

41st Annual AAAE
Airport Law Workshop
Washington, D.C.

Session #12

Legal Requirements for Assessing and Reporting the Environmental Impacts of Airports



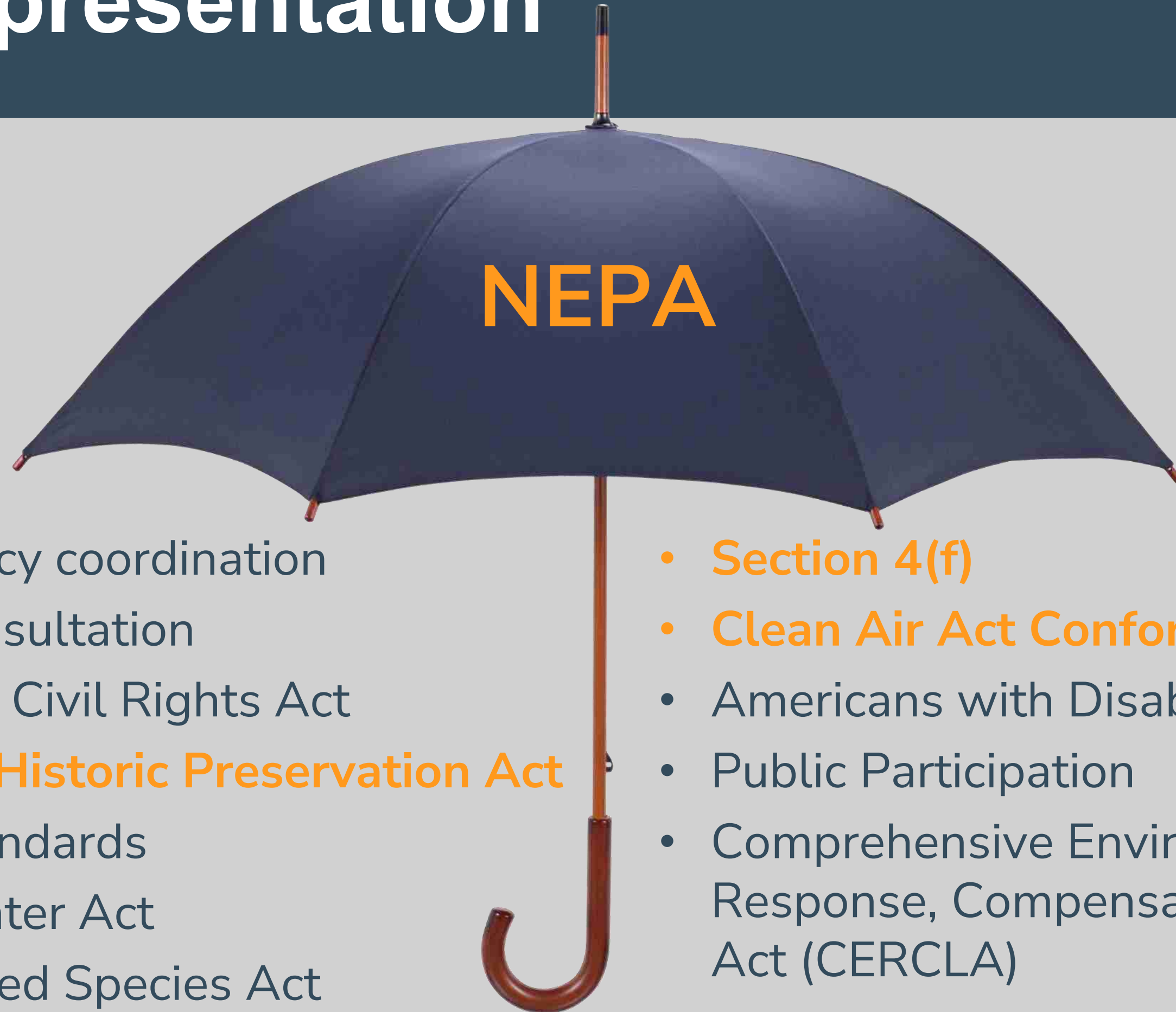
Speaker

Katie van Heuven



Partner
Kaplan Kirsch LLP

Today's presentation



- Interagency coordination
- Tribal consultation
- Title VI of Civil Rights Act
- **National Historic Preservation Act**
- Noise Standards
- Clean Water Act
- Endangered Species Act
- **Section 4(f)**
- **Clean Air Act Conformity**
- Americans with Disability Act
- Public Participation
- Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)

