



Guidance for EPA Regional Oversight of State National Environmental Policy Act (NEPA) Delegation

GUIDANCE FOR EPA REGIONAL OVERSIGHT OF STATE
NATIONAL ENVIRONMENTAL POLICY ACT (NEPA) DELEGATION

I. INTRODUCTION

This document is intended for use by Environmental Protection Agency (EPA) regions in overseeing state activities taken to support EPA compliance with the National Environmental Policy Act (NEPA) where the construction grants program has been delegated to the state.* It should be viewed as a companion to the Construction Grants Delegation and Overview Guidance Manual issued in December 1983 by the Office of Water. All citations to 40 CFR Part 6 refer to the Interim Rule published in the Federal Register in June 1985.

As of August 1985, EPA has delegated all or part of the construction grants program to 49 states and Puerto Rico. In this process EPA's emphasis has shifted from project-level decisionmaking to assessing performance against overall program and management objectives. As part of this delegation the states assume a larger role in NEPA compliance. Although EPA still is responsible for issuing environmental assessments/findings of no significant impact (EAs/FNSIs), categorical exclusions and environmental impact statements (EISs), delegated states can prepare EA and FNSI documents and make recommendations to EPA on NEPA actions. EPA retains primary responsibility for preparation of EISs and may take the lead for FNSI/EAs on selected projects. The charts attached show the state/EPA NEPA roles for delegated states.

This document delineates the fundamental responsibilities of each party (applicants/grantees, states, and EPA) in the delegated construction grants NEPA program. It also provides guidance and criteria for the EPA regions to use in evaluating delegated state programs.

II. DELEGATION AGREEMENTS

Delegation agreements are signed by responsible EPA and state officials and define EPA and state roles under each delegated state construction grants program. These are usually multi-year agreements, and EPA reviews state performance annually. Delegation agreements are the most significant documents for defining the state environmental review role. In addition, State/EPA Agreements are developed annually under the Clean Water Act Section 106 grant program. These outline the environmental goals and objectives to be pursued through the joint efforts of both agencies. Commitments of resources or activities may be incorporated in these agreements.

* Although the program is delegated to the state, EPA retains responsibility for NEPA compliance since EPA issues the grant. The state, however, may have a significant role in developing the documentation for NEPA compliance.

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The EPA regional administrator is the responsible official for NEPA decisions. The following NEPA-related duties may be delegated to states in delegation agreements:

- review of grantee submittals under EPA requirements for NEPA compliance as set out in 40 CFR Part 6;
- preparation of recommendations and draft documentation on eligible categorical exclusions;
- preparation of recommendations and draft documentation on partitioning environmental reviews;
- preparation of drafts of environmental assessments and drafts of findings of no significant impact (FNSIs) and recommendations on these;
- preparation of recommendations and draft documentation under applicable laws described under 40 CFR Part 6 Subpart C (e.g., Endangered Species Act, etc.);
- overview of grantee publication and distribution of notices pursuant to 40 CFR Part 6; and
- ensuring individual project compliance with grant conditions included as a result of environmental review.

The final decision-making authority for NEPA actions related to construction grants rests with the regional administrator and cannot be delegated to the states. The following functions are covered by this requirement:

- determinations of whether or not a project qualifies for a categorical exclusion (if an exclusion is granted, the project does not have to meet any other NEPA requirements);
- approvals for partitioning the environmental review process;
- finalizing the scope of an environmental assessment;
- approval and issuance of final environmental assessment;
- determination for and issuance of FNSIs;
- determination and issuance of notices of intent for preparing an EIS;
- scoping, preparation and issuance of draft, final and supplemental EISs;
- preparation and issuance of the Record of Decision (ROD) on an EIS;
- final decisions under other applicable laws described in Subpart C, 40 CFR Part 6;
- decisions required for utilizing a third party method for preparing an EIS;
- determining consistency of re-evaluated EISs or other NEPA decisions for projects awaiting grant funding following elapse of five years or more; and
- ensuring inclusion of grant conditions developed as a result of the environmental review process into the Record of Decision (ROD) and construction grant document, as appropriate.

The regional administrator is also responsible for oversight of delegated state environmental review activities and responsibilities, including oversight of grant conditions included as result of environmental reviews.

