
NEPA/HEPA LITIGATION CHECKLIST

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This checklist is a summary of the major procedural issues typically encountered in litigation involving the National Environmental Policy Act (“NEPA”) and chapter 343 of the Hawai’i Revised Statutes, also known as the Hawai’i Environmental Policy Act (“HEPA”). The checklist can be a useful tool for planning litigation strategy planning and identifying potential issues.

The issues are categorized under seven questions that one should ask when litigating a NEPA/HEPA action. The questions are:

1. What is being challenged?
2. What is the statutory basis for the challenge?
3. Are there any statutory prerequisites that need to be met?
4. What are the applicable statutes of limitation?
5. Are there any justiciability problems?
6. What is the standard of review?
7. What remedies are available?

Where relevant, the checklist reproduces the legal test applicable to an issue. Statutes and representative cases are also referenced where possible.

NATIONAL ENVIRONMENTAL POLICY ACT (“NEPA”)

What Is Being Challenged?

- Failure to prepare environmental assessment (“EA”)
- Challenge to Finding of No Significant Impact (“FONSI”)
- Challenge to environmental impact statement (“EIS”)
- Failure to prepare supplemental environmental impact statement (“SEIS”)

What Is the Statutory Basis For the Challenge?

- Administrative Procedures Act, 5 U.S.C. § 704 (“APA”)
- Declaratory Judgment Act, 28 U.S.C. § 2201

Are There Any Statutory Prerequisites That Need to Be Met?

- NEPA: “Major federal action” must be involved. 42 U.S.C. § 4332

- APA: “Final agency action” must exist. 5 U.S.C. § 704
 - ❖ Test: (1) action must mark the “consummation” of the agency’s decisionmaking process . . . it must not be of a merely tentative or interlocutory nature; (2) action must be one by which “rights or obligations have been determined,” or from which “legal consequences will flow.” *Bennett v. Spear*, 520 U.S. 154, 177-78 (1994).
 - ❖ What final agency action is at issue in the case depends on the type of challenge
 - *Failure to prepare EA*: The “major federal action” being challenged
 - *Challenge to FONSI*: The FONSI
 - *Challenge to EIS*: The Record of Decision (“ROD”)
 - *Failure to prepare SEIS*: If formal determination re whether to prepare a SEIS, the document containing the formal determination. *See, e.g., Portland Audubon Soc’y v. Upjohn*, 795 F. Supp. 1489, 1502 n.1 (D. Or. 1992). *But see Friends of the Clearwater v. Dombek*, 222 F.3d 552, 560 (9th Cir. 2000) (“An action to compel an agency to prepare an SEIS, however, is not a challenge to a final agency decision, but rather an action arising under 5 U.S.C. § 706(1), to ‘compel agency action unlawfully withheld or unreasonably delayed.’”).

What Are the Applicable Statutes of Limitation?

- **Six years** from the “final agency action.” 28 U.S.C. § 2401(a); *see Wind River Mining Corp. v. United States*, 946 F.2d 710, 713 (9th Cir. 1991) (applying general statute of limitation for civil actions against United States to actions for judicial review under APA).

- For claims seeking judicial review of a permit, license, or approval issued by a federal agency for a highway or public transportation capital project, **180 days** from the publication of notice in Federal Register announcing that the permit, license, or approval is final. 23 U.S.C. § 139(l).

Are There Any Justiciability Problems?

- Standing
 - ❖ Injury-in-fact (Injury in fact that is (a) concrete and particularized and (b) actual or imminent)
 - ❖ Traceability (Injury that is fairly traceable to the challenged action of the defendant)
 - ❖ Redressability (It is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision)

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 180-81 (2000).

- ❖ Zone of Interests (Prudential Standing): Whether the injury complained of is “within the meaning of the relevant statute,” i.e., whether the injury is within the statute’s “zone of interests.” *Lujan v. Nat’l Wildlife Found.*, 497 U.S. 871, 886 (1990).
 - Purely economic interests do not fall within the zone of interests. *Ashley Creek Phosphate Co. v. Norton*, 420 F.3d 934 (9th Cir. 2005); *Ranchers Cattleman Action Legal Fund United Stockgrowers of Am. V. United States Dep’t of Agric.*, 415 F.3d 1078 (9th Cir. 2005); *but see Rosebud Sioux Tribe v. McDivitt*, 286 F.3d 1031 (8th Cir. 2002).

- Ripeness
 - ❖ “A claim is fit for decision if the issues raised are primarily legal and do not require further factual development and the challenged action is final.” *Trustees for Alaska v. Hodel*, 806 F.2d 1378, 1381 (9th Cir. 1986).
 - ❖ Note: A “final agency action” is not necessarily ripe for review. *Municipality of Anchorage v. United States*, 980 F.2d 1320, 1323 (9th Cir. 1992).

- Mootness
 - ❖ “[C]ompletion of activity is not the hallmark of mootness. Rather, a case is moot only where no effective relief for the alleged violation can be given.” *Neighbors of Cuddy Mountain v. Alexander*, 303 F.3d 1059, 1065 (9th Cir. 2003).

