

Summary of Proposed Changes to the National Environmental Policy Act (NEPA) Regulations



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Action:

The Council on Environmental Quality (CEQ) published a Notice of Proposed Rulemaking “Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act”; Federal Register / Vol. 85, No. 7 / Friday January 10, 2020.

Click [here](#) to read the update in full.

Background:

The National Environmental Policy Act (NEPA) was signed into law January 1, 1970 (Public Law 91-190). The CEQ issued its NEPA implementing regulations in 1978 (found at 40 CFR 1500-1508). Guidance documents have been issued to assist with compliance of NEPA regulations, but no comprehensive updates have been proposed until now.

Reason for the Update:

Update Language

The NEPA regulations (40 CFR 1500-1508) have not been comprehensively updated since 1978.

Needed? YES

Some of the language in 40 CFR 1500-1508 is outdated and/or obsolete. Updates are needed to modernize the regulations, particularly for the digital age of the 21st century.

Accomplished? YES

Proposed updates modernize the filing and distribution requirements, data collection /presentation, and public participation guidelines. Regulations are also reorganized to consolidate topics and reduce duplication.



Streamline Process

The NEPA process, while linear on a flow chart, can become circuitous and time consuming.

Needed? YES

The process could be streamlined to allow more efficient evaluations and decisions for major infrastructure projects.

Accomplished? Partially

Revisions such as One Federal Decision should assist with streamlining. However, often the delays in an EIS occur due to changes in project design during the NEPA process; the proposed revisions would not mitigate these delays. Implementing more radical approaches, such as the Bureau of Ocean Energy Management’s Project Design Envelope approach would provide more flexibility for design changes (and less delays) during NEPA.

Brief Analysis:

The proposed changes to the NEPA regulations cover the spectrum from perfunctory to consequential. The reoccurring theme of the proposed revisions is “back to the Act” – the changes are primarily justified via references to the original NEPA law. At barely over four pages, the law is very high level and just sets the framework for execution, hence why the implementing guidelines were developed in the first place. Following is a summary of the top 15 proposed changes to the Regulations Implementing the Procedural Provisions of NEPA (in no particular order after #1):

- 1. Change to definition and evaluation of Effects or Impacts (§1508(g)).** This is the most dramatic proposed change. The terms direct, indirect, and cumulative have been deleted from the Regulations, and the definition now specifically says “Analysis of cumulative effects is not required”.
- 2. Incorporation of key elements of One Federal Decision (OFD) policy (§1501).** The elements of One Federal Decision from Executive Order 13807 including interagency coordination, joint Record of Decision, and two-year timeframe (for EIS) are now included throughout the revised Regulations.
- 3. Addition of “Tribal” to the phrase “State and Local” (throughout, starting at §1500.4).** Tribal entities are now given commensurate status with State and Local governments regarding agency coordination and consultation.
- 4. Addition of §1501.1 NEPA Threshold Applicability Analysis (§1501.1).** CEQ proposes to add a new section called “NEPA Threshold Applicability Analysis” to provide a series of considerations to assist agencies in determining whether NEPA applies. Of particular note is the corresponding change to the definition of Major Federal Action (§1508(q)) that actions with minimal federal funding or federal involvement are not Major Federal Actions.
- 5. Change to parameters for Scoping (§1501.9).** Previously scoping was tied to release of the Notice of Intent (NOI) to prepare an EIS. The revised regulations recommend starting scoping earlier in the process (formerly known as “pre-scoping”), without necessarily starting the 2-year timeframe (that results from release of the NOI).
- 6. Change to definition of “Significantly” and deletion of inference to segmentation (now §1501.3, formerly §1508.27).** While not glaringly obvious, this subtle change could be impactful. Previously, the definition of “significantly” (§1508.27) contained the phrase “Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.” This phrase was the basis for not allowing ‘segmentation’ under NEPA. However, in the revised Regulations, this phrase is absent. There is still reference to evaluating “... a single course of action” (§1502.4), but the prohibition of breaking down an action to avoid significance (e.g., segmentation) is no longer included in the revised Regulations.
- 7. Changes for Categorical Exclusions (CE) (§1501.4).** The CE discussion includes clarification that an agency can modify a proposed action to avoid ‘extraordinary circumstances’ so the action can fit an existing CE. Also, an agency can adopt another agency’s determination to apply a CE if the action is substantially the same (§1506.3).
- 8. Changes for Environmental Assessments (EA) (§1501.5) and Findings of No Significant Impact (FONSI) (§1501.6).** There are a number of changes proposed for the mid-level EA analysis and corresponding decision document (FONSI). The revisions include a 75-page limit and one-year timeframe for completion of an EA (§1501.10), allowance for lead and cooperating agencies (§1501.7 and §1501.8), allowance for tiering (§1501.11), and allowance for adoption (1506.3). The proposed Regulations codify the practice of a mitigated FONSI, in which an agency can issue a FONSI on the premise that enforceable mitigation will be undertaken to avoid significant impacts.
- 9. Changes for Environmental Impact Statements (EIS) and Records of Decision (ROD).** Changes to the EIS-level analysis/document occur throughout the proposed Regulations. As in the original language (§1502.7), the EIS has a 150-page limit. There is also now a 2-year timeframe (§1501.10). The EIS format recommendations have been updated to address electronic production and distribution (§1502.10), and to include costs of preparation for transparency (1502.11). Revisions also include clarification regarding when supplemental statements are required (§1502.9). As discussed under the OFD, the Regulations now include a single EIS and joint ROD for multiple federal decisions on an action.

10. Change to description of Alternatives (§1502.14).

Revisions center around narrowing the range of alternatives that need to be evaluated in an EIS. "All" is deleted before "reasonable alternatives" and alternatives outside the agency's jurisdiction are now precluded from evaluation.

11. Change to definition of Human Environment (§1508(m)).

This proposed revision is based on being consistent with the Act but is potentially problematic. The proposed change from "people" to "present and future generations of Americans" would intentionally exclude non-Americans in the US, as well as non-Americans in the areas where NEPA may be implemented for facilities and activities abroad (EO 12114 "Environmental Effects Abroad of Major Federal Actions").

12. Addition of "economic and technical considerations" to evaluation of environmental consequences (§1502.16).

CEQ proposes to add new language that the discussion of environmental consequences shall include economic and technical considerations.

13. Changes to applicant and contractor involvement (§1506.5).

This change is subtle but could have interesting repercussions. Under the auspices of allowing applicants and contractors to assume a greater role in the preparation of an EIS, "Agency responsibility for environmental documents" (§1506.5) no longer includes language that the contractor is selected by the lead agency, or that the contractor should execute a disclosure statement regarding potential conflict of interest.

14. Changes to agency compliance and multi-purposing of environmental documents (§1507.3).

Agency NEPA procedures now include more flexibility for multiple use of environmental documents to meet the requirements of NEPA and/or other environmental laws and processes.

15. Change to definition and expectations of Mitigation (§1508(s)).

The mitigation revisions clarify that adoption of mitigation is not required in the NEPA analyses, and that mitigation that is proposed should be designed to mitigate the effects of the proposed action (not be ancillary to the proposed action).

The information presented above is intended to be a summary of the highlights. **For more detailed discussion or analysis, please contact me:**

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