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January 8, 2021

NAEP Comments on Proposed Rulemaking – Update to the Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act – Docket CEQ-2019-0003

To: CEQ Agency Review Team

The National Association of Environmental Professionals (NAEP) is an interdisciplinary organization dedicated to developing the highest standards of ethics and proficiency in the environmental profession. We represent more than 5,000 members and affiliated environmental professionals working across the country in the public and private sectors. The National Environmental Policy Act (NEPA) has been a major focus area of the NAEP for many years and we have worked closely with the Council on Environmental Quality (CEQ) and other agencies and organizations to promote efficient and effective compliance with NEPA. We appreciate the opportunity to provide you the attached comments on CEQ's July 16, 2020 update to the regulations for implementing the procedural requirements of NEPA (40 CFR 1500-1518).

These comments were prepared by an informal group of NAEP members who have over a century and a half of collective NEPA experience. Group members included Betty Dehoney, NAEP President; Michelle Rau, NAEP Board Member and Secretary; Chuck Nicholson, NAEP Board Member and NEPA Practice Chair; Mike Mayer, Biological Resources Practice Chair; and Nic Frederick, NAEP Board Member and Water and Coastal Resources Practice Chair.

Thank you for consideration of these comments. Should you have any questions about our comments, please contact Betty Dehoney at betty@dehoney.net /619.540.3152.

Sincerely,

Betty Dehoney

Betty Dehoney, CEP, PMP, ENV SP
President, NAEP

January 8, 2021

To: CEQ Agency Review Team
From: National Association of Environmental Professionals
Subject: NAEP Comments on Proposed Rulemaking – Update to the Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act – Docket CEQ-2019-0003

Introduction

It is too soon to tell how the revised NEPA implementing regulation will affect compliance with NEPA, as well as the environmental planning profession. Some of the revisions are based on decades of case law and are long overdue; however, there are other revisions that cause ambiguity and could lead to vulnerabilities in NEPA documents. It is our experience as consultants, that agencies are interpreting the regulations differently, leading to confusion and inconsistency within and between agencies and departments. Increased uncertainty as to the defensibility of NEPA documents prepared in adherence to the revised regulations could result in a flurry of litigation.

The expected effects of the revised regulations on NEPA analysis, as stated in the background section of the July 16, 2020 *Federal Register* notice, cannot be quantified at this time. Some of the anecdotal conversations including analysis that would have been typically have been provided by previous guidance and comply with formatting and schedule requirements as dictated by the current CEQ documents. Many agencies lack guidance and practitioners are trying to keep documents progressing. With the potential effects of litigation,[1] the safest approach is to retain the previous environmental documentation standards, even if the previously required information is now part of the appendices. This would hopefully result in the environmental document surviving a court challenge.

As far as the potential time savings, there is insufficient information at this time as to determine whether there has been or will be an overall decrease in the time it takes to complete the environmental review. NAEP is in the process of generating a letter to CEQ requesting the establishment of a NEPA Metrics to enable a robust determination of the effectiveness of the revised regulations.

Many practitioners have also voiced a concern that the limited public input, reduced data collection, and changes in effects analyses and alternatives will result in increased litigation. This

[1] Alaska Cmty. Action on Toxics v. Council on Envtl. Quality, No. 3:20-cv-05199 (N.D. Cal. Filed July 29, 2020)

Wild Virginia v. Council on Envtl. Quality, No. 3:20-cv-00045 (W.D. Va. Filed July 29, 2020)

Envt. Justice Health All. v. Council on Envtl. Quality, No. 1:20-cv-06143 (S.D.N.Y. filed Aug. 6, 2020)

State of California v. Council on Envtl. Quality, No. 3:20-cv-06057 (N.D. Cal. filed Aug. 28, 2020)

creates more uncertainty and will likely result in analyses being done in two methods (one based upon past guidance and one based upon current guidance) to hedge our bets if you go to court.

This review was completed within a few days by a small subset of NEPA practitioners. From NAEP. Several topics warrant inclusion of additional technical subject matter experts and time to provide more substantive information.

This document is not intended to represent the views of NAEP, organizations with which any of the preparers are affiliated or necessarily all members of the preparers. No active federal employee participated in the preparation of the information contained herein.

