Congressional Research Service
Informing the legislative debate since 1914

IN FOCUS

Updated October 22, 2020

The Legal Framework of the National Environmental Policy Act

The National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321 *et seq.*, requires federal agencies to identify and evaluate impacts of "major Federal actions significantly affecting the quality of the human environment." Although an agency must consider these impacts, it need not elevate these environmental concerns above others. Instead, NEPA requires agencies to "take a *hard look* at environmental consequences" of their proposed actions, consider alternatives, and publicly disseminate such information before taking final action. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989) (emphasis added).

NEPA also established the Council on Environmental Quality (CEQ), which issues regulations and guidance detailing how federal agencies must implement NEPA. 40 C.F.R. pts. 1500–1518. Through these actions, CEQ has defined and interpreted some of NEPA's broad procedural mandate. In 2020, CEQ finalized revisions to its 1978 NEPA regulations, which apply to all proposals subject to NEPA reviews after September 14, 2020, although agencies may choose to apply them to ongoing reviews. 85 Fed. Reg. 43,304 (July 16, 2020). These regulations are being challenged by a number of states and other stakeholders, but will remain in effect unless the courts grant temporary or permanent legal remedies to pause implementation until the litigation is resolved.

This In Focus describes the legal obligations that NEPA and the 2020 CEQ regulations impose on federal agencies. It also highlights some changes that the 2020 CEQ regulations made to the 1978 regulations.

Federal Actions Subject to NEPA

Generally, NEPA's procedural mandates apply to all proposed "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332. Accordingly, to determine if NEPA applies to a proposed activity, agencies must assess whether the action is "major," if the effects from the major action are "significant," and whether the action is otherwise exempt from NEPA.

Definition of "Major Federal Action"

NEPA does not define "major Federal action." CEQ, however, has developed a definition, limiting the scope to actions "subject to Federal control and responsibility." 40 C.F.R. § 1508.1(q). The 2020 CEQ regulations further refine the scope by listing actions that do not qualify and other actions that may or "tend to" qualify. Actions that do not qualify as major federal actions include (1) nondiscretionary or extraterritorial activities or decisions; (2) actions that do not result in final agency actions as set forth in statute; (3) judicial or administrative enforcement; (4) certain funding assistance where a federal agency does not control the funds' use; (5) nonfederal projects with minimal federal funding or involvement; and (6) loans, loan guarantees, and other financial assistance where the federal agency does not exercise sufficient control or responsibility. *Id.* An agency may consider whether other actions qualify as "major Federal actions."

NEPA Thresholds

The 2020 CEQ regulations include "thresholds" to codify circumstances where courts have held that NEPA does not apply. 85 Fed. Reg. at 43,320. These thresholds require agencies to determine (1) whether the action is exempt by statute; (2) whether NEPA compliance would "clearly and fundamentally conflict" with another statute; (3) whether NEPA compliance "would be inconsistent with Congressional intent" of another statute; (4) whether the action is nondiscretionary such that the agency lacks authority to consider the environmental effects; and (5) whether review under a different statute is functionally equivalent to NEPA. 40 C.F.R. § 1501.1(a). Agencies may codify these thresholds into their own NEPA regulations. *Id.* §§ 1501.1(b), 1507.3(d)(6). They may also consult with CEQ in determining whether one of these considerations applies to a particular case. *Id.* § 1501.1(b)(1).

Assessing Significant Impacts

Before undertaking NEPA review for "major Federal actions," the 2020 CEQ regulations require an agency to assess whether the proposed action (1) normally has no significant impacts and is categorically excluded, (2) is likely to have insignificant impacts or unknown impacts, or (3) is likely to have significant impacts. *Id.* § 1501.3.

CEQ directs agencies to determine whether the impacts from a proposed action are "significant" by assessing the "potentially affected environment and degree of the effects" the action may have. *Id.* § 1501.3(b). These effects must include "short- and long-term effects"; "beneficial and adverse effects"; "effects on public health and safety"; and effects that would violate laws protecting the environment. *Id.* "Effects" are defined in the 2020 CEQ regulations as "changes to the human environment from the proposed action or alternatives that are reasonably foreseeable and have a reasonably close causal relationship to" those actions. This includes effects "that occur in the same time and place" as the proposed and alternative actions, as well as effects that are "later in time or farther removed." However, a "'but for' causal relationship is insufficient to make an agency responsible for a particular effect under NEPA." *Id.*

The current definition of "effects" builds on but also departs from the 1978 regulations in several ways. First, CEQ revised the definition of "effects" by eliminating references to "direct" and "indirect" effects, which are not terms used in NEPA. Second, the definition seeks to clarify

that agencies need not analyze effects of their proposed actions that are beyond their control. Third, CEQ eliminated the requirement that agencies consider the cumulative impacts from the proposed activity and related actions. Finally, the 2020 CEQ regulations require an "agency's analysis of effects to be consistent" with the regulations' revised definition of "effects," which appears to limit the effects that an agency may consider. *Id*. § 1508.1(g)(3).

