

MJB&A Summary ■ January 15, 2020

## Council on Environmental Quality Proposed Changes to NEPA

On January 9, 2020, the Council on Environmental Quality (CEQ) released proposed revisions to the National Environmental Policy Act (NEPA) implementing regulations, entitled “Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act.”<sup>1</sup> The proposed regulations are consistent with President Trump’s August 2017 Executive Order 13807. Overall, CEQ states that the proposed revisions would “modernize and clarify the regulations to facilitate more efficient, effective, and timely NEPA reviews by Federal agencies.”

This summary highlights key proposed changes to CEQ’s NEPA regulations, many of which have the potential to narrow the scope of what is required for NEPA reviews. For example, through a narrower definition of “effects” that would remove the terms “direct,” “indirect,” and “cumulative effects,” CEQ is proposing to only require consideration of the “effects” of proposed actions and alternatives that are “reasonably foreseeable” and have a “close causal relationship”. Federal agencies, therefore, would no longer need to consider effects that are temporally or geographically remote, as well as the result of a “lengthy causal chain”. Critics have stated that several of the changes may be used to limit the consideration of climate change impacts in NEPA analyses.

Additional key proposed changes to NEPA outlined in this summary include:

- clarifying the “threshold considerations” of whether NEPA applies to major federal actions;
- clarifying that federal agencies do not need to develop detailed analyses for alternatives outside the jurisdiction of the lead agency and such alternatives must be reasonable and economically and technically feasible;
- encouraging agencies to develop a process to consult with other agencies to apply categorical exclusions (CEs) from other agencies;
- setting page limits and a one-year limit for conducting environmental assessments (EA) / two-year timeframe for conducting environmental impact statements (EIS), with the possibility of extension for most projects;
- clarifying lead federal agencies’ role in the NEPA process and in proposing alternative actions, and requiring that senior agency officials address agency disputes in a timely manner;
- allowing agencies to allow applicants and contractors “a greater role in contributing information and material to the preparation” of an EIS, subject to the supervision and approval of the agency; and
- requesting comment as to whether previous draft greenhouse gas emission guidance should be codified, and if so, how to address them in the final regulation.

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<sup>1</sup> Council on Environmental Quality, 40 CF Parts 1500 to 1508, Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, available at [https://www.whitehouse.gov/wp-content/uploads/2020/01/NEPA-NPRM-01092020\\_Pre-publication-version.pdf](https://www.whitehouse.gov/wp-content/uploads/2020/01/NEPA-NPRM-01092020_Pre-publication-version.pdf).

Comments on CEQ’s proposal are due by March 10, 2020.

## Background

President Nixon signed the National Environmental Policy Act of 1969 into law in 1970, requiring federal agencies to consider environmental impacts in agency decision-making processes. NEPA requires federal agencies to analyze the potential environmental impacts of a proposed action, and, if those impacts are deemed to be significant, any unavoidable adverse environmental impacts of a proposed action, and alternatives to a proposed action. CEQ states in the preamble to proposed regulatory revisions that it has only substantively amended its NEPA regulations once, in 1978, though it has frequently issued guidance to clarify its implementation.

In August 2017, President Trump issued Executive Order 13807, which outlined the Administration’s “One Federal Decision” policy to improve federal review and oversight of the environmental review process and create new streamlined review and tracking processes. It also directed CEQ to undertake actions that would “enhance and modernize the Federal environmental review and authorization process.”<sup>2</sup> Additionally, CEQ issued its “Draft National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions” in June 26, 2019 regarding how NEPA analyses should address greenhouse gas (GHG) emissions.<sup>3</sup> In this new proposal, CEQ is requesting comment on “whether it should codify any aspects of its proposed GHG guidance in the regulation, and if so, how CEQ should address them in the regulations.”

## Summary of Proposed NEPA Revisions

The following summarizes the key changes CEQ is proposing to the revised NEPA regulations. (All sections noted below are the proposed new section references.)

