

Practitioners' Guide to the Proposed NEPA Regulations

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PRACTITIONERS' GUIDE TO THE PROPOSED NEPA REGULATIONS

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On January 10, 2020, the Council on Environmental Quality (CEQ) published its proposal for a comprehensive rewrite of the National Environmental Policy Act (NEPA) regulations that govern how federal agencies identify, analyze, and mitigate for the anticipated environmental impacts of major federal actions. 85 Fed. Reg. 1684. Comments are due on the proposal by March 10.

This proposal should be of significant interest to all environmental lawyers and practitioners, as it would make a number of important changes to the regulations that have substantially defined NEPA's obligations since their adoption in 1978.

The 1978 regulations have had an extraordinary influence on how environmental impacts are assessed, which alternatives must be evaluated, and how public participation is taken into account. The U.S. Supreme Court in 1979 said that these regulations were entitled to "substantial deference" in the interpretation of NEPA, "transforming advisory guidelines into regulations applicable to all federal agencies." *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979). Court decisions, guidance documents, manuals, and countless books have applied the regulations in developing a large body of administrative law and practice.

Acting in response to Executive Order 13807 ("Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure"), 82 Fed. Reg. 40463 (Aug. 24, 2017), CEQ has proposed to repeal and replace the entire set of NEPA regulations with new Parts 1500-1508 of title 40 of the *Code of Federal Regulations*. If adopted, the new regulations will govern all NEPA practice (not limited to "infrastructure") across the federal government. The proposed rule retains much of the existing language while adding new concepts and procedures, reorganizing the subject matter, and deleting various provisions. Thus, it is not always readily apparent where the changes are and how they operate with one another. Moreover, not all changes are addressed or highlighted in the preamble to the proposed rule.

This brief guide is in the nature of an issue-spotter to assist commenters and others in determining what changes have been proposed and how they may relate to familiar NEPA regulatory concepts. (For simplicity, reference to sections of the proposed rule are underlined to distinguish them from citations to the existing NEPA regulations.)

MAJOR FEDERAL ACTION SIGNIFICANTLY AFFECTING THE HUMAN ENVIRONMENT

NEPA requires a "detailed statement" of environmental impacts for any major federal action significantly affecting the quality of the human environment. NEPA §102(2)(C). The significance determination presents a threshold issue as to whether an environmental impact statement (EIS) or environmental assessment (EA) need be prepared at all.

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Significance Determination

CEQ's proposed §1501.3 directs agencies to define the appropriate level of NEPA review based on the significance of an action's likely effects on the environment. However, the proposed rule deletes the definition of the term "significantly" from Part 1508, moving some of that language to proposed §1501.3 while eliminating other elements. Currently, 40 CFR §1508.27 defines significance in terms of "context" and "intensity." Both of these terms would be replaced.

Proposed §1501.3(b)(1) replaces "context" with "the potentially affected environment." It states that agencies "*may consider, as appropriate*" the affected area as "national, regional, or local"; in contrast, under the existing regulations significance "*must be analyzed* in several contexts such as society as a whole . . . , the affected region, the affected interest, and the locality." 40 CFR §1508.27(a) (emphasis added). The proposal also replaces "world as a whole" with "Nation as a whole," presumably to exclude consideration of extraterritorial effects.

Proposed §1501.3(b)(2) replaces "intensity" with "degree of the effects." It retains several of the "intensity" measures of the current rule (beneficial and adverse, public health and safety, violations of law). But the proposal specifically removes "cumulative impacts" from any role in determining significance, and deletes existing §1508.27(b)(7) ("Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment").

As discussed in the next section, the rule's explicit removal of "cumulative impacts" as a basis for significance will likely place some major federal actions below the level of "significance" triggering NEPA. Note that CEQ's additional proposed removal of "indirect effects" from the proposed §1508.1(g) definition of "effects or impacts" (also discussed in the next section) likewise creates threshold NEPA applicability issues. An effect cannot be "significant" if it is not defined as a cognizable impact at all.

CEQ also proposes to delete §1508.27(b)(7)'s language prohibiting agencies from using the label of "temporary" action, or segmentation of an action into its component parts, to evade "significance." 85 Fed. Reg. 1695. The preamble cites proposed §1501.9(e) and §1502.4 as substitutes for these provisions. However, these sections deal with "scoping" for actions *already* determined to be significant and subject to an EIS, not with the threshold determination.

The proposed rule also removes §1508.27's specific references relating "intensity" (now "degree") to several other factors (endangered species, historic districts and structures eligible for listing on the National Register of Historic Places, and precedent-setting actions), as well as to potential controversy (this is likely in response to case law limiting controversy as a *sole* basis for significance).

