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Public Interest Comment¹ on

The Council on Environmental Quality's Proposed Rule

Update to the Regulations Implementing the Procedural Provisions of the National
Environmental Policy Act

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The George Washington University Regulatory Studies Center improves regulatory policy through research, education, and outreach. As part of its mission, the Center conducts careful and independent analyses to assess rulemaking proposals from the perspective of the public interest. This comment on the Council on Environmental Quality's proposed rule on updating the regulations implementing the National Environmental Policy Act does not represent the views of any particular affected party or special interest, but it is designed to evaluate the effect of CEQ's proposal on overall consumer welfare.

Introduction³

The Council on Environmental Quality (CEQ) is proposing an update to its regulations for implementing the procedural provisions of the National Environmental Policy Act (NEPA) of 1969. The purposes of NEPA include establishing a national policy toward the environment and promoting "efforts which will prevent or eliminate damage to the environment and biosphere and

¹ This comment reflects the views of the author and does not represent an official position of the GW Regulatory Studies Center or the George Washington University. The Center's policy on research integrity is available at <http://regulatorystudies.columbian.gwu.edu/policy-research-integrity>.

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³ This introduction and background draws substantially from my [public comment](#) on CEQ's 2018 ANPRM.

stimulate the health and welfare of man.”⁴ NEPA requires federal agencies to incorporate the potential environmental effects of their actions, projects, and programs into their decision-making process.⁵

CEQ published an advance notice of proposed rulemaking (ANPRM) on June 20, 2018, which “request[ed] comments on potential revisions to update and clarify CEQ NEPA regulations” as the Council considered substantively revising the regulations with subsequent rulemaking. The ANPRM included 20 questions, divided into 3 categories (NEPA Process; Scope of NEPA Review; and General), that largely focused on how to make NEPA more efficient, timely, and effective. CEQ published a notice of proposed rulemaking (NPRM) on January 10, 2020, which would “comprehensively update and substantially revise” the CEQ NEPA regulations that were initially finalized in 1978.⁶ CEQ’s proposed rule represents the first substantive revision of its NEPA regulations since 1986, when the requirements for “worst case analysis” were rescinded and replaced with provisions for disclosing incomplete or unavailable information when evaluating impacts for an environmental impact statement.⁷

NEPA requires that an agency (or multiple agencies), when taking a major federal action, must consider whether the proposed action significantly affects “the quality of the human environment.”⁸ According to CEQ’s existing regulations, such actions tend to consist of the adoption or approval of official policies (including rules and regulations), formal plans, programs, and specific projects.⁹ To consider the environmental effects of an action, agencies conduct an environmental review, which may involve three levels of analysis: categorical exclusion (CE); environmental assessment (EA); and environmental impact statement (EIS).¹⁰

The courts have interpreted various aspects of NEPA, including clarifying the Act’s objectives and determining compliance with procedural requirements. For instance, the U.S. Supreme Court identified NEPA’s “twin aims” of “plac[ing] upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action” and “ensur[ing] that the agency will inform the public that it has indeed considered environmental concerns in its

⁴ 42 USC 4321. Revised as of January 6, 2017: <https://www.gpo.gov/fdsys/granule/USCODE-2016-title42/USCODE-2016-title42-chap55-sec4321>.

⁵ GAO, “National Environmental Policy Act: Little Information Exists on NEPA Analyses,” GAO-14-369, April 2014, p. 1, <https://www.gao.gov/assets/670/662543.pdf>.

⁶ 85 FR 1684.

⁷ 51 FR 15618. Available at: <https://ceq.doe.gov/docs/laws-regulations/FR-1986-04-25-51-FR-15618-CEQ-NEPA-Regulations-NOFR-amending-1502-22.pdf>.

⁸ 42 USC 4332. Revised as of January 6, 2017: <https://www.gpo.gov/fdsys/pkg/USCODE-2016-title42/pdf/USCODE-2016-title42-chap55-subchapI-sec4332.pdf>.

⁹ 40 CFR 1508.18, 2019 edition.

