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Public Interest Comment¹ on
The Council on Environmental Quality's Advance Notice of Proposed Rulemaking
Update to the Regulations for Implementing the Procedural Provisions of the
National Environmental Policy Act

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Mark Febrizio, Policy Analyst²

The George Washington University Regulatory Studies Center

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 (CEQ) Advance Notice of Proposed Rulemaking (ANPRM) for updating the regulations for implementing the procedures of the National Environmental Policy Act (NEPA) does not represent the views of any particular affected party or special interest, but is designed to evaluate the effect of CEQ's proposal on overall consumer welfare.

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>.

² Mark Febrizio is a Policy Analyst at the George Washington University Regulatory Studies Center. He can be reached at mfebrizio@gwu.edu.

Introduction

For the first time in 30 years, the Council on Environmental Quality (CEQ) is considering an update to its regulations for implementing the procedural provisions of the National Environmental Policy Act (NEPA) of 1969.³ 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 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 decisionmaking process.⁵

On June 20, 2018, CEQ published an advance notice of proposed rulemaking (ANPRM) in the Federal Register, titled “Update to the Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act.”⁶ Through the ANPRM, “CEQ requests comments on potential revisions to update and clarify CEQ NEPA regulations” as it considers substantively revising the regulations with subsequent rulemaking.⁷ CEQ’s request for comment on potential revisions to NEPA regulations consists of 20 questions divided into three categories: NEPA Process; Scope of NEPA Review; and General. A consistent theme is to “ensure a more efficient, timely, and effective NEPA process consistent with the national environmental policy stated in NEPA.”⁸

The ANPRM itself will not change existing regulations, but any resulting proposed rule and final rule could have significant implications for the NEPA process and agency preparation of environmental reviews. Given the expertise and experience residing in federal agencies that implement NEPA, seeking their input at this early stage of developing a proposal is especially important.

The ANPRM is an opportunity for CEQ to align its NEPA regulations with the regulatory best practices established in Executive Order (EO) 12866, Office of Management and Budget (OMB) Circular A-4, and other documents developed after CEQ’s NEPA regulations were initially finalized. Specifically, CEQ should make its provisions on benefit-cost analysis (BCA) consistent with regulatory best practices as well as lay a foundation for conducting retrospective review of

³ While the statute is called the National Environmental Policy Act of 1969, it was signed into law on January 1, 1970.

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 Government Accountability Office (GAO). 2014. “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 CEQ. 2018. “Update to the Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act,” June 20, 2018, 83 FR 28591. <https://www.federalregister.gov/d/2018-13246>.

⁷ 83 FR 28591.

⁸ 83 FR 28591.

NEPA regulations. The Act and its implementing regulations lack measures for gauging NEPA's effectiveness. The agency can inform *ex post* analysis by establishing metrics that generate useful information on NEPA implementation. Furthermore, creating provisions for retrospective review will better prepare the public to provide recommendations on how to revise and clarify NEPA regulations in the future.

Brief Background on the NEPA Process

Before taking a major federal action, an agency (or multiple agencies) must consider if the proposed action significantly affects “the quality of the human environment.”⁹ According to CEQ's definition, “major Federal action includes actions with effects that may be major and which are potentially subject to Federal control and responsibility.”¹⁰ Such actions tend to consist of the adoption or approval of official policies (including rules and regulations), formal plans, programs, and specific projects.¹¹

When developing a proposal for a major federal action, agencies conduct an environmental review that can involve three levels of analysis: categorical exclusions (CE); environmental assessments (EA); and environmental impact statements (EIS).¹² The purpose of the process is to evaluate whether preparation of an EIS is required, as it is the most extensive form of environmental review under NEPA. When considering whether an EIS is necessary, agencies rely on their own procedures supplementing CEQ's regulations. An agency's adopted NEPA procedures may exclude categories “of actions which do not individually or cumulatively have a significant effect on the human environment” from detailed environmental review through an EA or an EIS.¹³

If an action does not fall under a CE, an agency prepares an EA, which may result in a finding of no significant impact (FONSI) or the decision to complete an EIS.¹⁴ Conducting an EIS requires an agency to determine the range of actions, alternatives, and actions to be considered.¹⁵

Additionally, NEPA can be viewed as an “umbrella statute” that incorporates compliance with other legal requirements into its process for environmental review. According to the Congressional Research Service (CRS), “any study, review, or consultation required by any other law that is

⁹ 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>.

¹⁰ 40 CFR 1508.18. Revised as of July 1, 2017, <https://www.gpo.gov/fdsys/pkg/CFR-2017-title40-vol37/xml/CFR-2017-title40-vol37-chapV.xml>.

¹¹ 40 CFR 1508.18.

¹² U.S. Environmental Protection Agency (EPA). “National Environmental Policy Act Review Process.” accessed August 13, 2018, <https://www.epa.gov/nepa/national-environmental-policy-act-review-process>.

¹³ 40 CFR 1508.4.

¹⁴ 40 CFR 1508.4, 1508.9, 1508.13, 1508.11.

¹⁵ 40 CFR 1508.25.

related to the environment should be conducted within the framework of the NEPA process.”¹⁶ Besides applicable state, local, and tribal laws, at least 15 other federal acts could correspond with NEPA review of a major federal action.¹⁷

Statutory Authority

The National Environmental Policy Act—which also created CEQ—was enacted in 1970 and is the primary statutory authority for NEPA regulations, although subsequent executive orders from multiple administrations guided the promulgation of CEQ’s regulations.

Executive Orders

EO 11514 (1970) clarified the responsibilities of federal agencies under NEPA and directed CEQ to issue guidelines for preparing detailed statements for environmental review of federal actions.¹⁸ EO 11991 (1977) amended EO 11514, directing CEQ to “[i]ssue regulations to Federal agencies for the implementation of the procedural provisions of the Act” and requiring agencies to comply with CEQ’s regulations.¹⁹

The final regulations governing the implementation of NEPA were originally published in November 1978, and by the following June the Supreme Court had already cited them, noting that “CEQ’s interpretation of NEPA is entitled to substantial deference.”²⁰

The regulations have been revised twice.²¹ More significantly, CEQ has only substantively updated the regulations once, in 1986, to revise its provisions on “incomplete or unavailable information”²² and remove the “worst case analysis” requirement in that section.²³

President Trump issued EO 13807 on August 15, 2017 “to ensure that the Federal environmental review and permitting process for infrastructure projects is coordinated, predictable, and

¹⁶ Congressional Research Service (CRS). 2011. “The National Environmental Policy Act (NEPA): Background and Implementation.” January 10, 2011, p. 25.

https://www.everycrsreport.com/files/20110110_RL33152_69b27c980f2b1121fd078e3982ac47e9c48d7111.pdf.

