A review of CEQ's sweeping changes to the NEPA regulations

By Brian Calvert, Elizabeth Diller, Rich Walter, and John Hansel

Introduction

On July 16, 2020, the Council on Environmental Quality (CEQ) published in the Federal Register the highly anticipated final rule revising its regulations for implementing the National Environmental Policy Act (NEPA). Following the publication of the Notice of Proposed Rulemaking (NPRM) on January 10, 2020, which we previously discussed here, CEQ received more than 1.1 million comments. This was not surprising given that CEQ's proposal was to replace the existing regulations in 40 CFR Sections 1500 to 1508 in their entirety. These revisions affect nearly every portion of the existing regulations.

This final rule is the only major revision of CEQ NEPA regulations since they were first adopted in 1978. As noted in our March 5, 2020, article, this final rule would not change the NEPA statute, but federal court rulings in the past have often given substantial deference to the adopted CEQ regulations in their interpretation of NEPA requirements.

CEQ's intent in issuing this final rule is to "facilitate more efficient, effective, and timely NEPA reviews by federal agencies." While some of the changes codify court decisions and practices that agencies are already using, there are also significant changes to—and more specific requirements regarding—the scope and timelines for the NEPA process and documents. While we suggest that NEPA practitioners to read the entire rule in full, this paper breaks down the key changes in the revised regulations.

Incorporating One Federal Decision

The final rule incorporates a number of key elements of the One Federal Decision (OFD) framework, which establishes a method for improving the environmental review process for major infrastructure projects per Executive Order 13807. These include development by the lead agency of a joint schedule, procedures to elevate delays or disputes, preparation of a single Environmental Impact Statement (EIS) and joint Record of Decision (ROD) to the extent practicable. It also includes a two-year goal for completion of environmental reviews, which will now be a requirement under 40 CFR 1501.10 for EIS completion (and one year for Environmental Assessment [EA] completion) unless written approval from a senior official for a different timeframe is obtained.

Consistent with section 104 of NEPA (42 U.S.C. 4334), codification of these policies will not limit or affect the authority or legal responsibilities of agencies under other statutory mandates that may be covered by joint schedules.

Reducing the types and numbers of federal actions that require NEPA compliance

In the proposed rule, CEQ included a series of considerations to assist agencies in a threshold analysis that would determine whether NEPA applies to a proposed activity or whether NEPA is satisfied through another mechanism. This provision, entitled "NEPA thresholds" at 40 CFR 1501.1, is included in the final rule with some changes. Federal lead agencies will need to perform a threshold analysis to determine whether NEPA applies to their federal actions. Per the final rule, factors that can exempt a federal action from NEPA compliance remain the same as the proposed rule and include:

- Whether the proposed activity or decision is expressly exempt from NEPA under another statute.
- Whether compliance with NEPA would clearly and fundamentally conflict with the requirements of another statute.
- Whether compliance with NEPA would be inconsistent with Congressional intent expressed in another statute.
- Whether the proposed activity or decision is a major federal action.
- Whether the proposed activity or decision, in whole or in part, is a non-discretionary action.
- Whether the proposed action is an action for which another statute's requirements serve the function of NEPA.

Newly introduced into the final rule is the definition of a major federal action, which is defined as an "activity or decision subject to federal control and responsibility." CEQ also provides a list of activities or decisions that are not included within the definition in 40 CFR 1508.1(q).

Examples of activities or decisions not defined as a major federal action include:

- Activities with effects located entirely outside of the United States.
- Non-discretionary actions.
- Actions that do not result in final agency action.
- Civil or criminal enforcement actions.
- Funding assistance solely in the form of general revenue sharing funds with no federal control over the use of funds.
- Non-federal projects with minimal federal funding/involvement where the agency does not exercise sufficient control and responsibility over the outcome of the project.
- Loans, loan guarantees or other forms of financial assistance where the federal agency does not exercise sufficient control and responsibility over effects of such assistance.

