

Applying the New CEQ NEPA Regulations

Welcome to Today's Webinar!

Applying the New CEQ NEPA Regulations

Moderated by:

Chuck Nicholson Senior NEPA Compliance Specialist, HDR



Applying the New CEQ NEPA Regulations



Betty Dehoney CEP, PMP, ENV SP NAEP President

- Owner of Dehoney Consulting Inc.
- Over 30 years of experience delivering solutions to navigating the complex world of environmental regulations
- Recipient of AEP Outstanding Contribution to the Environmental Profession
- Board of Trustees, ABCEP
- M.S. in Biology, Northern Arizona University



Contact: betty@dehoney.net

NAEP member benefits

- Free access to NAEP publications
- Discounted conference registration
- Discounts on webinars, educational courses, seminars, and workshops
- Access to NEPA archives and other environmental reports
- Career Center (post, share, and find jobs)
- Member directory access
- More networking opportunities

Save the Dates

- Monday, October 5, 2020
 - APU Webinar: World Habitat Day -- Quality of the Human Environment and Green Structure
- Thursday, October 8, 2020
 - NAEP Webinar: Greenhouse Gas Emissions Thresholds A Cautionary Tale from California
- Wednesday, November 18, 2020
 - APU Webinar: GIS Day -- Spatial Analysis in Environmental Planning
- Thursday, November 19, 2020
 - NAEP/ACRA Webinar on NHPA Section 106 Compliance
- Wednesday, December 9, 2020
 - Health Impact Analysis in Relation to Environmental Justice Issues
- Various dates: Advanced NEPA Workshops

See www.naep.org for details



Applying the New CEQ NEPA Regulations

Ron Deverman

Vice President/National Environmental Planning Leader, STV Inc.

- STV Vice President/National Environmental Planning Leader
- 35 years-experience Managing NEPA Transportation Projects
- Past President of NAEP NAEP Fellow; Poet and Author
- Chair, NAEP's Leadership Development Initiative
- Former Chair, NAEP/CEQ pilot program for NEPA
 innovation
- Adjunct Masters Professor at Northwestern



Contact: Ron.Deverman@stvinc.com



Applying the New CEQ NEPA Regulations

Michael Drummond

Director, Environmental Process and Policy Practice, WSPUSA

- Director, Environmental Process and Policy Practice within WSP USA's Advisory Services
- Provides strategic advice to infrastructure development clients on successfully navigating the federal permitting and approval process
- Previously Deputy Associate Director for NEPA at CEQ
- While at CEQ:
 - Helped draft the revised NEPA regulations
 - Led development of first government-wide reports on timelines for completing environmental studies
 - Led development of the Unified Federal Review
 process
- Earned J.D. from University of Washington School of Law and B.A from Evergreen State College



Contact: Michael.Drummond@wsp.com



Applying the New CEQ NEPA Regulations

P. E. Hudson

Counsel, Department of the Navy

- Federal Attorney for the Department of the Navy Office of General Counsel, Ventura, CA
- Practice includes NEPA and environmental law and the Navy's environmental and NEPA training portfolio
- NAEP member, past co-author of the NEPA BPP for EAs CEQ Pilot Study
- NAEP President's Service Award recipient, 2015 and 2019
- Former litigator in private practice
- Published author of 13 NEPA articles
- Retired Navy Commander (Oceanography)

**The views expressed are solely the personal views of the author and do not reflect those of the Department of the Navy, the Department of Defense, or the Federal government



Contact: pam.Hudson@navy.mil



Applying the New CEQ NEPA Regulations



- Principal at WSP USA, focusing on project and program management, tech analysis and review, policy development and review, and education and training on NEPA and CEQA compliance
- Nationally recognized leader in NEPA compliance with over 25 years of experience for wide range of public and private sector clients
- Frequently provides training and advice for NEPA and related compliance requirements through several organizations and universities
- Ph.D. in Environmental and Natural Resources Sociology from Utah State University, M.A. from University of Wyoming, B.S. from University of California, Santa Cruz



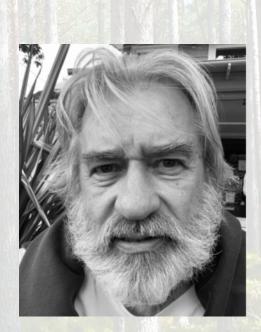
Contact: michael.d.smith@wsp.com



Applying the New CEQ NEPA Regulations



- Jonsultant
- 32+ years with the Federal government
- Frequent author and lecturer on NEPA and NEPA trainer for Northwest Environmental Training Center
- J.D. from Northwestern School of Law at Lewis & Clark College, B.A. and M.A. in biology from St. Cloud St. University, MN



Contact: oschmidt@att.net



Applying the New CEQ NEPA Regulations

Brian Boose

National Federal Environmental Planning Leader, AECOM

- Vice President: National Environmental Planning Technical Director at AECOM
- 32 years of experience in Environmental Planning consulting
- Nationally recognized subject matter expert in NEPA compliance for numerous Federal clients
- Managed and contributed to multiple complex environmental impact analyses, led numerous NEPA training courses, developed NEPA compliance handbooks and tools
- Currently leading AECOM's Innovation in Environmental Planning, including web-based "Digital NEPA" and Virtual Stakeholder Engagement technologies
- B.S. in Biological Sciences/Ecology from University of California at Davis



Contact: brian.boose@aecom.com



Applying the New CEQ NEPA Regulations

Jennifer Warf

National DoD Environmental Planning Leader, AECOM

- Associate Vice President, National Department of Defense Environmental Planning Leader at AECOM
- 19+ years of experience in Environmental Planning consulting
- Deeply experience in preparing NEPA documents for Army, Navy, Air Force, Marine Corps, National Guard Bureau, and USACE across the US and abroad
- Subject matter expert in DoD NEPA and natural resources management and permitting
- M.S. in Environmental Studies, B.A. in Zoology



Contact: jennifer.warf@aecom.com



Applying the New CEQ NEPA Regulations



Holly Reuter

Manager, The Clark Group LLC

- Environmental consultant and project manager at The Clark Group LLC
- 10+ years of experience implementing environmental law and policy for government agencies in the DC area
- Former law clerk at CEQ
- J.D. from University of Houston Law Center



Contact: hollyreuter@clarkgrouplic.com



Applying the New CEQ NEPA Regulations

Moderator: Chuck Nicholson Senior Environmental Scientist, HDR Inc.

- Senior Environmental Scientist/Planner, HDR Inc. with focus on NEPA policy and compliance
- Previously at Tennessee Valley Authority where most recently served as Senior NEPA Compliance Specialist
- NAEP Elected Board Member and Chair of NEPA Practice
- Ph.D. in Ecology & Evolutionary Biology, M.S. in Wildlife Management, B.S. in Wildlife & Fisheries



Contact: cpnicholson53@gmail.com



OUR NEPA YEARS: The Next Chapter

September 30, 2020

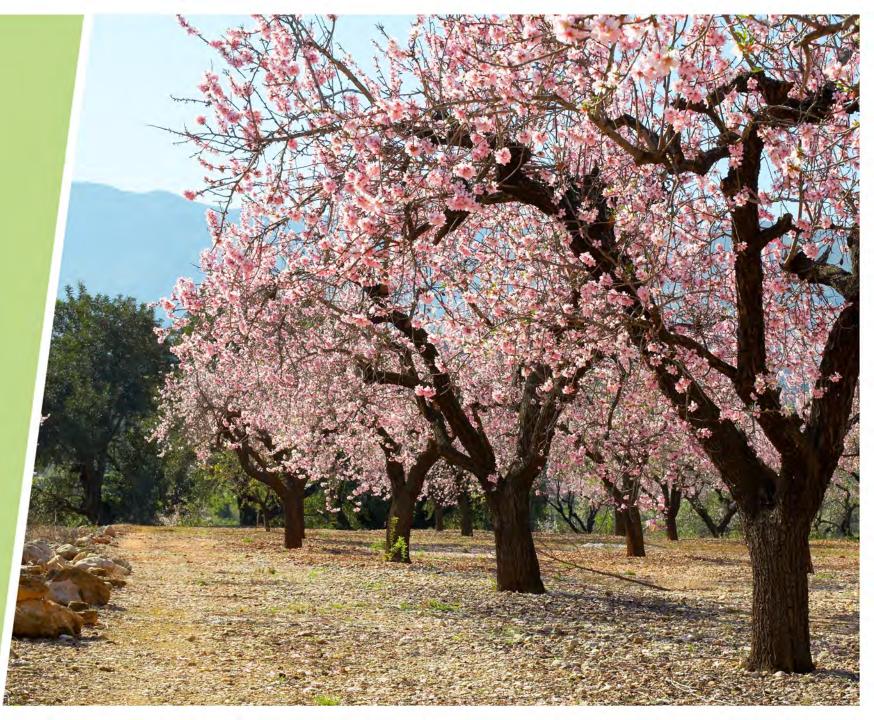
RON DEVERMAN, CEP

Vice President National Environmental Planning Leader



WHERE WE STARTED

- > The 1960's
- > Environmental Deterioration
- > Caldwell and Jackson
- NEPA Signed by President Nixon



