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# Answers to Key Questions about the Revised CEQ NEPA Regulations

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**Insight — 08/19/2020**

As previously described here, on July 16, 2020, the Council on Environmental Quality (CEQ) issued the first major revisions to its National Environmental Policy Act (NEPA) regulations since 1978, which become effective on September 14, 2020. The revised regulations have received much attention, ranging from enthusiastic support to intense opposition. This has led to considerable rhetoric, leaving many in the regulated community scratching their heads about how much has actually changed and how to apply the revised regulations to current and future federal agency authorizations. In this article, we answer some of the most pressing questions about the revised CEQ regulations.

**1. What are the most significant changes?**

**Elimination of Cumulative Impacts.** One of the largest departures from previous practice that has garnered the most opposition is the elimination of cumulative impacts from the scope of the effects analysis. The final version of the revised regulations dropped the language in the proposed revisions that expressly stated that an analysis of cumulative impacts is not required. But the revised regulations nonetheless repeal the prior definition of "cumulative effects" and limit the consideration of effects to those "that are reasonably foreseeable and have a reasonably close causal relationship to the proposed action or alternatives."[1] This change has already been targeted in litigation against the rules themselves[2] and likely will be included in as-applied challenges to projects in which the agency did not analyze cumulative effects.

**Definition of Major Federal Action.** The new regulations significantly rewrite the definition of "major Federal action."[3] The key changes are (1) elimination of the current language that includes failure to act, (2) express exclusion of non-discretionary actions, and (3) recognition that major Federal action does not include "[n]on-Federal projects with minimal Federal funding or minimal Federal involvement where the agency cannot control the outcome of the project."[4]

The first change is consistent with the concept that NEPA applies to proposed actions for which alternatives can be considered.[5] When an agency fails to act, there is no proposed action for which alternatives could be evaluated.[6] Thus, the elimination of non-discretionary actions is consistent with well-established NEPA case law, as well as the purpose of NEPA, as an environmental analysis provides little value if the agencies

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have no discretion to take any different action as a result of that analysis.[7]

The third change appears to expand upon what is commonly referred to as the "small handles" problem, where a federal agency has authority over a small portion of a much larger project.[8] The scope of the NEPA analysis in such a situation has been the subject of numerous court decisions, with inconsistent outcomes. The exclusion from major federal actions of projects where the agency cannot control the outcome may help address one aspect of the "small handles" question, though considerable debate likely will persist as to the appropriate scope of the analysis where the agency decision can influence the non-federal aspects of the project.

**Significance Thresholds.** Agencies must prepare an environmental impact statement (EIS) when impacts of the proposed agency action are expected to be significant. The previous CEQ regulations required consideration of context and ten intensity factors to weigh in determining whether impacts are significant.[9] These intensity factors include consideration of, for example, the degree to which the action may affect threatened or endangered species, cultural resources, and unique geographic areas (e.g., park lands, wild and scenic rivers, or ecologically critical areas).[10] Whether the impacts of a proposed action meet the significance threshold previously has been the frequent target of project opponents.

The revised regulations retain the concepts of context and intensity but refer to them as "the potentially affected environment" and the "degree of the effects of the action," respectively.[11] CEQ has eliminated seven of ten intensity factors, retaining only a consideration of beneficial and adverse effects; effects to public health and safety; and effects that would violate federal, state, tribal, or local law protecting the environment.[12] Because the significance threshold is such a key part of NEPA compliance, these revisions have already been the subject of facial challenges.[13]

**Limitation of the Alternatives Analysis.** The revised regulations constrain the range of alternatives that needs to be considered. While the previous regulations required agencies to "[r]igorously explore and objectively evaluate *all* reasonable alternatives" in an EIS,[14] the revised regulations state that agencies shall "[e]valuate reasonable alternatives to the proposed action[.]" [15] The preamble explains that it is CEQ's view that "NEPA's policy goals are satisfied when an agency analyzes reasonable alternatives, and 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."[16]

