



NEPA: The Fiscal Responsibility Act (FRA) Amendments and Proposed Phase II Rules

DESSA REIMER

OCTOBER 13, 2023

 **Holland & Hart**

NEPA Basics



- Enacted in 1970
- Procedural statute – 2 key goals
 - Informed public participation
 - Informed decision-making
- Action-forcing provision
 - Prepare an EIS for major federal actions with significant environmental effects

Litigation Risk Leads to:

- Increasing complexity, length, and time to complete the NEPA process
- Barrier to efficient decision-making for projects of all types

CEQ Regulations

- Promulgated in 1978
- 2020 Rulemaking – First major update
- 2022 Phase I rollback – addressed 3 key provisions
 - Purpose and need
 - Definition of effects, restores cumulative
 - CEQ regs as floor, not ceiling, of NEPA procedures
- 2023 Phase II Proposal– Comprehensive update (comment period closed Sept. 29, 2023)

Fiscal Responsibility Act Amendments



- Section 102 – the EIS will include:
 - “reasonably foreseeable” environmental effects
 - Any “reasonably foreseeable” adverse environmental effects that cannot be avoided
 - A “reasonable range” of alternatives that are “technically and economically feasible” and meet the purpose and need of the proposal
 - Analysis of the negative environmental impacts of not implementing the proposed action

FRA Amendments

- Section 106 – Level of Review
 - Threshold determination – no NEPA for non-final agency action, actions categorically excluded, actions with a clear and fundamental conflict with other law, or nondiscretionary agency acts
 - EA v. EIS – “reasonably foreseeable significant effects”

FRA Amendments

- Section 107 – Timely and Unified Review
 - One lead agency
 - To coordinate with cooperating agencies
 - Develop a schedule “in consultation with the cooperating agencies and the applicant”
 - One document – to the extent practicable
 - Page limits (exclusive of citations or appendices)
 - EIS = 150 pages, EIS of extraordinary complexity = 300 pages
 - EA = 75 pages

FRA Amendments



- Section 107 – Sponsor Preparation
 - A lead agency shall prescribe procedures to allow a project sponsor to prepare an EA or an EIS under the supervision of the agency. The lead agency shall independently evaluate the environmental document and shall take responsibility for the contents.

FRA Amendments

- Section 107 – Deadlines
 - EIS = 2 years
 - EA = 1 year
 - Trigger = earlier of
 - Day on which agency “determines” NEPA requires an EIS or EA
 - Day on which agency “notifies” applicant for a ROW that the application is complete
 - Day on which notice of intent is issued

FRA Amendments

- Section 107 – Deadline exception
 - Agency may extend the deadline “in consultation with the applicant, to establish a new deadline that provides only so much additional time as is necessary” to complete the EIS or EA.
 - Court Petition – For failure to “act in accordance” with the deadline
 - Court can set a deadline, not to exceed 90 days, for agency to act, “unless the court determines a longer time period is necessary”

FRA Amendments

- Section 108 – Programmatic EIS
 - Good for 5 years, generally
- Section 109 – Adoption of CatExs
- Section 111 – Major Federal Action Definition
 - Excludes actions “with no or minimal Federal funding” or “with no or minimal Federal involvement where a Federal agency cannot control the outcome of the project.”

CEQ's Phase II Rulemaking



- To implement the FRA Amendments
- Promote transparency
- Ensure meaningful public engagement
- Reinforce informed and science-based decision-making
- “Facilitate environmental, climate change, and environmental justice outcomes”
- Promote regulatory certainty

More Than a Rollback to 1978

- Identification of environmentally preferable alternative
- Specific emphasis on climate change and environmental justice effects
- Required consideration of “significant or important” effects
- Innovative approaches to NEPA
- Enforceable mitigation and compliance plans

From Procedural to Substantive

- Push toward environmental outcomes
 - Elimination of language regarding “procedural” statute (1500.1)
 - Identification of environmentally preferable alternative (1502.14)
 - Legally binding mitigation, and compliance plans (1505.3)

Restores Significance Factors



- Context and Intensity (1501.3(d))
- 2020 Rule – limited “context” to the potentially affected environment
 - 2023 Proposal returns to national, regional, and local, and global context
- 2020 Rule – Intensity reframed as “degree” of effects
 - 2023 Proposal returns to 10 factors

Prioritizes Climate Change Effects

- Context factors now require consideration of global, national, regional, and local context (1501.3)
- Encourages development of alternative to reduce climate change effects (1500.2(e))
- Obligation to evaluate conflicts with plans and policies, including those addressing climate change (1502.16(a)(6))
- Specifically listed in definition of “effects” (1502.16(a)(7), 1508.1(g))

Prioritizes Environmental Justice

- Policy = address adverse health and environmental effects that disproportionally affect communities with EJ concerns (1500.2(e))
- Significance factor = Degree of disproportionate effects on EJ communities (1501.3(d))
- Environmentally preferred alternative would address EJ concerns (1502.14(f))
- Analysis must include potential for disproportionate and adverse effects on EJ communities (1502.16(a)(14))
- Final decision should incorporate mitigation to address EJ concerns (1505.3(b))
- EJ is defined as “full” protection from disproportionate and adverse effects (1508.1(k))

Introduces New Concepts and Language

- Innovative approaches to NEPA for “extreme environmental challenges” (1506.12)
- “Important” v. “Significant” effects (1500.4(b), (f); 1502.9; 1502.16(a)(1))
 - “Comparison of the proposed action and reasonable alternatives shall be based on the discussion of the effects, focusing on the significant or important effects.”

Removes Limits on Judicial Review



- Requiring comments to exhaust administrative remedies (1500.3(b))
- Requiring specificity of comments and information (1503.3)
- Declaring that injunction is not the presumptive remedy for procedural NEPA violations (1500.3(d))

Does Not Fully Implement FRA

- Judicial petition process left unaddressed
- No guidance on procedures for applicant-prepared environmental documents
- Creates potential inefficiencies
 - Removes agency ability to consider only a “reasonable number” of alternatives (1502.14)
 - Removes agency ability to use “reliable and existing data” (1502.23)

QUESTIONS? ... THANK YOU



DESSA REIMER

hmreimer@hollandhart.com