
# NEPA Rules Rewrite: What's in a Name?

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## Changes in Definitions Section May Create Clarity for Agencies, Ammunition for Opponents

This is the first in a series of eAlerts on revisions to National Environmental Policy Act (NEPA) regulations published in the Federal Register on July 16, 2020 by the Council on Environmental Quality (CEQ). CEQ's revised rules amend 40 C.F.R. Parts 1500-1508. Nossaman attorneys Ed Kussy, Rob Thornton, Svend Brandt-Erichsen, Rebecca Hays Barho, Brooke Marcus Wahlberg, David Miller, and Stephanie Clark are contributors for this series.

We begin our series on the revised NEPA regulations by describing changes CEQ has made to the backbone of the regulations: the definitions section.

For many regulations, the "definitions" section is fairly innocuous. This has never been the case for the CEQ's NEPA regulations. In defining various critical terms, CEQ attempted to set the bounds on the scope and type of analyses contemplated by various elements of the NEPA process. The new CEQ rules are no different. Thus, a good deal of the early commentary of the new regulations has focused on how the definitions changed, what has been added, and what has been left out. Our commentary will focus on those changes likely to be most significant or controversial:

***"Categorical Exclusion"*** – The new definition of a categorical exclusion (CE) is quite narrow, simply referring to those actions listed as CEs in agency implementing procedures. This definition must be read together with 40 C.F.R. §§1501.4 and 1507.3(e)(2)(ii), which establish boundaries for CEs that are much like the prior version of the regulations. The rule continues to require agencies to list CEs in their implementing procedures. Some agency procedures, like those of the federal surface transportation agencies, contemplate that a project that is not listed, but would otherwise qualify as a CE, could be treated as a CE with some additional documentation. Not all agencies have such a provision in their implementing rules, however, and the new rule does not provide them this additional level of flexibility. Agencies are allowed to

use CEs from other agencies (40 C.F.R. §1506.3(d)), but the language of this provision does not seem to allow adoption of a process to effectively define a new, project- or program- specific CE.

***"Effects"*** – The change to the definition of "effects" in the new rules may end up as a primary flashpoint in the litigation that is sure to come. Likely to receive the greatest attention are the things removed from the old regulation. For example, as described in greater detail below, CEQ has eliminated explicit references to "indirect" and "cumulative" effects. Although the new definition of "effects" contains language that seems quite broad, other provisions seem to constrain the scope of analysis. This creates internal ambiguities. Simply changing critical, well-established concepts could well lead to more litigation until the precise scope of the changes is defined by future court decisions.

The new definition first states that effects or impacts of the action are those that are: (1) reasonably foreseeable; and (2) have a reasonably close causal relationship to the proposed action or alternatives. While the new rule drops an explicit reference to "indirect effects," it explicitly includes the idea that effects could occur either at the same time and place as the proposed action or its alternatives or could occur later in time and be further removed in distance from the proposed action. While the definition and preamble may imply that an agency could still consider what used to be called indirect and even cumulative effects, opponents of the new rules will certainly argue otherwise.

The new rule expressly rejects a simple "but for" causal relationship in determining the scope of effects to be considered. Actions too far removed in time or distance, or at the end of lengthy causal chain need not be considered. The definition specifically excludes actions that the agency has no ability to prevent or that would occur regardless of the proposed action. This considerably narrows the effects that any agency must consider in preparing a NEPA document and may assist project proponents in limiting the breadth of NEPA reviews.

On the other hand, the causation standard may also set up an internal contradiction in the definition itself, as the scope of "effects" seems at once to be fairly broad and then is narrowed in a way that rejects the initial precept. This is exacerbated by 40 C.F.R. §1501.3(b), which instructs agencies on how to determine if an effect is significant. That section does not limit the analysis to those effects the agency has power to control. These and other internal inconsistencies may rear their heads in future litigation.