Major Federal Action vs. Significance

The CEQ proposal (in what it describes as a "change in position") redefines "major federal action" to ensure that it is considered separately from "significant" impacts of an action (proposed §1508.1(q)). The existing NEPA regulations at §1508.18 state that "major" doesn't have a meaning independent of "significantly" in order to ensure that any federal action resulting in a "significant" impact does not escape review as non-major. While there was some question about the test in NEPA's early days—see *e.g.* FREDERICK ANDERSON, NEPA IN THE COURTS (1973) (cases divided); RICHARD LIROFF, A NATIONAL POLICY FOR THE ENVIRONMENT 166 (1976) (most courts used a one-test standard, and "none held that a small or minor federal project was excepted from the impact statement requirement if its environmental effects were

significant”)—after the 1978 regulations court decisions have been consistent with the view that significant impacts make a federal action major. CEQ’s statement at 85 Fed. Reg. 1709 that in the ensuing decades courts “have determined that NEPA does not require the preparation of an EIS for actions with minimal Federal involvement or funding” shows that the courts have been able to apply existing §1508.18 to exclude actions with little federal nexus.

Proposed §1508.1(q) would exclude from NEPA review certain farm and small business loan guarantees where federal involvement does not determine the primary action. Perhaps more significantly, it expressly excludes activities that “do not result in final agency action under the Administrative Procedure Act” (which may call into question the continued validity of programmatic EAs and EISs, which evaluate decision frameworks), and it eliminates “failure to act” from the current definition.

CUMULATIVE AND INDIRECT IMPACTS

CEQ’s proposed rule would completely remove the concept of “cumulative” effects from the NEPA regulations.² The sole reference to cumulative impacts in the proposed rule is a new sentence that states, “Analysis of cumulative effects is not required.” See proposed §1508.1(g)(2).

The term “indirect effects” would also be entirely excised from the definition of “effects or impacts” (proposed §1508.1(g)) and from the evaluation of “environmental consequences” (proposed §1502.16), as well as all other places where it currently appears in the regulations. The new definition of “effects or impacts” reproduces some language from existing §1508.8(b). But it explicitly deletes “indirect effects,” the phrase “whether direct, indirect or cumulative,” and the statement that “indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.” Further, CEQ is soliciting comment on whether the final rule should “affirmatively state that consideration of indirect effects is not required.” 85 Fed. Reg. 1708.

The proposed exclusion of both cumulative and indirect effects from the regulations would have at least two major consequences for future NEPA practice:

- NEPA applicability. First, under the proposal, cumulative and indirect effects cannot be used to determine the threshold of significance. If they are no longer defined as effects under NEPA, they cannot be “significant” effects on the human environment for purposes of determining what (if any) NEPA review is needed. See proposed §1501.3.
- Impact analysis. Second, such effects are no longer to be analyzed in EAs or EISs. Under current practice, if a federal action is the subject of an EA or EIS, the effects of the action and its alternatives must be analyzed. But if cumulative and indirect effects are excluded from the CEQ definition of effects—and cumulative effects analysis is prohibited (or at least is “not required” if that clause is read permissively)—then they cannot be evaluated (under proposed §1502.14, and §1502.16) or mitigated (proposed §1508.1(s)).

² The terms “cumulative” and “cumulatively” would be deleted from current 40 CFR §§1500.4(p) (“reducing paperwork”), 1500.5(k) (“reducing delay”), 1508.4 (“categorical exclusion”), 1508.7 (definition of “cumulative impact”), 1508.8(b) (“effects”), 1508.25(a)(2) & (c)(3) (“scope”), and 1508.27(b)(7) (“significantly”).

NEPA practitioners are familiar with the hundreds of NEPA cases analyzing cumulative and indirect impacts over the last 50 years, so there is no need to summarize the case law here. However, several points that might otherwise escape notice should be considered.

First, cumulative impacts analysis was not invented by the 1978 regulations, which codified and advanced existing practice in the agencies and in the courts. Indeed, the *earliest substantive* NEPA guidelines issued by CEQ in April 1971 (following the rudimentary 1970 Interim Guidelines) expressly required the identification and analysis of cumulative and indirect impacts:

5(b) . . . In considering what constitutes major action significantly affecting the environment, agencies should bear in mind that the effect of many Federal decisions about a project or complex of projects can be individually limited but cumulatively considerable. . . . The lead agency should prepare an environmental statement if it is reasonable to anticipate a cumulatively significant impact on the environment from Federal action.