¹⁷ CRS. 2011, p. 25.

¹⁸ Exec. Order No. 11514. “Protection and enhancement of environmental quality.” Richard Nixon, March 5, 1970, <https://www.archives.gov/federal-register/codification/executive-order/11514.html>.

¹⁹ Exec. Order No. 11991. “Environmental Impact Statements.” Jimmy Carter, May 24, 1977, <http://www.gccga.com/assets/executive-order-11991.pdf>.

²⁰ *Andrus v. Sierra Club*, 442 U.S. 347 (June 11, 1979).

²¹ CEQ. “CEQ NEPA Implementing Procedures.” accessed August 13, 2018, <https://ceq.doe.gov/laws-regulations/regulations.html>.

²² 40 CFR 1502.22.

²³ CEQ. 1986. “National Environmental Policy Act Regulations; Incomplete or Unavailable Information.” Final Rule, April 25, 1986. 51 FR 15618, <https://ceq.doe.gov/docs/laws-regulations/FR-1986-04-25-51-FR-15618-CEQ-NEPA-Regulations-NOFR-amending-1502-22.pdf>.

transparent.”²⁴ Section 5(e)(i) of the order directed CEQ to “develop an initial list of actions it will take to enhance and modernize the Federal environmental review and authorization process.”²⁵ CEQ published its initial list of actions on September 14, 2017, which included a provision to “review existing CEQ Regulations implementing the procedural provisions of NEPA in order to identify changes needed to update and clarify those regulations.”²⁶

Judicial Review

Furthermore, judicial review is an intrinsic part of the NEPA process and has been since the passage of the Act in 1970. While CEQ did not promulgate its implementing regulation until later in the decade, “litigation that served to interpret NEPA’s requirements and enforce agency compliance began almost immediately.”²⁷ 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 decisionmaking process.”²⁸ Furthermore, while NEPA and its implementing regulations prescribe particular procedural actions, agencies are still given significant leeway on substantive issues and decisions.²⁹

Although CEQ is tasked with administering NEPA requirements, enforcement of NEPA implementation is generally handled by the courts. Environmental reviews can be challenged in court by interest groups, private citizens, state and local governments, or other federal agencies. CEQ reports major cases that influenced the implementation of NEPA, including those that handled agency compliance obligations, definitional questions, and judicial review of agency actions.³⁰ A 2014 U.S. Government Accountability Office (GAO) report documented that the federal government often prevails in litigation.³¹ The majority of NEPA reviews are not contested via lawsuit, and the amount of litigation has remained relatively constant—consistently below 100

²⁴ Exec. Order No. 13807. “Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects.” Donald Trump, August 15, 2017. 82 FR 40463, <https://www.federalregister.gov/d/2017-18134>.

²⁵ Exec. Order No. 13807. *See*, 82 FR 40467-8.

²⁶ CEQ. 2017. “Initial List of Actions to Enhance and Modernize the Federal Environmental Review and Authorization Process.” Notice, September 14, 2017, 82 FR 43226, Section 3(b), <https://www.federalregister.gov/d/2017-19425>.

²⁷ CRS. 2011, Summary.

²⁸ CRS. 2011, p. 8.

²⁹ CRS. 2011, p. 8.

³⁰ CEQ. “Major Cases Interpreting the National Environmental Policy Act.” accessed August 10, 2018, https://ceq.doe.gov/docs/laws-regulations/Major_NEPA_Cases.pdf.

³¹ GAO. 2014, p. 18.

cases a year since 2009 (CEQ’s most recent litigation report is from 2013).³² Nevertheless, while litigation is generally rare, individual lawsuits can “hav[e] a far-reaching impact” and affect multiple federal actions.³³

Compliance with Regulatory Analysis Requirements

EO 12866 establishes the core tenets of regulatory analysis for executive branch agencies. A key requirement of EO 12866 is related to periodic review of regulations to consider whether they have met their objectives and/or can be improved:

...the agency will periodically review its existing significant regulations to determine whether any such regulations should be modified or eliminated so as to make the agency’s regulatory program more effective in achieving the regulatory objectives, less burdensome, or in greater alignment with the President’s priorities and the principles set forth in this Executive order.³⁴

Rather than attempt to solve a new problem with the ANPRM, CEQ is trying to promote better utilization of and resolve inadequacies with the existing NEPA process. The first two principles of regulation outlined in EO 12866 are consistent with this effort:

- (1) Each agency shall identify the problem that it intends to address (including, where applicable, the failures of private markets or public institutions that warrant new agency action) as well as assess the significance of that problem.
- (2) Each agency shall examine whether existing regulations (or other law) have created, or contributed to, the problem that a new regulation is intended to correct and whether those regulations (or other law) should be modified to achieve the intended goal of regulation more effectively.

Specifically, CEQ is considering substantive revisions of its NEPA regulations to make the process “more efficient, timely, and effective.”³⁵ While the ANPRM does not exclusively focus on the relationship between environmental review and infrastructure, it emphasizes factors relevant to infrastructure permitting including: efficiency, coordination among agencies, scoping, and reducing unnecessary burdens and delays.

The ANPRM is considered a significant regulatory action under EO 12866, but “the various statutes and executive orders that normally apply to rulemaking do not apply in this case” because

³² GAO. 2014, p. 19.

³³ GAO. 2014, p. 19.

³⁴ Exec. Order No. 12866. Sec. 5(a).

³⁵ 83 FR 28591.

there are no proposed requirements at this stage in the process.³⁶ Subsequent actions in the docket, such as proposed rulemakings, may be also considered significant and require compliance with the requirements for regulatory analysis under EO 12866.

Based on the principles contained in EO 12866, it is appropriate for CEQ to solicit feedback on how to improve the NEPA process and address the problems identified by EO 13807.³⁷ 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.

Regulatory Analysis

The initial CEQ regulations were promulgated before the initiation of “broadly applicable cost-benefit analysis requirements in the rulemaking process.”³⁸ Since NEPA regulations have not been revised since EO 12866 and OMB Circular A-4 were issued, the principles espoused in those policies are useful for shaping any revisions that emerge from this process.