Of particular interest to those who closely watch NEPA practice is the elimination of CEQ's clear requirement that agencies examine "cumulative impacts." Cumulative impacts were designed in CEQ's original regulations to measure the impacts of the proposed action in context with other past, present, and future actions irrespective of who undertook them, thus measuring the incremental effect of the proposed action on the environment. Not only has the analysis of cumulative impacts been dropped, the new "effects" definition includes the further limitation that agencies need not consider impacts beyond their control. It must be said that the treatment of cumulative impacts in a NEPA document has often presented problems, as it was difficult to draw boundaries around the scope of this analysis. In many EISs, the cumulative impacts analysis was little more than a report of what else was going on or planned in the area, with only cursory analyses of any synergistic impacts with the proposed action. Thus, while there has been much handwringing and writing about ending the requirement to specifically address cumulative impacts, the real impact of this change is uncertain. Nevertheless, and as noted above, both the removal of cumulative effects and the ambiguity of the internal inconsistencies in the new rule are sure to be the subject of litigation.

Finally, we would be remiss not to mention CEQ's elimination of the term "significantly" from the definitions section. The preamble to the final rule states that the definition of "significantly" has been replaced by new section 40 C.F.R. § 1501.3(b), which describes the factors agencies should consider in determining whether effects are significant. While that provision does address when an impact should be considered "significant," it is far narrower than the old definition. Further complicating matters, the terms "significantly" and "significant" have many meanings in federal environmental law (for example, in some programs, it simply means "capable of being measured," essentially a scientific concept). That is clearly not the case in the NEPA context. A clear description as to what "significant" meant for NEPA purposes was useful. The old definition was closely allied to the types of impacts that might give rise to an EIS, which was at least informative to the public and courts reviewing NEPA documents. Like other aspects of the new "effects" definition, we fear that the lack of clarity of this central NEPA concept could create problems and litigation.

***"Legislation"*** – The new definition of "legislation" is much shorter than its predecessor. Some provisions have been moved to other places in the new rule. The exclusion of actions proposed by the President fails to recognize how federal legislation is developed or how treaties are dealt with administratively. It is true that the Supreme Court has held that actions reserved to the President are beyond the scope of NEPA. But, in a sense, virtually all proposals for legislation come from the President. Thus, when legislation is developed by a department of the executive branch, it must be reviewed by the Office of Management and Budget (technically a part of the White House) for consistency with the President's policies and other government actions. Does this make the legislative proposal an action by the President? Similarly, requests for the ratification of treaties are no longer included in the definition. While treaties and other international agreements are approved by the President, they are often negotiated by the various federal departments and then sent to the White House, and, perhaps the State Department, for approval. Only a few treaties directly involve the President. How is this different from the way legislation is handled? The new rule provides no guidance with respect to these issues.

***"Major Federal Action"*** – There are several important changes in the new definition. The old rule plainly stated that the term "major" does not have a meaning independent from the term "significantly." Thus, any action with significant environmental effects was a major action. The new rule rejects this premise. Actions which are not "major" federal actions, such as actions with minimal federal involvement or investment, are not subject to NEPA, whether or not they have a significant environmental impact. Thus, for example, where a state uses only a small amount of federal funds on a large project, NEPA may not apply. For transportation projects, this provision parallels a CE added pursuant to MAP-21 (the 2012 transportation reauthorization statute) for small projects or projects with limited federal assistance. *See* 23 C.F.R. §§771.117(c)(23) and 771.118 (c)(18). This provision may similarly narrow the degree to which NEPA applies for non-federal projects requiring some level of federal permitting or other authorization, although it remains to be seen whether agencies will limit NEPA review in practice.

The style of the new provision is somewhat strange and departs from the previous provision. Rather than defining what constitutes a major federal action, the definition focuses on what is not a federal action, mirroring, in many ways, exclusions that have evolved over time in various court decisions. The actual definition appears almost as an afterthought.