CEQ makes it clear in the preamble that they expect agencies to further define these non-major actions in their agency NEPA procedures. Of note, the definition of what constitutes minimal funding or federal involvement is not described and leaves this question open to interpretation and legal scrutiny.

Reducing the scope of the required analyses

Defining "the human environment"

In the updated regulations, the human environment has been redefined by the rule. It states, "Human environment means comprehensively the natural and physical environment and the relationship of present and future generations of Americans with that environment." The change to note is that "people" has been replaced with "Americans." As authority for this change, CEQ cites the language in the NEPA statute, at 42 USC 4331, that describes one of the purposes of NEPA is to "fulfill the social, economic, and other requirements of present and future generations of Americans." This change may be the subject of debate as to whether non-citizens living in the United States are or are not included in the NEPA definition of the human environment.

Defining "effects"

In the final rule, CEQ revises the definition of effects consistent with the proposal, with some additional edits. In the proposed rule, CEQ removed the references to "direct" and "indirect" effects in the regulation in order to focus agency time and resources on considering whether the proposed action causes an effect rather than on categorizing the type of effect. In addition, CEQ proposed to strike refences to "cumulative" effects to focus on effects more proximate to federal actions. CEQ received many comments on the proposal to eliminate the requirement for analysis of cumulative effects. The final rule includes the same changes as the proposal. As CEQ noted in the NPRM, the reason for this change was that the terms "indirect" and "cumulative" have been interpreted expansively, resulting in excessive documentation about speculative effects and leading to frequent litigation.

Effects are now defined as "changes to the human environment from the proposed action or alternatives that are reasonably foreseeable and have a reasonably close causal relationship to the proposed action or alternatives, including those effects that occur at the same time and place as the proposed action or alternatives and may include effects that are later in time or farther removed in distance from the proposed action or alternatives."

"Reasonably foreseeable" means sufficiently likely to occur such that a person of ordinary prudence would take it into account in reaching a decision. The definition of effects states that a "but for" causal relationship is not sufficient to make an agency responsible for a particular effect under NEPA. However, in the final rule CEQ softens its language on effects that are remote in time, geographically remote, or the product of a lengthy causal chain by adding that they should be "generally not considered." The final rule retains the current language on assessing connected actions and requires those actions to be included in the agency's determination of what level of NEPA review is required for a specific proposed action.

In trying to protect itself in litigation from the legislative history on cumulative impacts, CEQ included in the final rule a limited cumulative impact provision within the EIS section on affected environment. §1502.15 affected environment says: "The environmental impact statement shall succinctly describe the environment of the area(s) to be affected or created by the alternatives under consideration, including the reasonably foreseeable environmental trends and planned actions in the area(s)."

This provision appears to require an analysis of how the affected environment would independently change over the useful life of the proposed action, with those changes accounted for in the baseline of the affected environment. For example, this provision would open the door for the ongoing effects of climate change on the environmental resources within the affected environment, which would then over the useful life of the action be aggregated or coupled with the proposed action's effects on that same resource. The language would also open the door to considering the effects of a federal action on other "planned actions in the area." But given the inclusion in the affected environment, this language does not support a true cumulative impact analysis as currently understood by NEPA practitioners.

As for the impacts of a proposed action on climate change, the final rule does not address this itself though CEQ does not preclude consideration of climate impacts in the preamble. With the narrowed definition of effects to only those with a "reasonably close causal relationship" and the elimination of the term "cumulative," however, the new NEPA regulations do not require analysis of more remote effects of federal actions on climate change. Direct emissions of greenhouse gas (GHG) emissions from federal actions would appear to be consistent with the new regulations but federal agencies may choose to analyze them in isolation from "cumulative" GHG emissions.

Since the rule is now final, the debate will shift to the courts as to whether cumulative analysis (including analysis of climate change) is required by the NEPA statue and if so, how that analysis should be conducted. While outside the scope of this article, there are multiple federal court rulings requiring cumulative analysis in NEPA, including in relation to climate change.