Better Defined Yet Flexible Public Engagement

The guidance now provided in the 40 CFR 1501.9, *Scoping* is primarily a welcome addition, as it helps to provide increased fidelity regarding stakeholder identification, Notice of Intent (NOI) requirements, and the use of technology during public engagement. It still maintains the original purpose of the public engagement process, which to inform the public and identify significant concerns, while eliminating insignificant concerns. The following list highlights the specific provisions, which will help to serve NEPA practitioners:

*Timing of Scoping***.** 1501.9(a),9a, *General,* now provides increased flexibility on starting the scoping process. Procedures facilitating scoping activities prior to the issuance of the NOI have been in place for some time for many transportation and some water resource actions and have generally worked well. The revised regulations promote increased early scoping for other actions. Previously, the start of public scoping for most EISs generally began at the issuance of the NOI.

While this provided a clear benchmark, it often meant that stakeholder involvement would occur late in the planning process; or alternatively, the NOI would be issued early in the planning process before many formal decisions were made and could lead to an optic of a “30-year EIS”. This change is welcome because it alleviates much of the pressure in terms of when to start talking to the public and allows for effective communication prior to the official “start of NEPA”; which is now defined in 1501.9(d), as when the agency has determined an EIS is necessary. It should be noted; however, that how to properly document early scoping is a reoccurring concern among practitioners, especially in light of the requirement to certify that public input on “Alternatives, Impacts and Information” were considered in the ROD.

Stakeholder Identification and Recognition of Tribes. 1501.9(b),9b, *Invite cooperating and participating agencies,* now provides improved definitions for who needs to be invited to the NEPA process. The use of the word “likely affected” allows for the inclusion of more stakeholder groups, and the inclusion of the word “Tribal” along with Federal, State and Local agencies and governments is a welcome addition. It has long been a best practice during the NEPA process to include these groups; however, this clarification is prudent as it encourages increased engagement and inclusion by the public, Native Americans and affected agencies.

Recognition of Current Technologies. 1501.9(c), *Scoping Outreach*, opens the door to allowing the use of current technologies during the public engagement process. There has been a movement in the last few years to employ web-based platforms in public engagement and the COVID-19 pandemic has exacerbated this trend. Web-based tools, such as virtual meetings, can help to increase the number of people engaged in a project, and are embraced by many members of the public. However, caution must be exercised here, as the sole use of web-based platforms can exclude many portions of the public including the elderly and low-income individual with limited access to computers.

Early input from the public is needed to ensure informed decision-making, identify alternatives, and address pertinent topical issues in the environmental documents. Unless pre-scoping is conducted in a manner that meets the objectives vs check-the-box, it will likely result in the need for recirculation, could incur delays when new alternatives and/or topics are identified and could lead to significant project needs being addressed late in the process. Public stakeholders often have "fatigue" when large scale projects that have been on the books for years are repeatedly stalled and restarted. In addition, the public often becomes aware of a project only after the formal NOI process is initiated (i.e., when the project is "real"). The concept schedule presented by CEQ provides for the DEIS to be completed in 14 months. This does not allow time for project description to be prepared for the alternatives, baseline studies to be conducted, effects analyses (modeling) and mitigation planning for the alternatives. With the requirement that permits must be issued very quickly after the EIS is completed, the proponent may need to exercise caution and be prepared to implement the alternatives, if the alternative can meet their purpose and need. Input at the relatively late in the game point of issuance of the NOI may require costly new planning/design, alternatives (including additional resource surveys), etc.

Another item consideration is that the stakeholders often suggest that it is their opinion that the input from the public is a sham and a waste of time. "It is a done deal" is a common comment in public meetings. This modification to the process only gives more weight to the fact that many agencies will use this tactic to avoid a more appropriate stakeholder process.

Recommendation: Maintain the emphasis in increased stakeholder engagement and flexibility in the timing of scoping; however, ensure steps are made to allow for marginalized populations, with limited access to computer technology. Additionally, any revisions to the regulations should continue the emphasis on identification of significant concerns, while eliminating insignificant issues.

Expanded Use of Categorical Exemptions

The addition of the ability of an agency to adopt another agency's categorical exclusion determination in 1506.3(d) is a welcome change and should facilitate the environmental review process for actions involving multiple agencies. As stated in 1507.3(f)(5), agency NEPA procedures should clearly define the process of using other agencies' categorical exclusions, including consideration of agency-specific extraordinary circumstances, consultation procedures, and public involvement requirements.

