

# NEPA and Agriculture: The Basics + CEQ's Proposed Regulations

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# Overview

## ➤ NEPA Basics

- Statute and regulations
- Role of the courts
- Impact on agriculture

## ➤ NEPA Modernization

- Precursors to CEQ's Proposed Rule
- Key Proposed Rule provisions
- Looking ahead

# What is NEPA?

- ▶ National Environmental Policy Act
  - Signed into law January 1, 1970
  - “Basic national charter for the protection of agriculture”
  - Requires Federal agencies to assess environmental impacts of proposed major federal actions

# What is NEPA?

- NEPA is a procedural statute
  - Operates as a series of boxes to check
  - Does *not* require an agency considering a qualifying action to answer “Yes” or “No”
  - Instead, requires the agency to determine “If yes, then [fill in blank]”

# What is NEPA?

- ▶ National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.*
  - “To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a **Council on Environmental Quality.**”

# What is NEPA?

- ▶ National Environmental Policy Act, 42 U.S.C. § 4331(a)
  - Policy: “[T]o use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.” 42 U.S.C. 4331(a).

# What is NEPA?

- ▶ National Environmental Policy Act, 42 U.S.C. § 4332(2)(C)
  - Procedure: Federal agencies must prepare a detailed statement on:  
(1) the environmental impact of the proposed action; (2) any adverse effects that cannot be avoided; (3) alternatives to the proposed action; (4) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity; and (5) any irreversible and irretrievable commitments of resources that would be involved in the proposed action.

# CEQ Regulations

- NEPA instructed CEQ to promulgate regulations
  - Guidelines issued in 1970
  - Regulations implemented in 1978
  - Essentially unchanged since then
  - Dual purpose:
    - Inform agency decision makers about environmental effects
    - Ensure that relevant information is made available to the public

# CEQ Regulations

- Established three levels of NEPA documentation
  - Environmental Impact Statement (EIS)
  - Environmental Assessment (EA)
  - Categorical Exclusion (CE)

# CEQ Regulations

- Established three levels of NEPA documentation
  - Environmental Impact Statement (EIS)
    - Required for major Federal actions significantly affecting the quality of the human environment
    - Scoping/planning
    - Contents: purpose/need; alternatives; affected environment; environmental consequences; list of preparers, appendices
    - Public comment period on draft EIS
    - Interagency review
    - Record of Decision (“yes” or “no”)

# CEQ Regulations

- Established three levels of NEPA documentation
  - Environmental Assessment (EA)
    - “Concise public document” used to determine whether a proposed action requires an EIS
    - Scoping process
    - Must include discussion of purpose/need for government action; alternatives; impacts; listing of agencies and personnel consulted
  - Finding of No Significant Impact (FONSI)
    - Separate document

# CEQ Regulations

- ▶ Established three levels of NEPA documentation
  - Categorical Exclusions
    - Activities that do not individually or cumulatively have a significant effect on the human environment
    - USDA/APHIS: Permit to conduct a field trial of a GE crop, 7 C.F.R. § 372.5(c)(3)

# Agency-Specific Regulations

- CEQ asked agencies to promulgate their own NEPA-implementing regulations
- Some variance between agencies
  - Criteria for categorical exclusions
  - Drafting participation by third parties (applicant-prepared first draft vs. agency-prepared first draft)

# Role of the Courts

- NEPA is one of the most heavily litigated and influential federal environmental statutes
- Courts extensively involved in NEPA implementation
- CEQ regulations adopted in 1978 to reflect judicial precedent:
  - Meaning of “significant impact,” “major Federal action,” “hard look”
  - Adequacy of EISs, EAs, and FONSI; CatEx appropriateness
  - Adequacy of scoping, comment, and other procedures
- “Easy button” for courts

# Impact on Agriculture

- Plans to develop and manage federal lands
  - E.g., series of cases challenging (on NEPA grounds) use of GE crops/pesticides on National Wildlife Refuges
- Federal authorizations of non-Federal activities
  - Licenses and permits
  - Federal grazing permits
  - Timber sale contracts
  - Approval of biotech crops

# CEQ Proposal: Precursors

## ➤ Executive Order 13807

- “Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects”
- Applicable to “major infrastructure projects”
- Established the “One Federal Decision” policy
- Introduced 2-year goal for EIS completion
- Directed CEQ to consider modernization of NEPA regulations

# CEQ Proposal: Precursors

- ANPR, June 18, 2019
  - Sought public comment on 20 questions
  - Aimed at “more efficient, timely, and effective NEPA process”
  - Took comments through August 20, 2019
  - 12,500 comments
  - Available at CEQ-2018-001 at [regulations.gov](https://www.regulations.gov)

# CEQ Proposed Rule

- Notice of Proposed Rulemaking, January 9, 2020
  - First proposal in 40 years
  - Extensive, historical preamble/reference document
  - Other resources at <https://www.whitehouse.gov/ceq/nepa-modernization/>
    - Timeline with links
    - All agencies' CatEx
    - Redline of proposal
  - Comment period closed March 10, 2020

# CEQ Proposed Rule

- Overview
  - Terminology/definitional changes
  - “When NEPA applies” changes
  - Process changes
  - Narrowing judicial review and remedies
  - Others
- Horizon-scanning

# CEQ Proposed Rule: Definitions

## ➤ “Effects”

- “Cumulative” is out
- “Effects or impacts” must be “reasonably foreseeable\* and have a reasonably close causal relationship to the proposed action or alternatives”
- Excludes environmental effects that an agency “has no authority to prevent or would happen even without agency action” (*Public Citizen*)
- (\*Reasonably foreseeable = sufficiently likely to occur such that person of ordinary prudence would take it into account)