### *Purpose and Policy*

CEQ proposes to make several changes to the introductory text of the regulation (§1500), stating that “NEPA is a procedural statute intended to ensure federal agencies consider the environmental impacts of their actions in the decision-making process.” In addition, CEQ proposes to add regulatory language to make clear that the “regulations create no presumption that violation of NEPA is a basis for injunctive relief or for a finding or irreparable harm. These regulations do not create a cause of action or right of action for violation of NEPA which contains no such cause of action or right of action.”

Consistent with the existing regulatory text, CEQ states that it intends that “judicial review of agency compliance with these regulations not occur before an agency has filed the final environmental impact statement, or has made a final finding of no significant impact..., or takes action that will result in irreparable injury.” Additionally, CEQ is proposing to include new regulatory language that would make each section of the NEPA regulations severable.

### *NEPA Applicability and Agency Planning*

CEQ’s proposal adds new language related to NEPA threshold applicability analysis (§1501.1) that would replace the current “purpose” section. CEQ’s proposal includes five considerations for federal agencies to determine whether NEPA applies:

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<sup>2</sup> Executive Order 13807, “Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects,” (August 24, 2017), available at: <https://www.federalregister.gov/documents/2017/08/24/2017-18134/establishing-discipline-and-accountability-in-the-environmental-review-and-permitting-process-for->

<sup>3</sup> MJB&A Memo, Summary of CEQ’s Draft NEPA Guidance on Considerations of GHG Emissions, (June 24, 2019).

- (1) whether the proposed action is a major federal action;
- (2) whether the proposed action, in whole or in part, is a non-discretionary action for which the agency lacks authority to consider environmental effects as a part of its decision making process;
- (3) whether the proposed action is an action for which compliance with NEPA would clearly and fundamentally conflict with the requirements of another statute;
- (4) whether the proposed action is an action for which compliance with NEPA would be inconsistent with Congressional intent due to the requirement of another statute; and
- (5) whether the proposed action is an action for which the agency has determined that other analyses or processes under other statutes serve the function of agency compliance with NEPA.

CEQ is proposing to provide agencies more discretion for when the NEPA process starts, by changing the regulatory language from the original “shall” to “should” and replacing “at the earliest *possible* time” with “at the earliest *reasonable* time” (§1501.2). Thus, the revised language would read that “Agencies *should* integrate the NEPA process with other planning and authorization processes at the earliest *reasonable* time.” CEQ also proposes to clarify that agencies should consider economic and technical analyses *with* environmental effects as opposed to the current language requiring agencies to consider environmental effects and values “compared to economic and technical analyses.”

Additionally, CEQ proposes to add a new section, “Determine the appropriate level of NEPA review” (§1501.3), to allow federal agencies to assess a proposed action and select an appropriate level of review. Under existing NEPA regulations, there are three levels, or “tiers” of review: (1) CEs, which do not require environmental review of possible environmental effects and alternatives, (2) EAs, and (3) EISs. The proposed regulations maintain these three tiers but details how agencies should determine the appropriate level of review and how agencies should determine the possible significance of a proposed action.

#### *Categorical Exclusions (CEs)*

For CEs, CEQ proposes to add a new section to the regulations titled “Categorical exclusions” (§1501.4) to provide more detail as to when a proposed action would qualify as a CE. Consistent with current practice, the proposed section is aimed at encouraging federal agencies to identify, in their NEPA procedures, categories of action that typically do not have a “significant effect on the human environment, and therefore, do not require preparation of an environmental assessment or environmental impact statement.” In addition, if an agency were to determine that an action falls under a CE, the new section would make clear that the agency must also consider the “extraordinary circumstances in which a normally excluded action may have a significant effect.” If so, the proposed regulatory language states that the agency “should consider whether mitigating circumstances or other conditions are sufficient to avoid significant effects.” However, if the action cannot be categorically excluded, the proposed regulations would require the agency to prepare an EA or EIS. Additionally, as discussed more below, the proposal includes new regulatory language that encourages agencies to consult with and apply categorical exclusion listed in another agency’s NEPA procedures.