Mitigated FONSI

NAEP supports the use of a Mitigated FONSI with the express understanding that the mitigation measures are required to be incorporated. Commitments to mandate or implement mitigation measures are not often made during the DEIS process. To adopt a Mitigated FONSI without assurances that the mitigation measures are going to be incorporated would potentially allow an agency to adopt a Mitigated FONSI whereas the project implementation would have resulted in significant effects without mitigation. We are concerned that the new requirement in 1501.6(c) will be interpreted as discouraging mitigation measures that are not required for compliance with other environmental statutes and applicable to resources that are not otherwise regulated. Most agencies probably have this authority under their enabling legislation and should not be discouraged from using it.

Emergency

NAEP appreciates the September 2020 CEQ guidance provided on emergency circumstances under 40 CFR 1506.12, which provides a more direct outline for Emergency Alternative Arrangements. In particular, the clarification that alternative arrangements must still comply with section 102(2)(C)'s requirement for a ''detailed statement,'' is welcome. CEQ's guidance was developed to allow agencies to respond to emergency circumstances including natural disasters, catastrophic wildfires, threats to species and their habitat, economic crisis, infectious disease outbreaks, potential dam failures, and infestations. NAEP recognizes the value in the guidance provided because of the complexity of emergencies. CEQ's commitment to alternative means for NEPA compliance under these circumstances should be applauded. Emergency circumstances require nuance and a broader understanding of the situation without coming at the expense of NEPA compliance. CEQ's guidance provides the appropriate acknowledgement of these circumstances.

NAEP does caution that inclusion of the term “economic crisis” as an emergency could have unintended consequences. The term directly conflicts with the requirements set in 1506.12, which limits alternative arrangements to actions necessary to control the immediate impacts of the emergency. By their nature, economic crises differ greatly from the more site-specific emergencies that have been the subject of the previous use of alternative arrangements. Economic disasters tend to be wide-spread, long-lasting, and not amenable to the “quick-fix” actions authorized under alternative arrangements. This could lead to a mischaracterization of the crisis in an attempt to minimize NEPA requirements for a proposed action. Because recovery from an economic disaster often does not have a well-defined end point, its use of alternative arrangements subject to manipulation. The guidance CEQ has provided, as previously stated, does mitigate these concerns to some degree but could be further clarified.

Developing Alternative Arrangements in relation to a declaration of an infectious disease could streamline development of a proposed action and could ensure individuals are exposed to infected individuals during the implementation of that action, particularly when dealing with a long-term emergency with a novel disease, such as COVID-19. In these circumstances, the emergency would be exacerbated by the approach. The outbreak could also be misappropriated in much the same way as an economic crisis.

Recommendation: Consider whether to include the term “economic crisis” as an emergency circumstance. Additionally, consider further clarifying Alternative Arrangements under infectious disease outbreak.

Recognition of Decisionmaker/Public Attention Bandwidth

The review of an EIS or an EA that runs from hundreds to thousands of pages exceeds the attention span of the general public and agencies. The concept of reducing encyclopedic (often with boilerplate text, excessive detail, and lengthy analyses of non-significant topics) appears to be a good goal. There are some concerns related to legal defensibility associated with complex projects and some potential recommendations in the following sections.

Involving "Senior Agency Officials" in the approval of EIS and EA processes and "certification" required for EISs.

a. The definition of a "Senior Agency Official" in the revised regulations adds confusion as the Senior Agency Official is defined as an official of Assistant Secretary status or higher. The position of Assistant Secretary is a department-level position. Therefore, it is unclear whether the actual approval is elevated out of the Agency decision-making and placed with someone at the Department level. By raising the level of approval to that of a Department official, CEQ has made it even more difficult to achieve the time limits associated with the preparation of an EA or EIS.

For example, lengthy or delayed Senior Agency and legal reviews of EISs was likely not considered in determining the time necessary to complete and EIS process. Access in a timely manner, ability to brief and resolve important issues becomes less feasible in a timely manner. In addition, there may be additional needs to develop new materials like briefing statements that must also go through agency review. If the intent of the revised NEPA regulations was to help streamline and speed up the EIS and EA processes, adding another layer of politically appointed, Department level review eliminates gains in streamlining and further reduces the efficacy of considering the impacts of federal actions.

Since the issuance EO 13807 and prior to the release of the revised NEPA regulations, we have seen Departments reduce the timeframes in half. For example, Secretarial Order 3355 requires DOI-agencies to complete the EIS process within 1 year and the EA process within 6 months. These types of changes have further reduced the effectiveness of NEPA and is in sharp contrast to the informed decision making envisioned by the drafters of NEPA.

b. Certification

The inclusion of the new certification requirement seems unnecessary. In the past, the signature of the agency decision-maker in the Record of Decision or Finding of No Significant Impact served this purpose. Therefore, the intent of this provision is unclear, unless it an attempt to further raise decision-making authority out of the agencies' purview and place that responsibility at the Department level by requiring a Senior Agency Official to provide the certification. As described above, this additional requirement may further frustrate an agency's ability to meet the streamlined time limits.