The delegation agreement should incorporate the following elements into the NEPA delegation process:

- (1) Annual overviews to be conducted by EPA in state offices in order to evaluate the state's compliance with NEPA procedures and requirements;
- (2) A provision that revisions to the delegation agreement can be initiated by either EPA or the state, on an as needed basis. Both parties must agree to such changes before the formal adoption;
- (3) The establishment of specific review points and the development of checklists to be used in reviews of delegated programs; and
- (4) A provision that retraction of the delegation agreement can occur in the case of clearly unacceptable performance by a state which shows lack of good faith or capacity to correct identified problems.

Under delegation, the role of the applicant or grantee remains the same. The applicant/grantee has the primary responsibility for preparing the facility planning material and Environmental Information Document (EID) and submitting it for review by the state. The delegated state agency has the responsibility to provide applicants/grantees with the latest available construction grants and NEPA guidance and to confer early with the applicant/grantee concerning NEPA determinations.

III. ENVIRONMENTAL REVIEW PROCEDURES

Since the final decision on whether a proposed agency action will significantly affect the environment is still one that EPA must make, the following approach to environmental review is recommended where states have been delegated the construction grants program.

In most cases, the state will collect data, analyze the project, consult with EPA where appropriate, and resolve issues. The state will then prepare documentation and submit it to EPA along with recommendations for a decision. EPA will review the documentation, request more information if necessary, resolve any remaining problems and complete the environmental review. One approach which can be taken is that a selected number (e.g. 10%) of cases be jointly identified by the region and state where the state will submit all environmental information related to the project (including documents and correspondence) to EPA for a "real time" evaluation. EPA would also participate in selected meetings with the applicant/grantee. These should be the more sensitive projects, and should be selected for the ensuing year during the annual overview session with the state. Another approach which is also appropriate would involve a retrospective review of individual state actions by the EPA

regional office. Under this approach, more information would be obtained on state reviews which took place during the preceeding year, and an analysis made of the environmental assessment. This would allow a more detailed review of the state action without the direct EPA presence in an on-going state grant review. An EPA region may also want to combine both of these approaches in its evaluation program.

The components of the environmental review process are outlined below. These are the same whether they are done by EPA or the state.

- (1) Consultation: The applicant/grantee is encouraged to consult with the state/EPA early in project formulation to discuss the potential eligibility for categorical exclusion, available alternatives, potential environmental issues, the need for an EIS, etc. In a delegated program the state will be the primary contact for these consultations.
- (2) Categorical Exclusion: At the request of an applicant/grantee, the state may review the eligibility of a project for a categorical exclusion from the remaining substantive environmental review procedures. The recommendation and documentation supporting the recommendation should be forwarded to EPA for a determination. Categorical exclusions must be limited to projects which will clearly have no significant environmental impact (40 CFR 6.107).
- (3) Partitioning: When there are overriding considerations of cost or impaired program effectiveness, a grant may be awarded for a component of a wastewater system in advance of completing all NEPA requirements. In these cases NEPA requirements need to be completed on the approved project component but not the whole system. The state may recommend partitioning based on the 40 CFR 6.507 criteria.
- (4) Environmental Assessment: This is the official documentation of the decision to issue a Finding of No Significant Impact (FNSI). The FNSI can only be issued by the EPA. However, for those states where the review of the facilities plan and EID has been delegated, the state may prepare a draft environmental assessment. EPA will make its determination based on the draft or other appropriate information and, after review and modification as necessary, will issue it as the final environmental assessment.
- (5) Environmental Impact Statement: The state may recommend that an EIS be done (or that a FNSI cannot be issued). EPA may also, determine that an EIS is required, whether or not the state recommends one. When this determination is made, the EPA is responsible for issuing a Notice of Intent to prepare an EIS and will have the lead responsibility in preparing the EIS, whether it is in a delegated state or not. The state will be involved in providing input and reviewing EIS outputs.

IV. EPA's OVERSIGHT AND EVALUATION PROGRAM

For the delegation of the environmental review process to be successful, the EPA regional office must develop and implement a review and evaluation program of state activities. The basic elements of such reviews are identified in the "Agency Policy on Delegation and Oversight: Making the State-EPA Partnership Work" (April 4, 1984). The activities most pertinent for NEPA compliance are:

- an EPA/state agreement defining shared NEPA responsibilities and reporting requirements;
- an annual joint EPA/state planning cycle;
- an annual EPA evaluation of state performance;
- a program for developing policies, guidance and technical assistance with state input; and
- state evaluations of EPA performance.