By eliminating references to "direct," "indirect," and "cumulative" impacts, CEQ's revised definition of "effects" could alter how agencies consider the climate change effects of their proposed actions. Various courts have held that an agency's NEPA review should consider the "reasonably foreseeable" direct, indirect, and cumulative effects from the proposed action's greenhouse gas emissions. In the 2020 rulemaking, however, CEQ stated that agencies may characterize "[t]rends determined to be a consequence of climate change . . . in the baseline analysis of the affected environment rather than as an effect of the action." 85 Fed. Reg. at 43,331.

Environmental Impact Statements: Significant Impacts

For actions with significant impacts, NEPA requires federal agencies to prepare, "to the fullest extent possible," a "detailed statement" known as an environmental impact statement (EIS). 42 U.S.C. § 4332. In its EIS, an agency must assess (1) the environmental impacts of the proposal; (2) unavoidable adverse environmental effects; (3) alternatives to the proposed action; (4) the relationship between the short-term uses of the environment and maintenance of long-term productivity; and (5) any irretrievable resource commitments involved if the proposal is implemented. *Id*. To determine the EIS's scope, an agency must consider (1) connected or similar actions; (2) "a reasonable number" of alternatives to the proposed action (no action, other "reasonable" actions, and mitigation measures); and (3) effects. 40 C.F.R. §§ 1501.9(e), 1502.14. An agency must release its draft EIS for comment from other agencies and the public. 42 U.S.C. § 4332(2)(C). Under the 2020 regulations, public comments not submitted during the comment period are deemed forfeited and unexhausted and cannot be raised later in court. 40 C.F.R. § 1503.3(b).

A final EIS must respond to comments from agencies and the public by modifying the proposal, developing alternatives, or explaining why comments do not merit substantive replies or changes. *Id*. §§ 1503.4. The 2020 regulations also stipulate that a final EIS should be "proportional to potential environmental effects and project size," but no more than 150 pages, or 300 pages if unusually complex. *Id*. §§ 1502.2(c), 1502.7. Further, an EIS should be completed within two years unless the lead agency approves a longer time. *Id*. § 1502.10(b)(2). In some circumstances, an agency may also need to create a supplemental EIS after preparing (and issuing for public comment) a draft or final EIS if the agency makes "substantial changes" to its initial proposal or learns of "significant new circumstances or information" related to environmental concerns. *Id*. § 1502.9(d).

Once an agency reaches a final decision on the action it wishes to take (i.e., the proposed action or an alternative), it creates a record of it in a written statement called a Record of Decision (ROD). *Id*. § 1505.2. The ROD is issued at least 90 days after publishing a draft EIS or 30 days after issuing a final EIS. The 2020 regulations require the ROD to contain a statement certifying that the agency considered all alternatives, information, and analyses submitted during the NEPA process. *Id*. A certified EIS is "entitled to a presumption that the agency considered the submitted alternatives, information, and analysis . . . in its decision." *Id*.

Environmental Assessments: Unknown Impacts

For actions that may have some impacts—but potentially not *significant* impacts—agencies must prepare an environmental assessment (EA). An EA is an initial analysis of an action's potential to have significant environmental effects. While preparing an EA, an agency must consult with other federal and state agencies with jurisdiction over a proposal's impacts. Agencies also involve the public in preparing EAs "to the extent practicable." *Id*. § 1501.5(e). An EA may lead to a decision to complete an EIS or to a finding of no significant impact (FONSI). The 2020 regulations set presumptive page and time limits for EAs: 75 pages, excluding appendixes, within one year. *Id*. §§ 1501.5, 1501.10.

Categorical Exclusions: No Significant Impacts

Under the 1978 regulations, CEQ allowed an agency to issue regulations identifying "categorical exclusions" (CEs)—actions that do not individually or cumulatively have significant effects on the human environment. These CEs may be excluded from further NEPA analysis unless an agency identifies extraordinary circumstances for a specific project that indicate the proposed action may have significant impacts. *Id*. § 1501.4. The 2020 CEQ regulations extend agencies' ability to address projects without significant impacts. Specifically, these regulations permit an agency to adopt another agency's CE determination if the proposed action is "substantially the same" as the action that the other agency already determined was categorically excluded from NEPA. *Id*. § 1506.3(d).

Judicial Review of NEPA Compliance

NEPA does not expressly provide for judicial review. Thus, legal challenges to an agency's NEPA compliance are subject to federal judicial review under the Administrative Procedure Act. 5 U.S.C. §§ 551 *et seq*. When reviewing an agency's final action, the court's role is "to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious." Balt. Gas & Elec. Co. v. NRDC, 462 U.S. 87, 97–98 (1983). The 2020 CEQ regulations address the types of agency actions that may be subject to judicial review and CEQ's intended remedies for NEPA noncompliance. 40 C.F.R. § 1500.3.

Nina M. Hart, Legislative Attorney
Linda Tsang, Legislative Attorney

IF11549

Disclaimer