6. Content of environmental statement. (a) The following points are to be covered. . . .
(ii) . . . Both primary and secondary significant consequences for the environment should be included in the analysis. For example, the implication, if any, of the action for population distribution or concentration should be estimated and an assessment made of the effect of any possible change in population patterns upon the resource base, including land use, water, and public services, of the area in question. . . .

(v) The relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity. This in essence requires the agency to assess the action for cumulative and long-term effects from the perspective that each generation is trustee of the environment for succeeding generations.

CEQ Guidelines, 36 Fed. Reg. 7724-29 (Apr. 23, 1971). Likewise, the 1973 Guidelines provided:

1500.6(a). The statutory clause "major Federal actions significantly affecting the quality of the human environment" is to be construed by agencies with a view to the overall, cumulative impact of the action proposed, related Federal actions and projects in the area, and further actions contemplated. . . . [A]n environmental statement should be prepared if it is reasonable to anticipate a cumulatively significant impact on the environment . . .

1500.8(a)(1). . . . The interrelationships and cumulative environmental impacts of the proposed action and other related Federal projects shall be presented in the statement . . .

1500.8(a)(3). Secondary or indirect, as well as primary or direct, consequences for the environment should be included in the analysis.

CEQ Guidelines, Preparation of Environmental Impact Statements, 38 Fed. Reg. 20549, 20551, 20553 (Aug. 1, 1973).

Second, early influential cases made it clear that the NEPA *statute* requires analysis of cumulative impacts. *E.g., Hanly v. Kleindienst*, 471 F.2d 823, 830-831 (2d Cir. 1972), *cert. denied*, 412 U.S. 908 (1973)

(construction of jail in an urban area a major federal action subject to NEPA because of cumulative effects on urban environment). The *Hanly* court interpreted “significantly” to include “the absolute quantitative adverse environmental effects of the action itself, including the cumulative harm that results from its contribution to existing adverse conditions or uses in the affected area.” The court explained:

In the absence of any Congressional or administrative interpretation of the term, we are persuaded that in deciding whether a major federal action will "significantly" affect the quality of the human environment the agency in charge, although vested with broad discretion, should normally be required to review the proposed action in the light of at least two relevant factors: (1) the extent to which the action will cause adverse environmental effects in excess of those created by existing uses in the area affected by it, and (2) the absolute quantitative adverse environmental effects of the action itself, including the cumulative harm that results from its contribution to existing adverse conditions or uses in the affected area.

Id. at 830-831 (emphasis supplied).

In 1976, citing the statute, not the Guidelines, the Supreme Court also emphasized that “cumulative impacts” are the basis for what we now call programmatic EISs. “Cumulative environmental impacts are, indeed, what require a comprehensive impact statement. But determination of the extent and effect of these factors, and particularly identification of the geographic area within which they may occur, is a task assigned to the special competency of the appropriate agencies.” *Kleppe v. Sierra Club*, 427 U.S. 390, 413-414 (1976).

Finally, the operational history of NEPA over 50 years has been working out *how* to evaluate cumulative impacts, not *whether* to evaluate them. See CEQ, [CONSIDERING CUMULATIVE EFFECTS UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT](#) (1997) (“The passage of time has only increased the conviction that cumulative effects analysis is essential to effectively managing the consequences of human activities on the environment. The purpose of cumulative effects analysis, therefore, is to ensure that federal decisions consider the full range of consequences of actions.”).

Cumulative impacts analysis has been predicated on NEPA §102(2)(A), which requires that agencies “utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man’s environment.” Cumulative and indirect impacts analysis has also been linked to NEPA §102(1), which directs that agencies interpret and administer the laws of the United States in accordance with the policies set forth in §101 of the law, among which are trusteeship of the environment for succeeding generations. The defensibility of a rule that takes cumulative and indirect impacts altogether off the table will likely be tested in relation to these statutory linkages.

CEQ states in the preamble that its intent is to “reduce confusion and unnecessary litigation” by limiting NEPA’s coverage to effects that are “reasonably foreseeable and have a reasonably close causal relationship to the proposed action” analogous to tort law principles of liability (85 Fed. Reg. 1707-1708). But a question that will no doubt be tested is whether the rule, if promulgated as proposed, ensures that a decisionmaker is fully informed of the consequences of a proposed agency action on the

human environment, as contemplated by NEPA's mandate for informed, public decisionmaking in the interest of future generations.³