NEPA overview

- Federal agencies must prepare a “detailed statement” when they propose to take a “major federal action significantly affecting the quality of the human environment”
 - Take a hard look at the impacts
 - Provide information about environmental effects to decision-makers and the public
 - Improve decision-making through disclosure and coordination/consultation
- Establishes Council on Environmental Quality (CEQ)
 - Agencies must develop procedures in consultation with CEQ

U.S. DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WESTERN-PACIFIC REGION

***FINDING OF NO SIGNIFICANT IMPACT
AND
RECORD OF DECISION***

Proposed Concourse B Expansion

Sacramento International Airport
Sacramento, Sacramento County, California



For further information:

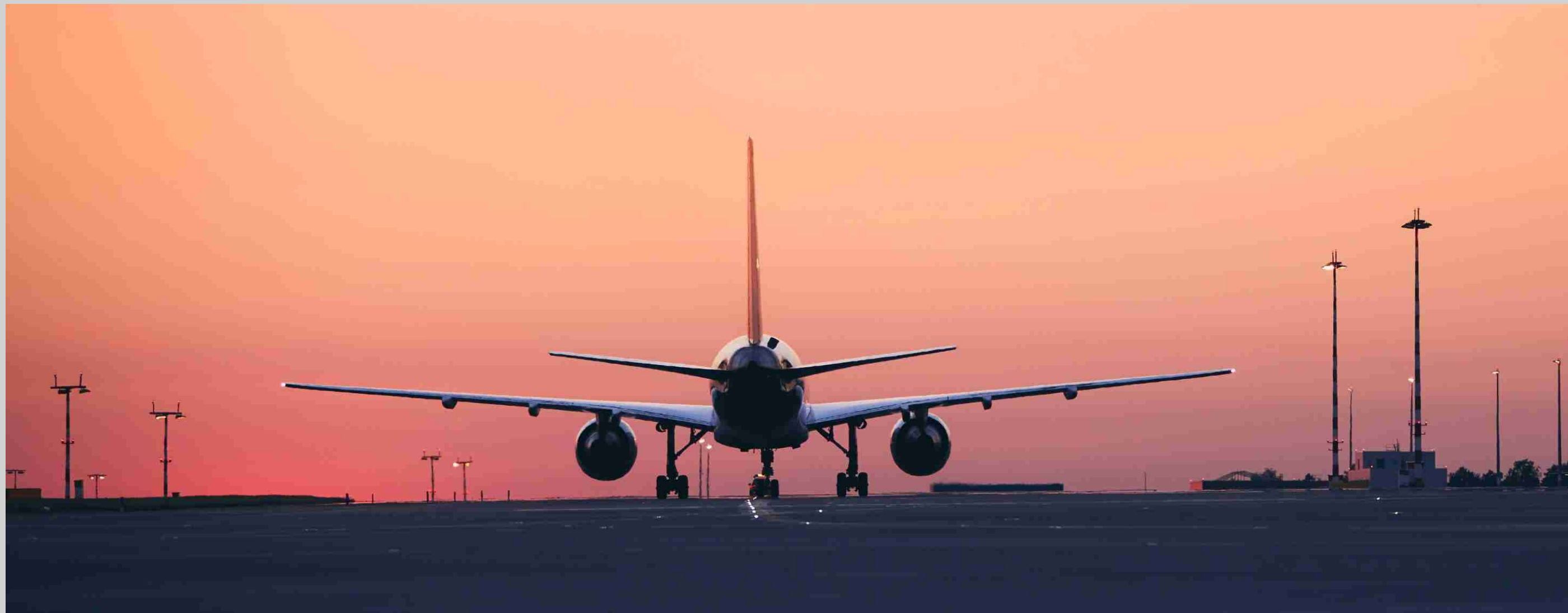
David M. Wickens
U.S. Department of Transportation
Federal Aviation Administration
Western-Pacific Region - Airports Division
San Francisco Airports District Office
2999 Oak Road, Suite 200
Walnut Creek, California 94597-7775
925-546-6445

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NEPA overview, cont.