¹⁰ EPA, “National Environmental Policy Act Review Process,” accessed March 6, 2020, <https://www.epa.gov/nepa/national-environmental-policy-act-review-process>.

decisionmaking process.”¹¹ While NEPA and its implementing regulations prescribe particular procedural actions, agencies are still given significant leeway on substantive issues and decisions.¹²

Although the fundamental understanding of NEPA would remain the same under the revised implementing regulations, CEQ’s proposed rule implies both substantive and procedural changes that affect the extent to which environmental review informs agency decision-making processes. This public interest comment offers comments on CEQ’s NPRM by focusing on aligning NEPA with regulatory best practices, encouraging systematic regulatory analysis of the proposed rule, and addressing specific topics where CEQ invites comment.

Aligning NEPA with Regulatory Best Practices

Although certain elements from my previous public interest comment on CEQ’s ANPRM may be integrated throughout this comment, I briefly summarize the core focus of the earlier arguments and recommendations here. Primarily, CEQ should align its NEPA implementing regulations with regulatory best practices, especially retrospective review.¹³

Agencies often incorporate NEPA as an “umbrella statute,” using its process as “a framework to coordinate or demonstrate compliance with any study, review, or consultation required by other environmental laws.”¹⁴ However, because its provisions were established before other important environmental review requirements or analytical guidance, this may justify an update to correspond with existing best practices. Notably, key documents guiding the proper application of benefit-cost analysis—such as Executive Order 12866 and OMB Circular A-4—came after the NEPA implementing regulations were last substantively revised. I suggested that CEQ should draw from those resources to inform the revisions of its NEPA regulations, because the degree to which the procedures for evaluating significant regulatory actions have come to resemble the NEPA regulations is striking. Both call for transparency, consideration of alternatives, thorough analysis, public participation, and interagency coordination. While discussing its rulemaking with OMB’s Office of Information and Regulatory Affairs (OIRA), CEQ should explore these parallels so that best practices from regulatory governance can help inform agency permitting and NEPA compliance.

Retrospective review, a critical regulatory best practice, deserves substantial attention as CEQ revises its NEPA implementing regulations. Executive Order 11514, which outlined CEQ’s

¹¹ CRS, “The National Environmental Policy Act (NEPA): Background and Implementation,” January 10, 2011, p. 8. Available at: https://www.everycrsreport.com/files/20110110_RL33152_69b27c980f2b1121fd078e3982ac47e9c48d7111.pdf.

¹² CRS 2011, p. 8.

¹³ The following section draws heavily from my [public comment](#) on CEQ’s 2018 ANPRM.

¹⁴ CRS 2011, Summary.

responsibilities, contained provisions for CEQ to evaluate the performance of NEPA, determine the effectiveness of its implementation, and develop and use metrics for monitoring environmental effects.¹⁵ In essence, developing ways to monitor environmental quality and conditions, analyze trends, and evaluate the effectiveness of existing programs and processes is built into the mission of CEQ.

However, a number of key challenges and inadequacies preclude adequate retrospective review of CEQ's NEPA implementing regulations. Multiple analyses demonstrate the lack of information on the effectiveness and implementation of NEPA. Most notably, a widely known 2014 report from the Government Accountability Office (GAO) "review[ed] various issues related to costs, time frames, and litigation associated with completing NEPA analyses" and concluded that "little information exists" on environmental reviews under the Act.¹⁶ Other studies of NEPA's effectiveness provide snapshots of how implementation has evolved over time.¹⁷ But such reports are ultimately limited in value, since they are inconsistently conducted and often do not use similar methodologies or metrics.¹⁸

Drawing from these various reports, I summarize challenges for tracking NEPA implementation and conducting retrospective review:

- Existing reports are frequently *ad hoc*, narrow in scope, or conducted over inconsistent timeframes. Thus, the ability to measure impacts and performance over time is limited.
- Many reports lack a clear baseline for analysis—i.e., what is progress compared to? How can we attribute various effects and results to the NEPA process?
- Consistent data on key measures are limited in availability and comparability—e.g., the number and types of analyses, the costs and benefits of NEPA reviews, timeframes for working through the NEPA process, and comprehensive information on the frequency and outcomes of litigation.

¹⁵ [Executive Order 11514](#), originally published in [35 FR 4247](#): "The Council on Environmental Quality shall ... (e) Promote the development and use of indices and monitoring systems (1) to assess environmental conditions and trends, (2) to predict the environmental impact of proposed public and private actions, and (3) to determine the effectiveness of programs for protecting and enhancing environmental quality."

