



Overview of Recent NEPA Updates

Environmental Review & Coordination Section
NOAA Office of General Counsel
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Background

- CEQ finalized [Phase 1](#) of their revision to the 2020 NEPA regulations on April 20, 2022 which was limited in scope to:
 - Modifications to purpose & need and requirements and related reasonable alternatives provisions
 - Restoration of flexibility for agency procedures; and
 - Restoration of requirement to consider cumulative effects
- On January 30, 2023, a draft NPRM began interagency review pursuant to EO 12866
- On June 8, 2023, President Biden signed the [Fiscal Responsibility Act](#), which included amendments to NEPA
- CEQ revised the draft NPRM to incorporate the FRA amendments, and [published](#) it in the Fed. Reg. on July 31, 2023
- Public Comment period closed September 29, 2023



Categories of Proposed Changes

- Restoration of 1978 Regulations
 - In many places CEQ has reverted regulatory text to the prior 1978 version
 - For many of these changes, minor clarifying (non-substantive updates) have also been made
- Retention of 2020 Regulations
 - CEQ did choose to maintain several aspects of the 2020 regulations
 - Some with substantive updates
- New provisions prior to FRA amendments to NEPA
- Changes in response to FRA



Update to “Threshold Determinations”

- **FRA change**: Requires agencies to assess whether NEPA applies to a proposed activity or decision (1501.3)(a)
 - Agencies directed to determine whether: proposed action is exempted from NEPA by law; compliance with NEPA would clearly and fundamentally conflict with another law; applicable statutory provisions make compliance with NEPA impossible; and ***proposed action is a major Federal action***.
- CEQ proposes to delete 2 of the “threshold” factors that were added by the 2020 regulations:
 - Inconsistency with Congressional intent expressed in another statute
 - Functional equivalence



Major Federal Action

- **FRA change:** CEQ proposes to revise definition to clarify the list of example activities or decisions that meet the definition, and revise the list of exclusions from the definition consistent with section 111(10) of NEPA. 1508.1(u)
 - **Proposes to exclude:**
 - Activities or decisions for projects approved by a Tribal Nation where the land is held in trust or restricted status and there is no Federal funding or involvement;
 - Non-Federal actions with no or minimal funding; or with no or minimal Federal involvement where the agency cannot control the outcome of the project;
 - Activities or decisions that are non-discretionary and made in accordance with agency's statutory authority;
 - Funding assistance solely in form of general revenue sharing funds which do not provide Fed agency compliance or enforcement responsibility over subsequent use.
- Proposes adding financial assistance subject to sufficient Federal agency control and responsibility as an example of a major Federal action.



Time Limits: Post-FRA (1501.10)

- FRA requires agencies to complete an EA within 1 year. (b)(1)
- FRA requires EIS completion in 2 years unless the lead agency extends the deadline in consultation with any applicant or project sponsor and sets a new deadline. (b)(2)
- Phase 2 proposes new (modified) requirement for lead agencies to develop schedules for EISs and EAs that include key milestones for environmental review process. (c)
 - Lead agencies required to notify other responsible agencies if milestones may be missed and to elevate issues for timely resolution.
 - Proposes new requirement that EIS schedules include dates for publishing the NOI, and issuing the DEIS, public comment period, FEIS, and ROD. (e)
 - Proposes new requirement for agencies to develop schedules for EAs that include the following milestones: decision to prepare an EA; issuance of the draft EA (where applicable); the public comment period on the draft EA, consistent with 1501.5, (where applicable); and issuance of the final EA and decision on whether to issue a FONSI or issue a NOI to prepare an EIS. (f)(1)-(4)
- Phase 2 proposes new requirement that requires agencies to make EIS schedules publicly available and to publish revisions to the schedule. (h)
- Phase 2 proposes to eliminate waiver process, given statutory requirement for timelines