Recommendation: Stop the time clock while decision making occurs.

Logistics involved in Senior Agency Official "certification" and the time necessary for that level of review given the prescribed EIS and EA timeframes.

Access in a timely manner, ability to brief of important issues. It is not feasible for them to be informed in that time period. Vacations, addition information (modeling), white papers may need to be prepared.

Elimination of Cumulative Assessment despite decades of case law

The preamble of the final rule describes the reasons for eliminating the definition of cumulative impact. Supposedly there were "many commenters" suggesting that it creates confusion, has been interpreted expansively resulting in excessive documentation about speculative effects, and actioner's struggle with how to conduct the analysis. These comments further suggest that it does not serve the purpose of informed decision-making.

These assertions—that assessing cumulative impacts and indirect effects has resulted in excessive documentation and diverted agency attention from ‘more important’ environmental problems Env. Justice Health Alliance v. CEQ—are factually unsupported, unexplained, and legally insufficient to justify such a substantial change in CEQ’s longstanding policy (See the complaint filed in Env. Justice Health Alliance v. CEQ, Case No. 20-cv-6143 (S.D. N.Y, 2020)).

Others have suggested similar rationales as to why the elimination is unlawful. For example, in the complaint filed under Wild Virginia v CEQ in the District Court for the Western District of Virginia, plaintiff’s Ninth Claim for Relief – Violation of the Administrative Procedures Act: Failure to Demonstrate That the New Policy is Consistent With the Governing Statute describe their analysis as to the inconsistency of the changed regulation with the underlying law. They state that CEQ’s new rule is inconsistent with the NEPA Statute by: unlawfully altering the definition of “effects” by removing the definitions of indirect and cumulative effects; mandating that a “but for” causal relationship is insufficient to make an agency responsible for the effect; requiring that effects should not be considered significant “if they are remote in time, geographically remote, or the product of a lengthy causal chain; stating that effects do not include “effects that the agency has no ability to prevent due to its limited statutory authority or would occur regardless of the proposed action.

The Final Rule unlawfully reverses course on the longstanding position that if a proposed federal action has a significant impact, including a significant cumulative impact, it is a federal action significantly affecting the human environment. The rule now requires that agencies first make a determination of whether an action is a “major federal action,” and then a separate determination of the action’s significance. This illegally allows “non-major” federal actions to indiscriminately inflict significant harms on the human environment with no opportunity for appropriate NEPA review.

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Based on the intent of the drafter’s of NEPA, the law was intended to not only look at the direct impacts federal action, but also step back and look at the bigger picture of unintended impacts, either indirect or cumulative. This bigger picture view allows the government to make the most-informed decision it can. Congresses declaration of our national environmental policy in 42 USC § 4331 makes it the responsibility of the federal government to “use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.” However, as a result of the development of the initial implementing regulations that responsibility fell to the individual agency when considering taking or approving actions. The confusion in part is over an individual agency’s ability to address cumulative impacts when it lacks the jurisdiction to do so, though the federal government may be able to address those impacts. Regardless of the delegation of responsibility, the regulation still required a big picture review of direct, indirect, and cumulative impacts. Removing the requirement to evaluate cumulative impacts frustrates congressional intent.

Climate Change

Climate change covers a broad spectrum of resources and requires a detailed understanding of the trends referenced in the 2020 Final Rule. As such, climate change can be difficult to conceptualize and therefore can be misinterpreted by the general public. The suggestion that the Final Rule does not preclude the consideration of impacts of a proposed action on climate change does not meet the burden of expectation placed on projects by the general public. Therefore, NAEP advocates for policy-based solutions to addressing climate change beyond the 2020 Final Rule. This would require a focused review of climate change policy. Given the complexities of climate change, it would be difficult to determine impacts of a proposed action on climate change without an approach that helps determine significance.

Climate change is often associated with cumulative effects, which is understandable. However, NAEP advocates against incorporating cumulative effects, including those associated with climate change, into the affected environment for a project because it could undermine the impacts of the proposed action on climate change. As written, the Final Rule appears to suggest that the addressing climate concerns would be optional, which in some cases could open agencies to litigation. Therefore, NAEP suggests a focused review of climate change guidance per the previous paragraph to assist agencies in determining the relevance of climate change on their proposed actions.

