



COUNCIL ON ENVIRONMENTAL QUALITY

Final Guidance for Effective Use of Programmatic NEPA Reviews

AGENCY: Council on Environmental Quality.

ACTION: Notice of Availability, Final Guidance for Effective Use of Programmatic NEPA Reviews.

SUMMARY: The Council on Environmental Quality (CEQ) is issuing its final guidance on programmatic National Environmental Policy Act (NEPA) reviews. This guidance provides clarification on when and how Federal agencies should use programmatic environmental analyses in accordance with NEPA, 42 U.S.C. 4332, and the CEQ Regulations for Implementing the Procedural Provisions of NEPA, 40 CFR parts 1500-1508. Guidance on programmatic NEPA reviews has been requested by the agencies and attention on programmatic NEPA reviews has increased as agencies undertake more broad landscape-scale analyses for proposals that affect the resources they manage. This guidance is designed to assist agency decisionmakers and the public in understanding the environmental impacts from proposed large-scope Federal actions and activities and to facilitate agency compliance with NEPA by clarifying the different planning scenarios under which an agency may prepare a programmatic, broad-scale, review. The guidance also addresses how agencies can prepare such reviews to ensure they are timely, informative, and useful for advancing decision-making. The goal of this guidance is to encourage a more consistent approach to programmatic NEPA reviews so that the analyses and documentation will allow for the expeditious and efficient completion of

any necessary tiered reviews. It builds on previous guidance that explained the use of tiering and its place in the NEPA process.

DATES: The guidance is effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: The Final Guidance for Effective Use of Programmatic NEPA Reviews is available at White House website (<http://www.whitehouse.gov/administration/eop/ceq/initiatives/nepa>) and on the National Environmental Policy Act website (www.nepa.gov). Paper copies are available upon request by contacting the CEQ Associate Director for National Environmental Policy Act Oversight, 722 Jackson Place, NW, Washington, DC 20503. Telephone: (202) 395-5750.

FOR FURTHER INFORMATION CONTACT: The Council on Environmental Quality (ATTN: Horst Greczmiel, Associate Director for National Environmental Policy Act Oversight), 722 Jackson Place, NW, Washington, DC 20503. Telephone: (202) 395-5750.

SUPPLEMENTARY INFORMATION: Enacted in 1970, the National Environmental Policy Act (NEPA), 42 U.S.C. 4321-4370, is a fundamental tool used to harmonize our environmental, economic, and social aspirations and is a cornerstone of our Nation's efforts to protect the environment. NEPA recognizes that many Federal activities affect the environment and mandates that Federal agencies consider the environmental impacts

of their proposed actions before deciding to adopt proposals and take action.¹ NEPA environmental reviews (the analyses and documentation prepared under NEPA) may be on the project-specific or on broader programmatic level. The analyses in a programmatic NEPA review are valuable in setting out the broad view of environmental impacts and benefits for a proposed decision such as a rulemaking, or establishing a policy, program, or plan. That programmatic NEPA review (e.g., Programmatic Environmental Assessment (EA), Programmatic Environmental Impact Statement (EIS)) can then be relied upon when agencies make decisions based on the programmatic EA or programmatic EIS, as well as decisions based on a subsequent (also known as tiered) NEPA review. Programmatic NEPA reviews should result in clearer and more transparent decision-making, as well as provide a better defined and more expeditious path toward decisions on proposed actions. This guidance clarifies the use of programmatic NEPA reviews by describing: (1) the nature of programmatic NEPA reviews; (2) when to use a programmatic and tiered NEPA review; (3) practical considerations for programmatic reviews and documents; (4) how to effectively conduct subsequent proposal-specific NEPA reviews; and (5) the lifespan of a programmatic NEPA document.

The *Federal Register* notice announcing the draft programmatic guidance and requesting public comments was published on August 22, 2014.² CEQ appreciates the thoughtful responses to its request for comments on the draft guidance. Commenters included private citizens, corporations, environmental organizations, trade associations,

¹ A discussion of NEPA applicability is beyond the scope of this guidance. For more information see CEQ, *The Citizen's Guide to the National Environmental Policy Act*, available at https://ceq.doe.gov/nepa/Citizens_Guide_Dec07.pdf.

