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# **CEQ's Proposed NEPA Regulations: Overview for the CCC**

February 11, 2020



# Overview



- NEPA Implementation at NOAA and NMFS
- Background on CEQ's Rulemaking Process
- Overview of Key Proposed Changes
- Changes that May Impact Fishery Management Process
- Questions





# NEPA at NOAA: NAO 216-6A

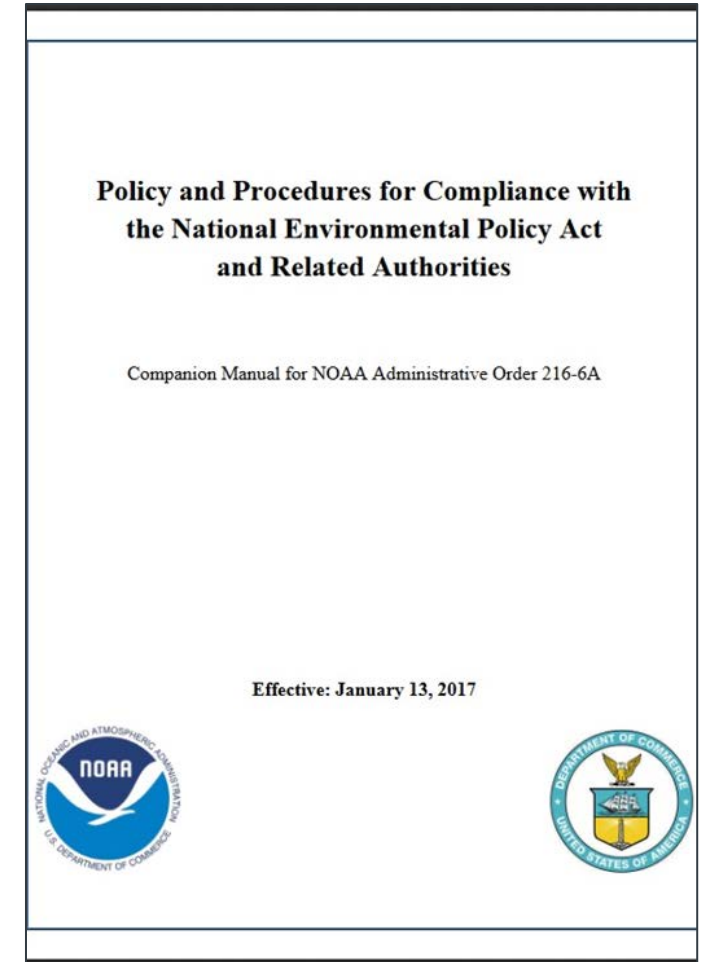


- [NOAA Administrative Order \(NAO\) 216-6A](#) issued on April 22, 2016
- Establishes NOAA's policy and procedures for compliance with NEPA and related authorities
- Delegates responsibility to oversee the NOAA NEPA program to the **NOAA General Counsel**, who in turn may delegate these responsibilities to appropriate staff, including to a **NOAA NEPA Coordinator**
- Authorizes development of a [Companion Manual](#), to provide additional, specific policies pursuant to NEPA and related authorities (Issued on January 13, 2017)



# MSA/NEPA Procedures: Road to Current Guidance

- 2007 MSRA mandate for new MSA/NEPA procedures
- 2008 Proposed Rule (withdrawn 2013)
- 2013 NMFS Policy Directive on MSA/NEPA
- 2016 NOAA NAO 216-6A; 2017 Companion Manual, Appendix C and Appendix E (CEs)





# Background on CEQ's Rulemaking



- CEQ promulgated its NEPA implementing regulations, 40 CFR parts 1500-1508, (1978) and has made only one substantive change (1986).
- On August 15, 2017, President Trump issued [E.O. 13807](#). Section 5(e)(i) directed CEQ to, among other things, “ensure that agencies apply NEPA in a manner that reduces unnecessary burdens and delays, including by using CEQ’s authority to interpret NEPA to simplify and accelerate the NEPA review process.”