The next point of inflection that NEPA practitioners should watch for is the interpretation of legal precedents—and the requirements of the NEPA statute itself in light of the new regulations—in future NEPA appeals.

Defining "significant"

Subsection 1508.27, which previously included the definition of "significantly" under NEPA—including the concept of using "context" and "intensity" for determining significance—has been deleted and replaced with language in Subsection 1501.3(b). This new language says that when considering "whether effects are significant, agencies shall analyze the potentially affected environment and degree of the effects of the action." In the rule, CEQ explains that it is replacing "context" with the "affected environment" and "intensity" with the "degree of the effects."

The language in 1501.3(b) retains some of the language formerly in 1508.27 in regards to beneficial and adverse effects, effects on public health and safety, and effects that violate federal, state, or local law for the protection of the environment. It deletes substantial prior language that was included as factors in determining "intensity" including whether effects are controversial, precedent-setting, associated with cumulative impacts, or related to effects on unique characteristics (including prime farmland, historic and cultural resources, wetlands, park lands, wild and scenic rivers, and ecologically critical areas).

Alternatives

Similar to the proposed rule, the final rule reduces the number of alternatives considered under NEPA. The softening of language on alternatives—for example, the deletion of "rigorously explore and objectively" that precedes evaluate reasonable alternatives as well as the deletion of the reference of the alternatives section being the "heart" of the EIS—remains in the final rule.

Reasonable alternatives are defined in the final rule as: ''reasonable range of alternatives that are technically and economically feasible, meet the purpose and need for the proposed action, and, where applicable, meet the goals of the applicant."

The new regulations deleted the prior requirement at 1502.14 (c) that specifically required consideration of "reasonable alternatives not within the jurisdiction of the lead agency." The CEQ justifies this change in the preamble by stating 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 that an agency may discuss reasonable alternatives not within its jurisdiction when necessary for their decision-making process. For example, unless new regulations are adopted, Federal Highway Administration projects would still be required to demonstrate logical termini as codified in 23 CFR 771.111(f).

In the proposed rule, CEQ invited comment on whether the regulations should establish a presumptive maximum number of alternatives for evaluation of a proposed action, or alternatively for certain categories of proposed actions. CEQ did not receive sufficient information to establish a minimum but adds to the final rule that agencies shall limit their consideration to a reasonable number of alternatives.

However, because Section 102(2)(E) of NEPA trumps the CEQ rule, this range must be expanded should all of the initially considered alternatives, including an applicant's preferred alternative, involve unresolved conflicts concerning alternative uses of available resources.

Expanding an applicant's role in EIS preparation

As a major departure from existing requirements, the final rule would allow applicants to prepare EISs (this is already allowed for EAs) if the lead agency has adequate capability to account for and evaluate what the applicant develops. This is similar to what was included in the proposed rule. However, CEQ includes a statement in the final rule that the federal agency is ultimately responsible for the environmental document irrespective of who prepares it. This was added in response to comments suggesting that agencies would be handing over their responsibilities to applicants.

The final rule makes it clear that agencies "shall independently evaluate the information submitted or the environmental document and shall be responsible for its accuracy, scope, and contents." The existing provisions—that an EIS contractor must be chosen by the lead agency and the selected contractor must sign a disclosure statement that it has no financial or other interest in the outcome of the project—were deleted in the proposed rule. They were replaced in the final rule by requiring the contractor or applicant preparing the environmental document to submit a disclosure statement that specifies any financial or other interest in the outcome of the action. In retaining this concept, CEQ recognizes that most applicants will have a financial interest in the outcome.