While much public commentary on this part of the proposal has dealt with its implications for evaluation of climate change impacts, in practice many analyses of cumulative impact in NEPA documents and cases have dealt with other issues, such as effects on watersheds, habitat, fisheries, local air pollution, and human health. Notably, environmental justice (EJ) analysis under NEPA is also founded on consideration of cumulative impacts, as agencies attempt to assess whether a proposed action will have a "disproportionately high and adverse impact" on a minority or low-income population. EJ analysis under NEPA has to date required an understanding of both existing and foreseeable impacts that affect a community and its health. CEQ, [ENVIRONMENTAL JUSTICE GUIDANCE UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT](#) (1997) ("Agencies should consider relevant public health data and industry data concerning the potential for multiple or cumulative exposure to human health or environmental hazards in the affected population and historical patterns of exposure to environmental hazards Agencies should consider these multiple, or cumulative effects, even if certain effects are not within the control or subject to the discretion of the agency proposing the action."); *see also* EPA, [FINAL GUIDANCE FOR INCORPORATING ENVIRONMENTAL JUSTICE CONCERNS IN EPA'S NEPA COMPLIANCE ANALYSES](#) (1998) ("EPA NEPA analyses must consider the cumulative effects on a community by addressing the full range of consequences of a proposed action as well as other environmental stresses which may be affecting the community.")

CATEGORICAL EXCLUSIONS

The proposed rule envisions an expanded role for categorical exclusions (CEs) in NEPA practice. While the proposal carries forward some practices already gaining traction under the current regulations, the proposed rule makes several other changes of note:

- CEQ proposes to alter the existing requirement that agencies adopting CEs determine that the excluded actions "normally do not have an *individually or cumulatively* significant effect on the human environment" by eliminating the proviso "individually or cumulatively" from [proposed §1508.1\(d\)](#), [proposed §1500.4\(a\)](#), [proposed §1500.5\(a\)](#), [proposed §1501.4\(a\)](#), and [proposed §1507.3\(d\)\(2\)\(ii\)](#). Contrast CEQ's 2010 [Categorical Exclusion Guidance](#), which noted: "Agencies should still consider the environmental effects of actions that are taken on a large scale. Agency-wide procurement and personnel actions could have cumulative impacts. For example, purchasing paper with higher recycled content uses less natural resources and will have lesser environmental impacts."
- As in the current regulations, agencies adopting CEs must provide for "extraordinary circumstances" in which a normally excluded action may have a significant environmental effect. Compare [proposed §1507.3\(d\)\(2\)\(ii\)](#) with current §1508.4. However, [proposed §1501.4\(b\)\(1\)](#) would specifically authorize agencies to apply mitigation or other conditions to reduce the extraordinary circumstances effect below the level of significance, and thus to allow use of the CE, in what we might call a "mitigated CE."

³ The preamble quotes *Metropolitan Edison Co. v. PANE*, 460 U.S. 766, 777 (1983), but *Metropolitan Edison* is generally understood as simply requiring that there be a physical impact rather than a psychological impact in order to trigger NEPA analysis.

- Finally, the proposal encourages federal agencies to use one another’s adopted CEs in carrying out NEPA responsibilities. It is unclear in the proposal whether a lead or cooperating agency may use another agency’s CE on a one-off or ad hoc basis (see proposed §1506.3(f)), or whether it must develop procedures for using another agency’s CE in order to take advantage of that option (see proposed §1507.3(e)(5)). CEQ also invites comment on whether it should adopt governmentwide CEs. 85 Fed. Reg. 1696.

ALTERNATIVES

Proposed §1502.14 (“Alternatives”) would delete existing (c), which requires agencies to “include reasonable alternatives not within the jurisdiction of the lead agency.” Current practice notwithstanding, CEQ says that “it is not efficient or reasonable to require” agencies to consider such alternatives. 85 Fed. Reg. 1702. CEQ also states that its proposed definition of “reasonable alternatives” (proposed §1508.1(z)) would likewise “preclude alternatives outside the agency’s jurisdiction because they would not be technically feasible due to the agency’s lack of statutory authority to implement that alternative.” *Id.*

When CEQ adopted §1502.14(c), it explained that it was codifying existing NEPA case law on alternatives. 43 Fed. Reg. 55984 (1978). *E.g.*, *NRDC v. Morton*, 458 F.2d 827 (D.C. Cir. 1972) (Alternatives need not include those that are remote and speculative, but do include reasonable alternatives not within the power of agency to adopt and put into effect itself). Over the ensuing decades, courts have used a rule of reason in determining which, if any, alternatives outside the jurisdiction of the lead agency will need to be considered. Certainly alternatives have to meet the “purpose and need” for the action, which will necessarily exclude some or even many that are outside agency jurisdiction, but some non-lead agency alternatives have been treated as “reasonable” and “appropriate” within the meaning of NEPA §§102(2)(C) and 102(2)(E).