#### *Environmental Assessments (EAs)*

For EAs, CEQ proposes new regulatory language that is intended to provide more detailed direction for EAs and their scope. CEQ states in the preamble that the proposed regulations CEQ expects that for actions that “protect or restore the environment, without unresolved conflicts concerning alternative use of available resources...agencies [would] examine a narrower range of alternatives to the proposed action.” However, if the project could have significant impacts, “the agency should consider reasonable alternatives that would avoid those

impacts or otherwise mitigate those impacts.” The preamble also makes clear that “an agency does not need to include a detailed discussion of each alternative in an EA, nor does it need to include any detailed discussion of alternatives that it eliminated from study.” CEQ also notes that “consistent with the current CEQ regulations, the proposed rule would not specifically require publication of a draft EA for public review and comment.” Rather, the proposed regulations continue to require the agency to involve relevant agencies, the applicant, and the public prior to the completion of a final EA.

### *Environmental Impact Statements (EISs)*

CEQ proposes a number of regulatory revisions related to supplemental statements, updated formats, and consideration of alternatives for EISs.

#### Supplemental Statements

For supplemental statements, CEQ proposes to add a new subsection that limits when supplemental statements are required. Specifically, §1502.9(d)(1) is proposed to state that agencies shall only prepare supplementals “if a major Federal action remains to occur.” CEQ explains that in the preamble that “[i]f there is no further agency action after the agency’s decision, supplementation does not apply because the Federal agency action is complete.”

#### EIS Format

CEQ also proposes changes to the format of EISs (§1502.10), including a requirement that an estimate of the cost of preparing the EIS be published on the cover page of the EIS, as well as “the costs of agency full-time equivalent personnel hours, contractor costs, and other direct costs.”

In terms of the purpose and need section (§1502.13) for EISs, CEQ proposes to “clarify that the statement should focus on the purpose and need for the proposed action,” striking references to alternatives so as to “focus on the proposed action.” CEQ explains in the preamble that “an “agreed-upon purpose and need statement at this stage can prevent problems later that may delay completion of the NEPA process.”

#### Reasonable Alternatives

Additionally, CEQ is proposing regulatory changes to limit the consideration of alternatives to “reasonable alternatives” noting that NEPA does not provide clarity on the consideration of alternatives in EISs. The preamble states that an EIS “need not include every available alternative where the consideration of a spectrum of alternatives allows for the selection of any alternative within that spectrum.” Thus, the proposed regulations would delete reference to “all reasonable alternatives.” Additionally, CEQ proposes to strike the regulatory requirement that EISs “include reasonable alternatives not within the jurisdiction of the lead agency.” Rather, CEQ states in the preamble that “it is not efficient or reasonable to require agencies to develop detailed analyses relating to alternatives outside the jurisdiction of the lead agency.” However, CEQ notes in the preamble that “an agency may discuss reasonable alternatives not within their jurisdiction when necessary for the agency’s decision-making process such as when preparing an EIS to address legislative EIS requirements pursuant to §1506.8 and to specific Congressional directives.” CEQ also seeks comment on whether the regulations should establish a presumptive maximum number of alternatives for evaluation of a proposed action, or alternatives for certain categories of proposed actions.

Through the proposed new definition of “reasonable alternatives”, CEQ proposes to add that consideration of alternatives must be “technically and economically feasible and meet the purpose and need of the proposed action.” The current regulations do not have any requirements related to the economic and technical

considerations of potential alternatives. CEQ's preamble also notes that the "discussion of environmental effects of alternatives need not be exhaustive but must provide information sufficient to permit a reasoned choice of alternatives for the agency to evaluate available reasonable alternatives."

For the regulatory provisions related to the affected environment (§1502.15) and environmental consequences (§1502.16), CEQ proposes to allow agencies to combine the affected environment and environmental consequences statement. CEQ states that this ability will ensure that the description of the affected environment focuses on "those aspects of the environment that are affected by the proposed action." CEQ also proposes significant changes to the regulatory language for environmental considerations. Specifically, CEQ states that the discussion should "focus on those effects that are reasonably foreseeable and have a close causal relationship to the proposed action." As discussed below, CEQ is proposing to effectuate this change through the proposed revisions to the definition of "effects" and "reasonably foreseeable." Additionally, CEQ proposes to add language requiring that the environmental consequences statement also consider economic and technical considerations, where applicable. Some commenters have noted that these proposed changes could prevent the consideration of possible climate change impacts of a project, as its effects do not represent "a close causal relationship."