² National Environmental Policy Act (NEPA) Draft Guidance, Effective Use of Programmatic NEPA Reviews, 79 FR 50,578, August 22, 2014.

federal agencies, and state agencies. CEQ received twenty-eight public comments, which are available online at

www.whitehouse.gov/administration/eop/ceq/initiatives/nepa/comments and at

www.nepa.gov. The comments that suggested editorial revisions and requested

clarification of terms are addressed in the text of the final guidance. Comments that

raised policy or substantive concerns are grouped into thematic issues and addressed in

the following sections of this notice.

HIGHLIGHTING THE VALUE OF NEPA

Many commenters expressed support for CEQ's efforts to encourage timely and efficient use of the NEPA environmental review process to inform agency decision-making. Some commenters asserted that the draft guidance did not adequately highlight NEPA's value and successes. These commenters urged CEQ to further discuss how NEPA is an effective tool for ensuring fully informed decision-making and meaningful public participation.

CEQ agrees and expanded the introduction of the final guidance to incorporate a broader discussion of NEPA's role in assisting agencies in decision-making and providing opportunity for meaningful public participation. This final guidance was developed to provide for the consistent, proper, and appropriate development and use of programmatic NEPA reviews by Federal agencies. It reinforces the process required to establish opportunities for public involvement, increased transparency, and informed decision-making.

APPLICABILITY TO ENVIROMENTAL ASSESSMENTS

One commenter asked for further explanation as to why programmatic approaches apply to developing an Environmental Assessment (EA) as well as Environmental Impact Statement (EIS).

CEQ interprets its regulations as allowing for the use of a programmatic approach in developing an EA. Neither the NEPA statute nor CEQ's regulations prohibit programmatic approaches for an EA. Each federal agency has its own agency NEPA implementing procedures which adapt the framework established by the CEQ regulations to address agency specific missions and decision-making authority. Agencies are encouraged to revise or amend their NEPA implementing procedures, if necessary, to allow for the use of programmatic EAs and EISs.

REQUEST FOR MORE EXAMPLES

Many commenters requested additional case studies and examples to show real-world applications of programmatic NEPA review. Some commenters also requested examples of where programmatic NEPA review would not be appropriate. Several commenters requested more examples of instances where programmatic NEPA review allowed for informed decision-making, meaningful public involvement, and adequately addressed site-specific impacts.

To address these comments, CEQ has added more examples and legal authorities, where appropriate, and tried to provide them wherever they are helpful and illustrative. If CEQ learns of other helpful examples, they will periodically be made available on the NEPA.gov website.

CONCERNS ABOUT DELAY

Some commenters expressed concern over the timeliness and burden of programmatic NEPA reviews. One commenter stated that tiered programmatic NEPA reviews may lead to unproductive additional layers of review and therefore may encourage undue delay, cost, and inefficiency. This commenter raised an example of how a programmatic review for a corridor will lead to duplicative review when individual projects are sited.

The final guidance emphasizes that agencies are given the discretion to determine whether programmatic NEPA review will be an effective and efficient way to address environmental impacts. If an agency determines that a broad-level analysis and review of a proposal allows informed and meaningful decision-making, the agency should have the flexibility to do so. Although the commenter argues that a tiered approach to review constitutes “delay,” CEQ finds that in many situations there is merit in looking at a proposal on a broad level and then focusing a subsequent, tiered, review on the relevant issues at the site- or project-specific level. The agency responsible for the NEPA review should take the timing of the decisions and the programmatic and subsequent tiered NEPA reviews into account when determining how best to proceed.

WHEN TO USE PROGRAMMATIC REVIEW

Several commenters requested that CEQ include a test or presumption about when using a programmatic approach is appropriate. One commenter advocated for a test as set out by *Kleppe v. Sierra Club*, 427 U.S. 390 (1976). Another commenter requested that CEQ include a presumption against programmatic NEPA review because case-by-case analysis of projects will provide more robust environmental analysis and public involvement. Conversely, another commenter urged CEQ to mandate when agencies

should conduct programmatic review for projects that affect a common geographic region or a suite of similar projects.