CEQ expects that the existing NEPA regulations could be enhanced and modernized to make the process more efficient. Relatedly, the ANPRM acknowledges that the regulations are a possible source of inefficiency and lack of accountability, and CEQ believes that updating the regulations could improve results. Previous executive orders, guidance from the White House, and decades of agency experience implementing NEPA form the basis for CEQ’s ANPRM. The rulemaking’s perspective on the relationship between environmental review and infrastructure permitting is informed by a March 2018 joint CEQ and OMB memorandum that calls “for agencies to carry out responsibilities under Executive Order (E.O.) 13807, which requires Federal agencies to process environmental reviews and authorization decisions for ‘major infrastructure projects’ as One Federal Decision (OFD).”³⁹

The agency is still gathering information on how best to update its NEPA regulations, and the ANPRM represents part of the process of examining other regulatory alternatives. In addition, the feedback generated by the ANPRM may reveal unintended consequences of the proposed standards. For instance, prioritizing efficiency may potentially come at the expense of robust public involvement. Alternatively, modifying NEPA regulations could disrupt existing agency

³⁶ 83 FR 28591, <https://www.federalregister.gov/d/2018-13246/p-51>.

³⁷ 83 FR 28591, <https://www.federalregister.gov/d/2017-18134/p-55>; *Also see*, “Memorandum of Understanding Implementing One Federal Decision under Executive Order 13807.” <https://www.whitehouse.gov/wp-content/uploads/2018/04/MOU-One-Federal-Decision-m-18-13-Part-2-1.pdf>.

³⁸ CRS. 2014. “Cost-Benefit and Other Analysis Requirements in the Rulemaking Process.” R41974, December 9, 2014, p. 3, <https://fas.org/sgp/crs/misc/R41974.pdf>.

³⁹ OMB & CEQ. 2018. “Memorandum for Heads of Federal Departments and Agencies.” March 20, 2018, <https://www.whitehouse.gov/wp-content/uploads/2018/04/M-18-13.pdf>.

processes for complying with NEPA without creating substantially better outcomes. The ANPRM invites the public and experts to weigh in on existing NEPA regulations before CEQ determines whether a proposed rulemaking is needed. Undoubtedly, the many federal agencies involved in implementing EO 13807 are engaged in internal deliberations about various ideas for improving NEPA and related procedures. For the purpose of the CEQ rulemaking, however, it would be helpful if agencies were encouraged to put their relevant insights and recommendations into the docket. CEQ should also consider actively soliciting comment from state agencies, since states frequently take responsibility for NEPA compliance when they are pursuing infrastructure projects that use federal funds and will have their own ideas for process improvements.

Several provisions in EO 12866 support the consideration of revisions to NEPA rules. For example, the order directs agencies to base regulations “on the best reasonably obtainable scientific, technical, economic, and other information”⁴⁰ and to prioritize clarity and reduce uncertainty.⁴¹ EO 12866 also requires CEQ to consider the impact of its regulatory requirements on other government entities, highlighting the importance of harmonizing federal actions with those of state, local, and tribal bodies:

Wherever feasible, agencies shall seek views of appropriate State, local, and tribal officials before imposing regulatory requirements that might significantly or uniquely affect those governmental entities. Each agency shall assess the effects of Federal regulations on State, local, and tribal governments, including specifically the availability of resources to carry out those mandates, and seek to minimize those burdens that uniquely or significantly affect such governmental entities, consistent with achieving regulatory objectives. In addition, as appropriate, agencies shall seek to harmonize Federal regulatory actions with related State, local, and tribal regulatory and other governmental functions.⁴²

EO 12866 also directs agencies to take into account cost-effectiveness and incentives when crafting regulations. The ANPRM creates an opportunity to reassess the appropriateness of the existing regulations and consider whether they represent “the best available method of achieving the regulatory objective.”⁴³

Responses to CEQ Questions

In light of the principles of regulatory analysis established in EO 12866, the following comments focus on the subsections in the ANPRM’s Request for Comment as well as discuss provisions for incorporating retrospective review into NEPA regulations. Some comments offer relatively

⁴⁰ Exec. Order No. 12866. Sec. 1(b)(7).

⁴¹ Exec. Order No. 12866. Sec. 1(b)(12).

⁴² Exec. Order No. 12866. Sec. 1(b)(9).

⁴³ Exec. Order No. 12866. Sec. 1(b)(5).

general advice on improving the existing regulations, while others respond to specific questions from CEQ. This public comment directly responds to six of CEQ’s 20 questions.

Section 1: NEPA Process

CEQ’s three questions related to the NEPA process primarily focus on two major themes: (1) synchronizing interagency coordination on environmental reviews and authorization decisions, and (2) integrating earlier environmental studies, analyses, and decisions into the process.

The existing regulations already include provisions intended to achieve those goals. For instance, various sections speak to environmental reviews involving multiple agencies (Question 1),⁴⁴ incorporation of previous studies from other levels of government (Question 2),⁴⁵ and ensuring optimal interagency coordination (Question 3).⁴⁶ Thus, the primary problems with the existing process might be more related to inadequate incentives for agencies to coordinate and utilize past environmental reviews. CEQ should investigate the underlying reasons why agencies do not sufficiently coordinate on or utilize earlier analyses for environmental reviews and authorization decisions.

For instance, adding the Section 106 review process—and relevant agencies like the Advisory Council on Historic Preservation (ACHP)—on top of the NEPA process contribute to a lack of “concurrent, synchronized, timely, and efficient” decisionmaking.⁴⁷ CEQ should evaluate how various satellite procedures and concurrent processes, such as Section 106 review, can be more effectively and efficiently integrated. CEQ partnered with ACHP to release *NEPA and NHPA: A Handbook for Integrating NEPA and Section 106* in March 2013,⁴⁸ but barriers remain to realizing the handbook’s purpose to “clarify potential areas of confusion and duplication that have long existed in administering these two separate statutes.”⁴⁹ CEQ should consider ways to integrate the guidance and best practices from the report into revised NEPA regulations.⁵⁰

⁴⁴ *E.g.*, 40 CFR 1503, 1506.2, 1506.3, 1506.4.

⁴⁵ *E.g.*, 40 CFR 1502.20, 1502.21, 1502.25(a).

⁴⁶ *E.g.*, 40 CFR 1500.2(c), 1503, 1504.