¹⁶ GAO 2014, pp. 1-2.

¹⁷ See, e.g., Dinah Bear 1989, "[NEPA at 19: A Primer on an 'Old' Law with Solutions to New Problems](#)," *Environmental Law Reporter* 19(10060); CEQ 1997, "[The National Environmental Policy Act: A Study of Its Effectiveness after Twenty-five Years](#)," January; NEPA Task Force 2003, "[Modernizing NEPA Implementation](#)," Report to CEQ, September 2003; DOE, "[American Recovery and Reinvestment Act of 2009 & NEPA](#)," accessed March 10, 2020; DOE, "[Lessons Learned Quarterly Report](#)," accessed March 10, 2018, last issue published September 2017.

¹⁸ Many projects affected by NEPA, like damming a major river, are not easily reversed. Thus, agencies should consider the best use of their time and resources when conducting a retrospective evaluation of an action's effects. Nevertheless, doing a retrospective analysis is often still worthwhile. Because the central focus of NEPA is on prospective analysis, *ex post* reviews should focus on what can be learned to improve future *ex ante* analyses.

- According to the NEPA Task Force’s report, “Reducing the accumulation of extraneous background data and emphasizing relevant environmental issues is key to the successful use of information in the NEPA process.”¹⁹ However, it is unclear what data are truly valuable to both inform agency decisions and provide measures on overall performance of the NEPA process. The absence of consistent government-wide reporting implies that agencies have not gathered feedback on what data would better serve evaluation of NEPA performance.
- Many data sources—e.g., reports from the National Association of Environmental Professionals (NAEP)—are not publicly accessible or are behind a paywall.

Since the publication of the 2018 ANPRM, CEQ has made efforts to mitigate the lack of data on NEPA implementation. First, CEQ “compiled data on timelines for 1,161 [final] EISs” between 2010 and 2017, releasing a report and database in December 2018.²⁰ Second, CEQ identified 631 actions between 2013 and 2017, obtained draft and final EISs for 568 actions, and released a report and database with the findings in July 2019.²¹

The reports’ findings are informative. For all EISs completed between 2010 and 2017, the average time from the notice of intent (NOI) to prepare an EIS to the record of decision (ROD) was 4.5 years, and the median time was 3.6 years.²² For final EIS page counts from 2013 to 2017, the average was 669 pages, and the median was 445 pages; page counts also appeared to increase between the draft and final EISs.²³ Nevertheless, rather than providing concrete answers about how to improve the NEPA process, such data are simply a starting point for better understanding its problems and designing effective solutions.

Consistent with efforts to better understand the obstacles to effective NEPA implementation, I offer multiple recommendations for broader retrospective review of the NEPA process:²⁴

Recommendation 1: CEQ should work with the Environmental Protection Agency (EPA) to augment the EIS database and expand it to EAs.

Agencies file EISs with EPA, and EPA retains them in a database with records of documents received by EPA since 1987. The database currently features 15,596 items²⁵ and includes the following basic details on EISs, which can be exported to multiple file formats:

- Title

¹⁹ NEPA Task Force 2003, p. 9.

²⁰ CEQ, EIS Timelines, accessed March 10, 2020, <https://ceq.doe.gov/nepa-practice/eis-timelines.html>.

²¹ CEQ, EIS Length, accessed March 10, 2020, <https://ceq.doe.gov/nepa-practice/eis-length.html>.

²² CEQ, [Environmental Impact Statement Timelines \(2010-2017\)](#), p. 4.

²³ CEQ, [Length of Environmental Impact Statements \(2013-2017\)](#), pp. 4-5.

²⁴ The following section draws heavily from my [public comment](#) on CEQ’s 2018 ANPRM, pp. 21-22.

²⁵ Accessed March 10, 2020. Available at: <https://cdxnodengn.epa.gov/cdx-enepa-II/public/action/eis/search>.