In addition, CEQ has eliminated the statement in the previous regulations that agencies should include reasonable alternatives not within the jurisdiction of the lead agency.[17] And it has included a new definition of "reasonable alternatives," which confirms that, to be reasonable, an alternative must be "technically and economically feasible, meet the purpose and need for the proposed action, and, where applicable, meet the goals of the applicant."[18] The inclusion of the applicant's goals is an important change that confirms what many courts had already concluded—agencies must take into account the goals of project applicants in

determining what constitutes a reasonable alternative.[19]

While the revised regulations do not specifically include new provisions or changes regarding the range of alternatives required in an environmental assessment (EA), the preamble confirms that "[r]equirements for documenting the proposed action and alternatives in an EA continue to be more limited than EIS requirements."[20] The preamble also explains that an "agency does not need to include a detailed discussion of each alternative in an EA, nor does it need to include any detailed discussion of alternatives that it eliminated from study."[21]

It remains to be seen what impact this change will have on agency practice and litigation outcomes. For EAs, the number of alternatives analyzed was already generally more limited than in EISs, so there may be little change in that context. For EISs, agencies may be hesitant to substantially limit their alternatives analyses due to potential legal challenges. However, with the new page limits, discussed further below, agencies may choose to relegate to an appendix some or all of their justification for rejecting certain alternatives without detailed analysis. As for litigation outcomes, legal challenges to NEPA analyses often include allegations that the agency considered an insufficient range of alternatives, the resolution of which is very fact specific. This practice will likely continue under the revised regulations, with slightly more ammunition for the agencies' defense.

**Applicant-Prepared EISs.** The prior regulations allowed an applicant to prepare an EA but required that EISs be prepared by the agency or an independent third-party contractor.[22] The revised regulations allow an applicant to prepare an EIS under the direction of the lead agency, which will likely provide the applicant more control over the timing and potentially the content of the analysis.[23] This is a major policy change that will likely be the target of significant opposition.

**2. Which changes simply codify existing NEPA case law?**

Several of the changes to the regulations adopt existing common law regarding NEPA compliance, which admittedly is not always consistent. Those changes include:

1. the recognition that NEPA is merely a procedural statute that imposes no substantive requirements;[24]
2. the forfeiture of issues not raised during the public comment period; [25]
3. the limitation of judicial review to final agency action; [26]
4. the lack of a private right of action under NEPA; [27]
5. the recognition that minor errors (often referred to by the courts as "flyspecks") should not lead to a finding of a NEPA violation;[28]
6. the acceptable use of mitigation to justify a "Finding of No Significant Impact" (referred to as a "mitigated FONSI"); [29]
7. the recognition that a supplemental NEPA analysis may be required only if a major federal action remains to occur; [30]
8. the incorporation of the applicant's goals into the purpose and need

statement.[31]

**3. How should agencies apply the revised regulations to a project that is currently in or about to initiate the NEPA process?**

The revised regulations state that they apply to any NEPA process begun after September 14, 2020.[32] For ongoing activities and NEPA processes that commenced before September 14, 2020, agencies have the discretion to apply the revised regulations.[33] However, there will be considerable uncertainty regarding the status of these regulations for quite some time, considering that opponents have already filed legal challenges[34] and the potential for an Administration change.

Project proponents with proposed projects subject to the new regulations, should consider ways to mitigate this uncertainty risk. One option is to coordinate closely with the lead agency to ensure that the environmental analysis would be able to withstand judicial scrutiny under both the revised and the previous regulations. This may include requesting preparation of an EIS when an EA would arguably be sufficient under the revised regulations or advocating for the consideration of more alternatives than are arguably required under the revised regulations. With respect to cumulative impacts, the project proponent should consider providing information about the affected environment that includes other past and present actions. The cumulative impact of other reasonably foreseeable future actions might also be incorporated into the discussion of the affected environment as a means of minimizing risk in case the regulations are eventually enjoined by the courts or amended by future rulemakings under a new Administration.