⁴⁷ 83 FR 28591, <https://www.federalregister.gov/d/2018-13246/p-12>.

⁴⁸ CEQ and ACHP. 2013. *NEPA and NHPA: A Handbook for Integrating NEPA and Section 106*. March 2013, https://ceq.doe.gov/docs/ceq-publications/NEPA_NHPA_Section_106_Handbook_Mar2013.pdf.

⁴⁹ CEQ. “NEPA NHPA Section 106 Handbook.” accessed August 16, 2018, <https://ceq.doe.gov/publications/nepa-handbooks.html>.

⁵⁰ These recommendation are also relevant to Question 16 in CEQ’s Request for Comment: <https://www.federalregister.gov/d/2018-13246/p-45>. However, they fit better in a broader discussion of the “NEPA Process” than under the “General” questions section.

Section 2: Scope of NEPA Review

According to CEQ regulations, “[s]cope consists of the range of actions, alternatives, and impacts to be considered in an environmental impact statement.”⁵¹ The scoping process is used in an environmental review “for determining the scope of issues to be addressed and for identifying the significant issues related to a proposed action.”⁵² CEQ asks ten questions related to the scope of NEPA review that implicate the length, timing, breadth, and complexity of the documents considered and produced by agencies seeking to take major federal actions (4 of these questions are addressed in this comment).

Question 5: “*Should CEQ’s NEPA regulations be revised to provide greater clarity to ensure NEPA documents better focus on significant issues that are relevant and useful to decisionmakers and the public, and if so, how?*”

Multiple passages in the existing NEPA regulations emphasize the importance of focusing on significant issues.⁵³ Most concisely, 1500.1(b) states, “Most important, NEPA documents must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail.”⁵⁴

This also suggests that, to the extent a problem exists, it may be driven by the incentives that cause agencies to conduct exhaustive NEPA reviews for fear of litigation rather than a lack of clarity about the importance of focusing on significant issues.⁵⁵ Assessing how often insignificant issues become major components of an EIS and determining which agencies are the most egregious offenders will help CEQ clarify provisions on how NEPA reviews should focus on significant issues.

Question 6: “*Should the provisions in CEQ’s NEPA regulations relating to public involvement be revised to be more inclusive and efficient, and if so, how?*”

Current NEPA regulations include provisions to “mail” public notices to interested parties.⁵⁶ To broaden the ability of the government to communicate relevant information to the public, the regulations should remain technology neutral, directing agencies to provide notices to the public, interested organizations, or other affected parties but not specifying the particular method used to communicate the notices.

⁵¹ 40 CFR 1508.25.

⁵² 40 CFR 1501.7.

⁵³ *E.g.*, 40 CFR 1500.4(c), 1500.4(g), 1500.4(p), 1501.1(d), 1508.4.

⁵⁴ 40 CFR 1500.1(b).

⁵⁵ *Also see*, the American Association of State Highway and Transportation Officials’ (AASHTO) public comments, p. 6, <https://www.regulations.gov/document?D=CEQ-2018-0001-8267>.

⁵⁶ 40 CFR 1506.6.

For instance, Part 1506.6(b)(1) could be revised as follows:

In all cases the agency shall provide notice to those who have requested it on an individual action through the least costly means, unless a specific method of communication is requested or mandated by statute.

Part 1506.6(b)(2) has additional references to mailed notices and also contains an outdated reference to the defunct EPA publication, the *102 Monitor*.⁵⁷

In the case of an action with effects of national concern notice shall include publication in the FEDERAL REGISTER and notice ~~by mail~~ to national organizations reasonably expected to be interested in the matter ~~and may include listing in the 102 Monitor~~. An agency engaged in rulemaking may provide notice ~~by mail~~ to national organizations who have requested that notice regularly be provided. Agencies shall maintain a list of such organizations.

Part 1506.6(b)(3) makes suggestions about what methods of communication that providing notice “may include,”⁵⁸ but it does not mandate any particular method. While making this section technology neutral would be valuable, it is not as critical as modifying the other sections.

Question 8: “Should any new definitions of key NEPA terms, such as those noted below, be added, and if so, which terms?”

(a) *Alternatives.* While alternatives are mentioned numerous times in existing CEQ regulations,⁵⁹ they are not defined in Part 1508 (Terminology and Index). In particular, Part 1502.14 provides instructions on how to analyze alternatives in an EIS, and Part 1508.25 requires agencies to consider three types of alternatives to determine the scope of an EIS. Adding a new definition for alternatives that centralizes information from other sections of the regulations would clarify how agencies should consider good alternatives to proposed actions. On the other hand, producing more detailed guidance on alternatives for individual agencies to integrate into their procedures could be preferable, since it is not clear that a one-size-fits-all definition will work well. At a minimum,

⁵⁷ The *102 Monitor* was a monthly journal established in the 1970s and published by EPA. It contained information on EISs, NEPA policies, and other relevant information from EPA and CEQ. See, Memorandum of Agreement No. 1 between EPA and CEQ. October 7, 1977, https://ceq.doe.gov/docs/get-involved/CEQEPA_MOU_EIS_Filing_10071977.pdf.

⁵⁸ 40 CFR 1506.6(b)(3).

⁵⁹ See, 40 CFR 1500.2(b), 1500.2(e), 1501.2(c), 1502.1, 1502.2(d), 1502.2(e), 1502.2(f), 1502.4(c)(2), 1502.4(c)(3), 1502.9(a), 1502.10, 1502.12, 1502.13, 1502.15, 1502.16, 1502.22(a), 1502.23, 1503.3(a), 1503.3(b), 1503.4(a), 1504.2(f), 1504.3(c)(2)(vi), 1505.1(e), 1505.2(b), 1505.2(c), 1506.1(a)(2), 1506.1(c)(3), 1507.2(d), 1508.5, 1508.9(b), 1508.22(a), 1508.23.