To be most effective, the NEPA compliance review should be an integral part of the total regional overview of the delegated construction grants program (as set out in 40 CFR 35.3025). Where the EPA regional NEPA compliance responsibility is not in the same organization as the construction grants program there is a need to closely coordinate the review of the delegated state construction grant program. In these cases it is recommended that a Memorandum of Agreement be developed between the two organizational units to spell out elements and responsibilities of the construction grant review, including NEPA compliance activities, with the goal of an integrated regional office review of all facets of the delegated program.

Regional evaluation procedures should be delineated in the delegation agreement. The procedure should provide for at least one on-site assessment of the state's performance per year. It should provide for record-keeping by the state and EPA on the number and kind of state reviews carried out and follow-up actions by EPA. The level of state staffing and expertise should be evaluated. Primarily, however, it should focus on the quality of state environmental reviews, and criteria are included below to address the elements of a qualitative review. A review of this kind can be effectively carried out by auditing selected actions in detail, rather than amassing large amounts of data on all actions. In implementing this approach it is recommended that a sample of state actions (categorical exclusions, EAs, FNSIs, recommendations) be developed which will be representative of the over-all quality of the program. Where data on a larger number of state actions is available this can be summarized and various elements of the state program can be evaluated in order to supplement the detailed audits of selected actions. Some regions have found that it is more effective to review one or more functional areas separately. This approach should be considered, although it is critical that an integrated assessment of all elements of the state plan ultimately be produced during the year.

The broadest elements of regional oversight reviews should include, at a minimum, evaluation of:

- conformance with established state and federal environmental review procedures;
- the thoroughness of state environmental reviews;
- the extent to which mitigation of adverse impacts is identified and recommended; and
- the extent to which the state is ensuring that mitigation measures are implemented by the grantee

The key EPA objective is to develop a good working relationship with the states based on a mutual understanding of the intent of NEPA, which is that environmental information should be an integral part of the decision-making process rather than something to be considered after a decision is made.

More detailed evaluation elements are outlined below. These should be seen as the minimal questions which should be raised in looking at state actions. Each region will, of course, have to tailor an evaluation which is most suitable for each of its states.

V. QUESTIONS TO BE INCLUDED IN A STATE PROGRAM EVALUATION

Compliance with National Environmental Policy Act (NEPA) Procedures

Are state environmental review procedures actually affording adequate protection of the environment before, during and after construction of wastewater facilities? Are any changes appropriate? Do the reviews identify the significant environmental issues and deemphasize insignificant ones? Do the state recommendations on Categorical Exclusions, Environmental Assessments/FNSIs, and EISs conform with requirements of 40 CFR Part 6? Are the alternatives developed realistic and well considered? Are alternatives considered to address all of the adverse environmental impacts identified? Are "worst case" impacts and the likelihood of occurrence identified, along with mitigation measures? Do the documents which the state has prepared address all of the procedural considerations required under NEPA regulations, including correct format and applicable public information activities.

Air Quality

Have projects been evaluated for compatibility with State Implementation Plans? If incineration is being proposed for sludge disposal has this been evaluated for compatibility with the SIP, and possible impact on human health and the environment? Have the indirect air quality impacts associated with development been evaluated? Has the possible volatilization of harmful pollutants been considered?

Water Quality

Were plants reviewed for all applicable requirements of the Clean Water Act (water quality standards, Areawide Waste Treatment Plans, etc.)? Were they reviewed for impact on downstream drinking water intakes? Were the

assumptions on stream capacity appropriate? Did the state consider "worst case" impacts of failure to operate and maintain the plant properly? Were the indirect effects on water quality of plant-induced development considered and was the evaluation realistic?

Wetlands/Floodplains

Does the state environmental review cover both direct and indirect impacts (including those from project-induced growth) on wetlands and floodplains? In cases where there are wetlands impacts: does the state cooperate with EPA and the Army Corps of Engineers in identifying alternatives and mitigation measures, do EAs contain detailed information on the location, extent, type and value of impacted wetlands, is a Statement of Findings developed?

Groundwater Protection

Has the project been reviewed for compatibility with CWA Sec. 208 comprehensive plans for control of pollution from residual wastes, application of treated wastewater or sludge, underground injection of wastes and discharge into streams which may contribute to aquifers? Is it compatible with the EPA groundwater strategy? If out-of-basin transfer is involved, what effect will it have on groundwater quality and quantity?

