

Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act

Summary of Final Rule

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The National Environmental Policy Act (NEPA) is a United States environmental law that promotes the enhancement of the environment and established the President's Council on Environmental Quality (CEQ). The law was enacted on January 1, 1970. To date, more than 100 nations around the world have enacted national environmental policies modeled after NEPA. NEPA requires the government to assess the environmental impacts of any "major Federal action," and consider alternative options that are less damaging to the environment

The final rule updating the CEQ regulations implementing the procedural requirements of NEPA was issued on July 15, 2020, and published in the Federal Register on July 16, 2020. The effective date of the final rule is September 14, 2020. Any NEPA review begun on or after this date must comply with the updated regulations. Also, agencies may apply the updated regulations to any ongoing NEPA reviews begun before September 14, 2020.

Many of the changes in the final rule are based on measures in recent transportation acts codified in 23 U.S.C. 139, in recent water resources acts, and FAST-41; presidential memoranda and Executive Orders (EOs), particularly the One Federal Decision process and page and time limits in the 2017 EO 13807; and Supreme Court and U.S. Circuit Court of Appeals rulings. Major changes in the final rule include:

- A presumptive time limit of 1-2 years to complete all environmental studies and established document page limits
- Federal projects with only minimal federal involvement are exempt from review
- Federal agencies are not required to consider all reasonable alternatives nor alternatives outside the agency's jurisdiction
- Federal agencies need not consider the indirect or cumulative effects of a project, only impacts that are reasonably foreseeable

The publication of the final rule follows the January 10, 2020, publication of the Notice of Proposed Rulemaking (NPRM) and a 60-day public comment period. CEQ received 1,145,571 comments on the proposed rule, most of which were the result of mass mail campaigns. CEQ classified 8,587 public comments as unique and 2,359 public comments as substantive.

A summary of the major sections of the final rule are provided below.

Time Limits

The Final Rule establishes the following new time limits for the completion of certain environmental reviews as follows:

- One year for completion of environmental assessments (EAs) unless a senior agency official of the lead agency approves a longer time period in writing. One year is measured from the date of agency decision to prepare the EA to the publication of the final EA. The final rule does not provide additional information defining the EA decision date and it is common that the need for an EA is identified some time before preparation of the EA begins.
- Two years for completion of environmental impact statements (EISs) unless a senior agency official of the lead agency approves a longer time period in writing. Two years is measured from the date of issuance of the Notice of Intent (NOI) to the date the Record of Decision (ROD) is signed.

Page Limits

The Final Rule sets a page limit of certain environmental documents as follows:

- No more than 75 pages for the text of EAs, not including appendices, unless a senior agency official approves a longer EA in writing.
- No more than 150 for the text of EISs, not including appendices, unless a senior agency official approves a longer EIS in writing.
- For proposals of unusual scope or complexity, no more than 300 pages is allowed, unless a senior agency official of the lead agency approves a longer version in writing.

A page is defined as 500 words and “does not include explanatory maps, diagrams, graphs, tables, and other means of graphically displaying quantitative or geospatial information.”

Level of Review and Significance

The Final Rule determines the appropriate level of NEPA review addresses factors in determining whether to categorically exclude the action, prepare an EA, or prepare an EIS. As before, this determination is dependent on the significance of the effects. The regulations, however, no longer contain the definition of “significantly.”

Significance varies with the setting of the proposed action and for a site-specific action would usually depend only upon the effects in the local area (i.e. no connected actions or cumulative effects). In considering the degree of effects, agencies should consider, as appropriate to the specific actions, short- and long- term effects, beneficial and adverse effects, effects on public health and safety, and effects that violate Federal, State, Tribal, or local laws protecting the environment.

Effects and Scope of Impact Analysis

The Final Rule defines effects, and its synonym impacts, 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.” The previous distinction between direct, indirect, and cumulative effects has been eliminated, although the new definition does include what were previously considered indirect effects.

The Final Rule goes on to state that a “but for” causal relationship is insufficient to make an agency responsible for a particular effect under NEPA and effects should generally not be considered if they are remote in time, geographically remote, or the product of a lengthy causal chain. Effects also do not include those effects that the agency has no ability to prevent or would occur regardless of the proposed action. This elimination of the previous requirement to consider cumulative effects is one of the most controversial changes in the new rule and will likely be the subject of litigation along with the concepts of remote in time, geographically remote, and lengthy causal chain, particularly in regards to greenhouse gas emissions. “The analysis of the impacts on climate change will depend on the specific circumstances of the proposed action” and “ agencies will consider predictable trends in the area in the baseline analysis of the affected environment.”

Categorical Exclusions (CE)

The Final Rule clarifies that an agency may categorically exclude a proposed action but must evaluate the action for extraordinary circumstances in which a normally excluded action may have a significant effect. However, even if an extraordinary circumstance is present, the agency may categorically exclude the proposed action if agency determines that significant impacts will be avoided. The rule also allows an agency to adopt another agency’s CE determination if the proposed action covered by the other agency’s determination is substantially the same as the adopting agency’s proposed action. This adoption must be documented.

Environmental Assessments (EA) and Findings of No Significant Impact (FONSI)

The Final Rule provides more detail on the preparation of EAs and FONSI. The format of EAs is intended to be flexible and EAs shall briefly discuss the purpose and need for the proposed action, alternatives, and the environmental impacts of the proposed action and alternatives, as well as list preparers and agencies and persons consulted. Consideration of the no action alternative is not expressly required and can be addressed by contrasting the impacts of the action alternatives with the current and expected environmental conditions in the absence of the action. Relevant agencies, applicants, and the public are to be involved in preparing EAs to the extent practicable.