- Document
- EPA Comment Letter Date
- Federal Register Date
- Agency
- State
- Links to downloadable documents (e.g., EIS and/or Comment Letters)

Expanding the database could aid long-term analysis of trends. For example, the database could report additional metrics where applicable:

- Unique identifier for each entry
- Regulation Identifier Number (RIN)
- Page counts
- Initial publication date of the Notice of Intent
- Number of lead and cooperating agencies
- Whether the document supersedes a previous one

Because evidence suggests that EISs make up less than 1 percent of all NEPA reviews,²⁶ extending the database to include EAs would provide substantially more information about NEPA implementation. For instance, researchers could consider what sorts of actions tend to require an EA versus those that require a more comprehensive EIS.

Recommendation 2: CEQ should establish expectations in its NEPA implementing regulations for metrics that can be used to measure improvement.

As I discussed in 2018, the Department of Energy’s Lessons Learned reports could be used as a benchmark for government-wide data production and collection.²⁷ Data should be comparable across time and agencies and made publicly available. Agencies like DOE have already demonstrated that it is possible to collect and report such data, even if the methods of conveying the information to the public could be improved.

Consistency and comparability over time are important. However, even if the metrics initially chosen for collection are imperfect, regularly reporting them will create a baseline process for retrospective review. Agencies could revise what to collect depending on feedback on the effectiveness of certain metrics, but having a starting point is critical. Key measures—distinguished by date, agency, state, and project type—could include:

- Number and types of NEPA reviews
- Cost data for EISs and EAs

²⁶ GAO 2014.

²⁷ See, Mark Febrizio, “[Better Data Collection Would Improve Analysis of NEPA Regulations](#),” published August 29, 2018.

- Completion times for EISs and EAs
- Document length of EISs and EAs

CEQ's recent reports on EIS timelines and length are a critical stride in providing information on the last two items. Related to the next recommendation, continuing to collect such data at regular intervals would aid continued and future analysis of these important trends.

Recommendation 3: CEQ should institute subsequent, periodic reviews of NEPA implementation at set intervals.

Periodically reevaluating NEPA implementation, every five years for example, would generate useful information on the process. Furthermore, it would enhance public input in NEPA implementation, expanding public involvement beyond commenting on individual NEPA reviews to a broader, process-oriented context. Relatedly, any revisions made by a final rule updating CEQ's NEPA implementing regulations should include "clear performance goals and metrics for outputs and outcomes" to evaluate the effectiveness of revisions.²⁸ In short, CEQ would also have feedback on the impact of changes made to NEPA regulations.

Combined with instituting periodic reviews of NEPA regulations at defined intervals, better data collection and analysis would improve evaluation of the effectiveness of NEPA implementation. Because of its small size, CEQ may need to consider ways to encourage agencies to provide it data on their NEPA process. CEQ could better assess which agencies implement NEPA most effectively. Further questions could include: How much of this effect is attributable to the authorities of the agency or its statutory constraints? Are there practices that other agencies could adopt that would improve their NEPA process? Having answers to those questions would equip CEQ to support its NPRM with regulatory analysis.

Regulatory Analysis

CEQ's proposed rule is a significant regulatory action under Executive Orders 12866, 13563, and 13771.²⁹ CEQ's docket does not include a regulatory impact analysis (RIA), or similar document,³⁰ despite Executive Order 12866 requiring that significant rules are to be accompanied by such an assessment of the regulatory action.³¹ The absence of an RIA for the proposed rule impedes informed decision-making, limits meaningful public participation, and restricts transparency. As I

²⁸ See, the "Regulatory Design" stage of the Evidence-Based Regulation Framework: Marcus C. Peacock, Sofie E. Miller, and Daniel R. Pérez, "A Proposed Framework for Evidence-Based Regulation," GW Regulatory Studies Center Working Paper, February 22, 2018, <https://regulatorystudies.columbian.gwu.edu/proposed-framework-evidence-based-regulation>.

²⁹ 85 FR 1711. Available at: <https://www.federalregister.gov/d/2019-28106/p-372>.

³⁰ Docket ID: CEQ-2019-0003, <https://www.regulations.gov/docket?D=CEQ-2019-0003>.

³¹ [Executive Order 12866](#), Sec. 6(a)(3)(C).

commented previously on CEQ’s 2018 ANPRM, “Any subsequent proposed rule should both acknowledge the tradeoffs associated with tightening, loosening, or modifying procedures related to environmental review as well as establish a clear linkage between the proposal and what the agency hopes to accomplish.”³²

Recommendation 4: Before moving forward with a final rule, CEQ should conduct, publicly release, and accept public input on an RIA of the update to its NEPA implementing regulations.