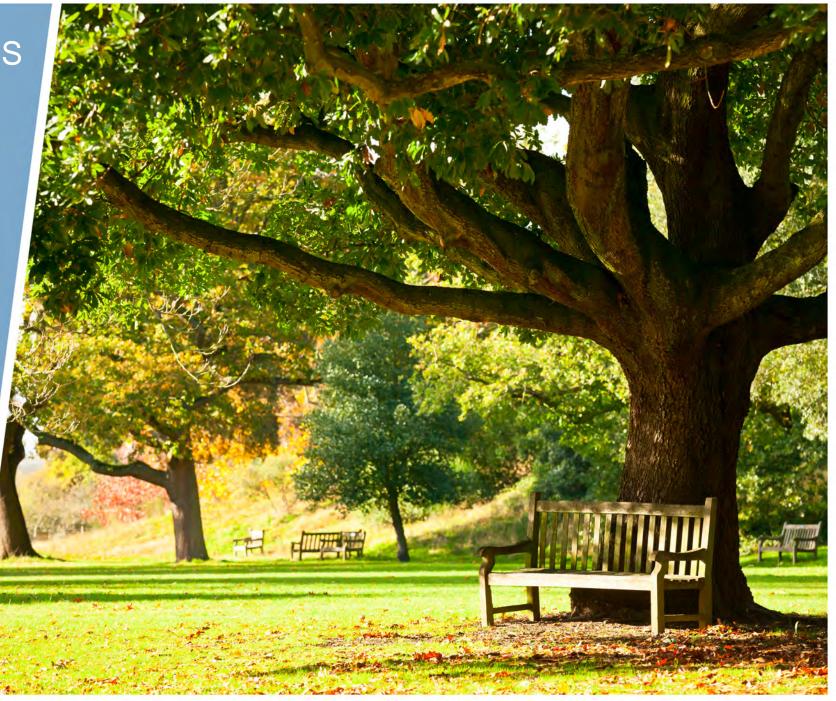
WHERE WE HAVE BEEN

- NEPA Implementing Regulations
- Considering the Effects of Our Actions
- Public Input into Informed Decision-Making



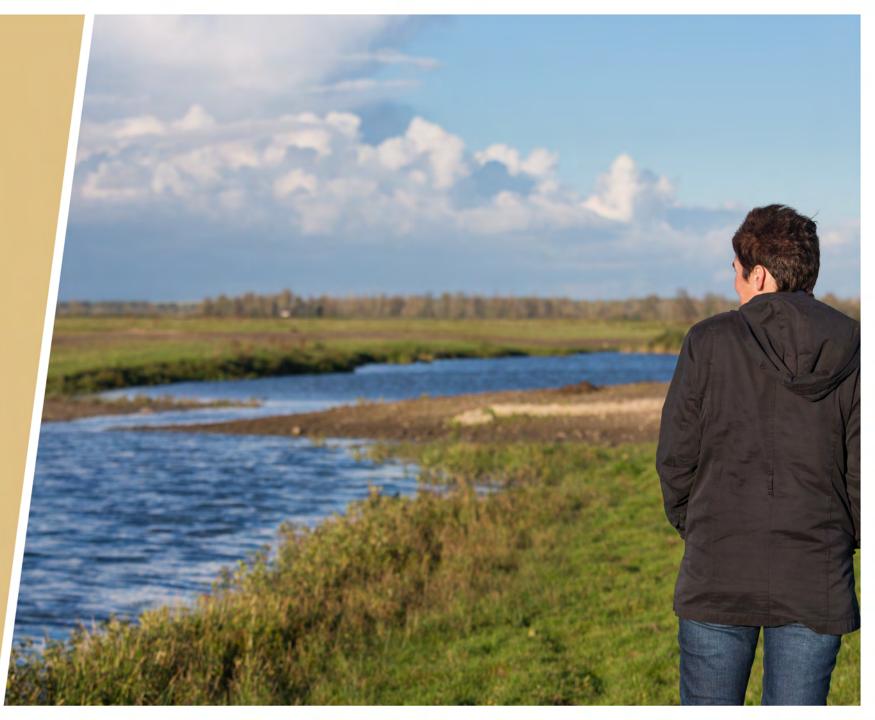
TRENDS OVER THE YEARS

- Increased Interagency Coordination
- > More Inclusive Assessments
- Empathic Community Engagement



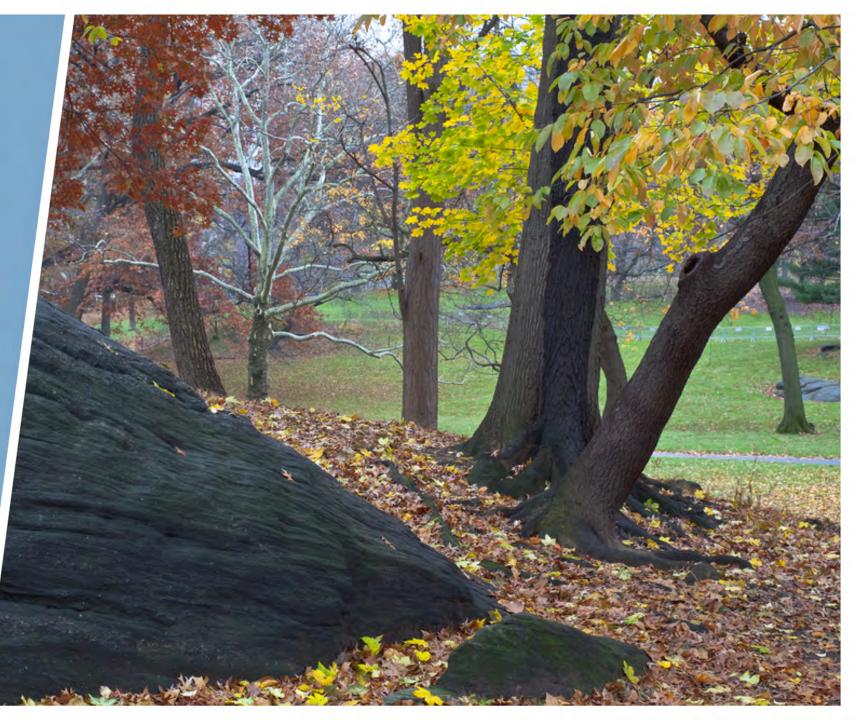
WHERE WE ARE NOW

- > Executive Order 13807
- > EIS Timelines and One Federal Decision
- NEPA Modernization 09-14-2020



THE GOOD AND HARD TRUTHS

- > Enhanced Public Involvement
- Simplified Environmental Effects



THE NEXT CHAPTER

- Planning for a Sustainable Future
- > Gathering the Harvest
- > Preserving the Quality of Place
- > Painting the Images of NEPA





THANK YOU

Ron.Deverman@stvinc.com www.stvinc.com



40 CFR § 1500.3 Exploring the "Council's Intention"

Presentation to the National Association of Environmental Professionals

September 30, 2020



§ 1500.3 Exploring the "Council's Intention"

- Overview of New § 1500.3 Provisions
- Alternatives, Information, and Analyses
- Judicial Review
- Remedies
- Severability

115	
-----	--

New Provisions within 40 CFR § 1500.3

- Mandate
- Exhaustion
 - Alternatives, Information, and Analyses (§ 1502.17)
 - Certification
 - o Presumption (§ 1505.2(b))
- Judicial Review
 - o Bond or Security Requirement
- Remedies
 - o Injunctive Relief
 - o Harmless Errors
- Severability

NSD

Alternatives, Information, and Analyses

Request for comments on "potential alternatives and impacts, and identification of any relevant information, studies, or analyses of any kind concerning impacts affecting the quality of the human environment" (§ 1500.3(b), 1501.9(d)(7)).