Endangered Species Protection

Do state environmental reviews address endangered or threatened species? Do they correctly identify endangered or threatened species in a project area? Do they consult with the US Fish and Wildlife Service on these? Do they address both direct effects and indirect effects of projects on endangered/threatened species and species habitats? Do they comply with applicable regulations (50 CFR Part 402) whenever a threatened or endangered species may suffer adverse harm from a wastewater construction project?

Wild and Scenic Rivers

Does the state identify river designations in reviewing projects? If an affected river is designated wild, scenic or recreational, does the state utilize information from the National Park Service in assessing impacts on these rivers? Is EPA notified when an adverse impact is identified?

Historic/Archaeological Resources

Does the state contact the State Historic Preservation Officer (SHPO) to identify all known historic, archeological and/or cultural properties in the project area? Does the state incorporate the historic preservation requirements set out in 36 CFR Part 800 into its environmental analysis? Where data are lacking does the state carry out the necessary survey work through the SHPO or EPA?

National Natural Landmarks

Does the state environmental review process include whether there are natural landmarks designated as National Natural Landmarks by the National Park Service within the project areas? Are alternatives formulated to have the least harmful impact upon these landmarks?

Important Agricultural Lands

Do project evaluations consider farmland protection, including both the direct and indirect impacts, and appropriate mitigation measures? If Environmentally Significant Lands (as defined in 7 CFR Part 657 by USDA) are impacted, does the state identify them, assess the impacts and delineate efforts to avoid or mitigate the adverse effects, including induced development. Does the state coordinate with the State Conservationist of the Soil Conservation Service to ensure that projects meet appropriate guidelines?

Coastal Zone Management Act

Where wastewater treatment facilities are to be located in areas defined as coastal zones does the state environmental review process assure that they are reviewed for consistency with State Coastal Zone Management plans? Is adequate consultation made with the state agency responsible for coastal zone management plans? Do the reviews include an adequate identification of sensitive coastal areas, review of both direct and indirect (particularly project-induced growth) and regional impacts?

Coastal Barrier Resources Act

Does the state review proposed projects for compliance with restrictions on new federal expenditures which have the effect of encouraging development on undeveloped coastal barriers within the Coastal Barriers Resources System?

Peer Review Process

Does the state have a peer review process for its environmental review documents? Does this include review by experts who are knowledgeable about all of the environmental considerations in the project area? Does the state have a list of experts which it can access for peer reviews?

Mitigation Measures

Do the environmental review documents describe the mitigation measures in the facility plans and do they recommend additional ones when needed? Are mitigation measures included as grant conditions? Does the state consider mitigation in subsequent project steps? These subsequent project steps affecting mitigation measures include:

- plans and specifications;
- grant applications;
- value engineering reports;
- plans of operation, including operation and maintenance manual;
- change orders; and
- project performance certification.

Other Considerations

Is the population data used current and accurate? Are the projections of population growth realistic? Have state and local land use controls been considered and is the project consistent with them? Have all of the affected environmentally sensitive areas (wetlands, floodplains, steep slopes, aquifer recharge areas, etc.) been identified, and potential direct and indirect impacts considered? Have impacts on recreational and open space areas been considered, including the potential for enhancing such areas?

VI. EPA ENVIRONMENTAL REVIEW ASSISTANCE PROGRAM

EPA's regional NEPA compliance staffs have a responsibility under the Agency's policy on delegation and oversight to assist states in performing environmental review tasks specified in State/EPA Agreements. Each EPA Regional NEPA compliance staff office should develop a comprehensive program of NEPA assistance for the States with delegated construction grants programs. As a minimum, an assistance program includes the following:

- Environmental Review Manuals or standard operating procedures which describe the substantive and procedural aspects of the environmental review process, including environmental review required under state law or regulation, for each delegated state
- Training sessions on environmental review activities as needed and appropriate

The program should also include an effective follow-up effort for assisting states in correcting problems found through regional evaluations or which have otherwise come up. It is also necessary that the region be available to provide assistance on particularly difficult or complex reviews.

The state's cooperation should be obtained in developing each part of a regional assistance program.