# CEQ Proposed Rule: Definitions

- “Major Federal action”
  - “Actions subject to Federal control and responsibility”
  - Not non-discretionary decisions
  - Not non-final agency actions
  - Not actions with minimal Fed funding or involvement
  - Not farm ownership and operating loan guarantees by FSA or certain SBA loans (no control over bank or borrower)

# CEQ Proposed Rule: Definitions

- “Reasonable alternatives”
  - New!
  - “A reasonable range of alternatives that are technically and economically feasible; meet the purpose and need for the proposed action, and, where applicable, meet the goals of the applicant”
  - No need to include reasonable alternatives *not* within the jurisdiction of the lead agency

# CEQ Proposed Rule: Definitions

- “Senior agency official”
  - New!
  - “Of assistant secretary rank or higher, or equivalent”
  - Designed for NEPA compliance, “mother may I” for page limit extensions, etc.

# CEQ Proposed Rule: Scope

- When does NEPA apply?
  - Introduces new factors (§ 1501.1)
    - Major Federal actions (vs. non-discretionary)
    - Where NEPA compliance conflicts with statute or congressional intent
    - Action for which another process is “functional equivalent” of NEPA
    - Can be determined in agency-specific NEPA regs or individually

# CEQ Proposed Rule: Scope

## ➤ When does NEPA apply?

- Expands use of CEs (§ 1501.4)
  - Agencies can cross-reference and apply other agencies' CE categories (upon consultation)
  - When a CE applies but there are “extraordinary circumstances” that may push outside CE, agency can consider mitigating circumstances to keep action under CE
  - Requested comment on development of government-wide CEs

# CEQ Proposed Rule: Process

- ▶ Time and page limits for EISs and EAs
  - “Presumptive” time limits (§ 1501.10)
    - EIS in 2 years, running from Notice of Intent
    - EA in 1 year, running from date of decision to prepare
  - “Senior agency official” can extend

# CEQ Proposed Rule: Process

- ▶ Time and page limits
  - 150, or 300 pages for EISs (§ 1501.4)
  - 75 pages for EAs (§ 1502.7)
  - “Senior agency official” can approve longer

# CEQ Proposed Rule: Process

- Scoping changes (§ 1501.9)
  - Scoping and interagency coordination to begin as soon as practicable
  - Can include outreach, like public meetings
  - Notice of intent as soon as practicable:
    - Purpose and need; action and alternatives; impacts
    - *Schedule*
    - *Request for comments*

# CEQ Proposed Rule: Judicial Review

- “Exhaustion” (§ 1500.3(b))
  - At NOI stage, agency will seek comment on potential alternatives, impacts, and ID relevant information, studies, and analyses
  - Comments must be timely submitted and “be as specific as possible”
  - Comments not submitted will be “unexhausted and forfeited”
  - Agency will certify in ROD that agency has considered all info
  - Creates presumption that agency has considered everything submitted

# CEQ Proposed Rule: Judicial Review

- ▶ “Actions regarding NEPA compliance” (§ 1500.3(c))
  - CEQ intends no judicial review until lead agency has issued ROD or other final agency action
  - Allegation of noncompliance resolves “as expeditiously as possible”

# CEQ Proposed Rule: Judicial Review

## ➤ “Remedies” (§ 1500.3(d))

- Noncompliance not compatible with irreparable harm (citing case law)
- NEPA harms remediable through compliance with NEPA regs; challenger’s burden to prove otherwise
- No private right of action
- Actions to review, enjoin, stay, or alter raised ASAP
- “Minor, non-substantive errors” should be considered harmless

# CEQ Proposed Rule: Others

- ▶ “One Federal Decision” (§ 1501.7)
  - Requires “lead” federal agency when multiple are involved in EA or EIS
  - If EIS, one EIS and joint ROD; if EA, one EA and joint FONSI

# CEQ Proposed Rule: Others

- “More hands on deck” (§ 1506.5)
  - Offers applicants and contractors greater role in contributing to environmental documents
  - Agency must independently evaluate and take responsibility for content

# CEQ Proposed Rule: Others

- Climate change (85 Fed. Reg. at 1710)
  - Refers to Greenhouse Gas guidance
  - Not “appropriate to address a single category of impacts in the regulations”
  - May revise GHG guidance in light of new regulations
  - Commenters have argued that removal of “cumulative effects” would impact agencies’ approach to climate change

# CEQ Proposed Rule: Others

- Changes to agency NEPA regs (§ 1507.3)
  - When final, agencies would need to develop or revise their NEPA regulations for consistency in one year
  - Discretion to apply revised regulations to environmental reviews commenced before that date

# CEQ Proposed Rule: Comments

- Significant interest (~170,000 submissions)
- Mixed bag
  - Extensive negative comments from NGOs, including those with resources to challenge
    - “Effects” and climate change approach are comment areas of concern
  - Supportive and constructive comments from agriculture (AFBF and numerous state Farm Bureaus), industry coalition, led by US Chamber

# What's on the Horizon?

- Legal challenges
- Congressional Review Act
- Revision of states' "little NEPAs" to conform

# Impacts (Ag and More Broadly)

- Revised “major Federal action” would narrow categories of actions subject to NEPA
- Would simplify and accelerate NEPA process, introduce more timing certainty
- Potentially decrease opportunity for litigation-related delays
- Climate change

**Questions?**

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