Specific NEPA document requirements

The new regulation does not include major change in the type of NEPA documents, but does have important provisions on content, extent, and applicability:

- Categorical exclusions – The revisions do not make any major changes to the purpose and use of categorical exclusions but do allow agencies to apply to their actions the categorical exclusions established by other agencies. (CEQ previously issued a comprehensive list of all agencies' categorical exclusions as of December 14, 2018.) For individual actions, if any extraordinary circumstances are present and can be mitigated to avoid significant effects, the categorical exclusion can be retained. The language from the proposed rule is softened in the final rule where agencies may use categorical exclusions to define actions that "normally do not have a significant effect" rather than "do not have a significant effect."
- EAs – No major changes to the EA process are proposed. However, agencies may apply the same provisions as applied to an EIS in relation to the level of data available, methodologies and scientific accuracy, and integration with other environmental reviews and consultations. More importantly, the scope of an EA is affected in the same manner as the scope of an EIS. A 75-page limit is established for an EA along with a one-year completion schedule unless a senior agency official extends in writing a new page limit and/or completion schedule.

The final rule makes it clear that the agency can issue a Findings of No Significant Impact (FONSI) when the proposed action "will not have significant effects." This text is changed from the proposed rule, which stated that the proposed action is "not likely to have significant effects." Unchanged from the proposed rule is the new requirement to include in a FONSI the authority for any mitigation that the agency has adopted and any applicable monitoring or enforcement provisions.

- EISs – The completion process and document format are not altered, with the minor exception that environmental consequences should be addressed in the same chapter or section as the affected environment. A two-year completion schedule is required (except as noted below), and the existing page limits are retained (i.e., a 150-page limit that may reach 300 pages for proposals of unusual scope or complexity). As with EAs, a senior agency official of the lead agency can extend in writing a new page limit and/or completion schedule. Another important change to note is the scoping process may begin "as soon as practicable after the proposal for action is sufficiently developed for agency consideration." The Notice of Intent (NOI) is now required to include a preliminary description of the proposed action and alternatives, a brief summary of expected impacts, the anticipated permits and other authorization, as well as among other things a schedule for the decision-making process. This effectively moves some work forward prior to the NOI, similar to other streamlining directives such as OFD and Secretarial Order 3355. Additionally, consistent with the proposed rule, CEQ has eliminated the consideration of degree of controversy when an agency determines the appropriate level of NEPA review.

The prior NEPA regulations included requirements that EISs should normally be less than 150 pages or 300 pages for proposals of unusual scope or complexity, but the final rule converts these to firm page limits unless a senior agency official of the lead agency approves a new page limit. From a practical point of view, these page limits need to be considered in the overall context of the situation that was present at the time of the prior regulations in 1978. At that time there were far fewer laws, regulations, and executive orders that had to be complied with and addressed. Furthermore, at that time there were no computers and the process of hand typing a document was laborious and any revisions that were needed were very challenging and time consuming to implement.

This is not to say that documents should be any longer than they need to be. They need to be long enough to sufficiently address and disclose the impacts of the project and compliance with the appropriate laws, regulations, and statutes. Perhaps that could be achieved within 75 pages in an EA and 150 pages in an EIS as specified in the new rule, but it depends on the specific situation related to the project being addressed. Many critics of the new rule assert that the page and time limits in the rule are arbitrary and will not further the underlying purposes of NEPA.

The new regulations do not address the challenge of compliance with other federal laws within the one-year time limit for an EA or the two-year time limit for an EIS.

Although Subsection 1501.24 mentions the need for integration of other federal laws, there is no mention of how this will be achieved in practice while still meeting the identified document timelines in the final rule.

One particular challenge concerns the timing of surveys for threatened and endangered species or seasonal wetlands that may require seasonally specific and/or multi-year surveys, which may not be accommodated within the aforementioned time limits. The likely practical response is that NEPA practitioners will now consider such surveys to be part of "pre-NEPA" planning instead. There may be temptation to either not do such surveys or to defer them to a post-approval preconstruction period, which could lower the rigor of the information included in a NEPA document.