Executive Order 12866 and OMB Circular A-4 lay out the essential elements of the RIA framework: (1) Analyzing the problem, (2) Identifying alternatives, and (3) Defining and estimating the benefits and costs of each alternative.³³ Building on the RIA framework, I suggest factors CEQ should consider when crafting its analysis.

Problem Analysis

First, CEQ should identify the nature and significance of the problem to solve.³⁴ In the context of the NPRM, this step relates to the nature and significance of perceived problems with the NEPA process, whether those problems can be addressed through regulation, and the extent to which the agency can tailor a regulatory solution to any defined problems.

While the NPRM includes important information on the nature of the problems with NEPA reviews, CEQ should systematically consider them. When the agency argues that the proposed revisions would “facilitate more efficient, effective, and timely NEPA reviews,”³⁵ more precision is warranted in an RIA. What sorts of factors and metrics are associated with those goals or would suggest they are not being met?

A great deal of evidence for problems in NEPA implementation exists. For instance, Section I.E of the NPRM lists multiple presidential directives from the G.W. Bush, Obama, and Trump administrations that “recognized the need to improve the environmental review process.”³⁶ A CEQ memorandum from March 2012 informed agencies of various tools “available to meet the goal of high quality, efficient, and timely environmental review under [NEPA].”³⁷ Other research and

³² See my [public comment](#) on CEQ’s 2018 ANPRM, p. 7.

³³ For an excellent example of how to apply this RIA framework, see Jerry Ellig’s public interest comment on a Surface Transportation Board petition for rulemaking, pp. 3-8: Jerry Ellig, “STB Petition to Consider Benefit-Cost Analysis,” January 31, 2020, <https://regulatorystudies.columbian.gwu.edu/stb-petition-consider-benefit-cost-analysis>.

³⁴ Executive Order 12866, Sec. 1(b)(1), Sec. 6(a)(3)(B)(i).

³⁵ 85 FR 1684.

³⁶ 85 FR 1690.

³⁷ CEQ, “Improving the Process for Preparing Efficient and Timely Environmental Reviews under the National Environmental Policy Act,” March 6, 2012. Available at: https://ceq.doe.gov/docs/ceq-regulations-and-guidance/Improving_NEPA_Efficiencies_06Mar2012.pdf.

reviews of the NEPA process have identified problems and offered recommendations, although there has been minimal follow up on whether those recommendations have been implemented.³⁸

While CEQ's reports on EIS length and timelines are helpful, their insight into long-term trends is minimal. For instance, if overly long timelines for completing EISs are identified as a problem, is that trend getting better or worse? Without comparisons to previous decades, determining whether these metrics are improving is difficult. Furthermore, EISs are only a tiny fraction of total NEPA reviews, meaning that substitution across different levels of review could also be affecting the trend (e.g., for certain categories of projects, agencies might be more frequently conducting EISs in place of EAs).

Alternatives

After determining whether the proposed rule addresses the identified problem, CEQ should consider whether its preferred approach is the most appropriate response. In other words, CEQ should identify a wide variety of alternative solutions.³⁹ Before issuing this NPRM, did CEQ consider other alternative ways to address the problems with NEPA? Collecting early feedback through its 2018 ANPRM was a constructive decision, but an RIA should explain how public input was incorporated into the process of identifying and assessing alternative approaches.

The NPRM includes many specific methods for addressing perceived problems. For instance, the proposed revisions to Part 1502 use page limits “to ensure that agencies develop EISs focused on significant effects and on the information useful to the decision makers and the public to more successfully implement NEPA.”⁴⁰ Did CEQ consider other methods for accomplishing this goal? Since the original regulations also incorporate flexible page limits,⁴¹ CEQ should explain why it expects these revisions to address the problem and consider alternative approaches to its preferred method.

Benefits and Costs

Third, CEQ should discuss and, where possible, estimate the benefits and costs of each alternative.⁴² While a procedural rule like CEQ's NPRM might not be amenable for quantifying or monetizing impacts, even a qualitative assessment of the proposed rule's expected effects is needed. In other words, a qualitative consideration of the potential effects of revising NEPA procedures could effectively describe CEQ's *ex ante* evaluation of its NPRM.

