



White Paper

Fundamental Principles for Smoothing the NEPA Process

By Alan Summerville

NEPA Background

The National Environmental Policy Act (NEPA) was established in 1970 to ensure that federal agencies assess the environmental impact of their actions, including freight rail construction projects. NEPA was never intended to provide for the protection of the environment at all costs—nor serve as merely a bureaucratic hurdle—but rather to "balance environmental concerns with the social, economic, and other requirements of present and future generations of Americans."¹ As testament to its simple but comprehensive language, the regulations that implement NEPA have changed little since it was enacted. Implementation and interpretation have been shaped by staff across the agencies and the issuance of guidance when necessary.

NEPA Review Process

Freight rail projects can require NEPA reviews for various reasons and from different agencies. For example, double-tracking or bridge replacement could require a permit and associated NEPA review from the U.S. Army Corps of Engineers. The use of a loan from the Railroad Rehabilitation and Improvement Financing program would require a NEPA review from the Federal Railroad Administration. When projects involve the construction of a rail line that allows entry into a new market, the Surface Transportation Board (STB) requires a NEPA review.

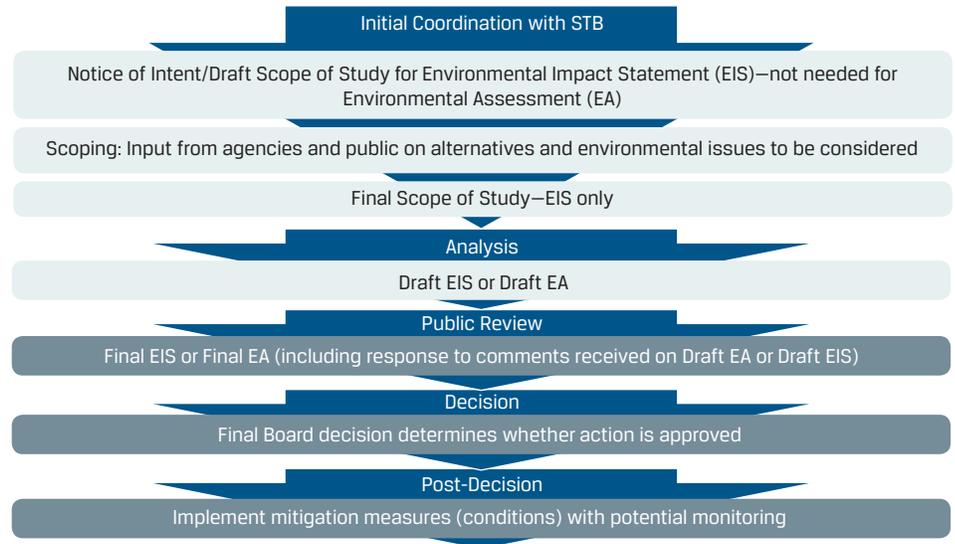
¹ National Environmental Policy Act, available at <https://ceq.doe.gov/welcome.html>.



As an example, constructing a line to a petrochemical plant or a marine terminal to provide competitive access may involve the creation of a short line that a Class I railroad can operate over.

With STB jurisdiction, attempts by state and local agencies to inappropriately deny a permit can be preempted due to interference with interstate commerce. The STB NEPA review process (illustrated below) is the focus of this paper.

NEPA PROCESS FOR FREIGHT PROJECTS UNDER STB JURISDICTION



Within each phase of the NEPA process, potential challenges can add unnecessary time and expense to the process. For more than 30 years, ICF International has been supporting federal agencies, railroads, and other entities in navigating the NEPA process. ICF fully understands the potential challenges and can help organizations avoid or manage through them. Grounding in three basic principles explored below also helps smooth the process.

1. Clearly Understand the Roles and Responsibilities of All Parties

The applicant, STB, and the third-party consultant enter into a memorandum of understanding (MOU) that defines roles and responsibilities summarized as follows:

Applicant: An applicant is the entity seeking authority to construct and operate a rail line. Applicants are expected to provide information on the proposed project and to cooperate fully with the STB in all activities related to the petition or application. Rather than wait for the board to request information, applicants sometimes volunteer information on alternatives considered, design and other criteria used to screen alternatives, and environmental data for selecting options and preparing permits. Retaining an outside counsel familiar with STB's environmental process is critical in approaching and navigating the process. The applicant is responsible for retaining an independent third-party consultant to assist in preparing either an EA or EIS, but the consultant's work will be managed



entirely by STB's Office of Environmental Analysis (OEA). Applicants can and should participate in the process through any of the legitimate ways they are allowed to engage. Vehicles for that participation include the outside counsel, the MOU, and the coordination of the permitting and NEPA processes.

Outside Counsel: A handful of law firms in Washington, DC, have significant experience in taking applicants through OEA's environmental review process. A firm should be engaged as early in the process as possible. The outside counsel often lays the groundwork with OEA to initiate the review and usually serves as the interface between the applicant and OEA. Outside counsel develops strategies with applicants and troubleshoots issues, based on previous experience with OEA's handling of other EAs and EISs.