Increasing agency attention to public comments, concerns, and recommendations

In the NOI, agencies are to request comments from the public on alternatives and effects. The draft and final EISs must then include a summary of all alternatives, information, and analyses submitted by state, tribal, and local governments, and other public commenters as well as invite comments on the completeness of the summary. The proposed rule contained language requiring a 30-day public comment period after the final EIS before executing the ROD. The final rule does not include the proposed mandatory 30–day comment period. However, the final rule does retain from the existing regulations the 30–day waiting period prior to issuance of the ROD (subject to limited exceptions) and specifies that agencies may solicit comments on the final EIS if they so choose. Of note, the final rule allows for continued use of statutoryprovisions—such as those in the Moving Ahead for Progress in the 21st Century Act (MAP-21 that allow for combining a final EIS and ROD.

Confining litigation claims to concerns raised during the NEPA process

By following the process described above for inviting and addressing state, tribal, and local governments, and other interested party and public comments throughout the EIS process, CEQ intends that a well-run NEPA process would constitute an "exhaustion" of the opportunity for public input. Comments or objections of any kind not submitted—including those based on submitted alternatives, information, and analyses—will be forfeited as unexhausted. In the preamble, CEQ explains that the exhaustion requirement will encourage commenters to provide the agency with all available information prior to the agency's decision, rather than disclosing information after the decision is made or in subsequent litigation. CEQ believes that this is important for the decision-making process and efficient management of agency resources.

In terms of soliciting public input, CEQ has taken steps to modernize this process by striking the reference to public meetings or hearings in the final rule. This provides more flexibility for agencies on how they obtain additional views and information, which could include a public meeting through use of current technologies such as virtual meetings.

Next steps

CEQ states that the final rule supersedes pre-existing CEQ guidance and materials and that they intend to publish a separate notice in the Federal Register listing guidance they intend to withdraw. CEQ will issue new guidance, as needed, consistent with the final rule and presidential directives. Once effective, this final rule will essentially negate the validity of most agencies' NEPA guidance, manuals, and handbooks that are based on either CEQ's former rule or withdrawn guidance documents. This will undoubtedly create numerous implementation challenges for agencies, unless and until substitute CEQ guidance slowly surfaces.

The revised regulations apply to all NEPA processes begun after the effective date, which would be September 14, 2020, at the earliest. Agencies then have one year to develop "proposed" NEPA procedures accordingly. This was revised from the proposed rule where agencies had one year from the publication date of the final rule. In so doing, agencies are directed not to impose additional procedures or requirements beyond those set forth in the final rule, except as otherwise required by law or for agency efficiency. However, CEQ states that agencies also have the discretion to apply the revised regulations to ongoing activities and environmental reviews. There is no prescribed deadline for agencies to develop their final NEPA procedures.

Environmental advocacy groups oppose many of the substantive changes, including applicant-prepared EISs, changing definitions of "significant" and "effects," eliminating reference to cumulative effects analysis, changes in alternatives consideration, and reducing the potential range of applicability of NEPA to projects. Two legal challenges have already been filed[1]. The rule includes a "severability" clause that essentially states that invalidating one portion of the rule would not invalidate the remainder of the rule. Depending on the results of the November 2020 election, there is also the potential for the new regulations to be voided pursuant to the requirements of the Congressional Review Act.[2]

While different administrations can and do have different interpretations of how NEPA should be conducted—and how the new regulations (and any associated subsequent guidance) apply—this rule includes distinct points of departure with past practice. However, the NEPA statute and case law are not altered. The interpretation of NEPA by the courts may invalidate, confirm, or provide additional illumination into the applicability of these regulation and the requirements of NEPA over time. But it cannot be ignored that the changes to how NEPA is implemented and applied are going to be substantially altered by the rule.

ICF has worked with federal agencies as well as applicants to comply with NEPA for many decades, through changing interpretations of CEQ regulations, guidance, court rulings, and administrations. Wherever NEPA goes next, ICF is here to help.