Proposed §1502.14 also deletes the current regulatory requirement to evaluate “all” reasonable alternatives to the proposed action, presumably to reduce the number that have to be considered.⁴ CEQ invites comment on whether to establish a presumptive maximum number of alternatives for actions or categories of actions—suggesting an example of three: proposed action, no action, and one other. 85 Fed. Reg. 1702.

REVIEW OF ENVIRONMENTAL EFFECTS

The proposed rule states that agencies shall define the proposal that is the subject of an EIS “based on the statutory authorities for the proposed action.” Proposed §1502.4. This limitation essentially bounds consideration of the proposal and its alternatives by the authority of the agency, risking under-characterization of some actions. Under current NEPA practice, a proposal seeking to fill 2 acres of waters as part of a transmission line crossing a river is not simply a “fill” project, for example.

Proposed §1508.1(g)(2) further says that an agency has no duty to consider “effects that the agency has no ability to prevent due to its limited statutory authority” or that would occur regardless of the proposed action. TCEQ cites *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004), as the foundation for the latter limitation (85 Fed. Reg. 1708), but this case, which held that the contested environmental effects were the result of presidential action rather than agency action, arguably stands

⁴ See also “reasonable alternatives” defined as “reasonable range of alternatives” (proposed §1508.1(z)).

for a more limited proposition. Given that the agency “has no ability to countermand the President’s lifting of the [trucking] moratorium or otherwise categorically to exclude Mexican motor carriers from operating within the United States,” there was nothing for the agency to decide that could have been informed by preparation of an EIS on the potential environmental impacts of its safety rules. So the “federal action” at issue there was not related to the impacts.

By its terms, NEPA intends to promote “informed decisionmaking,” which has been understood as including evaluation of a decision’s actual consequences. Thus, a permit for construction of a road across public lands has required consideration of the effects of logging or recreational use that will be facilitated by that road; and construction of a highway interchange has required consideration of the environmental effects of induced development. This is true even though the jurisdiction of the agency in the first case is for a “right-of-way” grant rather than forestry management or wilderness recreation on neighboring public lands, and in the second instance for “road construction” rather than land use planning and zoning.

Proposed §1508.1(g)(2) also says that “a ‘but for’ causal relationship is insufficient to make an agency responsible for a particular effect under NEPA.” But it is not clear what CEQ means by its use of the term “responsible for” in this usage. If it means that an agency need not *evaluate* the effect at all when determining whether (or not) to prepare an EIS or EA, and/or that it need not analyze such an effect in any document that it does prepare, this would be at tension with the requirements of NEPA §102(2)(C)—which is oriented toward informing the decisionmaker and meeting the goals of NEPA §101. If it means only that an agency need not follow a lengthy and tenuous chain of consequence to every possible future outcome, then it is likely consistent with most NEPA case law (including CEQ’s long-ago deletion of “worst case” analysis).

USE OF SCIENCE

In proposed §1502.24, new language says agencies shall “make use of reliable existing data and resources and are not required to undertake new scientific and technical research to inform their analyses.” While consistent with the view that agencies need not create new science or create new methods specifically to comply with NEPA, this provision would represent a substantial change *if* interpreted to deny the need for field work or study of particular resource environments that are not adequately covered by “existing data and resources.” There are many environments in which existing scientific data are incomplete to support decisions, even though the scientific methodologies to obtain such data are adequate.

In the section dealing with incomplete or unavailable information, the proposal changes the existing requirement to obtain information if the overall costs of obtaining it “are not exorbitant,” to “are not unreasonable.” Proposed §1502.22.

SUMMARY AND CERTIFICATE OF “CONCLUSIVE PRESUMPTION”

The proposal would create a new required section for draft and final EISs (FEISs), in which the agency must “summarize the alternatives, information, and analyses submitted by public commenters” (proposed §§1502.17, 1503.1(a)(3)), and it would add an additional 30-day comment/objection period *after* the FEIS related to the adequacy of that summary (proposed §§1503.1(b), 1503.3(b)). The proposed rule also provides that the agency will self-certify in the Record of Decision (ROD) that it has

“considered all of those alternatives, information, and analysis,” and says that the certification will create a “conclusive presumption” that is binding on the courts reviewing agency action (proposed §1502.18).

The procedural change may lengthen the review process and/or put more pressure on the time limit for completion of an EIS. But it also has the advantage of locating in one place issues and alternatives that may be of particular concern to outside commenters.