"The [DEIS] shall include a summary of all identified alternatives, information, and analyses submitted by State, Tribal, and local governments and other public commenters during the scoping process for consideration by the...agencies in developing the [EIS]." Append comments received to DEIS and invite comment on the summary (§ 1502.17(a)).

"The [FEIS] shall include a summary of all identified alternatives, information, and analyses submitted by State, Tribal, and local governments and other public commenters during the scoping process..." (§ 1502.17(b)).

Response to comments received on AIA section in DEIS.

NSD

NO

DEIS

FEIS

Alternatives, Information, and Analyses

RODD
 "Informed by the submitted [AIAs], including the summary in the [FEIS] and the agency's response to comments in the [FEIS] (§ 1503.4), together with any other material in the record that he or she determines relevant, the decision maker shall certify in the [ROD] that the agency considered all of the [AIAs], and objections submitted by States, Tribal, and local governments and other public commenters for consideration by the lead and cooperating agencies in developing the environmental impact statement (§ 1505.2(b))." (§ 1500.3(b)(4))
 Agency environmental impact statements certified in accordance with this section are entitled to a presumption that the agency has considered the submitted alternatives, information, and analyses, including the summary thereof, in the final environmental impact statement (§ 1502.17(b))." (§ 1505.2)

"Comments or objections of any kind not submitted, including those based on submitted alternatives, information, and analyses, shall be forfeited as unexhausted." ((§ 1500.3(b)(3) and 1503.3(b))

\\SD

Exhaustion

Judicial Review and Bonds (§ 1500.3(c))

"It is the Council's Intention that..."

- "...[J]udicial review...not occur before an agency has issued the record of decision..."
- "[A]ny allegation of noncompliance with NEPA and the regulations in this subchapter should be resolved as expeditiously as possible."

Bond Requirements

 "<u>Consistent with their organic statutes</u>, and as part of implementing the exhaustion provision...agencies may include an appropriate bond or other security requirement."

Remedies (§ 1500.3(d))

"It is the Council's Intention that ... "

- "...the regulations...create no presumption that violation of NEPA is a basis for injunctive relief or for a finding of irreparable harm."
- "...any actions to review, enjoin, stay, vacate, or otherwise alter an agency decision on the basis of an alleged NEPA violation be raised as soon as practicable after final agency action to avoid or minimize any costs to agencies, applicants, or any affected third parties."
- "...minor, nonsubstantive errors that have no effect on agency decision making shall be considered harmless and shall not invalidate an agency action."



Scoping the Proposal under the new Rule

Does the proposed *activity or decision* meet the threshold for a federal action? (40 C.F.R. 1501.1)

(1) is the activity/decision expressly exempt from NEPA under another statute;

(2) when compliance with NEPA clearly and fundamentally conflicts with the requirements of another statute;

(3) when compliance with NEPA would be inconsistent with Congressional intent expressed in another statute;

(4) is the activity/decision a major Federal action;**(compare 40 C.F.R. 1503.7);

(5) Is the activity/decision, in whole or in part, a non-discretionary action for which the agency lacks authority to consider environmental effects as part of its decision-making process; and

(6) is the activity/decision an action for which another statute's requirements serve the function of agency compliance with the Act.

Rule provides that an agency: make this determination on an individual basis; incorporate into its NEPA regs (see 40 C.F.R. 1503.7); seek assistance by the CEQ; or shall consult with other agencies for statutory concurrence.



Scoping the Proposal under the new Rule

Major Federal Action Defined (40 C.F.R. 1508.1(q))

Major Federal action or action means an activity or decision subject to Federal control and responsibility subject to the following:

(1) Major Federal action does not include the following activities or decisions:

- (i) Extraterritorial activities or decisions;
- (ii) Activities or decisions that are non-discretionary;
- (iii) No final agency action under the APA or other statute;
- (iv) Judicial or administrative civil or criminal enforcement actions;

(v) Funding assistance solely in the form of general revenue sharing funds with no Federal agency control over the subsequent use of such funds;

(vi) Non-Federal projects with minimal Federal funding or involvement where the agency does not exercise sufficient control and responsibility; and

(vii) Loans, loan guarantees, or other forms of financial assistance where the Federal agency does not exercise sufficient control and responsibility over the effects



Scoping the Proposal under the new Rule

Major Federal Action Defined (40 C.F.R. 1508.1(q))

(2) May include new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by Federal agencies; new or revised agency rules, regulations, plans, policies, or procedures; and legislative proposals (§ 1506)

(3) Major Federal actions tend to fall within one of the following categories:

(i) Adoption of official policy, such as rules, regulations, and interpretations adopted under the APA or other statutes; implementation of treaties and international conventions or agreements; formal documents establishing an agency's policies which will result in or substantially alter agency programs.

(ii) Adoption of formal plans.

(iii) Adoption of programs, such as a group of concerted actions to implement a specific policy or plan; systematic and connected agency decisions allocating agency resources to implement a specific statutory program or executive directive.

(iv) Approval of specific projects, such as construction or management activities located in a defined geographic area. Projects include actions approved by permit or other regulatory decision as well as Federal and federally assisted activities.

Still Being Reasonable? Changes to the Alternatives Consideration/ Analysis Requirements

Michael D. Smith Principal, WSP USA

Presentation to the National Association of Environmental Professionals

September 30, 2020

****\$D



Key Alternatives Section 1502.14 – OUT WITH THE OLD...

- Alternatives are "the heart of" the EIS
- Must "rigorously explore and objectively evaluate all reasonable alternatives"
- Should compare alternatives and impacts "thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public"
- Must "devote substantial treatment to each alternative considered in detail"
- Must include reasonable alternatives not within the jurisdiction of the lead agency

Key Alternatives Section 1502.14 – AND IN WITH THE NEW...

§ 1502.14 Alternatives including the proposed action.

Theis alternatives section should present is the heart of the environmental impacts of the proposed action and the alternatives in comparative form statement. Bbased on the information and analysis presented in the sections on the Aaffected Eenvironment (§ 1502.15) and the Eenvironmental Consequences (§ 1502.16), it should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public. In this section, agencies shall:

(a) Rigorously explore and objectively eEvaluate all reasonable alternatives to the proposed action, and, for alternatives that the agencywhich were eliminated from detailed study, briefly discuss the reasons for their having been eliminationed.

(b) Discussevote substantial treatment to each alternative considered in detail, including the proposed action, so that reviewers may evaluate their comparative merits.

(c) Include reasonable alternatives not within the jurisdiction of the lead agency.

(cd) Include the no action alternative of no action.

(de) Identify the agency's preferred alternative or alternatives, if one or more exists, in the draft statement and identify such alternative in the final statement unless another law prohibits the expression of such a preference.

(ef) Include appropriate mitigation measures not already included in the proposed action or alternatives.

(f) Limit their consideration to a reasonable number of alternatives.

How Many Alternatives are Required?

- CEQ's NPRM January 10, 2020
 - 85 FR 1702. What the presumptive number of alternatives should be (e.g., a maximum of three alternatives including the no action alternative).
- CEQ's Final Rule July 16, 2020
 - 85 FR 43331. CEQ did not receive sufficient information to establish a minimum, but adds a new paragraph (f) to the final rule to state that agencies shall limit their consideration to a reasonable number of alternatives. The revisions to the regulations to promote earlier solicitation of information and identification of alternatives, and timely submission of comments, will assist agencies in establishing how many alternatives are reasonable to consider and assessing whether any particular submitted alternative is reasonable to consider.

What is a Reasonable Alternative?

§1508.1(z). Reasonable alternatives means a reasonable range of alternatives that are technically and economically feasible, meet the purpose and need for the proposed action, and, where applicable, meet the goals of the applicant.

Purpose and Need

§1502.13. The statement shall briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including for the proposed action. When an agency's statutory duty is to review an application for authorization, the agency shall base the purpose and need on the goals of the applicant and the agency's authority.