1 Wild Virginia (et. al.) v. Council on Environmental Quality and Mary Neumayr in her official capacity as Chair of the Council on Environmental Quality and Alaska Community Toxics (et. al.) v. Council on Environmental Quality and Mary Neumayr in her official capacity as Chair of the Council on Environmental Quality.

2 Per the Congressional Review Act, the next Congress may disapprove federal agency rules made final during the last 60 legislative days of the current Congress. Whether the new NEPA regulations are subject to the provisions of the Act will depend on how many legislative days occur following the finalization of the new rule.

About the authors

Brian Calvert, Senior Managing Director, Environmental Planning

Brian Calvert's experience includes managing the planning and environmental work associated with a number of projects. He specializes in NEPA and CEQA analysis for projects involving the Federal Highway Administration and Caltrans. He is ICF's Southern California Transportation Team Leader, overseeing the environmental compliance documents for roadway projects throughout the region.

He has provided courses on transportation NEPA, NEPA delegation, and Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users environmental requirements.

Elizabeth Diller, Principal, Environmental Planning

Elizabeth Diller has almost 20 years of experience guiding a range of projects through the NEPA process. She is an expert on NEPA implementation and related environmental impact analysis requirements. Elizabeth has managed NEPA documents for numerous federal agencies and has a proven ability to direct teams of resource specialists to provide thorough, defensible analyses under compressed schedules.

Elizabeth partners with clients to provide NEPA compliance strategies and help them though complex and challenging problems by leveraging ICF's diverse group of experts. Also, Elizabeth is conversant in NEPA streamlining including Department of Interior Secretarial Order 3355, One Federal Decision, and Title 41 of Fixing America's Surface Transportation Act. Additionally, she has prepared and led environmental training seminars that address NEPA implementation and the full range of other environmental impact review requirements.

Rich Walter, Vice President, Environmental Planning

Rich Walter has 24 years of experience in environmental planning, compliance strategy, permitting, and mitigation development and implementation and climate action planning. He has worked on numerous controversial and complex environmental planning and compliance projects involving both state and federal environmental review and regulatory permitting.

He has directed and participated in environmental impact assessment, alternatives analysis, and environmental permitting processes for a variety of proposed developments, including high-speed rail; commuter rail; residential, commercial, and industrial development; park and recreation facilities and resorts; general plans and specific plans, flood control; water supply; wetland restoration; solar and wind energy; marine oil terminals and oil pipelines; natural gas power plants and pipelines; roads, highways, and bike paths; vineyards; telecommunications; and mining ventures. He also leads ICF's California Municipal Climate Action Planning practice which focuses on greenhouse gas inventories and greenhouse gas reduction planning for cities, counties, and regional governments in California.

John Hansel, Environmental Planning Expert Consultant

John Hansel is an accomplished environmental attorney and environmental protection specialist. With 38 years of experience in developing and managing environmental protection programs and policies, he has proven abilities in addressing controversial environmental issues from various perspectives—from policymaking, training, and implementation oversight to project-level environmental impact analyses and negotiations.

John is an expert on NEPA implementation and related environmental impact analysis requirements. He has provided NEPA compliance advice and conducted peer reviews on some of ICF's most complex and unique EISs. These EISs have covered such major federal actions as transporting spent nuclear fuel to the Yucca Mountain repository, establishing the nation's next set of corporate fuel economy standards, expanding the strategic petroleum reserve, permitting the Rockies East natural gas transmission pipeline, financing alternative forms of energy production, and streamlining the processing of experimental permit applications for the launch and reentry of reusable suborbital rockets. In addition to peer reviewing components of U.S. Department of Energy's (DOE's) EIS on transporting spent nuclear fuel to the Yucca Mountain repository, John has conducted NEPA compliance reviews on EAs and EISs for projects submitted to the DOE by loan applicants in response to solicitations for fossil energy advanced technologies and renewable energy technologies. As an accomplished trainer and facilitator, he has prepared and led environmental training seminars for ICF staff that address NEPA implementation and the full range of other environmental impact review requirements.

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