



Andrew Emrich

Partner
303.290.1621
Denver
acemrich@hollandhart.com



Tina Van Bockern

Of Counsel
303.295.8107
Denver
trvanbockern@hollandhart.com



Murray Feldman

Partner
208.342.5000
Boise
mfeldman@hollandhart.com

Council on Environmental Quality Issues Final NEPA Rule

Publication — 07/17/2020

On July 16, 2020, the Council on Environmental Quality (CEQ) published its final rule in the Federal Register revising the National Environmental Policy Act (NEPA) regulations (Rule). [This Rule](#), which is scheduled to go into effect on September 14, 2020, represents the first comprehensive revision to the NEPA regulations since they were issued in 1978. It is among the most significant environmental rules issued in the Trump administration and aims to streamline the timing and procedural requirements for federal agencies by recalibrating the scope and detail of environmental analyses that must be prepared for all major federal actions that significantly affect the human environment. The Rule is designed to expedite the approval and development of all federal projects, including major infrastructure and energy projects.

Among the Rule's key changes are the following:

Procedural Changes:

- Time and page limits
- Required schedules
- Approval of applicant-prepared Environmental Impact Statements (EIS)
- Expanded use of Tiering and Adoption
- Specific public comment requirements

Substantive Changes:

- Clarifies the threshold applicability analysis
- Revises analysis to determine “Significant Effects”
- Simplifies “Effects” analysis
- Eliminates separate definition of “cumulative impacts”
- Clarifies scope of judicial review

KEY PROCEDURAL CHANGES

Time and Page Limits. The Rule implements several procedural changes aimed at shortening the time it takes to prepare NEPA analyses and the length of NEPA documents. For example, Environmental Assessments (EAs) must be prepared within one year, measured from the date of the agency decision to prepare an EA to the publication of an EA or a finding of no significant impact (FONSI).

Environmental Impact Statements (EISs) must be prepared within two years, measured from the date of the issuance of the notice of intent to prepare an EIS to the date a record of decision (ROD) is signed. For both EAs and EISs, a senior agency official may approve a longer period, if needed. To meet these deadlines, the lead agency must develop a



Sandra Snodgrass

Partner
303.295.8326
Denver
ssnodgrass@hollandhart.com



Hadassah (Dessa) Reimer

Of Counsel
307.734.4517
Jackson Hole
hmreimer@hollandhart.com

schedule and set milestones for all environmental reviews and authorizations.

An EA must be 75 pages or less and a typical EIS must be 150 pages or less; however, an EIS of “unusual scope or complexity” can be up to 300 pages. For both EAs and EISs, a senior agency official can approve a larger page limit if needed. The data cited by CEQ suggests that recently prepared final EISs averaged 661 pages in length.

Applicant-Prepared EIS: The current NEPA regulations allow a private project applicant to prepare an EA, but not an EIS. The Rules allow an applicant to prepare both EAs and EISs. The Rules require the lead agency to oversee the preparation of the EIS by: (a) outlining the type of information required; (b) providing guidance; (c) participating in the preparation; (d) independently evaluating it prior to approval; and (e) taking responsibility for the scope and content.

Expanded Use of Tiering and Adoption: Tiering is the coverage of general matters in a broad analysis followed by a narrower (often project-specific) analysis that incorporates the broad analysis by reference. Under the current regulations, only an EIS can serve as the broad statement to which other analyses can be tiered. The Rule expands the use of tiering allowing the broader analysis to include EAs.

The current regulations allow one agency to adopt another agency's EIS. The Rule expands this to include EAs. An agency may also adopt another agency's determination that a categorical exclusion (CE) applies to the proposed action if the adopting agency's proposed action is substantially the same.

Public Comment Requirements: The Rule implements two main changes with respect to soliciting and receiving public comments. First, the Rule requires that the agency's notice of intent to prepare an EIS must request comments on potential alternatives and their impacts. Second, the Rule outlines the level of specificity required in public comments. For example, public comments on a draft EIS must: (a) provide as much detail as necessary to inform the agency of the commenter's position; (b) explain why issues raised are significant to the consideration of potential impacts; (c) reference the corresponding section or page number of the draft EIS; (c) propose specific changes to those parts of the EIS; and (d) include or describe the data sources and methodologies supporting the proposed changes.

HIGHLIGHTS OF SUBSTANTIVE CHANGES:

Threshold Applicability Analysis: In assessing whether NEPA applies to a specific action, the Rule requires federal agencies to consider the following criteria: (a) whether the proposed activity/decision is expressly exempt from NEPA under another statute; (b) whether compliance with NEPA would clearly conflict with requirements of another statute; (c) whether compliance with NEPA would be inconsistent with congressional intent expressed in another statute; (d) whether the proposed activity/decision is a major federal action; (e) whether proposed

activity/decision (or any part thereof) is a non-discretionary action for which the agency lacks authority to consider environmental effects as part of its decision-making process; and (f) whether the proposed action is one for which another statute's requirements serve the function of agency compliance with NEPA.

Revised Analysis for “Significant Effects”: Under the current NEPA regulations, whether a federal action is “significant” (and therefore must be analyzed in an EIS) requires an agency to analyze the “context and intensity” of the action in light of ten specific factors. The Rule now requires agencies to analyze “the potentially affected environment and degree of the effects of the action”. In considering the degree of an action's effects, agencies are now directed to consider (a) short and long-term effects; (b) beneficial and adverse effects; (c) effects on public health and safety; and (d) effects that would violate any federal, state, tribal, or local law protecting the environment.

Simplifies Effects Analysis: The Rule provides a new definition of “effects” that focuses on “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.” This definition aims to codify the Supreme Court's holding in *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004).

Elimination of Separate Definition of “Cumulative Impacts”: Current NEPA regulations require agencies to analyze the “cumulative impacts” in addition to the direct and indirect impacts, of their proposed actions. Agencies' analyses of cumulative impacts have been an area of significant litigation as agencies struggle to define and analyze which federal and non-federal “past, present, and reasonably foreseeable future actions” must be considered and analyzed. The Rule eliminates “cumulative impacts” as an independent category of impacts that agencies must analyze.

Clarifies Scope of Judicial Review: The Rule incorporates a number of judicial review principles employed by many courts in NEPA legal challenges. It precludes parties from raising issues in litigation that they did not present to the relevant agency during a public review period; clarifies that a legal challenge is not ripe until an agency issues its record of decision (ROD) or other final action; and highlights that an agency's analytical failure under NEPA may be remedied by additional procedural compliance. The Rule also clarifies that there is no presumption that injunctive relief should be granted for a NEPA violation.

The Rule is scheduled to become final in just under two months and legal challenges are certain to follow. In the coming weeks, Holland & Hart's NEPA practitioners will highlight how this Rule is likely to impact federal projects in the Rocky Mountain West and beyond.