

## Lecture 17 overview

1. Overview
2. Content
3. Threshold determination
4. Litigation
5. Mitigation

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## Environmental Assessments

- Prepared when actions not clearly significant or excluded  
Represents > 99% of all documents  
May include mitigated FONSI  
Very similar to EIS (*mini-EISs*):
- Shorter (often 50-100 pp)
  - Reduced in extent of detail
  - Evaluation of significance

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## CEQ §1508.9

- EA: a concise public document which serves to:
1. Briefly provide sufficient evidence and analysis for determining whether to prepare an EIS or a FONSI.
  2. Aid an agency's compliance with the Act when no EIS is necessary.
  3. Facilitate preparation of a EIS when one is necessary

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## CEQ §1508.9

EA: shall include brief discussions of:

- the need for the proposal;
- of alternatives as required by §102(2)(E);
- of the environmental impacts of the proposed action and alternatives;
- and a listing of agencies and persons consulted.

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## Environmental Assessments

Major differences with EIS:

1. Agency may adopt an EA prepared by another agency;
2. Background data incorporated by reference rather than detailed analysis;
3. Scope of alternatives may be broader;
4. Direct & indirect effects must be considered but not clearly delineated.

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## CEQ §1508.13

FONSI:

A document presenting the reasons why an action, not excluded, *will not have a significant effect* on the human environment and for which an EIS therefore will not be prepared.

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## CEQ §1508.13

### FONSI:

Shall include the EA, or a summary, and note other environmental documents related to it.

If the EA is included, the finding need not repeat any of the discussion but may incorporate it by reference.

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## FONSI

### *“Significant.”*

- Not defined in NEPA or legislative history
- No generally accepted definition
- Determined on case-by-case basis
- CEQ §1508.27: consider both context & intensity of action

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## *“Significant”*

### Context:

- *Relationship to setting:* must look at local effects, not infer from similar projects
- *Affected interests:* what is actually impacted
- *Short- or long-term nature:* short-term effects do not preclude significance

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## “Significant”

Intensity: severity of impact

A. *Beneficial vs. adverse impacts*:

- A significant effect may exist even if the agency believes that, on balance, the effect will be beneficial
- Beneficial effects cannot be balanced against negative effects in EAs

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## *Fiery Gizzard*

*Friends of Fiery Gizzard v.  
Farmers Home Administration*  
6<sup>th</sup> Circuit Court, 1995

- The agency concluded with an EA that a water treatment project would have no significant impacts but there would be a positive impact due to a sanitary water supply
- Plaintiffs claimed the existence of "significant" beneficial impacts required the preparation of an EIS

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## *Fiery Gizzard*

Findings:

1. EIS not required
2. One of the purposes of NEPA is to "*promote efforts which will stimulate the health and welfare of man*". The health and welfare will not be "stimulated" by the delays and costs associated with the preparation of an EIS

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## *Fiery Gizzard*

### Findings:

3. The benefits of the project would not justify a FONSI if the project would also produce significant adverse effects.
4. Where such adverse effects can be predicted, and the agency is in the position of having to balance the adverse effects against the projected benefits, the matter must, under NEPA, be decided in light of an EIS.

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## “Significant”

- B. Effects on public health & safety
- C. Unique effects
- D. Degree of controversy
- E. Highly uncertain, unique or unknown risks
- F. Precedents for future actions or decisions about a future consideration

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## “Significant”

- G. Cumulative impacts
- H. Adversely effects on objects in the National Register of Historic Places
- I. Loss or destruction of scientific, cultural, or historical resources
- J. Effects on endangered or threatened species or its habitat
- K. Threatens a violation of laws or requirements

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## *Hanley*

*Hanley v. Kleindienst*  
2<sup>nd</sup> Circuit Court, 1972

- Challenge to a General Services Administration EA for construction of a jail in New York City
- GSA issued an EA which described a number of impacts and concluded that the project was not a significant action

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## *Hanley*

Findings: *certiorari denied*

1. Determination of whether an EIS was required turns on meaning of "significantly."
2. An agency should review the proposed action in light of:
  - the extent it will cause adverse effects in excess of those created by existing uses
  - the quantitative adverse effects of the action itself, including cumulative harm

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## *Hanley*

Findings:

3. An EIS should be prepared where the impacts are controversial, referring not to the amount of public opposition, but to where there is a substantial dispute as to the size, nature, or effect of the major federal action.

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## Litigation

Lack of EIS major source of litigation

Must show that:

- Action has significant effects on human environment
- Analyses to determine FONSI were flawed

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## Litigation

Approaches:

- Find strong evidence that effects are significant
- Find incorrect, omitted or misleading information in decision
- Demonstrate important alternatives not considered
  - Logical alternatives
  - Opposing viewpoints
  - Attempts to minimize impacts

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## Litigation

Approaches:

- Ignored view of expert agencies
- Concluded significance without assessing effects
- Decision arbitrary or capricious:
  - Need "hard look" at environmental concerns
  - Present convincing case that impacts are insignificant

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## Marsh

*Marsh v. Oregon Natural  
Resources Council*  
Supreme Court, 1989

- Plaintiff sought to enjoin construction of a dam, partly because the Army Corps of Engineers did not prepare a second SEIS
- One report claimed that the dam would affect fishing & turbidity

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## Marsh

Findings: *SEIS not required*

1. Agencies may rely on their own experts in the face of conflicting views. "When specialists express conflicting views, an agency must have the discretion to rely on the reasonable opinions of its own qualified experts.

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## Marsh

Findings:

2. Reviewing courts must apply the *arbitrary and capricious standard* of the Administrative Procedure Act concerning whether an agency decision was 'arbitrary or capricious,'
3. The court must 'consider whether the decision was based on a *consideration of the relevant factors* and whether there has been a *clear error of judgment*.'

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## Marsh

### Findings:

3. Although reviewing courts grant a degree of deference to any agency's decision, they *should carefully review the record and satisfying themselves that the agency has made a reasoned decision* based on its evaluation of the significance - or lack of significance

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## Mitigation

- Avoidance of activities or areas
- Limits on actions or effects
- Repair or replacement of resources: on or off site

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## Mitigation

Incorporate measures to reduced effects below threshold: *mitigated FONSI*

- Measures must be considered before proposed action
- Action must be conditioned on measure:
  - Contractual obligations
  - Condition requirements
  - Design modifications/measures

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## Mitigation requirements

- Must be site specific
- Must be independently analyzed
- Cannot be added during EA process without restarting
- Measures must be available to public
- Measures not based on planned studies
- Requires analysis of measures and effectiveness

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## Next Time. . .

- Public Participation

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