- NEPA imposes *procedural*, not substantive requirements.
- The NEPA process is often how the public learns about airport improvement projects



“Major Federal action”



- FAA
 - Providing federal financial assistance
 - Approving an Airport Layout Plan
 - Approving a release of obligations (e.g., sale of federally funded airport property)
 - Approving airspace changes
- Other agencies (e.g. FHWA, Army Corps, Department of Defense)

“Detailed statement” – 3 levels of review



Categorical Exclusion (CATEX) (if no extraordinary circumstances)

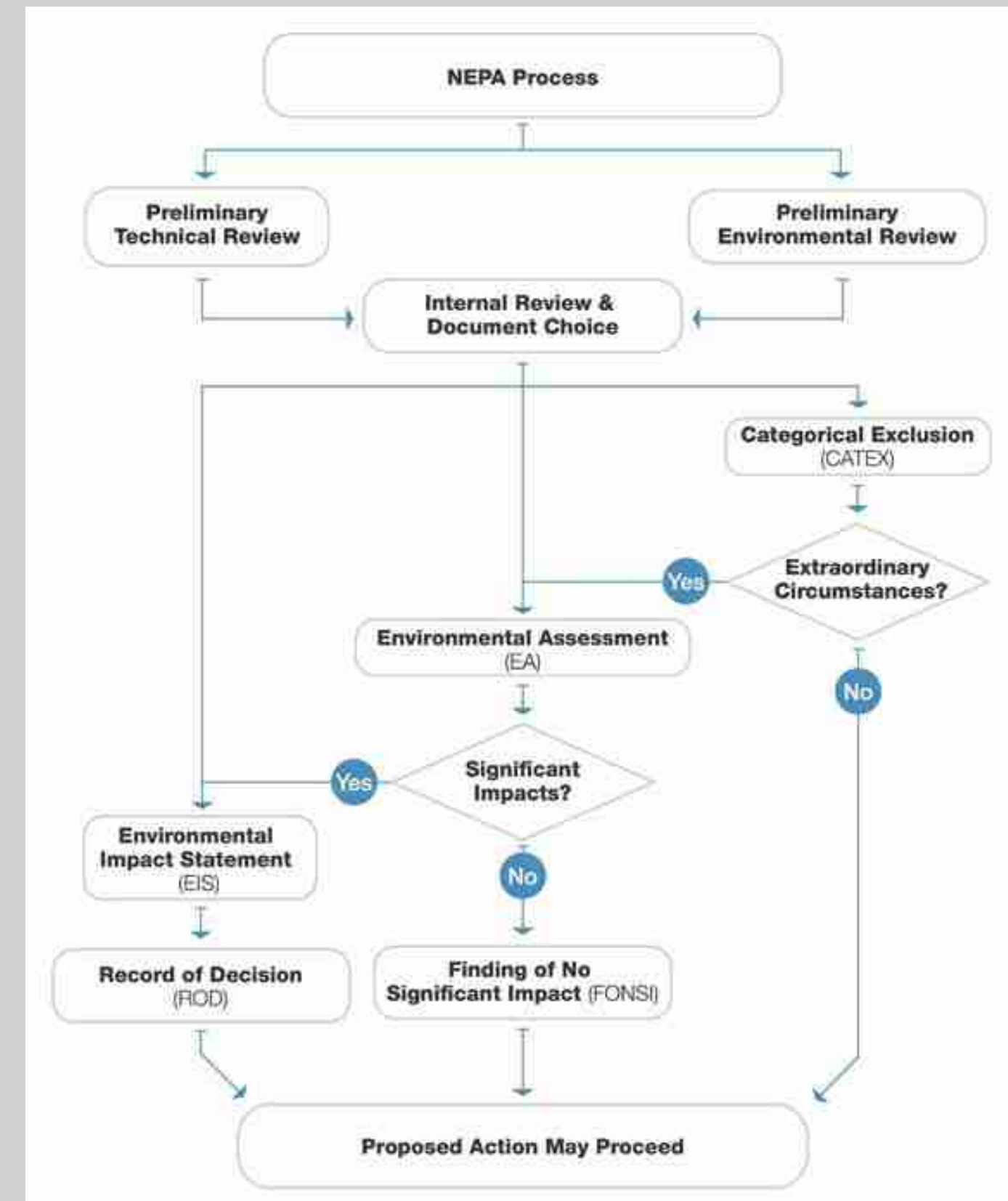
- Most common
- No public involvement required