On the other hand, the idea of an agency statement determining the limits of judicial review of compliance with statutory requirements has no apparent precedent, and may supplant the NEPA “hard look” with a “hard certification.” A “conclusive presumption” or “irrebuttable presumption” (BLACK’S LAW DICTIONARY 7th ed.) is fairly rare in U.S. law, and where it occurs it is usually a *legislative statement* that the existence of one fact is deemed to prove the existence of another with legal significance (e.g., eligibility for benefits).

A certification by an agency that it “considered” a fact submitted to it is not generally that type of usage. The term does appear in a few places in the California Environmental Quality Act (CEQA), but only in terms of using one established fact to satisfy another requirement (*see* CAL. PUB. RES. CODE §21151.8, where the failure of an expert agency to identify a hazardous substance site upon request of a school district within 30 days is “conclusively presumed” to satisfy the school district’s consultation requirement for an Environmental Impact Report or Negative Declaration; and CAL. PUB. RES. CODE §21159.24, where an infill housing project of at least 20 units per acre is “conclusively presumed” to satisfy the statutory criterion for infill housing exemption). Its use to cut off NEPA review based on an agency’s own evaluation would be novel. It may raise separation of powers issues, both as to whether the executive has power to create such a conclusive presumption absent congressional direction to do so, and whether it can foreclose judicial review by regulation.

PUBLIC COMMENT

The proposed regulations include requirements intended to elicit comments that are as “specific as possible” and that reinforce the usual judicial requirements that objections raised in litigation must have been submitted during the relevant comment periods (e.g., *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. at 553-54 (1978)). CEQ would add that comments or objections not timely submitted “shall be deemed unexhausted and forfeited,” proposed §1500.3(b)(3).

What is interesting is the relationship of this provision to the new procedure for post-FEIS objections to an agency’s “summary of submitted alternatives, information, and analyses.” Under proposed §1500.3(b)(3), apparently, if a commenter misses the 30-day objection period, proposed §1503.3(b), that would end the matter quite apart from the “conclusive presumption” in proposed §1502.18. Future commenters would need to be mindful of this timing hammer at the end of the FEIS process.

PREPARER OF ENVIRONMENTAL IMPACT STATEMENT

The proposed rule would allow applicants themselves to prepare EISs and EAs (as long as they are under guidelines from a federal official and ultimately signed by a federal official), will no longer require the agency to select contractors, and removes all the existing conflict-of-interest requirements for contractors. Proposed §1506.5(c). These changes are unexplained in the preamble except by a

statement that this would “give more flexibility with respect to the preparation of environmental documents.” 85 Fed. Reg. 1705.

This approach departs from both the longstanding CEQ regulations and earlier pre-regulation NEPA case law regarding conflicts of interest. *E.g.*, *Greene County Planning Board v. Federal Power Comm’n.*, 455 F.2d 412 (2d Cir. 1972) (agency, not the applicant, has duty to prepare EIS): “The danger of the procedure, and one obvious shortcoming, is the potential, if not likelihood, that the applicant’s statement will be based upon self-serving assumptions.” 455 F.2d at 420.

TIME AND PAGE LIMITS

The existing NEPA regulations authorize the lead agency to establish a schedule, time limits, and page limits for environmental documents, §§1507.1(b), 1501.8. The regulations also recommended normal page limits for EISs, §1502.7. These have only occasionally been observed.

Under proposed §1501.7(j), the lead agency establishes the schedule and milestones. Proposed §1501.10 defines time limits for EISs and EAs. Agencies will have two years to complete an EIS unless a senior agency official approves a longer time period and establishes the new time limit in writing. The period is measured from the date of the Notice of Intent to signing of the ROD. Agencies will have one year to prepare an EA unless a senior agency official approves a longer period and establishes the new limit in writing. The period is measured from the date of decision to prepare to publication of the final EA.

Page limits for EISs will be 150 pages (300 for proposals of “unusual scope or complexity”), and 75 pages for EAs, unless in either case a longer limit is approved by a senior agency official (proposed §§1502.7, 1501.5(e)).

ONE FEDERAL DECISION – JOINT EIS – LEAD AND COOPERATING AGENCIES

Under proposed §1501.7(g), “to the extent practicable, if a proposal will require action by more than one federal agency,” the lead and cooperating agencies shall evaluate the proposal in a single EIS and issue a joint ROD, or prepare a single EA and joint finding of no significant impact (FONSI). The “to the extent practicable” clause may need substantial clarification in practice. Many complex federal actions require additional information and individual legal determinations from multiple agencies, including amendment of management plans, grants of rights-of-way, permits, etc.