In terms of the use of the methodology and scientific accuracy provisions, CEQ is proposing to add language that would make clear that agencies are not required to undertake new scientific and technical research for EISs. Specifically, the proposed regulations would direct agencies to "make use of reliable existing data and resources," and make clear that they are "not required to undertake new scientific and technical research to inform their analyses." Rather, the regulations would also state that agencies "may make use of any reliable data sources, such as remotely gathered information or statistical models."

#### *Commenting on Environmental Impact Statements*

Under section §1503, CEQ proposes to update and revise the language on the ability to comment on EISs, including directing that agencies seek comment "in a manner designed to inform" those interested and requiring agencies to "invite comment specifically on the completeness of the submitted alternative, information and analyses section." CEQ also proposes new regulatory language that would state that "comments should explain why the issue raised is significant to the consideration of potential environmental impacts and alternatives to the proposed action, as well as economic and employment impacts, and other impacts affecting the quality of the human environment."

In terms of timing for comments, CEQ is proposing to add a new section (§1503.3(b)) that would require comments be submitted within 30-days of the publication of the notice of availability of the final environmental impact statement. Comments submitted after the 30-day window would be "considered exhausted and forfeited."

#### *Interagency Coordination, Lead Agencies, and Cooperating Agencies*

CEQ proposes a number of changes to the determination of lead and cooperating agencies (§1501.7 and §1501.8), including adding language that requires that federal agencies working collaboratively issue, when practicable, one joint EA, Finding of No Significant Impact (FONSI), EIS, and a joint Record of Decision (ROD). Under the proposal, the lead federal agency would be responsible for determining "the purpose and need, and alternatives in consultation with any cooperating agency." Additionally, the lead agency would be responsible for developing the schedule and setting milestones for all environmental reviews and authorizations required for implementation of the action.

### *Time and Page Limits*

While the current NEPA regulations do not set presumptive time limits for EAs or EISs, CEQ is proposing presumptive time limits of one year for EAs and two years for EISs, with longer timelines possible with senior agency official approval (§1501.10). One year would be measured from “date of decision to prepare an environmental assessment to the publication of a final environmental assessment.” Two years would be measured from the “date of issuance of the notice of intent to the date a record of decision is signed.” CEQ is proposing to retain the current factors that senior agency officials must consider when establishing time limits. In addition, the proposed regulation maintains existing language that allows for senior agency officials to set timeframes for the full NEPA process, as well as individual elements of the process.

For both EAs and EIS, CEQ proposes page limits. In section §1501.5, CEQ proposes that an EA “shall be no more than 75 pages, not including appendices, unless a senior agency official approves in writing an assessment to exceed 75 pages and establishes a new page limit.”<sup>4</sup> For EISs, CEQ is proposing to amend the current regulations that states that EISs “shall normally be less than 150 pages and for proposals of unusual scope or complexity shall normally be less than 300 pages” and remove “normally.” Additionally, if the proposed action is of unusual scope or complexity, the proposed regulations would allow a senior agency official of the lead agency to approve in writing a statement to exceed 300 pages and establish a new page limit.

### *Scoping and Timing*

Currently, once the lead agency determines that an EIS is necessary, it will publish a notice of intent (NOI) in the Federal Register, which initiates the “scoping” process. CEQ is proposing, however, to eliminate that requirement and instead allow an agency to begin the scoping process prior to the publication of the NOI. The proposed regulation (§1501.9) would allow an agency to begin the scoping process “as soon as practicable after the proposal for action is sufficiently developed for agency consideration.” Separately, as soon as practicable after determining that a proposal is sufficiently developed to allow for meaningful public comment and requires an EIS, the proposed regulatory language would require the lead agency to publish the NOI in the Federal Register.

