

**FEDERAL REGISTER NOTICE:
CEQ UPDATE TO REGULATIONS IMPLEMENTING
THE PROCEDURAL PROVISIONS OF THE
NATIONAL ENVIRONMENTAL POLICY ACT**

DETAILS

Link to FR Notice: https://www.federalregister.gov/documents/2020/01/10/2019-28106/update-to-the-regulations-implementing-the-procedural-provisions-of-the-national-environmental?utm_campaign=subscription%20mailing%20list&utm_source=federalregister.gov&utm_medium=email

Comment Due Date: March 10, 2020; Comments due to APTA: February 28, 2020

HIGHLIGHTS OF NPRM

The Council on Environmental Policy (CEQ) published a notice of proposed rulemaking (NPRM) to update its regulations implementing the National Environmental Policy Act (NEPA). NEPA was signed into law in 1970 and is a procedural statute that requires Federal agencies to assess the environmental impacts of proposed major Federal actions. NEPA established CEQ as an agency within the Executive Office of the President to administer Federal agency implementation of NEPA.

CEQ issued regulations for Federal agencies to implement NEPA in 1978. CEQ has not updated these regulations in over 40 years with the exception of one substantive amendment in 1986. According to CEQ, the outdated regulations have slowed and impeded the development of needed infrastructure in communities across the nation. This NPRM purports to “modernize, simplify, and accelerate the NEPA process”.

Highlights of General Proposed Changes:

First, CEQ proposes to make grammatical corrections, revises regulatory language from passive voice to active voice, adds paragraph letters and numbers to improve clarity, adds and revises terms to provide consistency, removes obsolete references, and changes citation formats to the modern usage.

Second, CEQ proposes adding a new section, “Exhaustion”, which would require the public to comment timely on alternatives, impacts, and identification of relevant information during the comment period or have their comment forfeited and “unexhausted”, which would prevent a Federal agency from considering information from the public that was not raised during the comment period. Federal agencies, on the other hand, would be required to certify in the record that it considered all the alternatives, information and analyses submitted by public commenters.

Third, CEQ proposes to revise the timing of judicial review of final agency action from the filing of an environmental impact statement (EIS) or finding of no significant impact (FONSI) to the filing of the record of decision (ROD) or other final agency action as designated by the Federal agency. In addition, the NPRM would clarify that NEPA and the Administrative Procedures Act allows agencies flexibility to structure its decision-making to allow parties to seek a stay of an agency’s final action and would explicitly state a violation of NEPA is remediated by complying with NEPA procedural requirements.

Lastly, CEQ proposes to add a “severability” clause to the regulation, which would allow portions of the rule to go into effect even if other portions of the rule are challenged in court.

Highlights of Proposed Changes to NEPA and Agency Planning:

CEQ proposes to provide Federal agencies a series of considerations to assist in determining whether NEPA applies. Further, the proposed changes would also emphasize agencies have the discretion to structure the timing of the NEPA processes to align with agency decision-making. The NPRM changes agencies “shall” apply NEPA early in the process to agencies “should” apply NEPA early in the process. Further, CEQ also proposes to clarify that agencies should consider economic and technical analyses along with environmental effects.

The NPRM would create a new Categorical Exclusion (CE) section that provides more direction on the application of CEs and addresses in more detail the process by which an agency considers whether a proposed action is categorically excluded under NEPA. Further, the new section would provide that agencies identify CEs in their NEPA procedures and agencies must provide for extraordinary circumstances. The new section also clarifies that categorical exclusions apply only to those CEs created by an administrative determination in an agency’s NEPA procedures and does not apply to Congressionally created CEs.

For Environmental Assessments (EAs), the CEQ proposes to consolidate all of the essential requirements for EAs into one section to improve readability. CEQ also clarifies that an agency must prepare an EA when necessary to determine whether a proposed action would have significant effect or the significance of the effects is unknown. ***The proposal would also set a 75-page limit for EAs*** but would allow senior agency officials to approve a longer length and establish a new page limit in writing.

Regarding FONSI, CEQ proposes to clarify that an agency must prepare a FONSI when it determines a proposed action will not have significant effects based on the analysis in the EA. In addition, CEQ would add a new section to address mitigation when it is required by another statute or when the agency issues a mitigated FONSI and would require the agency to state the legal basis for any mitigation adopted.