CEQ rejects the use of a set test that would be applicable across all agencies and the use of a default presumption. As written in the final guidance, agencies have discretion to determine whether a programmatic approach is appropriate. A default presumption may limit agency flexibility and be too prescriptive. *Kleppe* does not establish a hard line test and, instead, explains that agencies have the technical expertise and discretion to determine whether a programmatic review is appropriate. The final guidance explains that each agency should determine the circumstances in which it is appropriate to prepare programmatic NEPA documentation. The agency preparing the NEPA review is responsible for tailoring the review to the type of action involved while taking into account the potential efficiencies, maximizing informed decision-making, and ensuring compliance with other laws, regulations, and policies relevant to the decision at hand.

PROGRAMMATIC DOCUMENTS AS A STAND-ALONE DOCUMENT

Several commenters raised concerns about whether agencies may prepare a single NEPA document to support both programmatic and project-specific proposals. Some commenters have urged CEQ to create a default presumption that programmatic reviews alone are inappropriate.

The final guidance makes it clear that any Federal agency program charged with complying with NEPA has the discretion to determine when a programmatic NEPA review is appropriate. CEQ declines to create a default presumption but has added language to provide more clarity and guidance about when a NEPA review includes both

programmatic and project-specific decisions, as well as when a single programmatic NEPA review is appropriate. For example, a single programmatic NEPA review may be appropriate when an agency plans to make a broad program decision. When both programmatic and project-specific decisions are being made, the NEPA review should be clear in identifying the decisions and the environmental analysis to support those decisions.

PROPER USE OF TIERING

A few commenters raised concerns about when a programmatic EIS may be tiered from a previous programmatic NEPA review. One commenter expressed that improper tiering to subsequent actions could lead to delay, an unnecessary use of time and resources, and an improper substantive analysis of environmental impacts. This commenter, along with another commenter, requested that any tiered documents are only required to analyze new impacts that were not previously addressed. Conversely, another commenter stated that tiered review is the greatest opportunity for a recognized benefit of programmatic review and that they should be further encouraged.

The final guidance makes it clear that the Federal agency program responsible with complying with NEPA has the discretion to determine whether a programmatic NEPA review is appropriate. A programmatic NEPA review followed by a tiered NEPA review is appropriate when such an approach provides a framework for agencies to help public officials make timely decisions based on an understanding of the environmental consequences relevant to the decision at hand. As a result, CEQ finds it inappropriate to establish a presumption that substantive analysis is unnecessary or should be precluded in subsequent tiered documents. Finally, new examples have been added that explain that

one level of review may be sufficient in certain cases – such as when an agency undergoes rulemaking, adopts an agency-wide policy, adopts a formal plan, or redesigns and existing program – and that a programmatic EA is not invalidated when the subsequent decision requires preparation of an EIS.

TIERING FROM A PROGRAMMATIC EA WITH FINDINGS OF NO SIGNIFICANT IMPACT

A few commenters expressed concerns about scenarios where an agency has a PEA that results in a finding of no significant impact (FONSI) and then tiers to a subsequent project-specific EIS. One commenter stated that it seems counterintuitive that a programmatic Environmental Assessment supported by a FONSI could approve a number or actions that then lead to a NEPA analysis for a project that has the potential for a significant impact on the environment.

The final guidance has been modified to contain two examples of how a programmatic environmental impact statement may tier from a programmatic EA. One example is that a programmatic EA may be used to articulate standard mitigation for a suite of similar projects, such as capturing vented methane. This programmatic EA may result in a FONSI and project-level construction that goes beyond the mitigation in the EA will require a programmatic EIS. The other example is that a programmatic EA may result in a FONSI but a subsequent proposal represents a unique or unexpected circumstance that raises the potential for significant impacts. In such a circumstance, a tiered EIS would not undermine or invalidate the programmatic EA which resulted in a FONSI. Additionally, the final guidance also makes clear that an agency should explain

in all programmatic NEPA reviews how the agency intends to use it to complete future proposal-specific NEPA reviews.