Page Limits

- FRA amendments to NEPA set page limits at 75 pages for an EA and 150 or 300 pages for an EIS, depending on complexity.[statutory cite] (§§ 1501.5, 1502.7)
- Phase 2 regulations proposes to dispense with the ability to waive page limits because of FRA changes



Categorical Exclusions

- **Restoration**
 - Restored language to descriptions of CEs at 1501.4(a) & 1508.1(d) to define CEs as categories of action that don't individually or in the aggregate have significant effects
- **New Provisions**
 - 1501.4(a) CEs may be established jointly with multiple agencies
 - 1501.4(c) CEs may be established outside of agency NEPA procedures, through programmatic or planning documents
 - Still requires consultation with CEQ and opportunities for notice and comment
 - Also requires substantiation similar to creation of any CE
 - 1501.4(d)(2): Agencies may establish CEs for a limited duration "to promote experimentation"



Categorical Exclusions

FRA Changes

- Section 109 of the FRA creates new authority for agencies to “adopt” a CE listed in another agency’s NEPA procedures for a category of proposed actions
 - This includes requirements for the agency to (1) identify the CE; (2) consult with the agency that established the CE; (3) identify to the public the CE that the agency plans to use for its proposed actions; and (4) document adoption of the CE
- To minimize confusion, CEQ is using the term “apply” in its proposed regulations to implement this provision to distinguish from the traditional use of “adoption” to refer to an agency’s reliance on another agency’s previously completed analysis, including the determination that a CE applies to a proposed action



Environmental Assessments

- **Retains much of the language on EAs added by 2020 regulation**
 - 1501.5(e): CEQ proposed to add language regarding public comment requirements for EAs
 - “If an agency **publishes** a draft environmental assessment, the agency shall invite public comment and consider those comments in preparing the final environmental assessment.”
- **FRA change:**
 - Requires agencies to prepare a single EA and issue a joint FONSI or jointly determine to prepare an EIS. (§ 1501.7)
- **Mitigated FONSI:**
 - Updated to clarify that agencies must ensure that adopted monitoring or enforcement provisions are enforceable, and require an agency’s FONSI to state the enforceable mitigation requirements or commitments, and the authorities for them.
 - Proposes that agencies require a monitoring and enforcement plan for enforceable mitigation commitments. (1501.6(c))



EISs: New or Modified Provisions

Climate & EJ Related Proposals:

- 1502.16: CEQ proposes several changes to ensure that agencies integrate climate change and environmental justice considerations into the analysis of environmental effects
 - (a)(7) clarifies that the discussion of environmental consequences in an EIS must include any reasonably foreseeable climate change effects along with the effects of climate change on the proposed action and alternatives
 - (a)(10) requires agencies to address any risk reduction, resiliency, or adaptation measures included in the proposed action and alternatives
 - (a)(14) requires agencies to discuss potential for disproportionate and adverse health and environmental effects on communities that face environmental justice concerns



EISs: New or Modified Provisions

Alternatives

- Clarifies that agencies must consider a reasonable range of alternatives that fosters informed decision making. Clarifies they have discretion to consider reasonable alternatives not within their jurisdiction. (1502.14(a))

Incomplete or Unavailable Information (1502.21)

- Proposed Edit: “(b) If the incomplete ~~but available~~ information relevant to reasonably foreseeable significant adverse impacts is essential to a reasoned choice among alternatives, and the overall costs of obtaining it are not unreasonable, the agency shall include the information in the environmental impact statement.”