# Notice of Proposed Rulemaking (NPRM)



- On June 20, 2018, CEQ published an [ANPRM](#) requesting comments on potential revisions to update and clarify the CEQ regulations
- CEQ published its NPRM on January 10, 2020—website with info from CEQ is [here](#)
- Federal Register (85 Fed. Reg. 1684) Notice is [here](#)
- Regulations.gov docket is [here](#)
- Public comments are due on or before March 10, 2020





# CEQ's Goals for Rulemaking



- Update and clarify the CEQ regulations to facilitate more efficient, effective, and timely NEPA reviews by Federal agencies
- Respond to numerous questions that have been raised over the past four decades relating to implementation of NEPA and the CEQ regulations by codifying guidance, case law, and agency practice
- Reiterate and support the goals of the 1978 rulemaking of reducing paperwork and delays and promoting better decisions





# Overview of Key Proposed Changes: Proposals to Accelerate NEPA Process



- **Time Limits 1501.10:**

- **two years** for completion of Environmental Impact Statement (Notice of Intent → Record Of Decision) and
- **one year** for completion of Environmental Assessment (decision to prepare EA → final EA)



- **Page Limits 1502.7 & 1501.5(e):**

- Presumptive page limits for EISs= 150 for typical EIS, 300 for “unusually complex”
- Presumptive page limit for EAs=75







# Overview of Key Proposed Changes: Clarification on terms, application and scope of NEPA Review

New “threshold” consideration of whether NEPA applies to a particular action **1501.1**—agencies should consider:

- Whether the proposed action is a major Federal action\*
- Whether the proposed action, in whole or in part, is a non-discretionary action for which the agency lacks authority to consider environmental effects as part of its decision-making process
- Whether the proposed action is an action for which compliance with NEPA would clearly and fundamentally conflict with the requirements of another statute
- Whether the proposed action is an action for which compliance with NEPA would be inconsistent with Congressional intent due to the requirements of another statute
- Whether the proposed action is an action for which the agency has determined that other analyses or processes under other statutes serve the function of agency compliance with NEPA\*



# Overview of Key Proposed Changes: Clarification on terms, application and scope of NEPA Review

- Require earlier solicitation of input from the public to ensure informed decision-making by Federal agencies
- Require comments to be specific and timely submitted to ensure their consideration
- Define the term “reasonable alternatives” to provide that alternatives must be technically and economically feasible

## **1508.1(z)**

- CEQ also modified the range of alternatives language consistent with CEQ’s “40 Most Asked Questions” to require agencies to explore a reasonable range of alternatives rather than all alternatives



# Overview of Key Proposed Changes: EIS-specific changes



- New required section for EISs—“Summary of submitted alternatives, information, and analyses” **1502.17**
  - EISs must now include a summary of information that was submitted by public commenters
  - **1502.18** requires that the agency decision maker must certify in the ROD that the agency considered everything included in that summary
  - The NPRM provides that such certification entitles agencies to a “conclusive presumption” that the agency has considered all information in that summary





# Overview of Key Proposed Changes: EIS-specific changes

- New requirement for EIS cover sheet—must include an estimation of the total cost of preparing the EIS including the costs of agency personnel hours, contractor costs, and other direct costs **1502.11(g)**
- Proposal allows agencies to combine affected environment and environmental consequences sections **1502.15**



# Overview of Key Proposed Changes: Clarification on terms, application and scope of NEPA Review

- Proposed changes to the definition of environmental effects  
**1508.1(g)**
  - Proposal to strike definition of cumulative impacts, and the terms “direct” and “indirect”
  - CEQ proposes a change in position to state that analysis of cumulative effects as defined in the current regulations is not required under NEPA
  - Agencies should only analyze effects that are **reasonably foreseeable** and have a **reasonably close causal relationship to the proposed action**
  - Effects should not be considered significant if they are **remote in time, geographically remote, or the result of a lengthy causal chain.**



# Overview of Key Proposed Changes: Clarification on terms, application and scope of NEPA Review

- New definition proposed for ***major Federal action 1508.1(q)***
  - CEQ proposes to make clear that “major Federal action” does NOT include non-Federal projects with **minimal Federal funding** or **minimal Federal involvement** such that the agency cannot control the outcome on the project
  - CEQ invites comment whether there should be a threshold (percentage or dollar figure) for “minimal Federal funding,” and if so what that should be
  - CEQ also invites comment on whether any types of financial instruments including loans and loan guarantees, should be considered non-major Federal actions and the basis for such exclusion