³⁸ See, GAO 2014; Bear 1989; CEQ 1997; NEPA Task Force 2003.

³⁹ Executive Order 12866 6(a)(3)(C)(iii); [OMB Circular A-4](#), pp. 3-5.

⁴⁰ 85 FR 1700.

⁴¹ 40 CFR 1502.7, 2019 edition.

⁴² Executive Order 12866, Sec. 6(a)(3)(C)(ii), 6(a)(3)(C)(i), 6(a)(3)(C)(iii); OMB Circular A-4, pp. 7-9, 18-42.

In light of the stated purposes of NEPA—which include declaring a national environmental policy and promoting efforts that limit environmental damage—CEQ should offer insight into how the rule’s effects relate to NEPA’s purposes.⁴³ For instance, do the revised procedures still favor good projects and discourage bad ones? Do they encourage demonstrable improvements to projects, without too great a cost of delay?

The Fact Sheet on the proposed rule offers an overview of key elements of the proposal, many of which appear to be benefits.⁴⁴ Similarly, are there potential drawbacks that CEQ has identified from these changes? What are the expected effects on public participation in the NEPA process? In light of the shorter timelines and page counts, does CEQ expect a tradeoff between less thorough analyses and more focused analyses? Will agencies need to dedicate resources to altering their compliance with NEPA and revising their own implementing procedures?

Much of the public commentary on the NPRM⁴⁵ relates to clarifying the definition of “effects” by removing the categories of cumulative, direct, and indirect effects in favor of a “consideration of effects that are reasonably foreseeable and have a reasonably close causal relationship to the proposed action.”⁴⁶ Although CEQ discusses its reasoning in the NPRM, expounding on the anticipated effects of changing how agencies assess cumulative effects would clarify the agency’s thinking and promote a reasoned decision based on the evidence.

For instance, providing examples of projects that might fall under a different level of environmental review under the revised regulations would be informative (i.e., under the updated definition of effects, a certain action would only be required to produce an EA rather than an EIS). Furthermore, is there data on the percentage of projects that currently include cumulative impacts? Which agencies typically conduct such projects? Relating to the proposed interpretation of a close causal relationship (proximate cause in tort law),⁴⁷ has CEQ assessed what the drawbacks of such a definition are relative to alternative definitions?

Responses to Specific Topics Inviting Comment

Throughout its NPRM, CEQ invites comments on multiple specific questions. The following sections address select areas where I believe I can provide relevant feedback to CEQ.

⁴³ The National Environmental Policy Act of 1969, as amended. Available at: https://www.energy.gov/sites/prod/files/nepapub/nepa_documents/RedDont/Req-NEPA.pdf.

⁴⁴ Fact Sheet: CEQ’s Proposal to Modernize its NEPA Implementing Regulations, <https://www.whitehouse.gov/wp-content/uploads/2020/01/20200109FINAL-FACT-SHEET-v3-1.pdf>

⁴⁵ See, e.g., [Going Deeper on NEPA, with J.B. Ruhl](#); [Push to scale back US environmental law draws ire at hearing; Landmark Environmental Rules Slated for Overhaul](#); [Does Federal Permitting Under the National Environmental Policy Act Need Reform?](#);

⁴⁶ 85 FR 1707-8.

⁴⁷ 85 FR 1708.

A. Proposed changes throughout Parts 1500-1508

CEQ invites comment on whether it should make these types of changes throughout the rule or if there are additional specific instances where CEQ should make these types of changes. (85 FR 1692)

In general, CEQ's NEPA regulations would benefit from the improved organization, grammar, clarity, word choice, and consistency that would be carried out throughout document under the proposed rule. In addition, adding "tribal" when "state and local" entities are referenced in the NEPA regulations is an excellent change,⁴⁸ which is consistent with my public comment on the 2018 ANPRM⁴⁹ and Executive Order 12866.⁵⁰

Recommendation 5: CEQ should implement its proposed changes throughout parts 1500-1508 to improve clarity, and it should incorporate references to tribal entities where state and local entities are mentioned.