For example, under current practice, agencies typically issue their own RODs even when relying on a collaboratively prepared FERC EIS. Some projects require sequential decisions and may need differing environmental analyses, such as Corps of Engineers permitting of specific stream crossings where precise alignments were not specified in a prior EIS and ROD. NEPA procedures for “adoption” of an EA or EIS can address the sequencing issue in appropriate circumstances (proposed §1506.3, compare current 40 CFR §1506.3). The proposed adoption rule would add EAs, as well as drafts and portions of EISs, to the current rule. *Id.*

AGENCY NEPA PROCEDURES

Implementation of NEPA is, of course, subject to specific NEPA procedures adopted by federal agencies. The current versions of these procedures (regulations) incorporate many of the concepts and approaches developed by federal agencies over 50 years of NEPA implementation, and reflect the

internalization of many of the concepts and methods under the existing CEQ regulations. The proposed rule makes several changes in directing updates to agency NEPA regulations.

Proposed §1507.1 (“compliance”) removes the existing language endorsing agency “flexibility.” Proposed §1500.3(a) and proposed §1507.3(a) further state that “agency NEPA procedures shall not impose additional procedures or requirements beyond those set forth in these regulations,” except as provided by law or required for agency efficiency. Thus, existing agency procedures that address issues such as cumulative impact methods, identification of alternatives, or programmatic EISs may be at risk or actually preempted. Agencies will have 12 months to revise their regulations after the proposed rule becomes final.

The proposed regulations recommend that federal agencies consider rules to require that private parties be required to post a financial bond in support of a stay pending administrative or judicial review of an agency decision. Proposed §1500.3(c). Agencies may adopt their own administrative processes as authorized by statute, but it is doubtful that agency rules can determine federal court procedures. The chief difficulty for parties may arise where there is an administrative exhaustion requirement in agency regulations, wherein a party or complainant may need to post a bond in connection with an administrative appeal before a final agency decision is rendered that can be appealed to federal court.

FUNCTIONAL EQUIVALENCE

Under proposed §1506.9, a new section would establish NEPA “functional equivalence” outright for agencies’ adoption of new regulations. This would be a very broad expansion of the doctrine of functional equivalence, which has historically been limited to agencies whose mission is to protect the environment—often limited to EPA regulations.⁵

The proposed version would allow an agency to determine that its regulatory processes were a “functional equivalent” to NEPA if: (1) it applied “substantive and procedural standards” to ensure full and adequate consideration of environmental issues; (2) “public participation” is required for adoption of a final “alternative”; and (3) “a purpose” of the analysis is “to examine environmental issues.” *Id.* CEQ’s proposed regulations for agency NEPA procedures restate the same three standards to support an agency’s substitution of other processes as functional equivalents, proposed §1507.3(b)(6).

This is a relatively low threshold, as presumably most notice-and-comment rulemaking under the APA, coupled with typical agency practice, would normally satisfy all three prongs. It is possible that this proposal is designed to have the usual Regulatory Impact Analysis (RIA) that accompanies regulations⁶ substitute for NEPA’s “detailed statement” and the usual requirements of 40 CFR Parts 1500-1508. But substitution of these procedures for NEPA’s may lead to the absence of “scoping” and opportunities for identification of alternatives and issues for analysis prior to the production of a draft rule, as well as the absence of a complete range of alternatives.

⁵ A. Berlowe & A. Ferlo, *Litigating NEPA Cases*, in *THE NEPA LITIGATION GUIDE*, 245-47 (American Bar Assn., A. Ferlo et al. eds., 2d. ed. 2012).

⁶ An RIA is required for economically significant rules by Executive Order 12866 and OMB Circular A-4. It has a primarily economic focus, but may also evaluate costs and benefits related to impacts or projected impacts on the environment. See OMB, [Agency Checklist: Regulatory Impact Analysis](#).

The notion of removing many regulatory actions from potential NEPA review may also be supported by CEQ's proposal to delete from proposed §1502.4(b) the existing reference to agencies preparing programmatic EISs for the "adoption of new agency . . . regulations" (emphasis supplied). The proposal also would delete the existing statement that programmatic EISs are "sometimes required." *Id.*

OTHER

Tribal Participation. CEQ throughout its proposal has proposed to include Indian tribes to emphasize their participation in the coordination and consultation process. The proposed rule adds "tribal" to the phrase "state and local" throughout. The proposal also would eliminate provisions in the current regulations that limit tribal interests under some provisions to "reservations." 85 Fed. Reg. 1692.

Mitigation and EA Procedures. The proposal includes other changes that reflect current or developing NEPA practices, such as codifying the longstanding practice of "mitigated FONSI" and defining mitigation to clarify that it must have a nexus with the impacts being mitigated. 85 Fed. Reg. 1709. However, the proposal has little to say about updating or defining EA procedures, even though the EA has become the *de facto* workhorse of NEPA analysis over the last several decades. CEQ did not, as many had anticipated it might, define procedures, public participation, and scoping for EAs. Instead, it largely maintained existing language and practice, proposed §1501.5.