Environmental Review Manuals

Several regions have already prepared comprehensive guidance manuals (Environmental Review Manuals) for states to use in performing environmental reviews under delegated construction grants programs. The development of

such manuals by all regions is encouraged. This can be done by appropriately modifying manuals which are currently being used. While each region has discretion as to format, it is recommended that the manual be organized into topic areas (e.g. NEPA, Endangered Species, Historic Preservation, etc.) and that each topic area contain two parts: (1) substantive guidance and (2) reference documents. The manuals should include the following:

- a discussion of review procedures and key terms;
- the environmental review process with state delegation under 205(g);
- identification of responsibilities for environmental reviews, EIS candidates, categorical exclusions, partitioning environmental reviews, assessments, FNSIs, etc.;
- an environmental screening checklist;
- guidance for identifying potential EIS candidates;
- guidance on identifying components for accelerated partitioned environmental review;
- sample formats for environmental assessments, FNSIs, partitioning decisions, categorical exclusion decisions, and content of environmental information documents;
- a peer review process; and
- appropriate reference documents (such as: EPA Procedures for Implementing the National Environmental Policy Act (40 CFR Part 6), Sec. 40 CFR 35.2113 of the construction grants regulation, CEO NEPA implementing regulations (40 CFR Parts 1500-1508))

Individual sections should be included in the manual to cover the substantive requirements and present appropriate references for reviews of: air quality, water quality, wetlands/floodplains, groundwater, endangered species, fish and wildlife, wild and scenic rivers, historical/archaeological resources, prime agricultural lands, coastal zone management, coastal barrier resources, and public participation. For each area the guidance should provide an account of the legislative and regulatory framework and its applicability to the construction grants program. State requirements should be included as well. Key contacts within the state, EPA and, where appropriate, other Federal agencies should be listed. A list of more detailed reference documents may also be appropriate.

Training Assistance

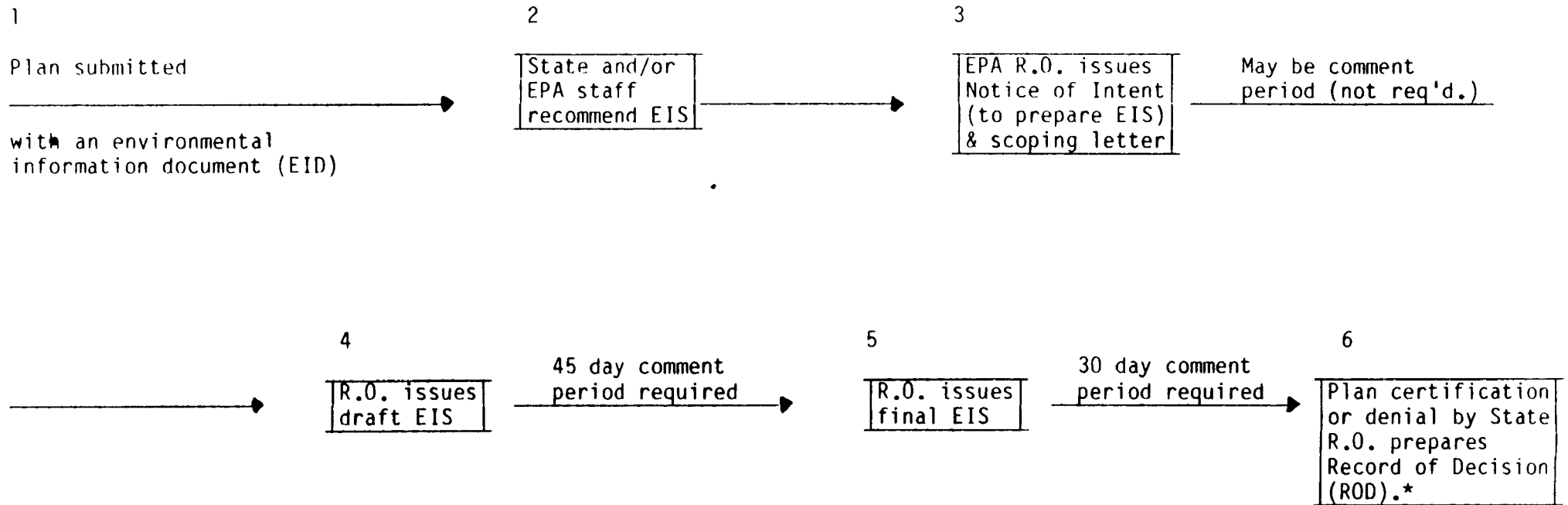
EPA's policies on delegation and oversight urge that training needs be identified and pursued which will assist states in carrying out their obligations under delegation agreements. Generally, training

needs can be identified from reviews of products submitted by states and from state requests for training. Key areas for training sessions include:

- the Environmental Review Manuals;
- NEPA requirements;
- specific environmental laws;
- unique or fragile environments (coastal areas, small mountain communities);
- coordination among various governmental levels of environmental review requirements;
- techniques for monitoring performance of construction grantees and applicants; and
- "state-of-the-art" environmental assessment techniques.

