the adequacy of final EISs.¹²⁹ Of course, these NEPA statistics represent only a fraction of litigation related to environmental impact assessment, because many more lawsuits are filed under state environmental review statutes.

Another fact that is evident from CEQ's statistics is that non-profit organizations and citizens groups play a critical role in enforcing agency compliance with NEPA. Of the 94 lawsuits filed in 2011, between 60 and 81 were filed by public interest groups, citizens associations, concerned individuals, or some combination thereof.¹³⁰ The role that these groups play in NEPA enforcement underscores the importance of transparency and public dissemination in the environmental impact assessment process because such enforcement would be impossible without public knowledge of agencies' activities.

Some critics of NEPA have questioned whether the need for the public to enforce NEPA and associated state laws warrants the cost and delay that such litigation has spawned. Even when an agency action is annulled by a court for failure to follow environmental review procedures, it is possible that the agency will simply re-authorize the same, environmentally detrimental action after correcting its procedural missteps. Conversely, strategic litigants who oppose a project for non-environmental reasons can, in theory, take advantage of minor procedural errors and sue under the statutes in an effort to halt or delay agency actions, even if those actions are environmentally sound. Although it is unclear whether these fears are founded, such concerns have given rise to some efforts to reform NEPA so as to deter lawsuits that the critics view as frivolous or futile.

One doctrine that has developed and that limits some citizens' ability to seek judicial enforcement of NEPA and related statutes is the legal requirement of "standing" to sue. Under this doctrine, a plaintiff cannot bring a lawsuit unless the plaintiff has a legally recognized interest in doing so. In order to establish that interest, a plaintiff must show that he or she may suffer actual or imminent harm, that the agency action is the cause of that harm, and that success in the lawsuit will redress the harm.¹³¹ In addition, the plaintiff must establish that his or her interest in the lawsuit falls within NEPA or the related state statute's "zone of interests."¹³² Although NEPA's zone of interests is broad, courts have ruled that purely economic harm is not within that zone.¹³³ In other words, a plaintiff whose only injury is the economic effect of an agency action cannot challenge the action for that reason alone.¹³⁴ This doctrine may help limit NEPA litigation to projects that threaten genuine environmental interests.

¹²⁹ Id.

¹³⁰ Id.

¹³¹ Monsanto Co. v. Geertson Seed Farms ("Monsanto"), 130 S.Ct. 2743, 2752 (2010).

¹³² Bell v. Bonneville Power Admin., 340 F.3d 945, 951 (9th Cir. 2003).

¹³³ Ashley Creek Phosphate Co. v. Norton, 420 F.3d 934 (9th Cir. 2005).

¹³⁴ See, e.g., Mall Props. Inc. v. Marsh, 672 F. Supp. 561, 566 (D. Mass. 1987), app. dismissed, 841 F.2d 440 (1st Cir. 1988), cert. denied, 488 U.S. 848 (1988).

Notwithstanding some limitations to citizens' right to sue to enforce the requirements of NEPA and state environmental review statutes, lawsuits filed by the public remain the primary means of enforcing agencies' compliance with those laws. The public's important role in enforcement makes access to the court system and the existence of public interest organizations with the financial and professional resources to litigate over technically complex scientific issues critical to the successful implementation of environmental impact assessment procedures. In the United States, each side to a litigation typically bears its own attorneys fees; only rarely does the losing side in a NEPA case need to pay the other side's fees. Thus the fear of having to pay defendants' attorneys fees does not inhibit such litigation in the U.S., unlike in many other countries.

VII. Implementing Environmental Impact Assessment in China

A. Lessons from the United States' Experience

NEPA was the first of the United States' "informational" environmental laws, founded on the belief that transparency and public input can supplement more traditional "command-and-control" regulation. This "informational" approach is premised on the theory that requiring agencies to assess environmental information will create internal pressure to adopt environmentally-favorable outcomes and that requiring public disclosure of such information will create external pressure for environmental change.

Most observers would likely agree that the United States' experience has proved the value of such information-forcing approaches. One measure of NEPA's success has been the adoption of similar information-disclosure laws with respect to various specific environmental issues. For example, sixteen years after the enactment of NEPA, Congress established the Toxics Release Inventory, an online database of chemical releases above certain thresholds.¹³⁵ More recently, the United States Environmental Protection Agency established rules requiring many companies to publicly disclose greenhouse gas emissions, well before the agency attempted to regulate those emissions directly.¹³⁶

Broad access to judicial review promotes effective environmental impact assessment in several ways. First, the risk that courts will undo agency actions taken without adequate review provides an incentive for agencies to abide by both the letter and the spirit of NEPA and similar laws. Furthermore, because litigation can cause both delay and expense, access to courts gives those affected by the adverse environmental impacts of a project leverage in negotiating for a less-impactful version of the project earlier in the review process.