CEQ should consult the directives in EO 12866 on identifying and evaluating alternatives as it revises NEPA regulations or prepares guidance for agencies.⁶⁰

(c) Reasonably Foreseeable. The term is used multiple times in Part 1502.22 to modify “significant adverse impacts,” in Part 1508.7 to modify “future actions,” and in Part 1508.8 to modify “Indirect effects.” When discussing how to deal with “incomplete or unavailable information,” the regulations even define reasonably foreseeable “For the purposes of this section.”⁶¹ Since CEQ deemed it important to define in the context of Part 1502.22, creating a revised definition that reflects the most current usage of the term would improve clarity. Better clarity would assist agencies in avoiding environmentally unsatisfactory actions, especially in the context of predecision referrals to CEQ or litigation. It could also help avoid overly risk-averse approaches to environmental review—often stemming from fear of litigation—that incentivize agencies to disregard CEQ guidance to only focus on significant issues and effects.⁶²

Question 13: “*Should the provisions in CEQ’s NEPA regulations relating to the appropriate range of alternatives in NEPA reviews and which alternatives may be eliminated from detailed analysis be revised, and if so, how?*”

As “the heart of the environmental impact statement,” clear direction on evaluation of alternatives assists with effective environmental review and decisionmaking.⁶³ The requirements to “objectively evaluate all reasonable alternatives” and justify which alternatives were eliminated from consideration establish greater accountability for agencies.⁶⁴ Any revisions should consider EO 12866 and direct agencies to focus on appropriate and reasonable alternatives:

An assessment, including the underlying analysis, of costs and benefits of potentially effective and reasonably feasible alternatives to the planned regulation, identified by the agencies or the public (including improving the current regulation and reasonably viable nonregulatory actions), and an explanation why the planned regulatory action is preferable to the identified potential alternatives.⁶⁵

⁶⁰ See, Exec. Order No. 12866: Sec. 1(a), Sec. 1(b)(3), Sec. 1(b)(8), Sec. 4(c)(1)(B), Sec. 6(a)(3)(C)(iii).

⁶¹ 40 CFR 1502.22(b)(1).

⁶² While not discussing the issue in the same context as this comment, former CEQ General Counsel Nicholas Yost articulated that fear of litigation is a key reason for delays in conducting NEPA reviews. See, Yost’s public comment at p. 7: “Fear of litigation which can lead to overcaution which in turn can lead to delay. This is more a perception than a reality. Only a small proportion of processes result in judicial challenges, and only a small proportion of such challenges results in injunctive relief. In one typical recent year 99.97% of NEPA actions were successfully completed without injunctive relief—hardly enough to cause a high level of concern. (At the same time the prospect of such relief if a project proponent attempts to shortcircuit NEPA and the Regulations encourages compliance—doing a good job in the first place.)”

⁶³ 40 CFR 1502.14.

⁶⁴ 40 CFR 1502.14(a).

⁶⁵ Exec. Order No. 12866, Sec. 6(a)(3)(C)(iii).

Furthermore, the provisions to present the environmental impacts of alternatives in comparative form help evaluation among choices and should be retained. Mandating agencies to include in the analysis “the alternative of no action” or actions outside “the jurisdiction of the lead agency” improve decisionmaking by requiring the EIS to consider alternatives that the agency may otherwise not have an interest in including. To bolster the evaluation of alternative approaches, CEQ should clarify the types of alternatives that agencies shall consider. Specifically, to make the analysis more robust, the agency should consider integrating alternatives from the list of Alternative Regulatory Approaches in OMB Circular A-4 into its NEPA regulations.⁶⁶

A variety of stakeholders agree that retaining the provisions to examine and choose among appropriate and reasonable alternatives is important to the NEPA process.⁶⁷ Most notably, Nicholas C. Yost, former General Counsel of CEQ, emphasized that “[t]he requirement fully to examine alternatives should not be eliminated” because it is fundamental to applying NEPA.⁶⁸

Section 3: General

CEQ’s seven general questions address various potential issues with the existing regulations, including obsolete or outdated provisions, inadequate integration of tribal governments in the NEPA process, issues related to mitigation, and miscellaneous questions to streamline and improve NEPA reviews. Some of the questions are quite broad or lack specificity; there is substantial overlap with questions from other sections. However, the general questions also provide an opportunity to make recommendations not covered by the process- or scope-related sections.

Question 14: *“Are any provisions of the CEQ’s NEPA regulations currently obsolete? If so, please provide specific recommendations on whether they should be modified, rescinded, or replaced.”*

As discussed in the answer to **Question 6**, the public involvement provisions in Part 1506.6—specifically related to providing notice—are outdated. The requirements for providing notice only specify methods that were available to the agency at the time of the initial drafting of NEPA regulations. The provisions should be revised to retain requirements for public involvement but should not constrain agencies in how to provide such notice. Agencies should be permitted to rely on contemporary methods of communication (e.g., email, website updates, RSS feeds, online

⁶⁶ Office of Management and Budget (OMB). 2003. “Circular A-4: Regulatory Analysis.” Last modified September 17, 2003. <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A4/a-4.pdf>.

⁶⁷ E.g., National Wildlife Federation Comments on CEQ NEPA Regulations ANPRM, <https://www.regulations.gov/document?D=CEQ-2018-0001-3660>: “The evaluation of alternatives is one of the most important and informative aspects of NEPA and restricting it would inevitably lead to poorer decision-making, less transparency, waste, and greater environmental harm” (pp. 13-14). *Also see*, Phil Francis, Chair of Coalition to Protect America’s National Parks, p. 8, <https://www.regulations.gov/document?D=CEQ-2018-0001-1079>.

⁶⁸ Nicholas Churchill Yost. 2018. “Response to Request for Comments.” Docket ID No. CEQ-2018-0001. August 6, 2018, p. 2.

databases, social media, etc.) but also be allowed flexibility should available methods change or new technologies become available. In short, performance-based standards for communication are preferable to provisions that identify a specific manner of compliance.⁶⁹

Question 17: *“Are there additional ways CEQ’s NEPA regulations should be revised to improve the efficiency and effectiveness of the implementation of NEPA, and if so, how?”*

As noted above, a crucial way to improve the efficiency and effectiveness of the implementation of NEPA would be to align the guidance in the regulations on benefit-cost analysis (BCA) with those in EO 12866 and OMB Circular A-4. Since the promulgation of NEPA regulations in 1978 and their subsequent revision in 1986, the executive branch has provided substantial federal guidance on undergoing regulatory analysis and conducting BCA. EO 12866 instructs:

In deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating. Costs and benefits shall be understood to include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider. Further, in choosing among alternative regulatory approaches, agencies should select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity), unless a statute requires another regulatory approach.⁷⁰

Properly conducted BCA is essential to weighing competing alternatives and evaluating tradeoffs among options. Furthermore, incorporating best practices for BCA does not preclude seriously considering non-quantifiable benefits or costs. EO 12866 goes on to clarify:

Each agency shall assess both the costs and the benefits of the intended regulation and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs.⁷¹

The BCA within an EIS does not necessarily force an agency into making a particular decision on a major federal action. Rather, it provides information important to the agency making an informed, rigorous decision. As a procedural statute, NEPA “imposes no requirement other than to require agencies to consider the environmental impacts of their actions before proceeding with

⁶⁹ This is a key principle of regulation. *See*, Exec. Order No. 12866, Sec. 1(b)(8).