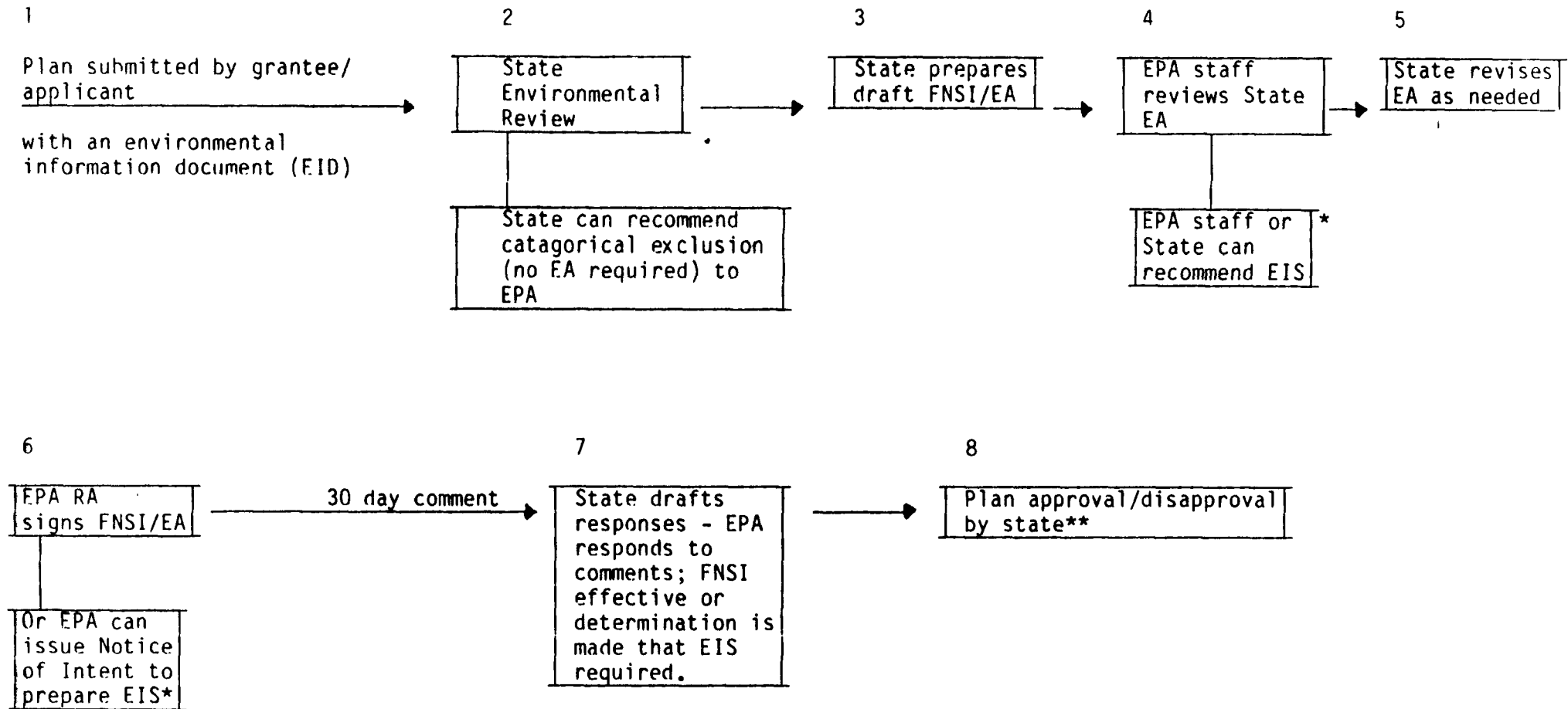
It is recommended that NEPA compliance training be coordinated with the regional construction grants program.

NEPA PROCESS UNDER STATE DELEGATION: EISs



* If EPA does not agree with state approval/denial it may invoke "overriding federal interest" which withdraws state delegation for that individual plan.

NEPA PROCESS UNDER STATE DELEGATION



* See EIS process diagram attached

**If EPA does not agree with state approval/disapproval it may invoke "overriding federal interest" which withdraws state delegation for that individual plan.