Environmental Assessments (EA)

- If a CATEX isn't available; or
- If unsure whether there will be a significant impact
- *Public review of final EA*

Environmental Impact Statements (EIS)

- Most detailed analysis
- Public involvement and review of draft EIS



Sponsor preparation of documentation



- NEPA is a federal obligation, but....
- Longstanding practice to allow sponsors to prepare CATEXs and EAs.
 - New opportunity for EISs
- Documents must be prepared under the “supervision of the agency”
- Agency *must* have procedures for sponsor preparation

What's in the document?

Documented CATEX

EA/EIS major elements

- Purpose and need of the proposed action
- Explanation of alternatives
- Description of the affected environment
- Analysis of the environmental consequences of the alternatives (including the no action alternative)
- Mitigation
- Public Involvement*

Key Sources:

FAA Order 1050.1G

**Order 1050.1 Desk
Reference**

What are the legal risks?



City of Los Angeles v. FAA (9th Cir. 2023) (ordering FAA to redo the noise impact analysis in the EIS for Burbank's terminal redevelopment because FAA unreasonably assumed that construction workers would not operate multiple pieces of noisy construction equipment simultaneously)

Barnes v. DOT (9th Cir. 2011) (FAA failed to evaluate impacts associated with increased demand from a runway expansion)

Shifting landscape (2023 - ??)



Fiscal Responsibility Act of 2023



- Codifies the three levels of NEPA review
- Establishes definitions, including of “major Federal action”
- Provides for sponsor-prepared environmental documents
- Establishes page and time limits for EAs and EISs
- Clarifies requirements for EISs
- Establishes thresholds for when environmental document is required
- Allows the interagency adoption of CATExs
- Provides direction for lead and cooperating agencies

FAA Reauthorization Act of 2024



Section 743

- Limits FAA approval authorities (therefore limiting NEPA)

Section 783:

- Amends Aviation Streamlining Act

One Big Beautiful Bill Act



Sponsor “opt in” fees

Sponsor may pay a fee for an expedited EIS or EA

- One-year for an EIS
- 180 days for an EA

Funding goes to Treasury, not specific agency

Provide to CEQ:

- A description of the project
- A declaration of whether the project sponsor intends to prepare the EA or EIS

Supreme Court



Seven County Infrastructure Coalition v. Eagle County, Colorado

- Agencies are owed “substantial deference” when they decide what effects to consider in an EIS and how deeply to analyze them.
- Agencies can draw a “reasonable and manageable line” to define the project.
- Agencies only need to consider the effects of the “project at hand” not other projects separated by time or space.
- Agencies not required to study effects of projects over which they do not exercise regulatory authority.