NSD

Soliciting Information on Alternatives

- §1500.3(b) Exhaustion. (1) To ensure informed decision making and reduce delays, agencies shall include a request for comments on potential alternatives and impacts, and identification of any relevant information, studies, or analyses of any kind concerning impacts affecting the quality of the human environment in the notice of intent to prepare an environmental impact statement (§ 1501.9(d)(7) of this chapter).
- (2) The draft and final environmental impact statements shall include a summary of all alternatives, information, and analyses submitted by State, Tribal, and local governments and other public commenters for consideration by the lead and cooperating agencies in developing the draft and final environmental impact statements (§ 1502.17 of this chapter).
- (3) For consideration by the lead and cooperating agencies, State, Tribal, and local governments and other public commenters must submit comments within the comment periods provided, and comments shall be as specific as possible (§§ 1503.1 and 1503.3 of this chapter). Comments or objections of any kind not submitted, including those based on submitted alternatives, information, and analyses, shall be forfeited as unexhausted.

Soliciting Information on Alternatives

§1500.3(b)(4) Informed by the submitted alternatives, information, and analyses, including the summary in the final environmental impact statement (§ 1502.17 of this chapter) and the agency's response to comments in the final environmental impact statement (§ 1503.4 of this chapter), together with any other material in the record that he or she determines relevant, the decision maker shall certify in the record of decision that the agency considered all of the alternatives, information, and analyses, and objections submitted by States, Tribal, and local governments and other public commenters for consideration by the lead and cooperating agencies in developing the environmental impact statement (§ 1505.2(b) of this chapter).

wsp

Lead and Agency Consultation on Alternatives

Lead agencies

- §1500.7(h)(4). Determine the purpose and need, and alternatives in consultation with any cooperating agency.
- Cooperating agencies
 - §1501.8(b)(6). Consult with the lead agency in developing the schedule (§ 1501.7(i)), meet the schedule, and elevate, as soon as practicable, to the senior agency official of the lead agency any issues relating to purpose and need, alternatives, or other issues that may affect any agencies' ability to meet the schedule.

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

The plain language of NEPA requires a full alternatives analysis. The statute directs agencies to prepare a "detailed statement" on alternatives "to the fullest extent possible[.]" 42 U.S.C. § 4332. This means, as CEQ has interpreted and the courts have affirmed, agencies must consider all reasonable alternatives. "The 'existence of a viable but unexamined alternative renders an environmental impact statement inadequate." Audubon Naturalist Soc'y of the Cent. Atl. States, Inc. v. U.S. Dep't of Transp., 524 F. Supp. 2d 642, 667 (D. Md. 2007) (quoting Res. Ltd., Inc. v. Robertson, 35 F.3d 1300, 1307 (9th Cir. 1994)); accord, Webster v. U.S. Dep't of Agric., 685 F.3d 411, 427 (4th Cir. 2012) (citing 42 U.S.C. § 4332(2)(C)(iii) and evaluating whether agency impact statement considered all reasonable alternatives). CEQ's reductions to the alternatives that must be considered are inconsistent with the governing NEPA statute and are arbitrary and capricious.

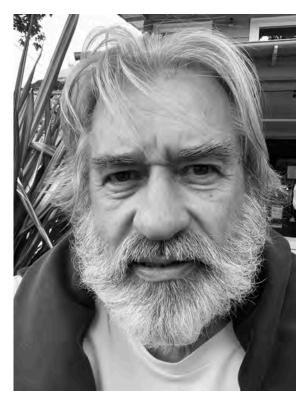
\\SD

Wild Virginia v. CEQ

- The Final Rule unlawfully allows a number of activities to proceed prior to the completion of the NEPA process. 40 C.F.R. § 1506.1(b) (2020). Such authorized activities include the "acquisition of interests in land (e.g., fee simple, rights-of-way, and conservation easements), purchase of long lead-time equipment, and purchase options made by applicants."
- Allowing a particular alternative to proceed prior to the completion of the NEPA process undermines NEPA's role as an "action-forcing" statute and forecloses the objective alternatives analysis that the statute requires for a "proposed" action, not one already underway. 42 U.S.C. § 4332(2)(C)(iii).

Wild Virginia v. CEQ

This allows applicants to predetermine many aspects of the project, going directly against legal precedent and previous CEQ guidance. See Sierra Club v. Marsh, 872 F.2d 497, 504 (1st Cir. 1989) (acknowledging the harm to the environment caused by "the deeply rooted human psychological instinct not to tear down projects once they are built[, and the] difficulty of stopping a bureaucratic steam roller, once started"); Council on Envtl. Quality, 1997 Effectiveness Study 11–12 ("[T]he 'NEPA process' is often triggered too late to be fully effective. . . . It is critical for top policy leaders and managers to integrate NEPA early into their policymaking and programming if their agencies are to get the full benefit of NEPA.").



In the pandemic summer of 2020

Owen L. Schmidt, BA, MA, JD, has 32 years 6 months and 22 days service with the Federal Government. The author received his J.D. from Northwestern School of Law of Lewis & Clark College (1977), and a B.A. (1969) and M.A. (1973) in biology from St. Cloud State University, Minnesota. He is a frequent author and lecturer on the National Environmental Policy Act and is the NEPA trainer for the Northwest Environmental Training Center. He was the Editor of Oregon Birds, the quarterly journal of Oregon Field Ornithologists (now Oregon Birding Association) for 14 years (1985- 99), the Compiler of the Tillamook Bay (Oregon) Christmas Bird Count for 32 years (1986-2017), and was a long-time member of the Oregon Bird Records Committee (1981-2017).

oschmidt@att.net

©2020

©2018 Owen L. Schmidt

40 CFR 1508.25 Scope.

Scope consists of the range of actions, alternatives, and impacts to be considered in an environmental impact statement. The scope of an individual statement may depend on its relationships to other statements (Section 1502.20 and Section 1508.28). To determine the scope of environmental impact statements, agencies shall consider 3 types of actions, 3 types of alternatives, and 3 types of impacts. They include:

(a) Actions (other than unconnected single actions) which may be:

(1) Connected actions, which means that they are closely related and therefore should be discussed in the same impact statement. Actions are connected if they:

(i) Automatically trigger other actions which may require environmental impact statements.

(ii) Cannot or will not proceed unless other actions are taken previously or simultaneously.

(iii) Are interdependent parts of a larger action and depend on the larger action for their justification.

- (2) Cumulative actions, which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement.
- (3) Similar actions, which when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental consequences together, such as common timing or geography. An agency may wish to analyze these actions in the same impact statement. It should do so when the best way to assess adequately the combined impacts of similar actions or reasonable alternatives to such actions is to treat them in a single impact statement.

(b) Alternatives, which include:

- (1) No action alternative.
- (2) Other reasonable courses of actions.
- (3) Mitigation measures (not in the proposed action).

(c) Impacts, which may be: (1) Direct; (2) indirect; (3) cumulative.

But see 2020 regulations on "similar": - §1501.6, 30-day notice for FONSI for action similar to EIS - §1502.4(b)(1)(ii), programmatic EISs on actions with "relevant similarities"

40 CFR 1508.7 Cumulative impact.

"Cumulative impact" is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

40 CFR 1508.7 (1978).

The language for reasonably foreseeable future actions is withdrawn (deleted), but is the concept deleted?

(e) *Determination of scope*. As part of the scoping process, the lead agency shall determine the scope and the significant issues to be analyzed in depth in the environmental impact statement. To determine the scope of environmental impact statements, agencies shall consider:

(1) Actions (other than unconnected single actions) that may be connected actions, which means that they are closely related and therefore should be discussed in the same impact statement. Actions are connected if they:

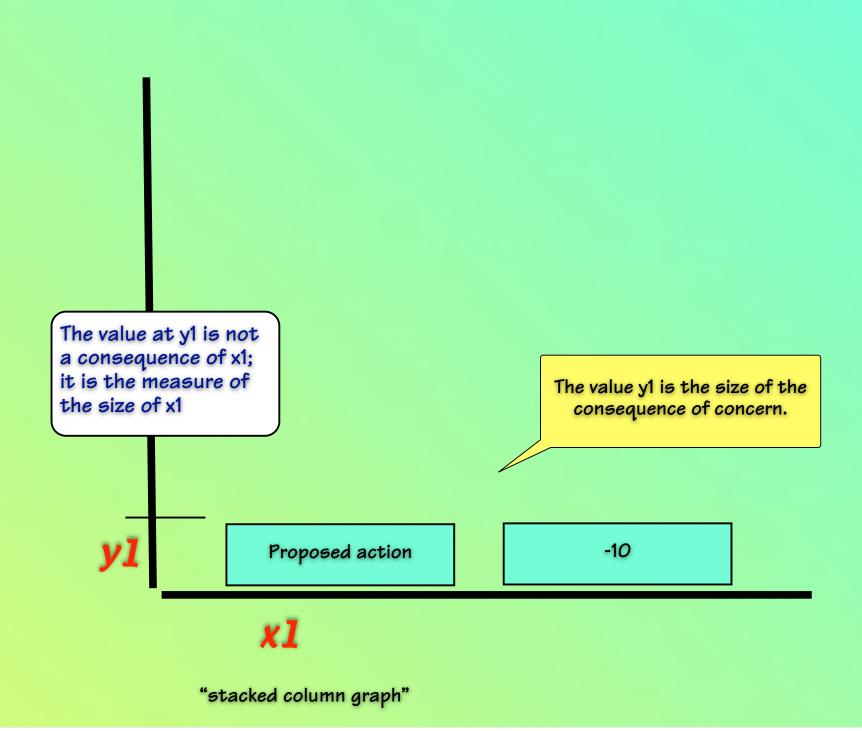
(i) Automatically trigger other actions that may require environmental impact statements;