Methodology and Scientific Accuracy (1502.23)

- Reinstates the term “high-quality information”, as used in the 1978 regulations, and includes best available science and reliable data, models, and resources
- Proposes removing limitations to reliance on existing resources to clarify that agencies are not precluded from undertaking surveys, investigation, other forms of data collection to inform EIS
- Proposes adding a provision that would require agencies to use projections when evaluating reasonably foreseeable effects, including climate change-related effects



EISs: Provisions Implementing FRA

- Requires agencies to identify the environmentally preferable alternative in the EIS, not only in the ROD.(1502.14(f))
- Requires that agencies prepare a single EIS and, except where inappropriate or inefficient, issue a joint ROD. (1501.7)
- Requires an EIS to include analysis of the effects of the no action alternative, including any adverse environmental effects. (1502.16)
- Direct agencies to ensure environmental documents are prepared with professional integrity, including scientific integrity, and make use of reliable data and resources in carrying out responsibilities under NEPA. (1502.23, 1506.5, 1507.2)

Tracking & Disclosure Requirements



- Proposes requiring unique identification numbers for EAs and EISs to help the public and agencies track the progress of the environmental review and associated documents. (1501.5, 1502.4)
- Proposes to require agencies to provide on their websites or other information technology tools their agency NEPA procedures and a list of EAs and EISs that are in development and complete. 1507.4(a)(1)
- Encourages agencies to post their environmental documents to their websites.1507.4(a)(2)



Programmatic Reviews

- Changes prompted by FRA
 - Incorporate new provisions on how a programmatic document can be used in subsequent environmental documents. (1501.11)
 - Proposes to require agencies to briefly document their reevaluations when relying on programmatic environmental documents older than 5 years.
- Changes preceding FRA
 - Phase 2 proposes to codify best practices for developing programmatic environmental documents and subsequently tiering to an EIS, EA, or programmatic environmental document (1501.11)
 - CEQ encourages the use of programmatic reviews (EIS or EAs) to evaluate the effects of policies, programs, plans, or groups of related activities
 - Provides examples of the types of agency actions that may be appropriate for programmatic environmental documents



Mitigation

- **New provision:**

- Encourages lead and cooperating agencies to incorporate, where appropriate, mitigation measures addressing a proposed action's significant adverse human health and environmental effects that disproportionately and adversely affect communities with EJ concerns. (1505.3(b))

- **Modified provision**

- Requires monitoring and compliance plans when an agency relies on mitigation as a component of the proposed action to analyze the reasonably foreseeable environmental effects, and committed to in a ROD, FONSI, or separate document.



Other Notable Revisions

- **Revisions prompted by FRA amendments**
 - Clarify the roles and responsibilities for lead, joint lead, and cooperating agencies to reduce duplication and improve coordination across the Federal Government. (§§ 1501.7, 1501.8)
 - Agencies must prescribe procedures to allow applicants or project sponsors prepare an EA or EIS. (§ 1507.3).
 - Regardless of preparer, agencies take full responsibility of environmental documents.



Other Notable Revisions cont'd

- **Revisions proposed prior to FRA amendments**
 - Proposes to delete § 1506.9 “Proposals for regulations” in its entirety
 - Amends provisions on adoption of an EIS, EA, or CE for clarity and readability and to ensure agencies conduct independent review of the document they are adopting. (§ 1506.3)
 - Adds a section on innovative approaches to NEPA reviews to address extreme environmental challenges (§ 1506.12)
 - Would allow CEQ to grant a request for modification to authorize “innovative approaches” to address extreme environmental challenges
 - Would require CEQ approval for any innovative approaches
 - Would make clear that approval does not waive requirement to comply with NEPA



Agency Compliance & Procedures

- **Compliance** (§§ 1507.1, 1507.2)
 - To be consistent with FRA amendments, will require agencies to designate a Chief Public Engagement Officer responsible for facilitating community engagement across the agency.
- **Procedures** (§ 1507.3)
 - Agencies will have **12 months** from the effective date to propose updates to their NEPA procedures (b)
 - Proposes to restore text from the 1978 regulations requiring agencies to continue to review their policies and procedures and revise them as necessary to be in full compliance with NEPA. (b)(2)
 - Add more specificity for the process for establishing new or revising existing CEs, consistent with CEQ's 2010 CE guidance and agency practice. (c)(8)
 - Proposes to require agencies to include in their NEPA procedures a process for reviewing their CEs every 10 years. (c)(9)