STB: OEA considers the potential environmental impacts of a proposed project and leads the preparation of the environmental documentation, either an EIS or EA. OEA directs, reviews, and approves the activities of the third-party consultant and is ultimately responsible for ensuring that NEPA and the related environmental laws and regulations are satisfied.

Third-Party Consultant: An independent, third-party consultant operates under the sole supervision, direction, and control of OEA to assist in conducting the environmental review and preparing the environmental documentation related to an applicant's proposed project. The third-party consultants bring objective, relevant, and appropriate expertise to assist the board in fulfilling its obligations under NEPA.

2. Provide the Right Level of Information

In the initial development stage—prior to approaching OEA—resources can be wasted, and legal vulnerabilities created because of imprecise language or an unsuitable level of detail. The applicant should provide OEA with the right level of information so that OEA can successfully implement the scoping process. An appropriately defined purpose and need statement will inform development of a reasonable range of alternatives and should not be too narrow or too broad. Not enough detail (e.g., insufficient mapping) could lead the public to comment that starting the process is premature. Too much detail may suggest a predetermined outcome.

A project description with too little information can slow the process, because agencies and the public will need clarity before providing comment. Too much information also can create problems, not the least of which is unnecessarily expended resources. As an example, carefully screening potential alternatives and deciding on the applicant's preferred alternative could save time and money if it lessens the amount of effort that OEA and the third-party consultant must expend. Rather than create obstacles that could have been avoided, applicants can help themselves by providing the appropriate level of information that demonstrates thinking through alternatives in advance of approaching OEA and having a good rationale for the alternative development process.

3. Plan Ahead for Success

Although NEPA legislation itself is straightforward, implementation can be overwhelming and costly without a thorough understanding of potential challenges or pitfalls. At the highest level, the steps of the NEPA process are the same for every project, but at a functional level, each project brings its own unique requirements. From the outset, applicants can save time and money by taking measures to understand these requirements themselves or engaging with those who already have a thorough understanding. Toward this end, three actions bear consideration:

A. Retain an outside counsel. The outside counsel helps an applicant develop a strategy, introduces the project to OEA, and facilitates the process.

B. Engage relevant agencies. For the sake of a comprehensive, streamlined process, applicants should consider meeting with relevant agencies before meeting with OEA. Since NEPA is intended to support a process in which all involved agencies' requirements are integrated, applicants can shape the process and inform a scope that delineates analyses that will be applicable to all relevant agencies.

C. Source a third-party consultant. Third-party consultants bring objective, relevant, and appropriate expertise to assist the board in fulfilling its obligations under NEPA. The benefits of engaging a firm with the right experience can be realized quickly, since an applicant can propose a firm to OEA without OEA having to go through a procurement process. Sole-sourcing saves time, but an applicant must ensure that the chosen firm has experience working with STB, including knowledge of OEA precedents, court decisions, practices, and staff.

Although an applicant cannot control an agency's environmental review process, it can take the steps described above to increase the chances that the process will unfold successfully.

ICF Capabilities

As one of the industry's most experienced NEPA third-party consultants, ICF thoroughly understands the perspectives of involved regulatory, commercial, community, and nongovernmental organizations. ICF has prepared and reviewed hundreds of EISs and EAs as well as state-level environmental analyses and supporting technical analyses. Specialists from across ICF support every facet of the NEPA process. We are nationally integrated and staff our projects based on the right mix of process management and technical experience and without the constraints of local profit centers. Our project experience runs the gamut, from simple and straightforward to complex and controversial. The more complex projects have been covered by the Wall Street Journal, the New York Times, the Washington Post, and other major newspapers. Our experts have worked on construction projects nationwide and every Class I railroad merger from the last wave in the 1990s. We have substantial experience working with senior agency personnel and attorneys and with railroad and shipper personnel and their in-house and outside counsel.



About ICF

ICF (NASDAQ:ICFI) is a leading provider of professional services and technology-based solutions to government and commercial clients. ICF is fluent in the language of change, whether driven by markets, technology, or policy. Since 1969, we have combined a passion for our work with deep industry expertise to tackle our clients' most important challenges. We partner with clients around the globe—advising, executing, innovating—to help them define and achieve success. Our more than 5,000 employees serve government and commercial clients from more than 65 offices worldwide. ICF's website is icf.com.

About the Author



Alan Summerville has more than 25 years of experience shaping and navigating the EIS process for time-sensitive, complex, and controversial projects. He has also managed or directed EAs for less complicated projects. For the past 20 years, he has had a management role in numerous EISs and EAs for railroad construction and mergers under the Surface Transportation Board. He has an extensive understanding of railroad operations, their potential environmental effects, and the environmental review process. He managed reviews for projects nationwide ranging from less than a mile to more than 200 miles. He has substantial, successful experience working with agency and outside counsel on NEPA-related litigation. Mr. Summerville holds an M.A. in City Planning from the University of Pennsylvania, and a B.A. in Economics and Political Science from the University of Vermont.

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