SUPPLEMENTATION AND NEW INFORMATION

Some commenters raised concerns about when a programmatic review should be supplemented or when new information would substantially affect the programmatic analysis. One commenter requested that CEQ include language that, once a decision is made, there is no obligation for an agency to supplement a NEPA review. This commenter requested that in light of *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55 (2004), any decision to approve a plan should be recognized as a completed decision and no supplements to a programmatic NEPA review are required.

CEQ has added a footnote in the final guidance to clarify the role of *Southern Utah Wilderness Alliance*. In that case the United States Supreme Court noted that an agency must take a “hard look” at new information to determine whether supplementation is necessary. 542 U.S. at 73 (citing *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 370-374 (1989)). The Court distinguished *Southern Utah Wilderness Alliance* in that there were no subsequent decisions to be made and there was no ongoing “major Federal action” that required supplementation. *Id.*

The final guidance makes it clear that supplementation may be required when there are more decisions to be made by the agency that would use the original NEPA review. The programmatic NEPA review process may defer issues for subsequent tiers of review. Site- or project-specific impacts might not be fully evaluated at initial tiers of review when the decision to act on a site development or its equivalent is yet to be made. Agencies should, when decisions remain to be made and the Federal action is on-going,

consider new information to determine if that would require updating or supplementing the programmatic NEPA review.

Another commenter requested language in the final guidance that requires agencies to carefully reexamine any programmatic NEPA review that is more than five years-old to determine whether the criteria for supplementation must be met. This commenter notes that there are many cases where an agency fails to update a NEPA review even though there has been no construction or ongoing activity for five years. Another commenter asked CEQ to have agencies supplement their programmatic reviews, rather than address the information at the site-specific level, in situations where new information could affect the impacts of program as a whole.

CEQ understands these concerns and further refined its discussion about supplementation. The CEQ regulations provide a procedural framework for keeping environmental analyses current. They require agencies to prepare supplements upon determining there is significant new information of relevance to the proposed action or its impacts. The final guidance acknowledges that there is a possibility of new information arising after an EA or EIS is completed that exists regardless of whether a NEPA review is programmatic. The requirements to update or supplement a NEPA review remains the same for programmatic as it does for non-programmatic NEPA reviews.

THE LIFESPAN OF PROGRAMMATIC DOCUMENTS

Some commenters raised the concern about the lifespan of programmatic documents and asked for more clarity about when supplementation or a new programmatic NEPA review will be required. These commenters pointed out that, while programmatic NEPA reviews may discuss potential environmental impacts, the

information can often become outdated and cannot be used for subsequent decision-making. One commenter suggested that the final guidance should mandate that an agency may not rely on any NEPA document that is more than ten years old. Another commenter suggested that all programmatic NEPA analysis should have set triggers for supplementation or expiration dates.

The final guidance clearly states that agencies must consider and make reasonable efforts to anticipate the length of time the programmatic decision and its supporting NEPA review will be maintained and used for subsequent tiered reviews. There is no fixed timeline or expiration date for programmatic NEPA documents, just as there is no fixed timeline or expiration date for other types NEPA review. The final guidance refers to question 32 in CEQ's 40 Most Asked Questions, which states that as a rule of thumb, if the proposal has not yet been implemented, or if the EIS concerns an ongoing program, EISs that are more than five years old should be carefully reexamined to determine if a supplement is required. The final guidance does encourage agencies to determine the factors that may result in the need to supplement or refresh the analysis and communicate this to stakeholders. When a programmatic review is projected to have a long life span to be used for subsequent decision-making, the final guidance states that an agency should pay close attention to the possible effects of new information.

ALTERNATIVES

Several commenters requested more clarity on the appropriate use of alternative analysis in a programmatic NEPA review. One commenter asked for a narrower interpretation of what constitutes a "reasonable alternative" so that broad-level NEPA review is not unduly burdened. Other commenters asked that CEQ place particular

emphasis on the importance of soliciting and considering alternatives developed outside of the lead agency, especially local government and publically-developed alternatives. Several commenters suggest that limiting alternatives or general analysis in one review that is later relied upon in a subsequent site-specific NEPA review could limit meaningful and informed decision-making. They urged CEQ to amend the guidance to prohibit the use of programmatic NEPA reviews to narrow or restrict future alternatives for activities such as multifaceted actions or operating plans. Many commenters stated that alternatives and public involvement should not be narrowed down until site-specific impact analysis has been carried out.