D. Proposed Revisions to Environmental Impact Statements (EISs) (Part 1502)

A concern raised by many commenters is that agencies have limited resources and that it is important that agencies use those resources effectively. Analyzing a large number of alternatives, particularly where it is clear that only a few alternatives would be economically and technically feasible and realistically implemented by the applicant, can divert limited agency resources. CEQ invites comment on whether the regulations should establish a presumptive maximum number of alternatives for evaluation of a proposed action, or alternatively for certain categories of proposed actions. CEQ seeks comment on (1) specific categories of actions, if any, that should be identified for the presumption or for exceptions to the presumption; and (2) what the presumptive number of alternatives should be (e.g., a maximum of three alternatives including the no action alternative). (85 FR 1702)

As the existing NEPA implementing regulations state, the section on considering alternatives "is the heart of the environmental impact statement."⁵¹ Similarly, guidance on regulatory analysis directs agencies to assess various alternatives when developing regulations.⁵² As a result, the proposal to set a presumptive maximum number of alternatives is problematic.

⁴⁸ *Also see*, the public comment from William Micklin of the Ewiiapaayp Band of Kumeyaay Indians: <https://www.regulations.gov/document?D=CEQ-2019-0003-0006>.

⁴⁹ *See*, 2018 ANPRM PIC, p. 8.

⁵⁰ Executive Order 12866, Sec. 1(b)(9).

⁵¹ 40 CFR 1502.14, 2019 edition.

⁵² *See*, OMB Circular A-4.

Setting maximums—particularly for alternative approaches—is a blunt tool with perverse incentives. For example, such changes may make it easier for agencies to contrast the preferred action with a substantially less desirable action and “no action.” In other words, agencies could have greater leeway to construct “straw man” alternatives rather than focusing on real competing alternatives.

In contrast, OMB’s approach in Circular A-4, which suggests a presumptive *minimum* of alternatives (“at least three options”), would be more prudent:

You should carefully consider all appropriate alternatives for the key attributes or provisions of the rule. The previous discussion outlines examples of appropriate alternatives. Where there is a “continuum” of alternatives for a standard (such as the level of stringency), you generally should analyze at least three options: the preferred option; a more stringent option that achieves additional benefits (and presumably costs more) beyond those realized by the preferred option; and a less stringent option that costs less (and presumably generates fewer benefits) than the preferred option.⁵³

Such an approach incentivizes agencies to consider a baseline of alternative options, with the flexibility to expand the analysis depending on the scope of the problem to be solved. Agencies should also be encouraged to explore different mechanisms for achieving the purpose of the action. More frequently integrating NEPA reviews with regulatory impact analyses under EO 12866 may encourage agencies to consider approaches that remain within a reasonable range of alternatives.

Recommendation 6: CEQ should not establish a presumptive maximum of alternatives but instead consider different ways to incentivize agencies to focus on genuine competing alternatives.

H. Proposed Revisions to Other Requirements of NEPA (Part 1506)

CEQ invites comments on additional analyses agencies are already conducting that, in whole or when aggregated, can serve as the functional equivalent of the EIS. Aspects of the E.O. 12866 cost benefit analysis may naturally overlap with aspects of the EIS. (85 FR 1705)

When a major federal action is related to a significant regulatory action, agencies should more closely integrate the RIA and EIS processes. When it comes to covered regulations, NEPA and Executive Order 12866 apply similar procedures, as recognized by the NPRM.⁵⁴ Allowing the two

⁵³ OMB, Circular A-4, p. 16.

⁵⁴ 85 FR 1705: “An RIA, alone or in combination with other documents, may serve the purposes of the EIS if (1) there are substantive and procedural standards that ensure full and adequate consideration of environmental issues; (2) there is public participation before a final alternative is selected; and (3) a purpose of the review that

procedures to be integrated is sensible, so that a regulatory decision can be made with proper attention to both sources of information.

Furthermore, the separation between the two processes is often inconsistent with NEPA's objective of encouraging informed decision-making. To provide a recent example, Canadian experts noticed that a U.S. Fish and Wildlife Service rule had two comment periods open for public comment—one for a notice of intent to conduct an EIS and a second for the NPRM.⁵⁵ They questioned why this was the case, because if the agency had already selected its preferred option in the NPRM, how can the EIS process meaningfully inform the choice among alternative actions? While this situation is not necessarily common to all major federal actions, it reflects a limitation of separating the two processes.

