

AASHTO PRACTITIONER'S HANDBOOK

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DEFINING THE PURPOSE AND NEED AND DETERMINING THE RANGE OF ALTERNATIVES FOR TRANSPORTATION PROJECTS

This Handbook provides recommendations for defining the purpose and need and determining the range of alternatives in environmental impact statements and environmental assessments for transportation projects, in accordance with the National Environmental Policy Act (NEPA).

Issues covered in this Handbook include:

- Considering relevant legislation and planning decisions
- Determining and documenting the need for the project
- Defining the project purpose
- Developing and applying alternatives screening criteria
- Coordinating with agencies and involving the public

The Practitioner's Handbooks are produced by the Center for Environmental Excellence by AASHTO. The Handbooks provide practical advice on a range of environmental issues that arise during the planning, development, and operation of transportation projects.

The handbooks are primarily intended for use by project managers and others who are responsible for coordinating compliance with a wide range of regulatory requirements. With their needs in mind, each Handbook includes:

- key issues to consider;
- a background briefing;
- practical tips for achieving compliance;
- a list of reference materials.

In addition, key regulations, guidance materials, and sample documents for each Handbook are posted on the Center's web site at <http://environment.transportation.org>



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Overview



This Handbook is intended to provide practitioners with practical suggestions for defining the purpose and need and determining the range of alternatives for highway, public transportation, and railroad projects.

The adoption of the purpose and need statement is one of the most consequential decisions that the lead agencies make in the National Environmental Policy Act (NEPA) process, because the purpose and need provides the foundation for determining which alternatives will be considered and for selecting the preferred alternative. The purpose and need also can be a major factor in deciding whether a particular alternative can be approved under other laws such as Section 4(f) of the U.S. Department of Transportation (U.S. DOT) Act and Section 404 of the Clean Water Act. Because of its importance, the decision on purpose and need can become a source of disagreement and delay in the NEPA process and is frequently a focal point for litigation. This Handbook summarizes key requirements and provides suggestions about how to develop a purpose and need statement that is clear, well-supported, and defensible.

Alternatives screening also plays an enormously important role in the NEPA process, because it is the vehicle for deciding which alternatives remain on the table for detailed environmental analysis. Typically, a screening process involves identifying a broad range of potential alternatives and then applying a standard set of evaluation criteria to eliminate alternatives that do not meet the purpose and need or are otherwise found to be unreasonable. In addition, when the number of reasonable alternatives is very large, similar alternatives may be combined to allow for a manageable number of alternatives to be studied in detail. Disagreements about which alternatives to eliminate from consideration can become a significant source of delay in the NEPA process, and litigation challenges often focus on the adequacy of an agency's rationale for its screening decisions. This Handbook provides an overview of the legal requirements for alternatives screening and provides suggestions for managing this process effectively.

The topics covered in this Handbook include:

- Considering relevant legislation and transportation planning decisions
- Determining and documenting the need for the project
- Defining the project purpose
- Developing and applying alternatives screening criteria and
- Coordinating with agencies and involving the public

Background Briefing

This section summarizes key requirements that apply when defining the purpose and need and determining the range of alternatives in NEPA studies for transportation projects. It focuses primarily on the requirements for an environmental impact statement (EIS) or environmental assessment (EA) prepared by the Federal Highway Administration (FHWA), Federal Transit Administration (FTA), or Federal Railroad Administration (FRA).

Why a Purpose and Need Is Required. The Council on Environmental Quality (CEQ) regulations require an EIS to “briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action.”¹ For an EA, the regulations require a “brief discussion of the need for the proposal.”² Agencies have broad, but not unlimited, discretion to determine the purpose and need. As one court stated, “[o]nce an agency has considered the relevant factors, it must define goals for its action that fall somewhere within the range of reasonable choices.”³

¹ 40 CFR 1502.13.

² 40 CFR 1508.9(b).

³ *Citizens against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1990).