**4. What will be the impact of the page and time limits?**

Following the precedent set by the Secretary of the Interior in Secretarial Order 3355,[35] the revised regulations adopt page limits for EAs and EISs. The text of an EA must not exceed 75 pages unless the senior agency official[36] approves an extension in writing and establishes a new page limit.[37] The text of an EIS must not exceed 150 pages, except that proposals of unusual scope or complexity must not exceed 300 pages unless the senior agency official approves exceedance of this limit in writing and sets a new page limit.[38] These page limits do not apply to appendices.[39]

CEQ has also limited the time allowed for the NEPA process to one year for EAs and two years for EISs, unless the senior agency official of the lead agency approves a longer time in writing and sets a new time limit.[40] For EAs, the one-year limit is measured from the date of the decision to prepare an EA to the publication of the final EA or FONSI.[41] For EISs, the two-year period is measured from the date of the issuance of the notice of intent to prepare an EIS to the date the record of decision is signed.[42]

These time and page limits may streamline the NEPA process to a modest extent. However, agencies will continue to be concerned about legal challenges to their NEPA analyses and thus will want to ensure that they invest sufficient time and thoroughly document their findings. Thus, the practical result of these limits will more likely be that (1) a bulk of the effort

will be completed before publication of the notice of intent or the decision is made to prepare an EA, and (2) much of the analysis will be included in appendices rather than in the text. It is also important to note that agencies may not adhere to the CEQ deadlines if there are no repercussions for missing those deadlines. It is highly unlikely that a project proponent would sue to enforce the time limits, so the pressure to complete the NEPA process in one or two years would have to come from within the agencies. The extent to which agencies rigorously (or even half-heartedly) enforce the timing requirements will likely vary.

**Conclusion**

Many of the changes in the revised regulations merely codify existing case law and agency practice or clarify language that has previously been the source of confusion. Others, however, represent a sharp departure from how agencies have implemented NEPA to date. It is those latter changes that are the focus of ongoing litigation challenging the new rules, ensuring that there will be a continued lack of certainty regarding the ultimate effect of CEQ's revisions.

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[1]Revised 40 C.F.R. § 1508.1(g).
[2]*See Alaska Cmty. Action on Toxics v. CEQ*, Case No. 3:20-cv-05199 (N.D. Cal.) (filed July 29, 2020); *Wild Virginia v. CEQ*, Case No. 3:20-cv-00045 (W.D. Va.) (filed July 29, 2020).
[3]*Id.* § 1508.1(q).
[4]*Id*.
[5]42 U.S.C. § 4332(2)(C) (discussing proposals for federal actions and alternatives thereto).
[6]*Cf. Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004) (judicial review of agency inaction is limited to when an agency fails to take a discrete action that it is required to take); *id.* at 73 (finding NEPA's supplementation obligation was not triggered when there was no ongoing federal action, despite allegations of the agency's failure to act).
[7]*See, e.g., Alaska Wilderness League v. Jewell*, 788 F.3d 1212, 1225-26 (9th Cir. 2015); *Sac & Fox Nation v. Norton*, 240 F.3d 1250, 1262 (10th Cir. 2001).
[8]*See* Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act 85 Fed. Reg. 43,304, 43,350 (July 16, 2020) (referencing the "small handle" problem); *see also Sw. Williamson Cnty. Cmty. Ass'n v. Slater*, 243 F.3d 270, 279 (6th Cir. 2001) (concluding that the amount of federal involvement did not convert the entire state highway project into a "major federal action.").
[9]Previous 40 C.F.R. § 1508.27. Although the revised regulations are not effective until September 14, 2020, to avoid confusion, we use "previous" in this article to refer to the version of the CEQ regulations in effect prior to the 2020 revisions.
[10]*Id.*
[11]Revised 40 C.F.R. § 1501.3(b).
[12]*Id.*
[13]*See supra* note 2.
[14]Previous 40 C.F.R. § 1502.14(a) (emphasis added).