Similarly, greenhouse gas (GHG) emissions are a difficult issue for individual projects to assess and mitigate. A policy to reduce GHGs must be created at a national level. This would allow projects to be assessed for whether they are consistent with applicable policies. Some states have or are planning GHG standards that help applicable impact analyses. NAEP recommends revisiting GHG guidelines in order to develop a more robust GHG policy.

Alternatives

The revised guidance makes major changes to the processes of determining the alternatives analyzed in detail in EAs and EISs and describing the impacts of those alternatives.

See our comments related to the definition of impacts, and particularly cumulative impacts, elsewhere in this letter. In regard to describing the impacts of alternatives, we are particularly concerned about the new provision in 1502.23 that states that agencies are not required to undertake new scientific and technical research to inform their analysis. This can be interpreted as authorizing agencies to rely on previously existing data sources to describe the existing environment and anticipated impacts. This will result in inadequate analyses of many proposed actions for which site-specific field studies, as well as modeling studies, are otherwise essential for informed decisionmaking. Such studies are reasonably defined as part of “new scientific and technical research.”

Several of our members and attendees at our recent NEPA training sessions have questioned the changes to 1502.14 on alternatives and the associated new definition of reasonable alternative. These concerns include the development of excessively narrow purpose and need statements and the implications of developing alternatives to address the “unresolved conflicts concerning alternative uses” provision of NEPA. We hope to discuss this further.

Recommendation: Revise 1502.23 to state that research necessary to adequately define the impacts of the proposed action and alternatives must be conducted unless specifically excluded under 1502.21.

Conflicts Between Section 508 and Page Counts

NAEP welcomes the current emphasis on producing easier to read and more visually appealing EAs and EISs; however, there is a potential conflict between this goal and compliance with ADA Section 508, which requires very specific formatting to allow for accessibility. For example, the current revisions encourage the use of graphics and tables, by excluding these items from a document's page count. However, heavy reliance on graphics can prove troublesome in the 508 process, which requires explanation text to allow the seeing impaired to understand the image. While not overly burdensome, this would also add time to document development, particularly for supplemental documentation and surveys required for NEPA documents (such as Waters of the US reports). The use of graphics are indeed a valuable tool in NEPA; however, it needs to be recognized that NEPA documents are required to be 508 compliant, which does eliminate many efficiencies in relying in a graphic heavy approach.

Page length does not equate to schedule or cost saving. Concerns of adequacy of analyses particularly with complex analyses (water supply) or numerous alternatives drive the document length. The analyses still must be completed to inform the lead agency as well as permitting entities (Endangered Species Act, Clean Water Act, Air Quality, etc.) to complete the process. These analyses are now being put in the appendices. Some concepts are identified in the recommendations to recognize the benefits of a shorter document and the need to substantiate the findings for legal sufficiency.

Recommendation: The NEPA regulations should recognize accessibility requirements, and help practitioners navigate the sometimes-conflicting objectives of readability and accessibility.

For projects with substantial controversy, complex analyses or numerous alternatives consider having the DEIS be comprised of an Executive Summary (less than 300 pages) but a section that would have technical summaries providing substantial evidence to support the conclusion. Typically, technical reports are prepared for many of the technical topics (e.g., air quality, biology, cultural resources….). These reports are very technical with lots of boilerplate information. A summary of the technical report is often included in most EA/EISs with the technical report as an appendix. If these summary reports were attached to the EA/EIS for the topics that need this information to substantiate the findings this would reduce concerns related to legal adequacy of the EA/EIS.

One would then be concerned with the overly "conservative" agency that would want each topic to have the same level of analysis which would result in having encyclopedic documents. California has a process that helps substantiate that certain topics are not significantly affected thus not requiring an extended discussion in the environmental document (Focused EIR in CEQA). The process uses an Initial Study to allow the DEIR to focus on the potentially significant topic. Using a similar concept could be used and eliminate topics (with factual basis) in a succinct report. This could be part of the supplemental information that is distributed with the Executive Summary.

Hypothetical question for consideration- does the NEPA process need to discuss beneficial effects for topics that do not have a negative impact?

Limitation on Public Comments

This another much-discussed topic, particularly 1500.3(b), within NAEP and attendees at NEPA training sessions. It has long been the practice of many agencies to consider comments received outside of formal comment periods. Such comments may not get the same response as other comments, but we do not think dismissing them out of hand is a good practice.

