

REGULATORY UPDATE: 2020 FINAL NEPA RULE

Key Provisions:

- Causation Standard
- “Indirect” & “Cumulative” Effects
- Climate Change Impacts
- NEPA Thresholds
- Major Federal Action
- Clarifies Level of NEPA Review
- Expansion of Categorical Exclusions

August 6, 2020

Summary

The White House Council on Environmental Quality (CEQ) published its final rule on July 16, 2020, updating the regulations implementing the procedural provisions of the National Environmental Policy Act (NEPA). This was the first significant update to NEPA regulations since they were first issued in 1978, over 40 years ago. The Trump administration sought this update to modernize NEPA and facilitate more efficient, effective, and timely NEPA reviews. There are varying opinions from proponents and opponents as to what this newly published rule does and does not do. Highlighted within this regulatory update are the major changes to the 1978 regulations that will potentially

impact our clients. Some changes to the rule are straightforward while some will require further analysis and discussion. Several updates to the rule have the potential to influence how environmental and technical documents are prepared and delivered. eSPARC is focused on thoroughly analyzing changes to the rule; this bulletin provides key updates while a more detailed analysis is being performed.

The Final rule goes into effect September 14, 2020 and unless otherwise altered by Congress, will apply to any NEPA process commenced after that

date. However, the new regulations can also be applied to ongoing or current NEPA studies already in progress per agency discretion, and are required to be reviewed to identify if any conflicts with other regulations exist within one year of the effective date. If a conflict does exist, the new CEQ regulations take precedence.



Environmental Impacts

The new regulations eliminate the concepts of “cumulative” and “indirect” effects. Additionally, the Rule redefines “effects” 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.” The goal of this revision is to clarify that agencies should not consider effects significant if they are “generally...remote in time, geographically remote, or the result of a lengthy causal chain.” Subject to a review

under NEPA, this change limits the scope of effects associated with a proposed action. Cumulative and indirect effects will potentially still be a consideration as other federal environmental laws and regulations still apply.

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NEPA Applicability

The new regulation grants considerable discretion to agencies to define when compliance with another environmental statute (e.g., Clean Water Act) could satisfy the requirements of NEPA. Agencies may issue categorical exclusions for project types that are determined to have a low probability of impact on the human environment. This aspect of the rule has potential for far reaching consequences and warrants close observation as agencies implement the new rule.



The rule incorporates core elements of the “One Federal Decision” policy which was adopted by Executive Order in August 2017. The rule directs lead agencies to play a more active role in coordinating review across multiple agencies.



Final Rule Highlights

Streamlined NEPA Process

- ◆ Establishes presumptive time limits of two years for the preparation of environmental impact statements (EISs) and one year for the preparation of environmental assessments (EAs)
- ◆ Specifies presumptive page limits for EISs and EAs, not including appendices
- ◆ Requires joint schedules, a single EIS, and a single record of decision (ROD), where appropriate, for EISs involving multiple Federal agencies
- ◆ Strengthens the role of the lead agency and requires senior agency officials to oversee NEPA compliance, including timely resolution of disputes to avoid delays
- ◆ Allows applicants to assume a greater role in preparing EISs with appropriate disclosure of financial or other interests and with supervision and independent evaluation by the agency

Public Involvement and Coordination with States, Tribes & Localities

- ◆ Requires agencies to provide more information to and solicit input from the public earlier in the process
- ◆ Facilitates use of documents prepared by State, Tribal, and local agencies to comply with NEPA
- ◆ Enhances ability of Native Americans to participate in the NEPA process and ensures appropriate consultation with affected Tribal governments and agencies
- ◆ Eliminates provisions in the prior regulations that limit Tribal interest to reservations
- ◆ Promotes use of modern technologies for information sharing and public outreach

Limiting Scope of Reviews

- ◆ CEQ revised the definition of “affected environment” to clarify the affected environment includes “reasonably foreseeable environmental trends.” CEQ states that under the Rule, agencies “will consider predictable environmental trends in the area in the baseline analysis of the affected environment.” By restricting agency consideration of predictable environmental trends to the baseline analysis, CEQ essentially prevents climate change from constituting an “effect” of a proposed action.
- ◆ The Rule now defines “reasonable alternatives” as a “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.” While the Rule does not prescribe the number of alternatives agencies must consider, CEQ notes that an EIS “need not include every available alternative where the consideration of a spectrum of alternatives allows for the selection of any alternative within that spectrum.” This revision could make it substantially harder to challenge NEPA analyses on the ground of a deficient “alternatives” analysis in an EIS.
- ◆ Does not alter any substantive environmental laws or regulations.