⁷⁰ Exec. Order No. 12866. Sec. 1(a).

⁷¹ Exec. Order No. 12866. Sec. 1(b)(6).

them and to involve the public in that process” and “does not dictate what the decision must be.”⁷² Similarly, requiring BCA to be a component of every EIS forces agencies to take both costs and benefits into account and inform the public of the estimated tradeoffs.

The recommended wording of Part 1502.23 should be revised as follows:

~~If a [C]ost-benefit analysis relevant to the choice among environmentally different alternatives is being considered for the proposed action, it shall be incorporated by reference or appended to in the statement as an aid in evaluating the environmental consequences of appropriate and reasonable alternatives. To assess the adequacy of compliance with section 102(2)(B) of the Act the statement shall; when a cost-benefit analysis is prepared, discuss the relationship between that the cost-benefit analysis and any analyses of unquantified environmental impacts, values, and amenities. For purposes of complying with the Act, the weighing of the merits and drawbacks of the various alternatives need not be displayed in a monetary cost-benefit analysis and should not be when there are important qualitative considerations. In any event, an environmental impact statement should at least indicate those considerations, including factors not related to environmental quality, which are likely to be relevant and important to a decision.~~

Furthermore, language from EO 12866 can be adapted and inserted into Part 1502.23 in the following manner:

Agencies should assess all costs and benefits of available alternatives, including the alternative of no action. Costs and benefits shall be understood to include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider. Further, in choosing among alternatives, agencies should select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity), unless a statute requires another approach.

Generally, the degree to which EO 12866 and the related procedures for evaluating significant regulatory actions have come to resemble NEPA and the related procedures for evaluating major federal actions 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.

⁷² CRS. 2011, p. 31.

Retrospective Review

Beyond substantive revisions to existing NEPA regulations, CEQ’s ANPRM offers an opportunity to modify the regulations in order to generate better information on the effectiveness of NEPA. Consistent with EO 13563 (2011), retrospective analysis of existing rules is valuable for evaluating whether regulations meet their objectives and can be improved. Crucial to this process, the regulatory system—along with federal agencies operating within it—“must measure, and seek to improve, the actual results of regulatory requirements.”⁷³ Thus, asking whether the rule achieved its objectives is a productive question.

CEQ was established “to ensure that Federal agencies meet their obligations under NEPA” and “oversees NEPA implementation, principally through issuing guidance and interpreting regulations that implement NEPA’s procedural requirements.”⁷⁴ The agency should consider instituting methods to collect data from cooperating agencies—particularly in the federal government—to measure the impact of environmental review on outcomes and evaluate trends in NEPA implementation. Integrating retrospective review into the NEPA process would require better data collection and availability. Specifically, CEQ should request information on the number, types, time frames, cost to complete, and document lengths for NEPA reviews (see **Recommendation 2** below).

CEQ’s authority to evaluate and revise NEPA regulations is also contained in its initial responsibilities, as outlined by EO 11514:

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.⁷⁵

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.

While CEQ’s ANPRM could be interpreted as an attempt to conduct retrospective review, the lack of data on NEPA analyses remains a severe limitation on productively reviewing NEPA

⁷³ Exec. Order No. 13563. “Improving Regulation and Regulatory Review.” Barack Obama, January 18, 2011, Sec. 1(a), <https://obamawhitehouse.archives.gov/the-press-office/2011/01/18/executive-order-13563-improving-regulation-and-regulatory-review>.

⁷⁴ CEQ. “Major Cases Interpreting the National Environmental Policy Act.” accessed August 10, 2018, https://ceq.doe.gov/docs/laws-regulations/Major_NEPA_Cases.pdf.

⁷⁵ Exec. Order No. 11514.

regulations. In short, a dearth of information is available for evaluating the effectiveness of NEPA based on consistent and comparable metrics.

A 2014 GAO report on NEPA “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.⁷⁶ Below are the main areas that GAO focused on, along with their primary findings:

- **Agencies of primary focus.** GAO primarily analyzed the Department of Defense (DOD), the Department of Energy (DOE), the Department of the Interior (DOI), the Department of Transportation (DOT), and the Forest Service within the Department of Agriculture because those agencies most frequently completed NEPA reviews.⁷⁷
- **Number and type of NEPA analyses.** Locating governmentwide data collected across agencies was rare. While “EPA publishes and maintains governmentwide information on EISs” through its EIS database,⁷⁸ EISs comprise less than 1% of all NEPA actions, and comparable information was not available for EAs, CEs, or other NEPA documents. In general, 95% of NEPA reviews end in CEs, and almost 5% end in EAs.⁷⁹
- **Costs and benefits of completing NEPA analyses.** Data on the costs and benefits associated with completing NEPA analyses were rare. According to EPA officials, “no governmentwide mechanism to track the costs of completing EISs” was available.⁸⁰ Agencies generally were challenged by the difficulty of “segregat[ing] costs for analysis.”⁸¹ High-level estimates revealed substantial variability in the range of costs for preparing EAs (\$5,000 to \$200,000) and EISs (\$250,000 to \$2,000,000).⁸² Reflecting a different but related problem, the benefits of NEPA reviews are largely conveyed in qualitative terms, such as facilitating public involvement or avoiding design problems in early stages of a project.⁸³ Furthermore, because NEPA often functions as an “umbrella statute” that integrates compliance with other environmental requirements,⁸⁴ separating its impact from that of other environmental statutes and analyses is difficult.⁸⁵
- **Time frames associated with performing NEPA analyses.** GAO found some information on the length of time needed to complete NEPA analyses. The National

⁷⁶ GAO. 2014, pp. 1-2.

⁷⁷ GAO. 2014, p. 2.

⁷⁸ GAO. 2014, p. 8. *Also see*, Environmental Impact Statement (EIS) Database, <https://cdxnodengn.epa.gov/cdx-enepa-II/public/action/eis/search>.