An agency shall make the FONSI available for public review for 30 days before taking final action if the proposed action is one that normally requires the preparation of an EIS or is without precedent. FONSI shall include the EA or incorporate it by reference and need not repeat discussion in the EA. The FONSI must state the authority for any adopted mitigation measures and any applicable monitoring or enforcement provisions. If the FONSI is based on mitigation, the mitigated FONSI “shall state any enforceable mitigation requirements or commitments that will be undertaken to avoid significant impacts.” The final rule does not otherwise establish separate standards for a “mitigated FONSI.”

The Final Rule also extends the One Federal Decision process to EAs by requiring, to the extent practicable, that for a proposal requiring action by more than one Federal agency and that is the subject of an EA, the lead and cooperating agencies evaluate the proposal in a single EA and, where appropriate, issue a joint [single] FONSI.

Environmental Impact Statements (EIS)

The Final Rule encourages the initiation of scoping, including appropriate pre-application procedures, prior to publication of the Notice of Intent (NOI). This pre-NOI work is particularly important given that the 2-year time limit for preparing EISs begins with publication of the NOI. Agencies are directed to publish the NOI as soon as practicable after determining that the proposal is sufficiently developed to allow for meaningful public comment. The NOI must include a request for identification of potential alternatives, information, and analyses relevant to the proposed action.

The rule requires draft EISs to discuss, at appropriate points, “all major points of view on the environmental impacts of the alternatives, including the proposed action.” Final EISs “shall discuss any responsible opposing view that was not adequately discussed in the draft EIS and indicate the agency’s response to the issues raised.” Agencies are to prepare supplemental EISs “if a major Federal action remains to occur” and there are “substantial changes to the proposed action that are relevant to environmental concerns” or there are “significant new circumstances or information relevant to environmental concerns.” Agencies can use an EA to determine the need for a supplemental EIS.

The Final Rule also revises other sections of an EIS, such as Purpose and Need, Alternatives Analysis, Affected Environment, and Environmental Consequences. As an example, in the Environmental Consequences section, several significant changes have been made, including the former requirement to consider direct and indirect effects is eliminated.

Draft EISs must include a summary that identifies all alternatives, information, and analyses submitted during the scoping process for consideration in developing the EIS. The draft EIS must also include, in an appendix, the submitted comments or, if the comments are “exceptionally voluminous,” summaries of the comments. These requirements have been at least partially met in the past by agencies that routinely issued a scoping report, sometimes as an EIS appendix, that describes comments received during the scoping process and how they were considered in developing the EIS. As part of the draft EIS review process, the lead agency is required to invite comments on the summary of submitted alternatives, information, and analyses. The final EIS must include a summary that similarly identifies all alternatives, information, and analyses submitted for consideration in developing the final EIS.

Use of Contractors

The Final Rule removes the previous requirement that a contractor preparing an EIS be selected by the lead agency. Contractors, including applicant-selected contractors, must submit a disclosure statement specifying any financial or other interest in the outcome of the action but are no longer required to specify that they have no such interest. The disclosure statement need not include confidential information. Contractor- and applicant-prepared environmental documents must still be prepared under the direction of the lead or cooperating agency who will provide guidance, participate in its preparation, independently evaluate it prior to approval, and take responsibility for its scope and contents.

NEPA Applicability Determinations

The Final Rule describes factors to consider in determining whether a proposed action is subject to NEPA. The act requires that agencies prepare a “detailed statement” (i.e., an EIS) for “major Federal actions significantly affecting the quality of the human environment” (42 U.S.C. 4332(2)(C)). This phrase was previously interpreted as a single concept, with “major Federal action” not having meaning independent of “significantly.” The final rule interprets “major Federal action” as an action that is

subject to NEPA and “significantly” as a factor to determine the appropriate level of NEPA review.

Actions that are not subject to NEPA include non-discretionary actions; actions that are expressly exempt under another statute; actions for which compliance with NEPA would conflict with the requirement of another statute or be inconsistent with Congressional intent expressed in another statute; actions for which the requirements of another statute are functionally similar to NEPA requirements; actions that the agency determines on a case-by-case basis to be exempt; extraterritorial actions (i.e., actions with effects entirely outside U.S. jurisdiction); judicial or administrative civil or criminal enforcement actions; funding assistance where the Federal agency has no control over the subsequent use of the funds; non-Federal projects with minimal Federal funding or other Federal involvement; and loans, loan guarantees, and other financial assistance where the Federal agency does not control the effects of the assistance.

Lead and Cooperating Agencies

The Final Rule incorporates provisions from the One Federal Decision process on the roles and responsibilities of these agencies. Cooperating agencies are directed to consult with the lead agency in developing the schedule, meet the schedule, and, as soon as practicable, elevate to the senior agency official of the lead agency issues relating to purpose and need, alternatives, or other issues affecting the ability to meet the schedule. Cooperating agencies are prohibited from commenting on environmental issues for which they do not have jurisdiction by law or special expertise.

Limitations on Actions

Finally, the rule limits actions during the NEPA process to actions that are the subject of an EA. It also states that agencies considering a proposed action for Federal funding may authorize activities by applicants such as acquisition of interests in land, purchase of long lead-time equipment, and purchase options.