Notably, the Canadian environmental review process, clearly outlined by the Impact Assessment Act,⁵⁶ reflects a more frontloaded analytical process than that of the United States.⁵⁷ CEQ may wish to look at the implementation of environmental review in other countries as it considers ways to improve the NEPA process.

Recommendation 7: CEQ should use its NEPA implementing regulations to promote integration of the NEPA and Executive Order 12866 processes for applicable rulemakings.

I. Proposed Revisions to Agency Compliance (Part 1507)

Opportunities exist for agencies to combine existing geospatial data, including remotely sensed images, and analyses to streamline environmental review and better coordinate development of environmental documents for multi-agency projects, consistent with the OFD policy. One option involves creating a single NEPA application that facilitates consolidation of existing datasets and can run several relevant geographic information system (GIS) analyses to help standardize the production of robust analytical results. This application could have a public-facing component modeled along the lines of EPA's NEPAAssist, which would aid prospective project sponsors with site selection and project design and increase public transparency. The application could link to the Permitting Dashboard to help facilitate project tracking and flexibilities under §§ 1506.5 and 1506.6. CEQ invites comment on this proposal, including comment on whether additional regulatory

the agency is conducting is to examine environmental issues. CEQ proposes § 1506.9 to promote efficiency and reduce duplication in the assessment of regulatory proposals.”

⁵⁵ Docket ID: FWS-HQ-MB-2018-0090, <https://www.regulations.gov/docket?D=FWS-HQ-MB-2018-0090>.

⁵⁶ See, Impact Assessment Act and CEEA 2012 Comparison, <https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance/impact-assessment-act-and-ceea-2012-comparison.html>.

⁵⁷ See, e.g., <https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance/impact-assessment-process-overview/phase2.html>.

changes could help facilitate streamlined GIS analysis to help agencies comply with NEPA. (85 FR 1707)

This option seems like a beneficial proposal that CEQ should further explore. Testing a beta-version with a small subset of actions (or agencies) may help to refine the application. If instituted, the results of GIS analyses produced through the application should be publicly available during the public comment period on an EIS. The Federal Emergency Management Agency (FEMA) employs tools for conducting benefit-cost analyses for its Hazard Mitigation Assistance (HMA) and Public Assistance (PA) grant programs.⁵⁸ These tools permit FEMA to produce many analyses in a standardized manner, even when dealing with a variety of applicants. CEQ should consult with FEMA on whether its tools provide a useful reference for standardizing the production of GIS analyses associated with the NEPA process.

Recommendation 8: CEQ should pursue the option to create a single NEPA application for standardizing GIS analyses, and it should consult with FEMA on developing methodologies and tools.

⁵⁸ See, FEMA's Benefit-Cost Analysis (BCA) program guidelines, methodologies, and tools for the Hazard Mitigation Assistance and Public Assistance grant programs: <https://www.fema.gov/benefit-cost-analysis>.

Conclusion

CEQ's NPRM would be the first substantive revision in decades to its NEPA implementing regulations. This public interest comment assesses CEQ's proposal in three main sections: (a) aligning NEPA with regulatory best practices; (b) encouraging systematic regulatory analysis of the proposed rule; and (c) addressing specific topics where CEQ invites comment. Below I summarize my recommendations:

1. CEQ should work with EPA to augment the EIS database and expand it to EAs.
2. CEQ should establish expectations in its implementing regulations for metrics that can be used to measure improvement over time.
3. CEQ should institute subsequent, periodic reviews of NEPA implementation at set intervals.
4. Before moving forward with a final rule, CEQ should conduct, publicly release, and accept public input on an RIA of the update to its NEPA implementing regulations.
5. CEQ should implement its proposed changes throughout parts 1500-1508 to improve clarity, and it should incorporate references to tribal entities where state and local entities are mentioned.
6. CEQ should not establish a presumptive maximum of alternatives but instead consider different ways to incentivize agencies to focus on genuine competing alternatives.
7. CEQ should use its NEPA implementing regulations to promote integration of the NEPA and Executive Order 12866 processes for applicable rulemakings.
8. CEQ should pursue the option to create a single NEPA application for standardizing GIS analyses, and it should consult with FEMA on developing methodologies and tools.