⁷⁹ GAO. 2014, p. 7.

⁸⁰ GAO. 2014, p. 11.

⁸¹ GAO. 2014, p. 12.

⁸² GAO. 2014, pp. 12-13.

⁸³ GAO. 2014, pp. 15-17.

⁸⁴ CRS. 2011, p. 25.

⁸⁵ GAO. 2014, p. 17.

Association of Environmental Professionals (NAEP) uses information published in the Federal Register to calculate the time frame for NEPA reviews.⁸⁶ Similar to other data, these data miss much of the big picture as such information is not available for EAs or CEs. Minimal governmentwide data from agencies was available on the time frames for CEs and EAs.

- **Frequency and outcome of NEPA litigation.** Some information exists on litigation related to NEPA. CEQ tracks and publishes annual reports on the number of lawsuits filed, although “no governmentwide system exists to track NEPA litigation or its associated costs.”⁸⁷ The Department of Justice, NAEP, and legal studies also provide certain information on NEPA litigation.

Beyond this limited information, GAO found minimal systematic data that could be used to track the effectiveness of implementing NEPA regulations.

Other resources, such as various studies of NEPA’s effectiveness, provide snapshots of how implementation has evolved over time. But such reports are ultimately limited in value, since they are inconsistently conducted and often do not use similar methodologies or metrics. Key examples include the following reports:

- **General Counsel of CEQ’s primer on NEPA at 19 years (1989).**⁸⁸ It provides a background on the Act, discussion of CEQ’s guidance and regulations, and a qualitative evaluation of the NEPA process. The report highlighted that NEPA’s “most important functions continue to be integrating environmental factors into federal decisionmaking and opening up that process to outside parties.”⁸⁹ The article also identified that EAs too often look like EISs in terms of length and complexity.
- **CEQ’s study of NEPA’s effectiveness after 25 years (1997).**⁹⁰ Released in 1997, the report noted the successes and failures of NEPA and documented various trends. Critically, it acknowledged “NEPA’s implementation at times has fallen short of its goals,” primarily due to “endless documentation” produced by agencies.⁹¹ The report also lauded the opportunities provided by the Internet, declaring “Technological Revolution to the Rescue.”⁹² Nevertheless, without establishing a consistent method of tracking the

⁸⁶ GAO. 2014, p. 13.

⁸⁷ GAO. 2014, p. 19.

⁸⁸ Dinah Bear. 1989. “NEPA at 19: A Primer on an ‘Old’ Law with Solutions to New Problems.” 19 Environmental Law Reporter 10060 (1989). https://www.energy.gov/sites/prod/files/nepapub/nepa_documents/RedDont/G-CEQ-DinahBearArticle.pdf.

⁸⁹ Bear. 1989, p. 10068.

⁹⁰ CEQ. 1997. The National Environmental Policy Act: A Study of Its Effectiveness after Twenty-five Years.” January 1997, <https://ceq.doe.gov/docs/ceq-publications/nepa25fn.pdf>.

⁹¹ CEQ. 1997, p. iii.

⁹² CEQ. 1997, p. 49.

successes, failures, and trends identified in the report, CEQ (and the federal government more broadly) did not truly capitalize on an opportunity to improve NEPA implementation. The report even mentioned the need for comprehensive data to conduct effective NEPA analyses: “The key to implementing an interdisciplinary place-based approach, and addressing the full range of cumulative effects, is obtaining adequate environmental data ... the current lack of quality environmental baseline data severely hampers the requisite thorough scientific comparison of alternatives.”⁹³ Similar criticisms can be made of more general tracking and evaluation of NEPA implementation.

- **The NEPA Task Force’s report to CEQ on modernizing NEPA implementation (2003).**⁹⁴ Less than a decade after CEQ conducted its own study of NEPA, it established a task force composed of federal agency employees, which published a report focusing on how to modernize NEPA implementation. The report recommended improving information technology, establishing professional positions for technical NEPA consultation, conducting annual legal forums, and developing a handbook that integrates NEPA with other environmental reviews. The report also identified the need to clarify the processes for CEs and EAs. However, no subsequent report has since gone back and evaluated the extent to which the task force’s recommendations were attempted or implemented.

Few of the recommendations stemming from these reports have spurred long-term improvements in governmentwide information availability on NEPA implementation. Furthermore, a number of *ad hoc* or single-agency reports provide valuable information, but they are limited in scope, consistency, and comprehensiveness:

- **CEQ’s 11 reports to Congress on the American Recovery and Reinvestment Act of 2009 and NEPA.**⁹⁵ The documents included reporting results on the overall number of NEPA reviews (broken down by type) as well as details on individual agency results. The final report provided overall results, information on completed NEPA reviews, pending NEPA reviews, and even (primarily qualitative) benefits from reviews by various agencies.⁹⁶

⁹³ CEQ. 1997, p. 27.

⁹⁴ NEPA Task Force. 2003. “Modernizing NEPA Implementation.” Report to the Council on Environmental Quality. September 2003. <https://ceq.doe.gov/docs/ceq-publications/report/finalreport.pdf>.

⁹⁵ Department of Energy. “American Recovery and Reinvestment Act of 2009 and NEPA: CEQ Reports to Congress.” accessed August 10, 2018. <https://www.energy.gov/nepa/american-recovery-and-reinvestment-act-2009-and-nepa-ceq-reports-congress>.

⁹⁶ CEQ. 2011. “11th and Final CEQ Report to Congress.” <https://www.energy.gov/nepa/downloads/11th-and-final-ceq-report-congress>.

- **DOE’s Lessons Learned Quarterly Reports.**⁹⁷ Since December 1994, DOE has produced quarterly reports on the agency’s NEPA compliance efforts and documented metrics on costs, preparation times, etc.⁹⁸ Specifically, “The Program collects and publishes time and cost metrics to help DOE objectively focus on controlling these aspects of its NEPA compliance, and disseminates information broadly relevant to NEPA implementation, such as guidance on public participation and interagency coordination procedures.”⁹⁹ The format and information contained in each report has changed over time, although some elements have remained constant. For instance, the September 2017 report included: a chart breaking down the proportion of EISs, EAs, and CEs; detailed metrics on DOE’s EIS process times (such as median completion times); growth in the length of DOE EIS documents; and document cost and time statistics for the quarter.¹⁰⁰ However, only the cost and time data seems to be consistently reported across quarterly issues.