The final guidance emphasizes that alternatives in a programmatic NEPA review are expected to reflect the level of the Federal action being proposed and the standard NEPA requirements for alternatives apply. “Reasonable alternatives” depend on the nature of the proposal and the facts of the case. Factors in determining whether an alternative is reasonable include the purpose and need for the decision and its effects on the environment and on the affected community(s), as well as the state of the technologies available to achieve the proposed outcome. The final guidance makes clear that, by articulating the reasoned choice between alternatives, with a discussion of why considered alternatives were not chosen, the range of alternatives in programmatic NEPA reviews can be appropriately narrowed.

CEQ supports public and local government involvement in the NEPA process, including the development of alternatives. Non-agency alternatives can be considered in any NEPA process, regardless of whether it is programmatic or not, provided they are technically and economically feasible. The final guidance was revised to clarify that non-agency alternatives may be considered. Additionally, the final guidance provides an

entire section devoted to public involvement and collaboration and cooperation among Federal agencies, tribes, and state and local governments. CEQ's encouragement of working with other parties includes the development of reasonable alternatives to allow for informed decision-making.

CUMULATIVE IMPACTS

Several commenters raised concerns about how to effectively analyze cumulative effects for each resource in tiered programmatic review rather than only completing cumulative analysis for the program overall. These commenters suggest that it is difficult to evaluate cumulative actions when individual projects are deferred or not completely conceptualized.

As specifically set out in the CEQ regulations and all CEQ guidance, the consideration of the potential cumulative impacts of proposed actions is an important and integral aspect of the NEPA process. CEQ has modified the final guidance to describe when cumulative impacts should be analyzed for potentially affected resources in each level of review. An agency should not solely complete a cumulative analysis for the broader programmatic review.

PUBLIC INVOLVEMENT

Commenters were most concerned about how programmatic NEPA review affects public participation and involvement. Several commenters expressed concern that programmatic NEPA review leads to a "shell game" when there is deferred analysis of specific impacts to subsequent tiers within the NEPA process. According to these commenters, deferred analysis may lead to poor meaningful involvement and an insufficient review of potential environmental impacts. One commenter asked for CEQ to

strengthen guidance language about how to actively engage the public before and during an agency's programmatic NEPA review process. Several commenters asked CEQ to emphasize that agencies must communicate to the public how the programmatic NEPA review is being used and which issues are deferred for subsequent tiered NEPA reviews. These commenters noted that where an agency issues a programmatic NEPA review and a party is interested in challenging its validity, the agency often responds that the party should wait to raise concerns at the site-specific level because the agency will address these concerns at that level. They suggest that it is appropriate to raise issues at the programmatic level where the issues affect the program as a whole and the issues are not present at each site-specific level, or where the cumulative impact of the issues is plain at the programmatic level but is relatively insignificant at the level of the site. Another commenter raised the issue that broad-level review may create public participation issues because it is difficult for the public to understand how a project affects them until the project-specific level. One commenter also suggested that CEQ mandate that all comment periods for programmatic NEPA review be extended from 45 days to 90 days.

The final guidance makes it clear that CEQ strongly encourages public involvement in all programmatic and tiered NEPA reviews. As the final guidance explains, engaging the public in the environmental aspects of Federal decision-making is a key policy goal of NEPA and the CEQ regulations. Public involvement is not limited to the provision of information by agencies; it should also include meaningful opportunities for the public to provide comment and feedback on the information made available. Considering recent advances in information technology, agencies should consider employing additional measures to involve the public beyond simply publishing a *Federal*

Register notice. The final guidance suggests ways to involve the public, such as engaging non-governmental organizations, citizen's groups, labor organizations, and trade associations.

The final guidance recognizes that public engagement is particularly important when developing programmatic NEPA reviews in order to ensure agency objectives are understood and to make it clear how a programmatic review will influence subsequent tiered reviews. Effective public engagement also will help manage expectations with regard to the purpose and need, the scope of the broad environmental analyses, and the purpose and need and scope of subsequent site- and project-specific environmental analyses. The final guidance encourages outreach to potential stakeholders as early as possible to afford the public a meaningful opportunity to comment on and shape the programmatic NEPA review and/or develop alternatives to be considered. The guidance recognizes that members of the public are less likely to participate or engage in the commenting process if they do not fully understand how the outcomes will affect them. It is critical that agencies provide context and as much information as possible in the beginning of the public involvement process.