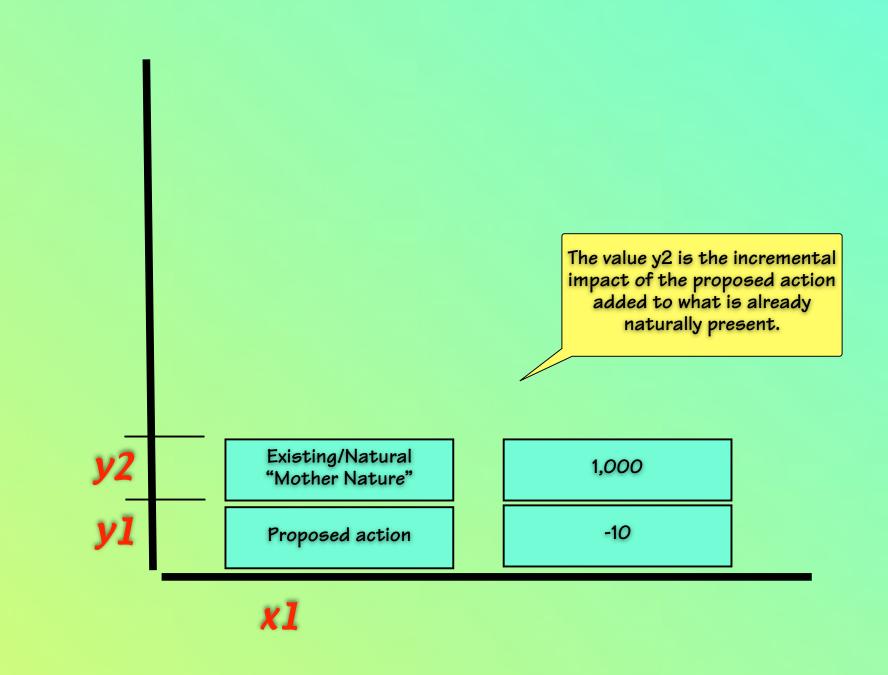
(ii) Cannot or will not proceed unless other actions are taken previously or simultaneously; or

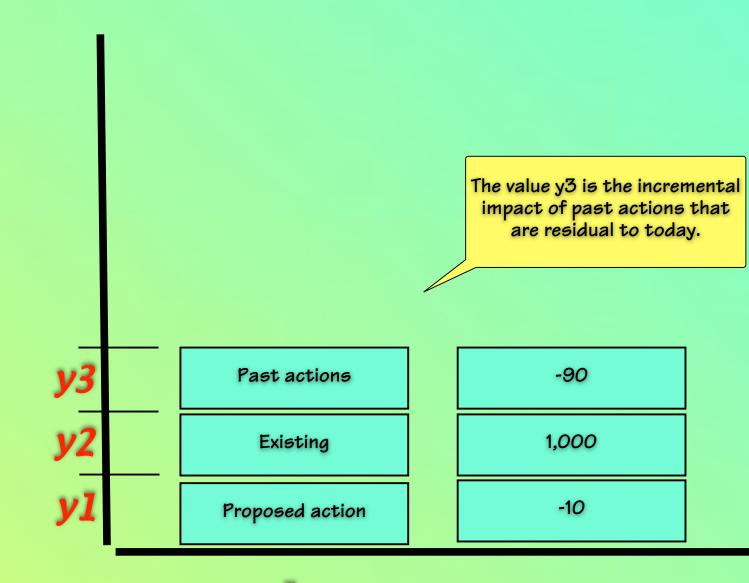
(iii) Are interdependent parts of a larger action and depend on the larger action for their justification.

(2) Alternatives, which include the no action alternative; other reasonable courses of action; and mitigation measures (not in the proposed action).

(3) Impacts.