Whether a Purpose Is Too Narrow. Courts have cautioned agencies against defining the project purpose too narrowly. The most commonly cited rule is that “an agency may not define the objectives of its action in terms so unreasonably narrow that only one alternative from among the environmentally benign ones in the agency’s power would accomplish the goals of the agency’s action, and the EIS would become a foreordained formality.”⁴ In deciding whether an agency’s purpose is “unreasonably narrow,” courts review the factors considered by the agency. Examples of factors that may help to support a purpose and need include: direction provided by Congress in legislation; objectives identified in the transportation process; factual information in the project record; and input provided by agencies and the public.

How the Purpose and Need Statement Is Used. A succinct, well-supported purpose and need statement is a fundamental building block of any EIS. It plays a critically important role under NEPA and other laws:

- **NEPA.** The purpose and need statement is a key factor in determining the range of alternatives considered in an EIS. The purpose and need limits the range of alternatives because an agency can dismiss, without detailed study, any alternative that fails to meet the project’s purpose and need.⁵
- **Section 4(f).** Under Section 4(f), the U.S. DOT is required to determine whether there is any “feasible and prudent” alternative that avoids the use of significant publicly owned parks, recreation areas, and wildlife or waterfowl refuges, as well as any significant historic sites.⁶ An alternative that does not meet the purpose of a project is not prudent and therefore can be eliminated from consideration under Section 4(f).⁷
- **Section 404.** Under Section 404 of the Clean Water Act, the U.S. Army Corps of Engineers is required to determine whether there is any “practicable” alternative that avoids the use of aquatic resources within its jurisdiction. In general, an alternative that does not meet the purpose of a project is not practicable and therefore can be eliminated from consideration under Section 404.⁸ The determination of “practicability” under Section 404 is distinct from the determination of “reasonableness” under NEPA. The agency responsible for determining “practicability” under Section 404 is the Corps.

Requirement to Evaluate “All Reasonable Alternatives.” The CEQ regulations require an EIS to “rigorously explore and objectively evaluate all reasonable alternatives” and to “[d]evote substantial treatment to each alternative considered in detail so that reviewers may evaluate their comparative merits.”⁹ The regulations also provide that “for alternatives which were eliminated from detailed study, [the EIS should] briefly discuss the reasons for their having been eliminated.”¹⁰ These requirements have been clarified through guidance, case law, and agency practice. Some key points include:

Alternatives can be eliminated for failing to meet purpose and need and/or for other reasons. Alternatives can be eliminated in the screening process based on any factor that is relevant to reasonableness, including but not limited to its inability to meet the purpose and need.

- An alternative that does not meet the purpose and need is, by definition, unreasonable, and for that reason, it can be eliminated in the screening process.
- Even if an alternative meets or potentially meets the purpose and need, it can still be rejected as unreasonable based on one or more other factors, including environmental impacts, engineering, and cost, and limited ability to meet purpose and need.

An alternative may be reasonable even if it is not desired by the project sponsor. The CEQ has explained that “[i]n determining the scope of alternatives to be considered, the emphasis is on what is ‘reasonable’ rather than on whether the proponent or applicant likes or is itself capable of carrying out a particular alternative. Reasonable alternatives include those that are practical or feasible from the technical and economic standpoint and using common sense, rather than simply desirable from the standpoint of the applicant.”¹¹

⁴ *Citizens against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1990).

⁵ *City of Alexandria v. Slater*, 198 F.3d 862, 867–869 (D.C. Cir. 1999).

⁶ 49 USC 303. The requirement to consider feasible and prudent avoidance alternatives does not apply if the use has a “de minimis” impact.

⁷ 23 CFR 774.17 (definition of “feasible and prudent avoidance alternative”).

⁸ 40 CFR 230.3(l) (definition of “practicable”).

⁹ 40 CFR 1502.14(b).

¹⁰ 40 CFR 1502.14(a).