What Is the Standard of Review?

- “Hard look”: agency must take a “hard look” at potential environmental consequences of proposed action. *Klamath Siskiyou Wildands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989, 992 (9th Cir. 2004)
- “Rule of reason”: Courts apply a “rule of reason” standard in reviewing the adequacy of a NEPA document. *Id.*
- Legal issues—Reasonableness standard. “Essentially the same” as abuse of discretion. *Northcoast Envntl. Ctr. v. Glickman*, 136 F.3d 660, 667 (9th Cir. 1998).
- Factual issues—Arbitrary and capricious standard. “[W]hether the agency ‘considered the relevant factors and articulated a rational connection between the facts found and the choice made.’” *Id.*

What Remedies Are Available?

- Declaratory relief
- Injunctive relief

HAWAI‘I ENVIRONMENTAL POLICY ACT (“HEPA”)

What Is Being Challenged?

- Failure to prepare environmental assessment (“EA”)
- Challenge to negative declaration
- Challenge to determination that environmental impact statement (“EIS”) required
- Challenge to acceptance of EIS
- Failure to prepare supplemental environmental impact statement (“SEIS”)

What Is the Statutory Basis For the Challenge?

- Failure to prepare EA: HRS § 343-7(a)
- Challenge to negative declaration: HRS § 343-7(b)
- Challenge to determination that EIS required: HRS § 343-7(b)
- Challenge to acceptance of final EIS: HRS § 343-7(c)
- Failure to prepare SEIS: Unclear. HRS § 343-7(a) or (b) (depending on whether formal determination of necessity for SEIS was issued).

Are There Any Statutory Prerequisites That Need to Be Met?

For challenges to acceptance of EIS, comments on the EIS required; scope of judicial review limited to concerns identified and discussed in comments. HRS § 343-7(c); *Price v. Obayashi Haw. Corp.*, 81 Hawai‘i 171, 183 n.14, 914 P.2d 1364, 1376 n.14 (1996).

What Are the Applicable Statutes of Limitation?

- Failure to prepare EA: 120 days of the agency’s decision to carry out or approve the action. HRS § 343-7(a)
- Challenge to negative declaration: 30 days after public has been informed of determination that EIS is not required for proposed action. HRS § 343-7(b)
- Challenge to determination that EIS required: 60 days after public has been informed of determination that EIS is required for proposed action. HRS § 343-7(b)
- Challenge to acceptance of final EIS: 60 days after public has been informed of determination that final EIS is accepted. HRS § 343-7(c).
- Failure to prepare SEIS: Unclear. If under HRS § 343-7(a), 120 days of agency’s decision to carry out or approve the action. If under HRS § 343-7(b), 30 days after public has been informed that SEIS not required for proposed action. If under HRS § 343-7(c), 60 days after public has been informed of acceptance of original EIS. *See Sensible Traffic Alternatives and Resources, Ltd. v. Federal Transit Admin. of United States Dep’t of Transp.*, 307 F. Supp. 2d 1149 (D. Haw. 2004).

- Intervention in a timely-filed lawsuit does not necessarily have to be within limitation period. *Kepo'o v. Kane*, 106 Hawai'i 270, 103 P.3d 939 (2005).

Are There Any Justiciability Problems?

- Standing
 - ❖ Injury-in-fact ("actual or threatened injury as a result of the defendant's conduct")
 - ❖ Traceability ("injury fairly traceable to the defendant's actions")
 - ❖ Redressability ("would a favorable decision likely provide relief for plaintiff's injury")
Sierra Club v. Hawaii Tourism Auth. ex rel. Bd. of Directors, 100 Hawai'i 242, 250, 59 P.3d 877, 885 (2002)

- Ripeness

- Mootness

"A case is moot where the question to be determined is abstract and does not rest on existing facts or rights." *CARL Corp. v. State*, 93 Hawai'i 155, 164, 997 P.2d 567, 576 (2000)

What Is the Standard of Review?

- "Rule of reason": Standard applies to sufficiency of EIS. "[A]n EIS need not be exhaustive to the point of discussing all possible details bearing on the proposed action but will be upheld as adequate if it has been compiled in good faith and sets forth sufficient information to enable the decision-maker to consider fully the environmental factors involved and to make a reasoned decision after balancing the risks of harm to the environment against the benefits to be derived from the proposed action, as well as to make a reasoned choice between alternatives." *Price v. Obayashi Haw. Corp.*, 81 Hawai'i 171, 183, 914 P.2d 1364, 1376 (1996).
- Sufficiency of EIS is a question of law. *Id.* at 182, 914 P.2d at 1375.

What Remedies Are Available?

- Declaratory relief
- Injunctive relief

Note: Can look to federal law re NEPA where Hawai'i law is silent. "[I]n instances where Hawai'i case law and statutes are silent, this court can look to parallel federal law for guidance." *Price v. Obayashi Haw. Corp.*, 81 Hawai'i 171, 181, 914 P.2d 1364, 1374 (1996).