Of particular interest are two exclusions from what will be viewed as "major federal action": activities that are non-discretionary and non-federal projects with minimal federal funding where an agency does not exercise sufficient control and responsibility over the outcome of the project at issue. Certain environmental permits

issued by federal agencies such as the U.S. Fish and Wildlife Service are arguably non-discretionary in the sense that where certain criteria are met, the agency is required to issue the permit (*see, e.g.*, "shall" language set forth in Endangered Species Act section 10). These same types of permits often do not dictate *whether* a project will or can proceed, though *how* a project proceeds can be affected by whether an agency does, in fact, issue the requested permit or approval. These issues have been argued and variably won and lost over time in various courts. Like so many of the other definitions, it remains to be seen whether and how agencies will change their approach to NEPA review and how courts will view such changes in the future.

"***Mitigation***" – The only change to this important definition is the note that NEPA requires that mitigation be considered and does not require the adoption of mitigation measures. This is well- established law and the new rule continues to contain the requirement that agencies identify the manner in which the provisions in the NEPA document will be met. However, the new rule may do nothing to limit NEPA challenges that focus on the failure of an agency to prove that mitigation provided by a project will, in fact, be implemented.

*"**Page**"* – This is an interesting new definition because of the greater emphasis on the page limitations for EAs and EISs. The number of words per page is specified (500), presumably to avoid attempts to go around the page limitation by reducing the font of the print, but excluded are maps, diagrams, graphs, tables, and other graphic material. This type of material usually takes up a fair amount of space in the typical EIS, providing considerable flexibility for staying within page limits.

*"**Notice of Intent**"* – This definition is substantially simplified. Other parts of the new rule make considerable change to the "NOI," most importantly not requiring its publication prior to starting the scoping process.

*"**Publish and Publication**"* – This is a new definition that provides greater flexibility by expressly allowing key NEPA documents, such as EISs, information, etc. to be published electronically. Many transportation agencies already follow this practice.

"***Reasonable Alternatives***" – This is a new definition that makes clear that the alternatives considered in the NEPA document must meet the agency's purpose and need, and, in the case of permit application "must meet the goals of the applicant." The preamble describing this definition states that this means that the goals of the applicant must be "considered." This is quite different from the explicit language of the new definition, and is bound to be a source of litigation. Transportation agencies are less likely to encounter this issue because projects are developed through a planning process, and a range of alternatives typically meet purpose and need. Non-federal project proponents working with federal agencies preparing NEPA documents may be able to use the new definition to minimize the number of alternatives carried forward for detailed analysis in a NEPA document, or may continue to experience resistance from agencies relying on the language in the preamble rather than the language in the definition itself.

*"**Reasonably Foreseeable**"* – This definition is new, but incorporates a standard that has been around for quite some time. That is, what would a person of ordinary prudence consider in reaching a decision. While this is a very fluid, fact dependent standard, its implications could be significant, particularly with respect to what effects are analyzed in the NEPA document. The issue of reasonable foreseeability likely will be a flashpoint in future litigation, particularly as it relates to climate change.

*"**Senior Agency Official**"* – This is a new concept in the regulations, explained more fully in the text of the rule. The official is of assistant secretary rank or higher, and has overall responsibility for the agency's NEPA

compliance. An official of this rank is typically a political appointee.

***"Tiering"*** – The new definition is shorter, but substantially similar. An important difference is that under the new rule, the first tier document need not be an EIS. The old regulation only references EISs for the first tier. Under the new rules, we may begin to see first tier EAs; however, this approach may create problems for later NEPA documents where impacts may be significant.

There are changes to other definitions. However, we do not believe they will have a significant impact. For example, the definition of scoping has been considerably shortened, but the changes to the scoping process are dealt with elsewhere in the regulation. As with the rest of the new rule, CEQ seeks to justify the changes with extensive citations to case law. However, the sheer number of NEPA decisions could justify alternative outcomes.

In sum, while many of the changes in definitions may not practically alter the legal landscape associated with NEPA review, codification of long-standing agency practice and some case law nevertheless may affect how certain agencies implement NEPA review in their planning and permitting processes, and will certainly provide ample opportunity for third parties to instigate facial and project-specific challenges to the new regulations. Because many of the regulatory changes are in line with the practices of transportation agencies, such agencies may not experience a significant shift in practice or uptick in litigation.