[15]Revised 40 C.F.R. § 1502.14(a).
[16]85 Fed. Reg. at 43,330.
[17]Previous 40 C.F.R. § 1502.14(c). That requirement had already been narrowed considerably by courts, which have recognized that evaluation of alternatives that the lead agency does not have the authority to require is a largely meaningless exercise. *See, e.g., City of Alexandria v. Slater*, 198 F.3d 862, 869 (D.C. Cir. 1999).
[18]Revised 40 C.F.R. § 1508.1(z).
[19]*See, e.g., Louisiana Wildlife Fed., Inc. v. York*, 761 F.2d 1044 (5th Cir. 1985) ("[I]t would be bizarre if the [agency] were to ignore the purpose for which the applicant seeks a permit and to substitute a purpose it deems more suitable.").
[20]85 Fed. Reg. at 43,323.
[21]*Id.*
[22]Previous 40 C.F.R. § 1506.5(b),(c).
[23]Revised 40 C.F.R. § 1506.5(b)(4).
[24]*Id.* § 1500.1(a). *See, e.g., Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) ("[I]t is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process.").
[25]Revised 40 C.F.R. § 1500.3(b)(3) (codifying the holding in *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 764-65 (2004)). Note that courts have recognized exceptions to this forfeiture concept, such as when the issue is so obvious that an agency should have been aware of it or when an issue was raised by another party. *See, e.g., Pub. Citizen*, 541 U.S. at 765 (noting that flaws in a NEPA analysis might be so obvious that there is no need for a commentator to point them out specifically in order to preserve its ability to challenge a proposed action); *Wyo. Lodging & Rest. Ass'n v. U.S. Dep't of the Interior*, 398 F. Supp. 2d 1197, 1210 (D. Wyo. 2005) ("[S]o long as the agency is informed of a particular position and has a chance to address that particular position, any party may challenge the action based upon such position whether or not they actually submitted a comment asserting that position."). It remains to be seen whether courts will continue to apply those exceptions despite the exhaustion requirement of the revised regulations.
[26]Revised 40 C.F.R. § 1500.3(c). *See, e.g., Karst Envtl. Education & Prot. Ctr. v. EPA*, 475 F.3d 1291, 1297 (D.C. Cir. 2007) ("NEPA claims must be brought under the [Administrative Procedure Act] and allege final agency action").
[27]Revised 40 C.F.R. § 1500.3(c). *See, e.g., Karst Envtl.*, 475 F.3d at 1295 ("NEPA creates no private right of action").
[28]Revised 40 C.F.R. § 1500.3(c). *See, e.g., Theodore Roosevelt Conservation P'Ship v. Salazar*, 661 F.3d 66, 75 (D.C. Cir. 2011) ("We have consistently declined to 'flyspeck' an agency's environmental analysis, looking for any deficiency no matter how minor." (internal quotations and citation omitted)).
[29]Revised 40 C.F.R. §1501.6(c). *See, e.g., Spiller v. White*, 352 F.3d 235, 241 (5th Cir. 2003) (approving the use of a mitigated FONSI and collecting cases that held the same).
[30]Revised 40 C.F.R. §1502.9(d). *See, e.g., Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 374 (1989) (holding that one criterion for supplementation is that major federal action remains to occur).
[31]Revised 40 C.F.R. §1502.12. *See, e.g., Citizens Against Burlington v.*

*Busey*, 938 F.2d 190, 199 (D.C. Cir. 1991) ("Congress did expect agencies to consider an applicant's wants when the agency formulates the goals of its own proposed action.")
[32]Revised 40 C.F.R. § 1506.13.
[33]*Id.*
[34]*See Alaska Cmty. Action on Toxics v. CEQ*, Case No. 3:20-cv-05199 (N.D. Cal.) (filed July 29, 2020); *Wild Virginia v. CEQ*, Case No. 3:20-cv-00045 (W.D. Va.) (filed July 29, 2020).
[35]*See Secretarial Order 3355*, Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects (Aug. 27, 2017), available at https://www.doi.gov/nepa.
[36]The "senior agency official" is newly defined as "an official of assistant secretary rank or higher (or equivalent) that is designated for overall agency NEPA compliance, including resolving implementation issues." *Id.* § 1508.1(dd).
[37]Revised 40 C.F.R. § 1501.5(f). The revised regulations define "page" as "500 words and does not include explanatory maps, diagrams, graphs, tables, and other means of graphically displaying quantitative or geospatial information." *Id.* § 1508.1(v).
[38]*Id.* § 1502.7. The text of the EIS refers to the sections on purpose and need, alternatives, the affected environment, and the environmental consequences. *Id.* (cross-referencing § 1502.10(a)(4) through (a)(6)).
[39]*Id.* §§ 1501.5(f), 1502.7.
[41]*Id.* § 1501.10(b).
[42]*Id.* § 1501.10(b)(1).
[43]*Id.* § 1501.10(b)(2).