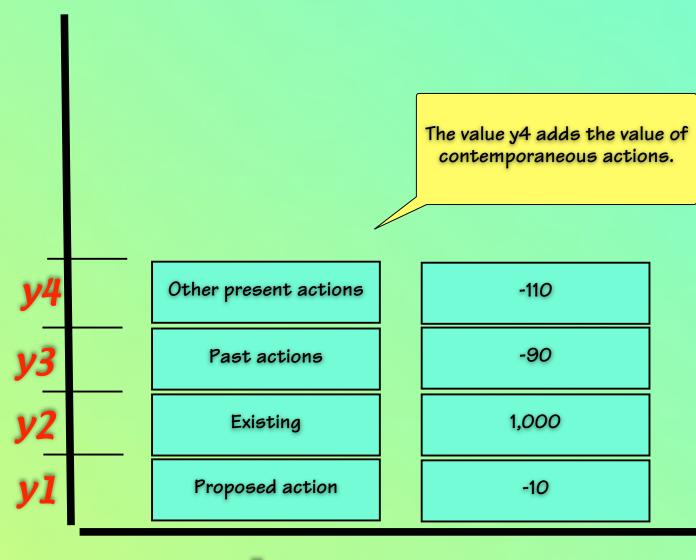




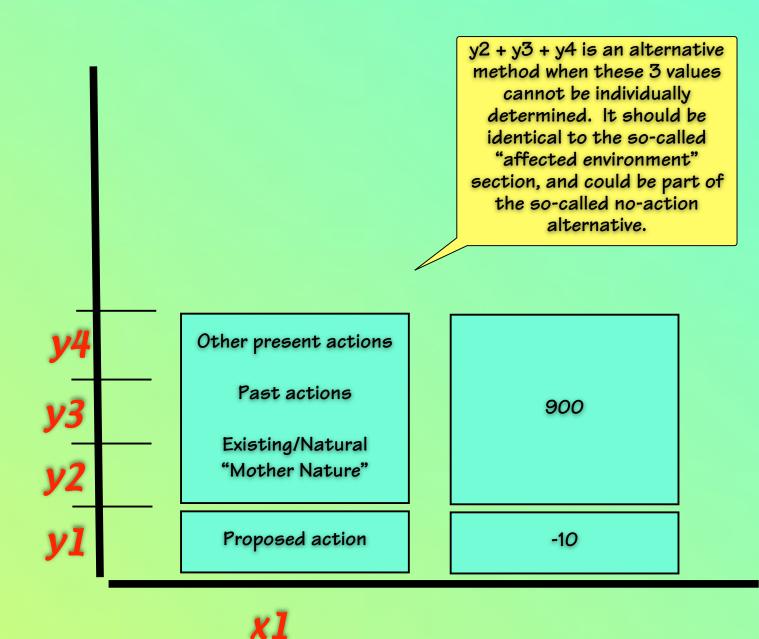


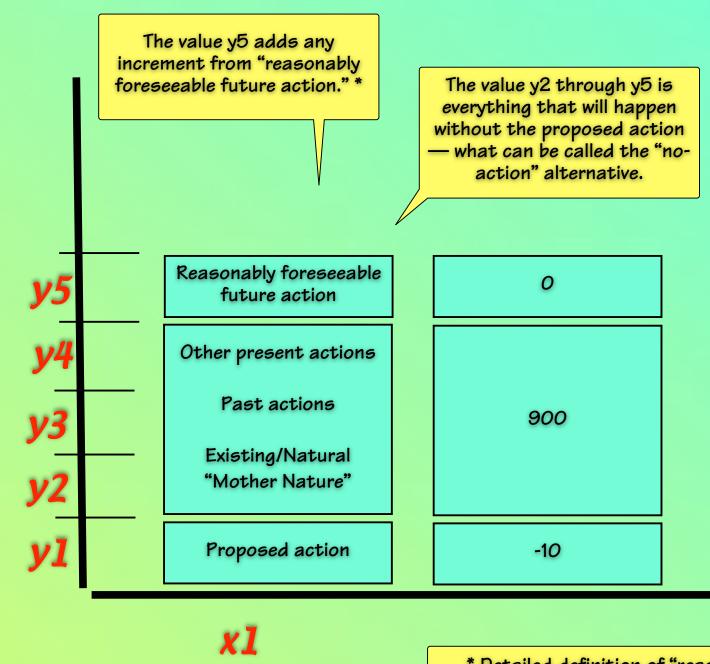
xl

7



x1



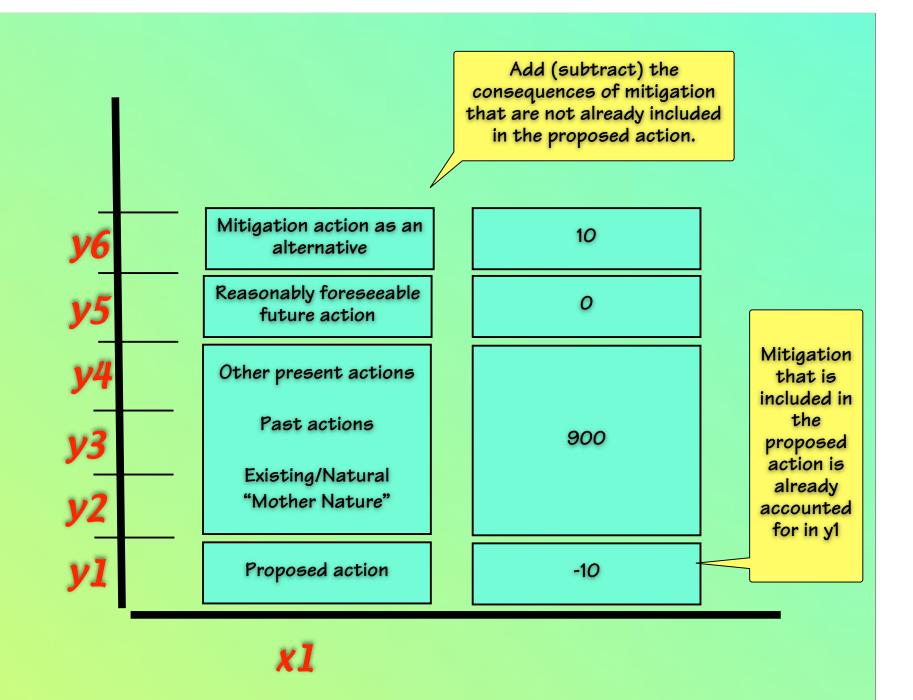


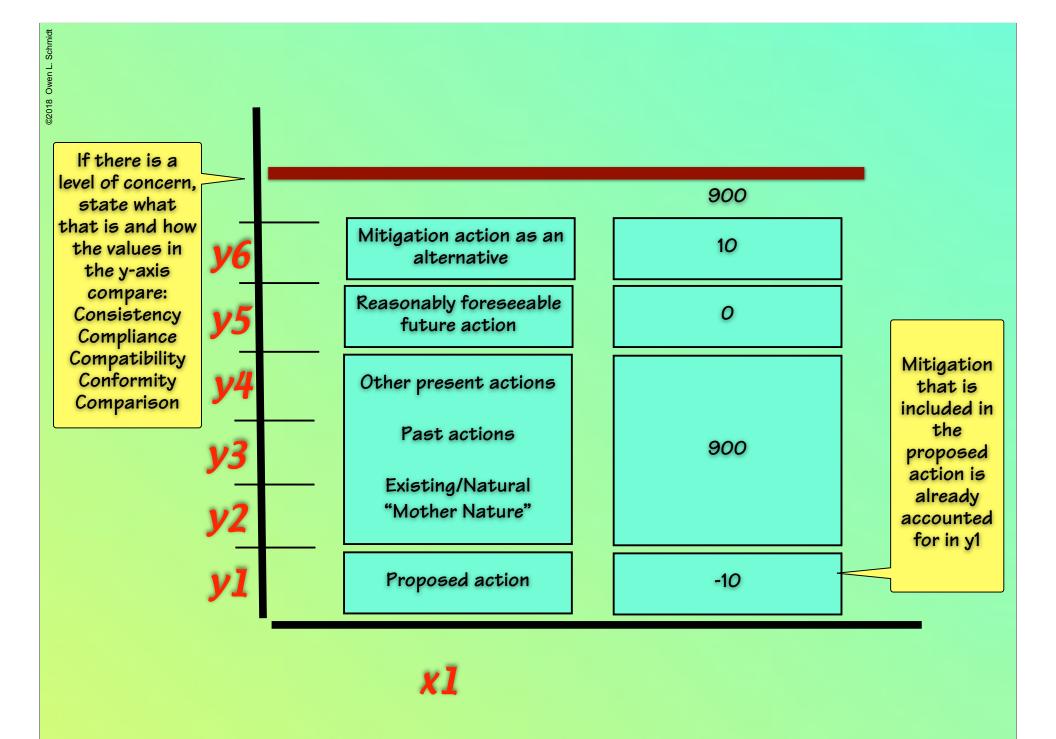
Schmidt

Owen L.

©2018

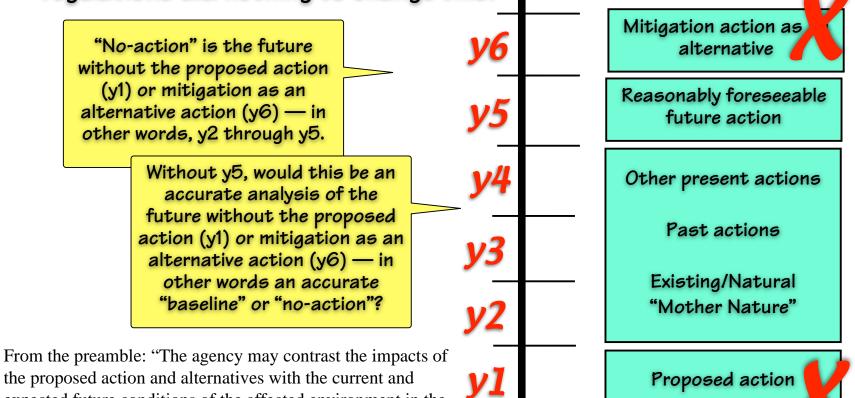
* Detailed definition of "reasonably foreseeable future action" is available





Yes. My opinion; there are no cases yet, obviously, and nothing exactly on point in the 2020 NEPA regulations:

1. Reasonably foreseeable future actions are a necessary part of an adequate analysis for a so-called "no-action" alternative. The 2020 regulations did nothing to change this.



the proposed action and alternatives with the current and expected future conditions of the affected environment in the absence of the action, which constitutes consideration of a noaction alternative."

FR 85(137), 43323

X

2. Reasonably foreseeable future actions are a regulatory part of the "Affected environment" section of an EIS. 40 CFR §1502.15 (2020).

§ 1502.15 Affected environment.

The environmental impact statement shall succinctly describe the environment of the area(s) to be affected or created by the alternatives under consideration, including the reasonably foreseeable environmental trends and planned actions in the area(s). ****

FR 85(137) 43331 (preamble, 2d column): To the extent environmental trends or planned actions in the area(s) are reasonably foreseeable, the agency should include them in the discussion of the affected environment. Consistent with current agency practice, this also may include non-Federal planned activities that are reasonably foreseeable. "Planned actions" (i.e., reasonably foreseeable future actions) and their consequences obviously can "affect or create" the same aspects of the environment as "affected or created by the alternatives under consideration."

3. Definition of scoping: "To determine the scope of environmental impact statements, agencies shall consider ... Actions ... that may be connected actions Actions are connected if they Automatically trigger other actins ... Cannot or will not proceed ... Are interdependent parts of a larger action and depend on the larger action for their justification. 40 CFR §1501.9 (2020).

(e) *Determination of scope*. As part of the scoping process, the lead agency shall determine the scope and the significant issues to be analyzed in depth in the environmental impact statement. To determine the scope of environmental impact statements, agencies shall consider:

(1) Actions (other than unconnected single actions) that may be connected actions, which means that they are closely related and therefore should be discussed in the same impact statement. Actions are connected if they:

(i) Automatically trigger other actions that may require environmental impact statements;

(ii) Cannot or will not proceed unless other actions are taken previously or simultaneously; or

(iii) Are interdependent parts of a larger action and depend on the larger action for their justification.