The final guidance has been modified to emphasize that proactive and robust public participation is encouraged and, when appropriate, comment periods may need to be extended to ensure meaningful involvement. CEQ declines to mandate a maximum timeframe for comment periods because agencies should have the flexibility and discretion to determine whether the minimum timeframes provided in the CEQ regulations should be extended to provide time for meaningful review.

The final guidance encourages that an agency supports early public participation by clearly explaining to the public not only what the proposed programmatic evaluation is meant to accomplish, but also how it relates to future actions, and why the public should get involved at the programmatic stage and not wait for any tiered reviews. The guidance makes clear that an agency should clearly state which concerns are addressed at that level of review and which concerns will be addressed in the tiered NEPA review.

COORDINATION WITH OTHER ENVIRONMENTAL REVIEWS

A few commenters reminded CEQ that NEPA review acts as the foundation for other statutory reviews such as the Endangered Species Act (ESA) and National Historic Preservation Act (NHPA). One commenter asked for more clarification that a consolidated NEPA review generally should form the basis for reviews under all federal environmental laws that pertain to a given action. Another commenter requested revisions to include a schedule or other mechanism for coordinating ESA, Marine Mammal Protection Act, NHPA, and other interagency consultation processes so as to increase efficiency and create enforceable timelines. Another commenter asked for additional discussion about entering into programmatic agreements with other regulatory agencies such as the United States Fish and Wildlife Service.

The final guidance recognizes that the purpose and need statement and the proposed action for the programmatic NEPA review are critical for determining the compliance requirements under other applicable laws and regulations, such as ESA, NHPA, and Clean Water Act. Language has been added to the final guidance to emphasize that an agency should consider the appropriate level of compliance with other laws for a programmatic NEPA review, for example by considering programmatic

agreements under the ESA and NHPA, and the potential for a separate, more focused and specific consultation, for any subsequent tiered NEPA review.

HARD LOOK DOCTRINE

A few commenters asked for further clarification on how the “hard look” doctrine should be met for programmatic NEPA analysis. The final guidance explains that a programmatic NEPA review should contain sufficient discussion of the relevant issues and opposing viewpoints to enable the decisionmaker to take a “hard look” at the environmental effects and make a reasoned choice among alternatives.

The final guidance describes the hard look doctrine in greater detail and an agency should include a statement in its programmatic NEPA review that explains rationale as to how various environmental effects were analyzed given the scope of the programmatic decisions being made.

MITIGATION AND MONITORING

Several commenters voiced concerns that the final guidance does not adequately address mitigation and monitoring. Some commenters noted that agencies often fail to follow through on mitigation strategies throughout the programmatic NEPA process, and solely focus on mitigation at the broad-level review. These commenters also recommend that agencies be required to incorporate not only monitoring but also triggers and methods to update mitigation requirements depending on the monitoring results. Some of these commenters also requested that CEQ provide more direction about the necessity of mitigation monitoring and adaptive management in the context of environmental review.

The CEQ regulations provide a framework for mitigating adverse environmental impacts. Mitigation and monitoring are key components of NEPA regardless of whether

the NEPA process is programmatic. The final guidance recognizes that programmatic NEPA reviews provide an opportunity for agencies to incorporate comprehensive mitigation planning and monitoring strategies into the Federal policymaking process at a broad or strategic, rather than specific or site-by-site, level. New language has been added to include recognition that best management practices, adaptive management practices, and standard operating procedures may also be incorporated. The final guidance now notes that adaptive management can provide the basis for an agency to change the course of implementation without the need for developing supplemental NEPA reviews and the associated documentation.

(Authority: 42 U.S.C. 4332, 4342, 4344 and 40 CFR Parts 1500, 1501, 1502, 1503, 1505, 1506, 1507, and 1508)

Dated: December 18, 2014.

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