CEQ is proposing to maintain the existing regulatory timing requirements for agency action (§1506.11), including that federal agencies cannot issue a ROD within 90 days of the publication of the notice in the Federal Register of the draft EIS and 30 days after the publication of the notice of the final EIS. The proposed regulation also maintains the existing circumstances in which agencies may waive or make an exception to the timing of agency action.

### *Pre-Decisional Referrals to the Council of Proposed Federal Actions Determined to Be Environmentally Unsatisfactory*

The Clean Air Act (§309) requires the Environmental Protection Agency (EPA) to review and comment on proposed actions of other federal agencies and can refer any actions that are “unsatisfactory from the standpoint of public health or welfare or environmental quality” to CEQ. CEQ’s current NEPA regulations (§1504.2) include certain criteria for when environmental referrals should be made to CEQ, and CEQ proposes to add an additional criterion for referral that would include “economic and technical considerations, including the economic costs of delaying or impeding the decision making of the agencies involved in the action.”

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<sup>4</sup> The proposed regulation defines a page as having a word count of 500, thus allowing for “graphic display of quantitative information, tables, photos, maps, and other geographic information” to not count against the page limit.

### *Additional Proposed Revisions*

Under existing NEPA regulations, the lead agency, or cooperating agency, can select a contractor to prepare an EIS. However, CEQ’s proposal (§1506.5) would eliminate the language stating that “it is the intent of these regulations that the contractor be chosen solely by the lead agency, or by the lead agency in cooperation with cooperating agencies, or where appropriate by a cooperating agency to avoid any conflict of interest.” Similarly, CEQ proposes to remove the requirement that the contractor “execute a disclosure statement prepared by the lead agency, or where appropriate the cooperating agency, specifying that they have no financial or other interest in the outcome of the project.” Rather, the proposed regulations state that the responsible federal officer must “independently evaluate it prior to its approval, and take responsibility for its scope and contents.” CEQ explains in the preamble that the changes are intended to “improve communication between proponents of a proposal for agency action and the officials tasked with evaluating the effects of the action and reasonable alternatives, to improve the quality of NEPA documents and efficiency of the NEPA process.”

In terms of the opportunity for public involvement (§1506.6), CEQ proposes to remove the reference to the criteria for which a federal agency should hold or sponsor public meetings. The two criteria currently listed for when an agency should conduct a public meeting include: (1) “substantial environmental controversy concerning the proposed action or substantial interest in holding the hearing,” and (2) “a request for a hearing by another agency with jurisdiction over the action supported by reasons why a hearing will be helpful.” The revisions would only specify that an agency should hold a public meeting or hearing when appropriate or if statutorily required.

CEQ is proposing to add an additional section (§1506.9) that would allow analysis, such as a regulatory impact analysis, prepared pursuant to other statutory or Executive Order requirements to serve, under certain criteria, as the functional equivalent of an EIS. The proposed criteria include that: (1) there are “substantive and procedural standards that ensure full and adequate consideration of environmental issues”; (2) there is public participation before a final alternative is selected; and (3) the purpose of the analysis is to examine environmental issues.

### *Revisions to Agency Compliance*

CEQ is proposing to modify the regulatory provisions in §1507 to provide additional time for agencies to develop or revise agency NEPA procedures to implement the final CEQ regulations. Specifically, CEQ proposes that within one year (the current regulations provide eight months) of the publication of the final NEPA regulation revisions, agencies would be required to submit revised processes and procedures to implement the revised NEPA regulation.

Additionally, CEQ proposes to include additional actions that would not trigger NEPA review including:

- (1) non-major Federal actions;
- (2) actions that are non-discretionary, in whole or in part;
- (3) actions expressly exempt from NEPA under another statute;
- (4) actions for which compliance with NEPA would clearly and fundamentally conflict with the requirements of another statute; and
- (5) action for which compliance with NEPA would be inconsistent with Congressional intent due to the requirements of another statute.

Relatedly, CEQ is also proposing revisions to the definition of major federal actions, detailed in the following section.