# Overview of Key Proposed Changes: Codification of Current Agency Practices

- Expressly permits use of mitigated Findings of No Significant Impacts (FONSI) **1501.6(c)** and mitigated Categorical Exclusions **1501.4(b)(1)**
- Recognizes use of documents such as a Supplemental Information Report (SIR) to determine that changes to a proposed action or new circumstances or information do not require the agency to prepare a supplement **1502.9(d)(4)**
- Allows flexibility to design and customize public participation, including through promotion of use of modern technology to expand information sharing and enhance public involvement **1506.6**



# Overview of Key Proposed Changes: Agency Implementation



## Senior Agency Official

- Proposal requires agencies to designate a “senior agency official” to be responsible for overall review of agency NEPA compliance
- **1508.1(dd)**—defined as an official of **assistant secretary rank** or higher, or equivalent



## Agency NEPA Program Information

- New section **1507.4** requires agencies to provide agency websites to share things such as: Agency policy and guidance documents, directory of pending and final environmental documents, searchable database







# Overview of Key Proposed Changes: Agency Implementation



## Agency NEPA Procedures

- Agencies have 1 year from final rule to publish a proposed revision to procedures
- Procedures should indicate any “non major Federal actions” to which NEPA does not apply and determine that documents prepared under other statutory authorities are “functionally equivalent” to NEPA and therefore not subject to NEPA
- Preamble also provides that agency procedures can be used to align compliance with NEPA and other statutes, including creating exceptions for page and time limits where necessary





# NPRM Next Steps



## 2 Scheduled public hearings

- February 11, 2020 in Denver, CO
- February 25, 2020 in Washington, DC



## CEQ ongoing outreach efforts

- <https://www.whitehouse.gov/ceq/nepa-modernization/>
- <https://ceq.doe.gov/laws-regulations/regulations.html>



## Initial internal steps for review of agency NEPA procedures





# What Would this Mean for our Fisheries Management Process?



# Key Issues



- Functional Equivalency
- Exhaustion of Remedies
- Contents of Analyses
- Time and Page Limits
- Timing of Agency Action
- Mitigated CEs and FONSIIs
- Efficiencies





# Functional Equivalency



**For proposed regulations, analysis under other law may satisfy NEPA if:**



- substantive and procedural standards
- full and adequate consideration of environmental issues
- public participation
- a purpose is to examine environmental issues



1501.1(a)(5), 1506.9





# Exhaustion of Remedies



- **Establishes Procedures to Ensure Comments are timely**



- NOI would solicit comments on alternatives and impacts
- Duty to comment
- Listing and certification of alternatives
- 30 day cooling off period before the ROD, the ROD would be required to address additional comments received.



- **Comments not received during the regulatory period are deemed “forfeited”**



1500.3(b)



# Contents of Analyses



- **Alternatives:**
  - EIS: Reasonable range, economically and technologically feasible, removes “not within jurisdiction” alternatives **(1502.14, 1508.1(z))**
  - EAs: narrows range to those required for NEPA 102(2)(E) **(1501.5(c))**
- **Impacts:** would narrow impacts considered **(1508.1)**
- **Economic and Technical considerations:** adds new required considerations **(1502.16(a)(10), (b))**
- **Incomplete or unavailable information:** Eases agency duty to obtain this **(1502.22, 1502.24)**





# Time and Page Limits



## Time Limits 1501.10:

- **two years** for completion of EIS (NOI → ROD) and
- **one year** for completion of EA (decision to prepare EA → final EA)



## Page Limits 1502.7 & 1501.5(e):

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# Timing of Agency Action



- Current Requirements: minimum time between publication of DEIS/FEIS and final action: 90 days/30 days
- Proposed Rule would allow modifications if necessary to comply with another statute





# Using Mitigation



- Creates a new section on Mitigated Categorical Exclusions (CEs)
- Expressly permits use of Mitigated Findings of No Significant Impacts (FONSIIs)



1501.4(b)(1), 1501.6(c)





# Efficiencies



- Recognizes use of documents such as a Supplemental Information Report (SIR) to determine that changes to a proposed action or new circumstances or information do not require the agency to prepare a supplement
- Other Efficiencies: Maintains guidance on programmatic documents, tiering, and incorporation by reference



1502.9(d)(4)



# Questions and Discussion



**NOAA**  
**FISHERIES**