(2) Alternatives, which include the no action alternative; other reasonable courses of action; and mitigation measures (not in the proposed action).

(3) Impacts.

A "reasonably foreseeable future action" could be one that is "connected" because it is "triggered" by the proposed action or alternative actions, and — if triggered it would be later in time than the proposed action, i.e., a "future action."

(e) *Determination of scope*. As part of the scoping process, the lead agency shall determine the scope and the significant issues to be analyzed in depth in the environmental impact statement. To determine the scope of environmental impact statements, agencies shall consider:

(1) Actions (other than unconnected single actions) that may be connected actions, which means that they are closely related and therefore should be discussed in the same impact statement. Actions are connected if they:

(i) Automatically trigger other actions that may require environmental impact statements;

(ii) Cannot or will not proceed unless other actions are taken previously or simultaneously; or

(iii) Are interdependent parts of a larger action and depend on the larger action for their justification.

(2) Alternatives, which include the no action alternative; other reasonable courses of action; and mitigation measures (not in the proposed action).

(3) Impacts.

A "reasonably foreseeable future action" could be one that is "connected" where "it will not proceed" unless the proposed action or alternative actions are taken "previously."

(e) *Determination of scope*. As part of the scoping process, the lead agency shall determine the scope and the significant issues to be analyzed in depth in the environmental impact statement. To determine the scope of environmental impact statements, agencies shall consider:

(1) Actions (other than unconnected single actions) that may be connected actions, which means that they are closely related and therefore should be discussed in the same impact statement. Actions are connected if they:

(i) Automatically trigger other actions that may require environmental impact statements;

(ii) Cannot or will not proceed unless other actions are taken previously or simultaneously; or

(iii) Are interdependent parts of a larger action and depend on the larger action for their justification.

(2) Alternatives, which include the no action alternative; other reasonable courses of action; and mitigation measures (not in the proposed action).

(3) Impacts.

BTW this is the definition of mitigation as an alternative.

A "reasonably foreseeable future action" could be one that is "connected" where it is "interdependent" in a larger action along with the proposed action or alternative actions and dependent on the larger action for its justification.

4. The consequences of connected actions are relevant to the question of significance:

§ 1501.3 Determine the appropriate level of NEPA review.

(b) In considering whether the effects of the proposed action are significant, agencies shall analyze the potentially affected environment and degree of the effects of the action. Agencies should consider connected actions consistent with §1501.9(e)(1).

If a "reasonably foreseeable future action" is one that is "connected" then it "should" be considered in an EA when answering the question of significance.

§1501.9(e)(1) applies only to EISs, so CEQ uses the word "should" for an EA "Are reasonably foreseeable future actions still part of a NEPA analysis?"

5. From CEQ's "Emergencies and the National Environmental Policy Act Guidance," September 14, 2020. CEQ makes "future conditions"

ATTACHMENT 2 Preparing Focused, Concise and Timely	y Environmental Assessments

Purpose and Need for the Proposed Action	<u>n</u>

The agency should briefly describe the ex	isting conditions and the projected
future conditions of the area impacted by	the action.

	A "reasonably foreseeable future action" could obviously be relevant to the "projected future conditions of the area."

relevant to an EA:

- ***
- ***
- ***

6. ".... akin to proximate cause in tort law."

Department of Transportation v. Public Citizen, 124 S.Ct. 2204, 2215 (2004):

However, "but for" causation is insufficient to make an agency responsible for a particular effect under NEPA and the relevant regulations. NEPA requires a "reasonably close causal relationship" akin to proximate cause in tort law. *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774, 103 S.Ct. 1556, 75 L.Ed.2d 534. Also, inherent in NEPA and its implementing regulations is a "rule of reason," which ensures that agencies determine whether and to what extent to prepare an EIS based on the usefulness of any new potential information to the decisionmaking process.

Cause-and-effect implies a timeline from cause to effect. If a future action and its consequences are caused by and have a "reasonably close causal connection" to the proposed action they are to be included.

If a reasonably foreseeable future action and its consequences are potentially useful to the decisionmaking process — they are to be included.

BONUS QUESTION

- What if a "reasonably foreseeable future action" is NOT connected, or triggered, or interdependent (does not satisfy the 2020 regulation definition of connected, 1501.9(e)(1)) — in other words, it is coincidental
- But the future action causes environmental consequences that add to or change the environmental consequences of the proposed action (the consequences of the proposed action and future action are "cumulative" in the usual sense)
- Do these "cumulative" consequences have to be accounted for in an EA or EIS on the proposed action?

MY OPINION: No. These consequences are not proximately caused by the proposed action (the public citizen rule); they are caused by the other (future) action, which is not a connected action under the 2020 regulations(the regulatory rule), and thus not within the scope of the EA or EIS. Can the agency do anything about such a consequence? If not, such a consequence is not within the scope of the EA or EIS.

Course

BASIC NEPA: THE LAW, LOGIC, AND LANGUAGE OF THE NATIONAL ENVIRONMENTAL POLICY ACT



Upcoming Course Dates

October 13, 2020 - October 14, 2020

Instructor: Owen Schmidt

Live Remote Attendance, WA

October 27, 2020 - October 28, 2020 Instructor: Owen Schmidt Live Remote Attendance, AZ

November 3, 2020 - November 4, 2020 Instructor: Owen Schmidt Pacific Time, WA

November 17, 2020 - November 18, 2020 Instructor: Owen Schmidt Live Remote Attendance-- USA, WA

November 17, 2020 - November 18, 2020 Instructor: Owen Schmidt Live Remote Attendance, WA

December 8, 2020 - December 9, 2020 Instructor: Owen Schmidt Live Remote Attendance, WA

January 12, 2021 - January 13, 2021 Instructor: Owen Schmidt Austin, TX

https://www.nwetc.org

Course

ADVANCED NEPA-AN INTENSIVE ONE-DAY SEMINAR WITH SOLUTIONS TO THE MOST DIFFICULT NEPA PROBLEMS



Upcoming Course Dates ne-day

October 15, 2020 - October 15, 2020

Instructor: Owen Schmidt Live Remote Attendance, WA

October 29, 2020 - October 29, 2020 Instructor: Owen Schmidt

Live Remote Attendance, AZ

November 5, 2020 - November 5, 2020

Instructor: Owen Schmidt Live Remote Attendance-- USA, WA

November 19, 2020 - November 19, 2020

Instructor: Owen Schmidt Live Remote Attendance, ID

December 10, 2020 - December 10, 2020

Instructor: Owen Schmidt Live Remote Attendance, WA

January 14, 2021 - January 14, 2021 Instructor: Owen Schmidt Austin, TX



Expert environmental training for professionals



Driving NEPA Streamlining Through Technology (40 CFR 1506.6 & 1507.4)

30 September 2020

CEQ sets the stage for "electronic" innovation

• 40 CFR 1506.6 (Public Involvement):

- (b)(3)(x) ...Notice through electronic media (e.g., a project or agency website, email, or social media).
- (c) ... Agencies may conduct public hearings and public meetings by means of electronic communication except where another format is required by law. When selecting appropriate methods for public involvement, agencies shall consider the ability of affected entities to access electronic media.
- 40 CFR 1503.1(c) An agency shall provide for electronic submission of public comments, with reasonable measures to ensure the comment process is accessible to affected persons.





AECON

CEQ sets the stage for "electronic" innovation

• 40 CFR 1507.4 (Agency NEPA Program Information):

- (a) To allow agencies and the public to efficiently and effectively access information about NEPA reviews, agencies shall provide for agency websites or other means to make available environmental documents, relevant notices, and other relevant information for use by agencies, applicants, and interested persons. ...may include:

 (1) Agency planning and environmental documents that...provide for public involvement in agency planning processes; (2) A directory of pending and final environmental documents; (3) Agency policy documents, orders, terminology, and explanatory materials...; (4) Agency planning program information...; and (5) A database searchable by geographic information, document status, document type, and project type.
- (b) Agencies shall provide for *efficient and effective interagency coordination* of their *environmental program websites*, including use of shared databases or application programming interface, in their implementation of NEPA and related authorities.





AECOM

Welcome to the Future...and the Future is Now



Welcome to the Future...and the Future is Now (cont.)