CEQ also proposes to add to new language that encourages agency procedures to “provide for a process where the agency may consult with and apply categorical exclusions listed in another agency’s NEPA procedures to its proposed action by establishing a process that ensures application of the categorical exclusion is appropriate.”

### *Revisions to Definitions*

CEQ is proposing a number of changes to the definitions of key terms for NEPA regulations. The following highlights key proposed changes.

#### Effects

CEQ is proposing a new definition of “effects” by limiting the scope to those that “are reasonably foreseeable and have a reasonably close causal relationship to the proposed action or alternative.” The definition further states that “a ‘but for’ causal relationship is insufficient to make an agency responsible for a particular effect under NEPA.” The definition also makes clear that effects that are “remote in time, geographically remote, or the product of lengthy causal chain” do not need to be considered, which many critics have noted will be used to exclude consideration of climate change impacts. Additionally, the proposed definition expressly states that analysis of cumulative effects is not required to be considered and the preamble notes that “agencies are not expected to conduct exhaustive research on identifying and categorizing actions beyond the agencies’ control.” Of note, the proposed regulations would eliminate the definition of “cumulative impact.”

CEQ explains in the preamble that some commenters “raised concerns that the current definition creates confusion, and that the terms ‘indirect’ and ‘cumulative’ have been interpreted expansively resulting in excessive documentation about speculative effects and leading to frequent litigation.” Thus, CEQ states that the proposed change is intended “to focus agencies on analysis of effects that are reasonably foreseeable and have a reasonably close causal relationship to the proposed action.”

#### Human Environment

CEQ proposes revising the definition of “human environment” to mean “comprehensively the natural and physical environment and the relationship of present and future generations of Americans with that environment.” The proposed revised definition would eliminate the current regulatory language that “economic and social effects are not intended by themselves to require preparation of an environmental impact statement,” but refers to the definition of “effects” as a cross reference.

#### Major Federal Action

CEQ proposes revising the definition of “major federal action,” adding to the definition that actions with minimal federal involvement or funding or wherever a federal agency does not have control over the outcome of a project, would not qualify as a major federal action and thus, would not be subject to NEPA. The proposed regulation would define “major federal action” as “an action subject to Federal control and responsibility with effects that may be significant.” By comparison, the current definition “includes actions with effects that may be major and which are potentially subject to Federal control and responsibility.” The proposal would also eliminate the inclusion of a failure to act in the definition of a major Federal action explaining that “NEPA applies when agencies are considering a proposal for decision.” Citing *S. Utah Wilderness All*, CEQ states that “in the circumstances described...there is no proposed action and therefore no alternatives that the agency may consider.”

CEQ is also seeking comment on whether there should be a percentage or dollar threshold to further define “minimal federal funding,” and whether “any type of financial instruments, including loans and loan guarantees, should be considered non-major federal action and the basis for such exclusion.” Additionally, CEQ requests

comment on whether and how to exclude certain categories of actions common to all federal agencies from the definition.

#### Mitigation

CEQ proposes to limit the definition of “mitigation” in the regulation and clarify that mitigation “does not require adoption of any particular measure” consistent with a Supreme Court ruling that mitigation does not establish “a substantive requirement that a complete mitigation plan be actually formulated and adopted’ before the agency can make a decision.” In addition, CEQ proposes to add to the definition that mitigation “must have a nexus to the effects of the proposed action.”

#### Reasonable Alternatives

CEQ proposes to add a new term, “reasonable alternatives” to the regulations. CEQ proposes that the definition of “reasonable alternatives” means that such alternatives are “technically and economically feasible, meet the purpose and need of the proposed action, and where applicable, meet the goals of the applicant.” CEQ notes in the preamble that “agencies are not required to give detailed consideration to alternatives that are unlikely to be implemented because they are infeasible, ineffective, or inconsistent with the purpose and need for agency action.”

#### Reasonably Foreseeable

CEQ proposes to add a new term, “reasonably foreseeable” and to define it to mean “sufficiently likely to occur such that a person of ordinary prudence would take it into account in reaching a decision.”

### **Next Steps**

Comments are due to CEQ by March 10, 2020.

## Contacts

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