¹¹ CEQ, “Forty Most Asked Questions Concerning CEQ’s NEPA Regulations” (Mar. 16, 1981), Question 2a.

An alternative may be reasonable even if it requires legislative change. Courts have held that an alternative is not necessarily unreasonable simply because of the fact that a legislative change would be needed before the alternative could be implemented.¹² This principle does not preclude agencies from taking the need for legislative change into account when determining reasonableness. It simply means that the need for a legislative change, by itself, does not automatically make an alternative unreasonable.

Studying a “reasonable range” is allowed. The reference in the CEQ regulations to “all reasonable alternatives” implies that every reasonable alternative must be rigorously evaluated, no matter how many reasonable alternatives exist. The CEQ has clarified this requirement as follows: “When there are potentially a very large number of alternatives, only a reasonable number of examples, covering the full spectrum of alternatives, must be analyzed and compared in the EIS. ... What constitutes a reasonable range of alternatives depends on the nature of the proposal and the facts in each case.”¹³

Requirements for an EA. The requirement to consider “all reasonable alternatives” applies to an EIS; for an EA, the CEQ regulations state that an environmental assessment (EA) shall include a “brief discussion” of alternatives.¹⁴ Courts have held that the alternatives analysis required for an EA is less rigorous than the alternatives analysis required for an EIS.¹⁵ Consideration of the proposed action and a No Action alternative is often sufficient in an EA, whereas an EIS typically includes a range of action alternatives in addition to the No Action alternative.

Key Requirements in 23 USC 139. All highway, transit, and multimodal projects for which an EIS is prepared must follow an environmental review process defined in 23 USC 139. Railroad projects requiring an EIS must comply with Section 139 “to the greatest extent feasible.”¹⁶ Section 139 includes several important requirements related to the development of the purpose and need and the range of alternatives:

- **Potential Elements of Purpose and Need.** Section 139 states that the following purposes can be included in a purpose and need statement:
 - Achieving a transportation objective established in statewide or metropolitan transportation plans;
 - Supporting land use, economic development, or growth objectives established in Federal, state, local, or tribal plans; and
 - Serving national defense, national security, or other national objectives established in Federal laws, plans, or policies.¹⁷
- **Lead Agencies’ Role.** Section 139 gives the lead agency in the NEPA process responsibility for defining the purpose and need and determining the range of alternatives considered.¹⁸ The term “lead agency” is defined to include any state or local agency that is serving as a “joint lead agency” and any project sponsor that is a state or local government is required to be designated as a joint lead agency. Thus, the lead Federal agency and the state or local project sponsor share the responsibility for defining the purpose and need and determining the range of alternatives. The process does not move forward until any disagreement between them is resolved.
- **Opportunity for Involvement by Agencies and the Public.** Section 139 requires lead agencies to provide an opportunity for involvement for agencies and the public in defining the purpose and need and determining the range of alternatives. The law leaves lead agencies with substantial flexibility in determining how to provide this opportunity, but does state that this opportunity must occur “as early as practicable” in the NEPA process, implying that it cannot simply be combined with the comment period on the Draft EIS. Participating agencies are required to provide comments “on those areas within the special expertise or jurisdiction of the agency.”¹⁹ Similarly, the lead agencies are required to “consider and respond to comments received from participating agencies on matters within the special expertise or jurisdiction of those agencies.”²⁰

¹² *Kilroy v. Ruckelshaus*, 738 F.2d 1448, 1454 (9th Cir. 1984).

¹³ CEQ, “Forty Most Asked Questions Concerning CEQ’s NEPA Regulations” (Mar. 16, 1981), Question 1b.

¹⁴ See 40 CFR 1508.9(b).

¹⁵ *Native Ecosystems Council v. U.S. Forest Service*, 428 F.3d 1233, 1246 (9th Cir. 2005).