Electronic Innovations to Streamline NEPA

• Virtual (website-based) stakeholder meetings

- Replicates in-person meetings
- Provides infinite, full, and scalable functionality
- Connects to social media
- Accessible on any internet-connected device
- Connects to documents, data, agency NEPA websites, etc.
- Integrates input functionality (comment forms, surveys)
- Achieves social distancing
- Makes data available for longer periods (improves engagement)
- Allows data to be downloaded, printed, or viewed on website
- Digital outreach
 - Prepare, maintain, and update stakeholder email Listservs
 - Use social media for data sharing, notifications, and input
 - Conduct online surveys
 - Enable electronic commenting



ΔΞϹΟΝ

Electronic Innovations to Streamline NEPA

Digital (website-based) NEPA documents

- Science still underlies all analyses
- Easier to review, understand, and navigate
- Highly visual and interactive
- Allows shallow to deep drill on data components
- Incorporates links to agency websites, laws/regulations, and other online references for easy access
- Forms a basis for incorporation by reference and future use
- (Advanced) Agency NEPA websites
 - Library of documents
 - Searchable by geography, topic, issues, status, etc.
 - Potential to be GIS-based, integrated, highly visual, and interactive
 - Incorporation by reference, adoption, etc. avoid re-work
 - Potential links to relevant agency data
 - Potential links across agencies
 - Connectivity to digital NEPA documents
 - CX sharing/borrowing data



Overcoming the Broadband Divide (?)

- Expect the divide to narrow in time
- While some do not have home internet access, most have mobile devices with internet access (Virtual Stakeholder Meetings)
- What if your stakeholders are broadband underserved?
 - Access community facilities with internet access
 - Partner with community-based organization(s) to capitalize on established relationships to disseminate messaging and share data
 - Distribute electronic media CDs, DVDs, memory sticks
 - Issue mailers, newsletters, and fliers
 - Post in community-trafficked facilities
 - Conduct door-to-door outreach/door hanger campaigns
 - Perform social media outreach
 - Use traditional printed documents, stakeholder meetings, newspaper publications





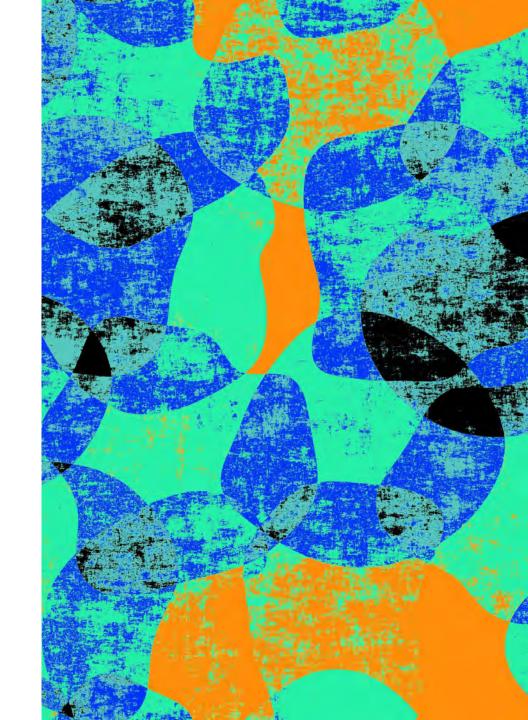
THANK YOU FOR LISTENING.





Next Steps for Federal Agencies: The Path to Implementation

HOLLY REUTER, MANAGER THE CLARK GROUP LLC



Overview



UPDATES TO AGENCY NEPA PROCEDURES

IMPLEMENTATION

Agency NEPA Procedures MUST:

•Implement CEQ regulations, eliminating inconsistencies

- •Adopt NEPA procedures to improve agency efficiency and make decisions in accordance with "procedural requirements"
- •Designate major decision points for programs likely to have significant effect on the human environment, begin NEPA at earliest reasonable time
- •Require relevant documents, alternatives, comments/responses part of record in NEPA reviews for decision makers
- •Require combination of environmental documents with other agency documents



40 CFR 1507.3

Agency NEPA Procedures MUST:

•Provide for actions subject to NEPA that are planned by private applicants or other non-Federal entities at 1501.2(b)(4)

•Provide for public notice as described in 1506.6(e)

•Include procedures for supplement to EAs, EISs, administrative records 1507.3

•Include criteria/ID typical classes of actions (EA, EIS, CATEX) 1507.3



Agency NEPA Procedures MAY:

•Include which actions do not fall under NEPA 1501.1

•Designate other statutes or Executive Orders that satisfy requirements under NEPA 101.1 & 1507.3(d)(6)

•Add process to coordinate and apply other agencies' CATEXs without determining the action is "substantially similar" 1506.3(d)

•Adopt procedures to combine EA process with scoping process 1507.3



Overview



UPDATES TO AGENCY NEPA PROCEDURES

IMPLEMENTATION

Consistency Review

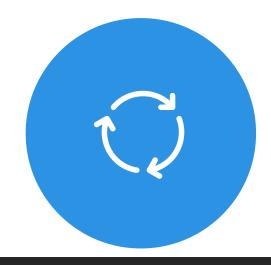
•Contact OGC for process input and buy-in

•Conduct a gap analysis for required and desired changes

•Identify policies, guidance, and training that must align

•Determine resource needs

•Brief leadership



Update Process

•Brief programs, policy office, OGC, leadership

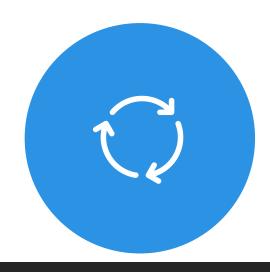
•Develop a working group with diverse representation

•Develop a schedule for drafting with internal approval processes

•Draft procedures with working group input

•Conduct internal review and approval cycles

•Brief leadership



CEQ Consultation

•Notify CEQ of submittal timeline

•Submit procedures for CEQ review and comment

•Review and adjudicate CEQ comments

•Brief leadership

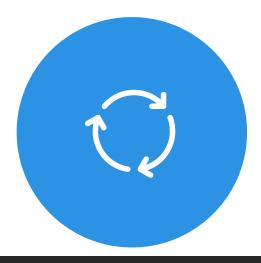
•Publish in Federal Register after consultation is complete



Recommendations for Agencies

•Identify immediate changes and risks to the NEPA process while procedural updates are underway – direct staff, issue factsheets etc.

- •Reach out to agencies with CATEXs you wish to adopt and collaborate on adoption process
- •Start developing a methodology for tracking EIS costs
- •Update agency guidance, trainings, policies, applicant and stakeholder materials to align with planned procedural changes

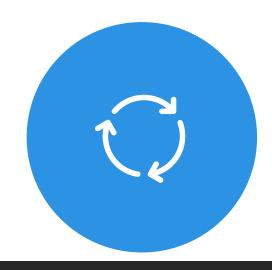


Recommendations for Practitioners

•Notify clients of new CEQ regulations and requirements

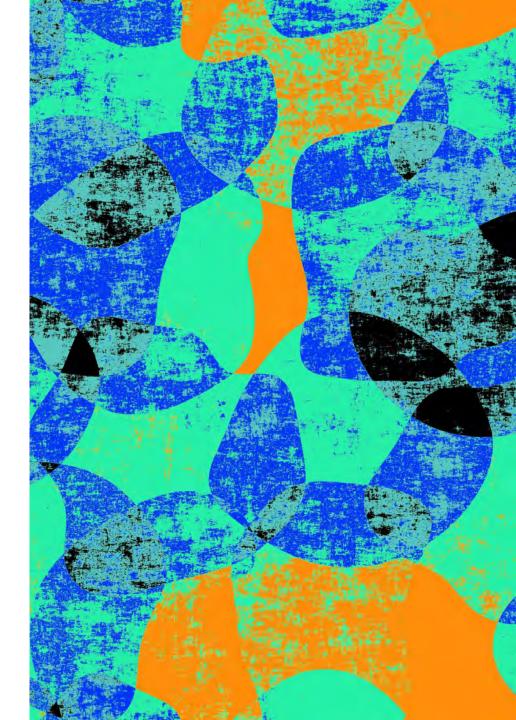
•Ensure all new NEPA analyses follow updated CEQ regulations

•Be prepared to explain NEPA process changes



Questions?

HOLLYREUTER@CLARKGROUPLLC.COM





Applying the New CEQ NEPA Regulations

Questions? Observations? Comments?