Given the importance of public input and participation in that process, the success of informational laws such as NEPA relies on making the relevant information available in a form that can be readily absorbed by members of the public. Many environmental review laws therefore require notice of key documents to be published in local newspapers or translated into the languages spoken in the surrounding community. There is also a trend toward requiring the publication of EISs and other key documents online. Environmental review laws also provide periods for public written comment and hearings to facilitate public input.

Notice and an opportunity to comment, however, are not necessarily sufficient to facilitate meaningful public participation. The highly technical nature of many EISs, which can contain

¹³⁵ See 42 U.S.C. § 11023.

¹³⁶ See 40 C.F.R. Part 98.

thousands of pages of supporting materials, can make it difficult for affected members of the public to evaluate and respond to an agency's conclusions—even if the underlying data is readily available. One way to promote public input is to provide funding for affected community groups to retain technical consultants who can review an EIS and assist in the preparation of comments. Although NEPA does not provide such financial assistance, certain state laws do.¹³⁷

Even where public funding is not available, environmental impact assessment processes have enabled the public to focus available resources to study projects' environmental impacts. NEPA has helped spur the creation of many environmental non-profit organizations focused largely on litigation, which often partner with community-based organizations in the areas affected by a proposed action. These national environmental organizations can also help overcome the obstacles posed by the technical nature of environmental review documents, as such organizations often bring expertise and additional resources to the environmental review process.

Finally, one of the most significant impacts of NEPA and other environmental review statutes has been the expansion of government agencies' perceptions of their internal missions to diversification of agencies' workforces. NEPA expressly requires all federal agencies to "review their ... statutory authority, administrative regulations, and current policies and procedures" in light of the policies set forth in the act,¹³⁸ and early judicial decisions confirmed that NEPA's EIS requirement applied to a broad range of agency actions that were not historically viewed through an environmental lens, such as military exercises. Establishing a "national policy which will encourage productive and enjoyable harmony between man and his environment"—which must be considered by all government agencies—had a significant impact on agency decision-making, even if NEPA does not dictate the substance of any particular decision. Moreover, for the first time, NEPA required many agencies to hire dedicated environmental staff, or reassign existing staff to new environmental roles, in order to prepare and review EISs. In many instances, the addition of biologists, environmental engineers, environmental lawyers, and other environmental professionals into an agency's professional ranks had far-reaching impacts on agency culture, further advancing the national policy established under NEPA.¹³⁹

B. An Incremental Approach to Implementing Environmental Impact Assessment

Because of its open-ended phrasing and a series of early judicial decisions that construed its terms broadly, NEPA has had far-reaching impacts on government decision making in the United States. Some states' environmental review laws are more limited in scope, and a

¹³⁷ For example, in certain proceedings before the New York State Public Service Commission, applicants proposing new electric transmission or generation projects must provide funds which are disbursed to affected municipalities and public interest organizations to enable them to participate in review of the project's environmental impacts. N.Y. Pub. Serv. L. § 122(5)(a), 164(6)(a).

¹³⁸ 42 U.S.C. § 4333

¹³⁹ For more detailed analyses of this transformation, see Paul J. Culhane, NEPA's Impacts on Federal Agencies, Anticipated and Unanticipated, 20 *Envtl. L.* 681, 690-91 (1990); Michael B. Gerrard, The Effect of NEPA Outside the Courtroom, 39 *Envtl. L. Rep.* 10615 (2009).

number of proposals on both a federal and state level have attempted to streamline certain elements of the environmental review process. The introduction of environmental impact assessment into the Chinese governmental system might benefit from adapting NEPA-like procedures incrementally, so as to realize the greatest benefits of environmental review while avoiding its greatest costs.