We also question the 1503.3 requirement that comments must be as specific as possible and limited to the adequacy of the statement and/or the merits of the alternatives. In our experience working with numerous agencies, more general comments, including those that are little more than a statement of support or opposition to the proposal are useful to decisionmakers. It has also been a standard practice for many agencies to tally such opinions in the responding to comments on a draft EA or EIS.

State and Federal Joint Documents

Anecdotally, in some states agencies and consultants are pursuing separate (state and federal) environmental processes. The state agencies are concerned about the legal adequacy and ability to complete their process considering the federal mandate. This separation has happened on projects that had already initiated a joint public scoping process. Separate environmental review process is costly and also not going to save any time. There is also the potential of one agency selecting an alternative that is not consistent with the other agency. When the projects are modified during the process (avoid, minimize adverse effects) and potential different mitigation is required based upon different state and federal criteria) the environmental analysis and conclusions may be different. If these differences are of a substantial magnitude, it may be necessary to recirculate one or both documents to create a consensus assessment. The public can be confused as to the processes and why two agencies are on two different timelines and displeased to be tracking and attending separate meetings.

Recommendation. Eliminate page and time requirements for projects being reviewed under a joint state and federal environmental document/process.

Use of Technical Reports/Data not Included in the Main Environmental Document

The revised NEPA regulations prescribe page limits for EISs and EAs of 150 pages and 75 pages, respectively. However, for an agency to fully understand the potential impacts of a federal action, modelling, research, and the development of technical reports may be required, especially for actions that could result in significant impacts on the human environment. Not only is this information necessary to make an informed decision, but also required to support the decision-making process. The revised regulations should be more specific on how this supplemental information is made available.

If the EIS and decision is based on the information in the technical reports, those reports should also be available for public review. This allows full transparency and the generation of helpful substantive public comments to improve the decision-making process and remedy issues of methodology, false assumptions, and impact analyses. Although some agencies are making these documents available for review, others are not.

When the reports and files are not made publicly available, interested parties are forced to submit FOIA requires to access the information. These requests can be labor and time intensive. It also suggests that the government may not be comfortable sharing the information. No all information would be available, as privileged information would remain privileged. Additionally, there is a question as to whether the courts will concur that reliance on these resources is acceptable or find that the public did not have opportunity to review the information and require recirculation.

Federal Action

The revised regulations seem to attempt to codify the “small federal handle” test in redefining a “Federal action.” However, the clarity intended may result in additional confusion as it relates to

non-federal projects requiring a federal permit. Agencies have struggled with when to “federalize” a non-federal project based on the agency’s involvement and decision-making authority. Recently, we have seen how the issuance of a permit, in which and EA is completed, could stop an entire project from going forward (See Standing Rock Sioux Tribe v. US Army Corps of Engineers). This case also revealed an approach of segmentation of issuing multiple federal permits for a project but categorizing them as individual actions. A similar approach was recently pursued on the Keystone pipeline project in terms of the USACE permitting scope. When these linear non-federal projects are initially planned, it is unlikely that a federal agency would have significant decision-making authority unless the project crosses federal resources. However, the approach of building much of the non-federal project prior to receiving key federal permits increases the federal control or impact on the non-federal project. These examples highlight the issues of how and when to define a federal action, which the revised regulations have not clarified.

One Federal Decision

In 2017, the president issued Executive Order (EO) 13807, “Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure.” This order seeks to reduce delays in environmental review and permitting for infrastructure projects that require an Environmental Impact Statement (EIS) under the National Environmental Policy Act (NEPA).

The revised NEPA regulations attempt to codify many portions of this executive order and make them generally applicable to all federal actions. On their surface, they seem reasonable and coordinated; however, they fail to take into consideration workload, staffing, and funding levels in agency offices around the country. Although there is a lot of merit in trying to reduce the time it takes to prepare an EIS and receive the necessary permits and authorizations the extent of inclusion of cooperating agencies may be difficult. Project have been highlighted where it has worked well, but those projects had dedicated agency staff and may not represent expectations for projects not elevated.

Permits and authorizations associated with the CWA, ESA, and NHPA can and have been successfully integrated with the NEPA process. However, the major complaint has been the time it takes to complete the process. The NEPA process has not significantly changed in the last two decades. What have changed are the number of proposed projects, staff and funding availability, and legal review associated with controversial projects.

Requiring the issuance of “One Decision,” cooperating agencies issuing permits could require more mitigation being required upfront in the EIS process than has normally been required. This could result in the possible conflation of permit conditions and NEPA mitigation. It may also lead to the development of conditional permits.