While providing a good template for other agencies to track metrics on NEPA performance or for governmentwide data collection, *ad hoc* reports are limited in their usefulness as long as comparability over both time and agencies is lacking.

In summary, a number of key challenges and inadequacies preclude adequate retrospective review of CEQ’s NEPA regulations:

- Existing reports are frequently *ad hoc*, overly narrow in scope, or conducted over inconsistent time frames. 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 severely lacking—e.g., the number and types of analyses, the costs and benefits of NEPA reviews, time frames for working through the NEPA process, and comprehensive information on the frequency and outcomes of litigation.
- 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.”¹⁰¹ However, it is unclear what data are truly valuable to both inform agency decisions and provide measures on overall performance of

⁹⁷ DOE. “Lessons Learned Quarterly Report.” accessed August 13, 2018, <https://www.energy.gov/nepa/guidance-requirements/lessons-learned-quarterly-report>.

⁹⁸ DOE. “Lessons Learned Quarterly Report,” 4th Quarter FY1994. https://www.energy.gov/sites/prod/files/nepapub/nepa_documents/RedDont/LLQR-1994-Q4.pdf.

⁹⁹ DOE. “Lessons Learned Quarterly Report.”

¹⁰⁰ DOE. “Lessons Learned Quarterly Report,” 3rd Quarter FY2017. https://www.energy.gov/sites/prod/files/2017/09/f37/LLQR%20Sep_2017.pdf.

¹⁰¹ NEPA Task Force. 2003, p. 9.

the NEPA process. The absence of consistent governmentwide 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.

CEQ should consider the following recommendations to aid more effective retrospective review of the NEPA process:

Recommendation 1: CEQ should work with EPA to augment and enhance the EIS database. Agencies file EISs with EPA, which are then retained in a database with records of documents received by EPA since 1987.¹⁰² The database currently includes the following basic details on EISs:

- Title
- Document
- EPA Comment Letter Date
- Federal Register Date
- Agency
- State
- Links to downloadable documents

However, simple improvements to the database could aid long-term analysis of trends. New metrics to consider reporting include:

- 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

Additionally, expanding the database to include EAs should be a goal.¹⁰³

¹⁰² See, Environmental Impact Statement (EIS) Database, <https://cdxnodengn.epa.gov/cdx-enepa-II/public/action/eis/search>.

¹⁰³ This recommendation is consistent with the comment from the Riverside County Transportation Commission, which suggests that CEQ should “[e]stablish a NEPA document database” (Recommendation #4), p. 3, <https://www.regulations.gov/document?D=CEQ-2018-0001-1417>. For context, the comment discusses the deficiencies of the NEPA Permitting Dashboard and explains how it could be enhanced to improve environmental reviews.

Recommendation 2: CEQ should revise its NEPA regulations to establish expectations for clear, consistent, comparable, and cost-effective metrics that can be used to measure improvement. 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. To begin, key measures would include:

- Number and types of analyses
- Completion times for EISs and EAs¹⁰⁴
- Cost data for EISs and EAs
- Document length of EISs and EAs

Each measure should be distinguished by agency, state(s), and project type (consistent categories for projects may have to be established too). DOE’s approach could be used as a template for other agencies, as its *Lessons Learned* reports indicate that it already collects these data. However, the usefulness of DOE’s reports are limited because the information is not consistently included in each issue nor available in a public database. Additionally, a comprehensive database with information from each agency would be helpful for examining interagency trends and comparing outcomes among agencies, project types, and states.

Recommendation 3: CEQ should institute subsequent, periodic reviews of NEPA regulations at set intervals. For instance, a reevaluation of NEPA implementation every five or ten years would generate consistent, useful information on the effectiveness of 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. Any revisions made during a subsequent proposed and finalized rule could also be tested for its effectiveness. In short, CEQ would also have feedback on the impact of changes made to NEPA regulations.

Recommendation 4: While transparency is an important goal of NEPA, CEQ should also keep in mind any national security considerations that might limit the information agencies are willing to disclose. A detailed EIS for a federal facility or a major component of national infrastructure—such as a pipeline, power line, or port—might inadvertently disclose vulnerabilities to hostile actors. While developing revised regulations, CEQ should seek advice from national security agencies on how best to reduce the likelihood that the NEPA process aggravates any such vulnerabilities.

¹⁰⁴ GAO details the difficulties of quantifying completion times (pp. 13-15). For the sake of consistency, “DOE measures EIS completion time from the date of publication of the Notice of Intent to the date of publication of the notice of availability of the final EIS” (p. 14).

Implementing these recommendations would improve ongoing efforts for retrospective review by increasing the data available for researchers and by enhancing the capabilities of agencies to consider the impact of their implementation of NEPA.

Conclusion

CEQ's NEPA regulations integrate environmental review into agency decisions on major federal actions. CEQ is gathering information and seeking public comment on if and how NEPA regulations should be revised. The main areas of interest for CEQ's ANPRM are the NEPA Process, the Scope of NEPA Review, and General questions for how to improve NEPA implementation and make it more efficient. The agency's revisions should focus on aligning existing regulations with best practices, including benefit-cost analysis and retrospective review.

The ANPRM provides an opportunity to identify obsolete requirements in the regulations and for CEQ to clarify and strengthen the evaluation of alternatives in the NEPA process. Furthermore, CEQ should revise the regulations to require BCA and align the discussion of costs and benefits with regulatory best practices found in EO 12866 and OMB Circular A-4.

However, significant obstacles and barriers remain for effectively evaluating the impact of NEPA. CEQ lacks information and data on the NEPA process and its implementation by agencies, which prevents effective evaluation of the Act's impact and results. This comment recommends that CEQ consider steps to improve data collection and retrospective review of NEPA regulations. CEQ can work with EPA to improve the EIS database by encouraging better reporting of document characteristics and expand the database to include EAs. CEQ can also revise its regulations to guide agencies toward more effective data collection on NEPA performance and implementation. Despite the limitations of DOE's *Lessons Learned* reports, other agencies could look to DOE as a basic template for collecting information on NEPA reviews. Data should be consistently reported, comparable across agencies, and publicly available.

Finally, instituting periodic reviews of NEPA regulations would generate data for further improvements and revisions of the NEPA process. While these recommendations will not resolve every issue identified in this comment, they offer a starting point for revising NEPA regulations and developing important feedback on the NEPA process.