Finally, the NPRM would add a new section requiring Federal agencies to evaluate proposals involving multiple Federal agencies in a single EIS and issue a joint ROD or a single EA and joint FONSI, when practicable. It also clarifies that the lead agency is responsible for determining the purpose and need and alternatives in consultation with any cooperating agencies. CEQ would also maintain its function of reviewing appeals of a denial to participate as a cooperating agency. Further, the NPRM would allow agencies to begin scoping as soon as the proposed action is sufficiently developed for meaningful agency consideration. ***Lastly, the proposed rule would set time limits for an EA (one year) and EISs (two years) with the ability of senior agency officials to extend the time frames.***

Highlights of Proposed Changes to EISs:

CEQ proposes to update the format, length, and timeline to complete EISs. First, ***CEQ proposes to enforce a page limit of 300 pages*** unless a senior agency official approves a lengthier document. Second, CEQ clarifies that agencies need to update their environmental documents when there is new information or a change in the proposed action. CEQ would also add a new paragraph to address how to determine whether a supplemental analysis is required by allowing an agency to document its determination of whether a supplemental analysis is required consistent with its NEPA procedures or in an EA. Third, regarding format, CEQ proposes to eliminate the requirement to include a list of all parties receiving a copy of the EIS and would allow agencies more discretion regarding format to allow agencies to customize EISs to address a particular proposed action. Fourth, CEQ would require agencies to track the costs of developing an EIS including staff and contractor time and other direct costs associated with developing the EIS.

Fifth, the NPRM proposes to update the requirements for a purpose and need statement. CEQ proposes to revise this section to clarify that the statement should focus on the purpose and need for the proposed action including the relationship between the proposed action and alternatives in the definition of reasonable alternatives. In CEQ's view, NEPA's policy goals are satisfied when an agency analyzes reasonable alternatives and 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. Further, CEQ proposes to not require an agency to consider an alternative outside of the lead agency's jurisdiction. CEQ specifically requests comment on whether the regulation should establish a maximum number of alternatives to analyze for a proposed action.

Finally, CEQ proposes to specifically allow combining “affected environment” and “environmental consequences” sections to adopt what has become a common practice in some agencies. This revision would ensure that the description of the affected environment is focused on those aspects of the environment affected by the proposed action. CEQ would also add a new section allowing for economic and technical considerations in the environmental consequences discussion and would add a new section summarizing all alternatives, information and analyses submitted by the public for consideration by the lead and cooperating agencies in both the draft and final EISs.

Other Proposed Changes and Effective Dates:

The proposed revisions to the regulations would encourage agencies to use current methods of electronic communication to engage and inform the public, clarifies that public comments must be specific and contain sufficient detail in order for the agency to consider the comment in its decision-making, public comment should also explain why the issue raised is significant to the consideration of potential environmental impacts, agencies may respond to comment collectively or individually, and clarifies NEPA does not require agencies to reconcile inconsistencies between the proposed action and State, Tribal or local plans or laws although the EIS should discuss the inconsistencies.

CEQ also requests comments on whether to include analysis of greenhouse gas emissions and potential climate change impacts in the regulations. While CEQ published a guidance document discussing how greenhouse gases should be analyzed in the NEPA process, it did not include a proposal in this NPRM because it did not seem appropriate to address a single category of impact in the regulation. CEQ requests public comment on whether it should codify its guidance on greenhouse gases in this updated regulation.

CEQ proposes that the changes to regulations would apply to all NEPA processes begun after the effective date of the final rule, but agencies have the option to apply it to ongoing reviews. In addition, agencies have the later of 1 year after the publication of the final rule or 9 months after the agency has developed its proposed NEPA procedures. CEQ also proposes a new paragraph to encourage agencies, in their NEPA procedures, to combine their NEPA documents with other agency documents, especially where the same or similar analyses are required for compliance with other requirements.

ADDITIONAL INFORMATION

CEQ published an advance notice of proposed rulemaking on June 20, 2018 (83FR 28591), which is heavily referenced in this NPRM.