This section discusses options for China to adopt an incremental approach to its environmental review program, beginning with a more limited law than NEPA, which could be evaluated and amended over time.

i. Scope of actions covered by environmental review

As described above, because of its broad definition of “action,” NEPA applies to a vast range of government approvals, funding decisions, and other discretionary actions. The Maryland Environmental Policy Act, however, is limited to “requests for legislative appropriations or other legislative actions,” and does not cover the issuance of permits and other regulatory actions.¹⁴⁰ Moreover, a number of recent federal laws have limited the scope of NEPA by establishing new “categorical exclusions” for additional types of highway projects, energy projects, and more.¹⁴¹ To phase in its environmental review program more gradually, China could limit the definition of covered actions to those projects expected to have the greatest environmental impacts (for instance, power plants, major manufacturing facilities, construction in sensitive environmental areas, etc.), and expand the program to cover additional types of actions based upon that initial experience.

ii. Scope of environmental impacts assessed

In addition to its broad definition of action, the term “human environment” has been interpreted expansively under NEPA, increasing both the number of projects that are subject to environmental review and the scope of the analysis when review is required. Critics of NEPA have argued that this definition has resulted in excessively long EISs, with a disproportionate emphasis on relatively minor impacts. In recently proposed regulatory reforms, New York has proposed requiring a formal “scoping” process prior to the preparation of an EIS, which defines subjects that will be covered and the specific analyses that will be undertaken in the EIS.¹⁴² Scoping can be used to screen out minor impacts, focusing the EIS on the topics that are most likely to have significant environmental effects.

In addition to scoping, China could include a more specific definition of environmental impacts under its environmental review law, or specifically exclude certain impacts from the review of environmentally beneficial projects. For instance, in recent amendments to its environmental review law, California recently declared that aesthetic impacts and parking

¹⁴⁰ Md. Regs. Code, Title 8, § 1-301.

¹⁴¹ See, e.g., Agricultural Act of 2014, Pub. Law 113-79; Safe, Accountable, Flexible, Efficient Transportation Equity Act of 2005: A Legacy for Users (SAFETEA-LU), Pub Law 109-59.

¹⁴² See New York State Department of Environmental Conservation, Final Scope for the Generic Environmental Impact Statement (GEIS) on the Proposed Amendments to the State Environmental Quality Review Act (SEQRA) at 10 (Nov. 28, 2012).

impacts of certain projects within designated “infill sites” and “transit priority areas” can no longer be considered significant impacts triggering the need for a full EIS.¹⁴³

iii. Timing and judicial review of the environmental review process

As described above, the environmental review process for a large project can last several years, which is often followed by prolonged litigation. While litigation does not automatically trigger a stay of the challenged project, it can be difficult for project sponsors to secure financing and proceed with controversial projects until such litigation is resolved. The six-year statute of limitations applicable to most NEPA claims can contribute to additional delay, allowing potential plaintiffs to wait several years before filing suit. In 2005, Congress shortened that statute of limitations to 180 days for highway and public transit projects,¹⁴⁴ and recent legislation limited the length of the comment period on EISs and the statute of limitations for navigational dredging and other water resources projects.¹⁴⁵ There have also been legislative efforts to impose deadlines on the overall length of the NEPA review process, although thus those proposals have not been adopted.¹⁴⁶ In addition to setting a shorter statute of limitations, to limit the length of the environmental review process China could also adopt a plan that has been proposed in New York, which would require the preparation of a final EIS within six months of the lead agency’s acceptance of the draft EIS.¹⁴⁷

¹⁴³ See SB-743 (enacted Sept. 27, 2013).

¹⁴⁴ See Safe, Accountable, Flexible, Efficient Transportation Equity Act of 2005: A Legacy for Users (SAFETEA-LU), 23 U.S.C. § 139(l)(1).

¹⁴⁵ See Water Resources Reform and Development Act of 2014, 33 U.S.C. § 2348(g)(2), (h)(5).

¹⁴⁶ See Responsibly And Professionally Invigorating Development Act of 2014, H.R. 2641 (passed U.S. House of Representatives March 6, 2014).

¹⁴⁷ See New York State Department of Environmental Conservation, Final Scope for the Generic Environmental Impact Statement (GEIS) on the Proposed Amendments to the State Environmental Quality Review Act (SEQRA) at 12 (Nov. 28, 2012).

VIII. Conclusion

In the forty-five years since NEPA was enacted, environmental impact assessment has become deeply ingrained in the fiber of administrative decision-making processes in the United States. Although the details of environmental review procedures and the relative benefits and shortcomings of the American system remain subject to debate, there is little doubt that NEPA and similar statutes have succeeded in their basic goal of ensuring that environmental considerations receive study and public disclosure for major governmental actions. Nations across the world have looked to the United States' system in designing their own such programs. We hope that the review of environmental review procedures provided in this white paper will provide useful guidance as China considers doing the same.