Regulatory changes



- Trump 1 Revisions to NEPA regulations (July 2020)
- Biden “Phase 1” Rulemaking (April 2022)
- Biden “Phase 2” Rulemaking (May 2024)
- Marin Audubon v. FAA (Nov. 2024) (D.C. Cir rules that CEQ regulations are “ultra vires”)
- Executive Order 14154 (Jan. 2025) (proposing rescission of CEQ regulations)
- CEQ Rulemaking rescinding NEPA regulations (published Feb. 2025, effective April 2025)
- Updated FAA guidance, Order 1050.1G

FAA Order 1050.1G

Incorporates the FRA amendments

- Page and time limits
- Procedures for sponsor preparation

Informed by the *Seven County* decision

- Scope of analysis and level of review

The Executive Director of the FAA Office of Environment and Energy, Julie Ann Marks, signed the following notice on June 30, 2025, and FAA submitted it for publication in the *Federal Register*. While we have taken steps to ensure the accuracy of this pre-publication version, it is not the official version. Please refer to the official version in a forthcoming *Federal Register* publication, which will appear on the *Federal Register* website, <https://www.federalregister.gov/>, Government Printing Office's website, <https://www.gpo.gov/app/collection/fr>, and on <https://regulations.gov> in Docket No. FAA-2025-1571. Once the official version of this document is published in the *Federal Register*, this version will be removed and replaced with a link to the official version.



U.S. DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

ORDER
1050.1G

Effective Date:
6/30/25

SUBJ: FAA National Environmental Policy Act Implementing Procedures

This Order serves as the Federal Aviation Administration's (FAA) policy and procedures for compliance with the National Environmental Policy Act (NEPA), as amended, and reflects the February 25, 2025, Interim Final Rule issued by the Council on Environmental Quality rescinding its regulations implementing NEPA. The provisions of this Order apply to actions directly undertaken by the FAA and to actions undertaken by a non-Federal entity where the FAA has authority to condition a permit, license, or other approval. The requirements in this Order apply to, but are not limited to, the following actions: grants, loans, contracts, leases, construction and installation actions, procedural actions, research activities, rulemaking and regulatory actions, certifications, licensing, permits, plans submitted to the FAA by state and local agencies for approval, and legislation proposed by the FAA. The Order was last revised in 2015.

This Order updates FAA Order 1050.1F, *Environmental Impacts: Policies and Procedures* to: 1) provide streamlined procedures that maintain environmental amenities and protection; 2) reduce regulatory delays that may impede aviation safety improvements and infrastructure development as well as integration of new entrant technologies; and 3) provide a clear, concise, and up-to-date statement of the FAA's requirements for implementing NEPA.

Christopher J. Rocheleau

Christopher J. Rocheleau
Acting Administrator

Distribution: Electronically

Initiated by: AEE-400

But wait, there's more ...



National Historic Preservation Act



- Primary U.S. law for historic preservation
- **Section 106:** Federal agencies must consider the impact of their undertakings on historic properties
- Procedural requirements

Section 106 Handbook: How to Assess the Effects of FAA Actions on Historic Properties under Section 106 of the National Historic Preservation Act



Federal Aviation Administration

June 2015

What's the difference?



NEPA

- Federal agencies must prepare a “detailed statement” when they propose to take a “major federal action significantly affecting the quality of the human environment”
 - Ensure that agencies understand environmental impacts of their actions
 - Disclose information about proposed action and environmental impacts to the public

NHPA

- Federal agencies must consider the impact of their “undertakings” on historic properties
 - Provide the Advisory Council on Historic Preservation with an opportunity to comment on projects before implementation.
 - Initiate consultation with SHPO, tribes
 - Disclose information about proposed undertaking and effects to the public

DOT Act of 1966 – Section 4(f)



- Codified at 49 U.S.C. § 303(f)
- Only applies to Department of Transportation agencies

“... the Secretary may approve a transportation program or project ... requiring the use of publicly owned land of a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance, or land of an historic site of national, State, or local significance (as determined by the Federal, State, or local officials having jurisdiction over the park, area, refuge, or site) only if—

(1) there is no prudent and feasible alternative to using that land; and

(2) the program or project includes all possible planning to minimize harm to the park, recreation area, wildlife and waterfowl refuge, or historic site resulting from the use.”