¹⁶ 49 USC 24201(a) (The U.S. DOT “shall apply the project development procedures, to the greatest extent feasible, described in Section 139 of Title 23 to any railroad project that requires the approval of the Secretary” under NEPA.).

¹⁷ 23 USC 139(f)(3).

¹⁸ 23 USC 139(f)(2) and 139(f)(4)(B).

¹⁹ 23 USC 139(d)(9).

²⁰ 23 USC 139(c)(6).

- **Issue Resolution.** Section 139 creates an “issue resolution” process for resolving disagreements among Federal agencies in the NEPA process. This process can be invoked by a Federal agency with jurisdiction over the project, by a project sponsor, or by the Governor of a state. Once this process is invoked, the lead agency is required to convene a meeting with the relevant agencies and the project sponsor. If the issue is not resolved directly between the agencies, the issue can be elevated to the CEQ and ultimately the President. This process can be used to resolve disagreements on purpose and need and range of alternatives; however, it is not automatically triggered when a participating agency submits a comment expressing disagreement or concern. This process is triggered only when an issue resolution meeting is specifically requested by a Federal agency, a project sponsor, or the Governor of a state.
- **Single NEPA Document.** In 2015, Section 139 was amended to require, in general, that “all Federal permits and reviews for a project shall rely on a single environment document prepared under [NEPA] under the leadership of the lead agency.”²¹ This provision means that, if two or more Federal agencies have an approval role for the same project, those agencies generally (with limited exceptions) must rely upon the same NEPA document to satisfy their NEPA responsibilities. Preparing a single document avoids the potential for different NEPA documents with different definitions of the project’s purpose and need.

Use of Planning–Environmental Linkages. Transportation agencies can use the transportation planning process to produce decisions or analyses that can later be adopted for use in the NEPA process—a practice known as planning–environmental linkage (PEL). For highway and transit projects, there are two main sources of authority for adopting planning decisions for use in the NEPA: the process described in Appendix A to the transportation planning regulations (23 CFR Part 450)²² and a separate process established in a Federal statute (23 USC 168). These processes allow similar types of decisions and analyses to be adopted, including:

- Purpose and need
- General travel corridor and mode
- Preliminary screening of alternatives
- Need for tolling or other innovative financing
- Travel demand and socio-economic growth forecasts

Both Appendix A to Part 450 and 23 USC 168 establish requirements that must be met before adoption can occur. While the requirements are similar, there are some notable differences. For example, under 23 USC 168, concurrence of a cooperating agency is required “if the planning product is necessary for a cooperating agency to issue a permit, review, or approval for the project.”²³

There is also a provision in 23 USC 139(f)(4) that allows the lead agency in the NEPA process to eliminate from detailed consideration an alternative that was previously rejected in the metropolitan transportation planning process or in a state environmental review process.²⁴ This provision only applies to adoption of an alternatives screening decision. It requires concurrence by cooperating agencies in some cases.

Coordination with Section 404 and Other Laws. The requirements of Section 404 of the Clean Water Act are distinct from NEPA and are more stringent in the sense that Section 404 requires selection of the practicable alternative that causes the least impact to aquatic resources.

- **Independent Authority.** As the permitting agency under Section 404, the Corps has a responsibility to determine which alternatives are practicable. Under its regulations, the Corps determines practicability based on “cost, existing technology, and logistics in light of overall project purposes.”²⁵ Thus, the Corps’ role under Section 404 requires the Corps to determine the “overall project purposes.” In that capacity, the Corps must determine the project’s “overall project purpose” and analyze alternatives to support the Corps’ decision on the Section 404 permit application. In addition, because issuance of a permit is a Federal action, the Corps has an independent responsibility to comply with NEPA.

²¹ 23 USC 139(d)(8).

²² 23 CFR 450.212 and 450.318 and Appendix A to Part 450.

²³ 23 USC 168(d).

²⁴ 23 USC 139(f)(4)(E).

²⁵ 40 CFR 230.3(l).