NEPA Goals. CEQ also did not take advantage of some previous recommendations to more closely link the EIA authorities in NEPA to the §102(1) requirement that agencies interpret and administer their "policies, regulations, and public laws" in "accordance with" the sustainable development and generational stewardship principles announced in NEPA §101(b). See, e.g., ELI, [REDISCOVERING THE NATIONAL ENVIRONMENTAL POLICY ACT: BACK TO THE FUTURE \(1995\)](#). CEQ has proposed to delete as duplicative and redundant the existing §1500.2 ("Policy"), which links NEPA compliance to statutory goals, including using "all practicable means to restore and enhance the quality of the human environment and avoid or minimize any possible adverse effects of their actions." However, it retains the language that agencies adopt procedures "to ensure that decisions are made in accordance with the policies and purposes of the Act," current §1505.1(a), in proposed §1507.3(b)(1)

Economic Terminology. CEQ proposes to change the term "possible" to "practicable" in proposed §§1501.7(h), 1501.9(b)(1), 1502.5, 1502.9(b), 1504.2, and 1506.2(b),(c), and to change "immediately" to "as soon as practicable" in proposed §1502.5(b). NEPA §102 uses the term "to the fullest extent possible" in defining the action-forcing mechanisms of the law, while NEPA §101(b) instructs the federal government to use "all practicable means" to coordinate federal actions in pursuit of NEPA's goals.

It is not clear what, if any, effect these changes in the regulations are designed to accomplish, although it may reflect some intention to incorporate an economic or agency competency constraint. In this regard, it may matter more that the proposed rule also adds "technically and economically feasible" in a number of places—as in the definition of "reasonable alternatives" in proposed §1508.1(z). Likewise, CEQ would add to the analysis of "environmental consequences" a new *required* element, stating that the EIS shall include, "where applicable, economic and technical considerations, including the economic benefit of the proposed action," proposed §1502.16(a)(10).

CONCLUSION

It is likely that the proposed rule will attract numerous public comments. The June 20, 2018 [Advance Notice of Proposed Rulemaking](#), which called for detailed answers to 20 questions (many with subparts), received more than 12,500 responses. The pending proposed rule will undoubtedly receive many more. Many of the changes published in the January 10, 2020, proposal—such as elimination of the definition of “significantly,” removal of “cumulative effects” as an element of NEPA analysis, similar treatment of “indirect effects,” deletion of conflict-of-interest provisions, the creation of agency-certified “conclusive presumptions,” and others—raise a substantial set of new issues that go beyond “modernizing” and “clarifying” the regulations.

If adopted as proposed, the regulations would, as CEQ recognizes, necessarily sweep away all existing CEQ guidance documents and handbooks. 85 Fed. Reg. 1710. They would also require complete revision of the NEPA procedures of all federal agencies, as well as all of their handbooks, manuals, forms, and guidance documents, within what is likely to be a chaotic period of up to 12 months. This transition period will in turn raise concerns about federal actions undergoing NEPA review and/or entering the process, or being reconsidered or addressed on remand. A substantial technical literature on NEPA practice would also be superseded.

At the same time, the substantive changes would call into question the continuing applicability of a half-century of federal court decisions and administrative tribunal decisions, creating future issues of whether these precedents concerning “cumulative” impact analysis, “indirect effects,” “reasonable alternatives,” or “significance” were interpretations of the NEPA statute or simply of the prior regulations. Nearly every word of the 1978 regulations has been litigated many times over. If adopted, the proposal would create new interpretive issues for litigators, judges, and agencies.

Finally, the proposed rule, if finalized, will likely draw challenges in scores of federal district courts across the country. In addition to substantive issues, it can be expected that there will be fierce contests over standing, ripeness, deference or lack thereof, retroactivity, and the relationship of current agency NEPA procedures (embodied in regulations, handbooks, and contracts) to new CEQ regulations. Different legal outcomes in multiple jurisdictions, including differences in the scope of remedial relief, may be further complicated by CEQ’s own proposal that all sections of the new rule be deemed “severable” ([proposed §1500.3\(e\)](#)). This may mean that for much of the next several years portions of the regulations may be applicable in some districts and not others; and federal agencies may need to manage NEPA processes differently across their portfolio of lands, planning and leasing activities, and permit actions in different geographic jurisdictions. States, tribes, and local governments, as well as applicants, will be faced with complex challenges as the rule is litigated.



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