Section 4(f): Covered properties

- Property that is protected by this statute has come to be known as “Section 4(f) Property.”
 - Public parks
 - Recreation areas
 - Wildlife and waterfowl refuges of national, state, or local significance
 - Historic properties



Section 4(f): Covered “uses”



- **Physical Use**
 - Actual physical taking of Section 4(f) property
 - *E.g.*, purchase of land, permanent easement, physical occupation of the property, alteration of structures or facilities on the property
- **Constructive Use**
 - No physical taking, but project has impacts that constitute “substantial impairment” on the value of the Section 4(f) property
 - “Substantial impairment” occurs if the protected activities, features, or attributes of the Section 4(f) property that contribute to its significance or enjoyment are substantially diminished
- **Temporary Use**
 - It depends!

Section 4(f): “Feasible and prudent”



- Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) (2005)
 - Directed DOT to clarify factors for determining whether an alternative is “feasible and prudent”
 - New exception for projects with only *de minimis* impacts on 4(f) lands
- Federal Highway Administration/Federal Transit Administration (FHWA/FTA) regulations (23 CFR part 774)
 - Alternative is “feasible and prudent” if it avoids using Section 4(f) property and does not cause problems that substantially outweigh the importance of protecting the Section 4(f) property
 - FAA does not have its own 4(f); relies on FHWA/FTA regulations

Section 4(f) Alternatives



- Alternative is not **feasible** if it cannot be built as a matter of sound engineering judgment
- Alternative is not **prudent** if it:
 - Does not address the purpose and need of the project
 - Results in unacceptable safety or operational problems
 - Causes severe social, economic or environmental impacts
 - Results in additional construction, maintenance, or costs of an extraordinary magnitude
 - Causes other unique problems or unusual factors
 - Involves multiple factors above that, although individually minor, cumulatively cause unique problems or impacts of extraordinary magnitude

Section 4(f) Alternatives: Least overall harm



- If no feasible and prudent alternative avoids 4(f) property, FAA must approve the alternative that meets the purpose and need and causes the least overall harm
- Test for determining “least overall harm”:
 1. The ability to mitigate adverse impacts to each Section 4(f) property
 2. The relative severity of the remaining harm, after mitigation
 3. The relative significance of each Section 4(f) property
 4. The views of the official(s) with jurisdiction over each Section 4(f) property
 5. The degree to which each alternative meets the purpose and need for the project
 6. After reasonable mitigation, the magnitude of any adverse impacts to resources not protected by Section 4(f)
 7. Substantial differences in costs among the alternatives

Clean Air Act

- Understanding the Clean Air Act
 - EPA sets National Ambient Air Quality Standards (NAAQS) for 6 “criteria pollutants”
 - States propose a State Implementation Plan (SIP) to implement, maintain and enforce the NAAQS
 - EPA reviews the SIPs
 - If SIP is approved, the state and local regulations in the SIP are enforceable as Federal law
 - If SIP is rejected, EPA creates a Federal Implementation Plan (FIP) and takes over administration of the state program



Clean Air Act Conformity



- Areas where air pollution levels meet the NAAQS are in “**attainment**”
- Areas where air pollution levels exceed the relevant NAAQS are in “**nonattainment**”
- Why is this relevant?
 1. More stringent emissions controls required in nonattainment areas
 2. Different permit requirements
 3. Conformity rules only apply in nonattainment areas

“No department, agency, or instrumentality of the Federal Government shall engage in, support in any way or provide financial assistance for, license or permit, or approve, any activity which does not conform to an implementation plan after it has been approved or promulgated ...”

- Clean Air Act § 176(c)

Clean Air Act Conformity, cont.



- Substantive requirement
 - Bars federal actions that do not conform to the Clean Air Act
- Federal requirement
 - FAA makes the conformity determination
 - Airport sponsors still play a crucial role supplying background and planning data

Does Conformity Apply?

- Is there a federal action?
- Is the project in a nonattainment area?
- Is there an exclusion?
- Is the project “presumed to conform”?
- Are emissions above *de minimis* thresholds?

Takeaways for airport lawyers



- NEPA is undergoing dramatic changes: make sure you are aware of latest changes.
- Consider all options to revise projects to limit/eliminate scope of federal environmental approvals.
- Pay attention to substantive environmental statutes too, not just NEPA.
- Don't forget about state/local obligations!

Questions?

