

adopted by voluntary consensus standards bodies.

This rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

#### Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023-01 and Commandant Instruction M16475.ID, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321-4370f), and have concluded this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule is categorically excluded, under figure 2-1, paragraph (34)(g), of the Instruction. This rule involves establishing a temporary safety zone that will be enforced for only two hours. An environmental analysis checklist and a categorical exclusion determination are available in the docket where indicated under

#### ADDRESSES.

#### List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, Waterways.

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 165 as follows:

### PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

- 1. The authority citation for part 165 continues to read as follows:

**Authority:** 33 U.S.C. 1231; 46 U.S.C. Chapter 701, 3306, 3703; 50 U.S.C. 191, 195; 33 CFR 1.05-1, 6.04-1, 6.04-6, 160.5; Pub. L. 107-295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

- 2. Add a temporary § 165.T07-0110 to read as follows:

#### § 165.T07-0110 Safety Zone; Festival of States 2012 Night Parade Fireworks Display, Tampa Bay, St. Petersburg, FL.

(a) *Regulated Area.* The following regulated area is a safety zone: All waters of Tampa Bay within a 375 yard radius of position 27°46'31" N, 82°37'38" W. All coordinates are North American Datum 1983.

(b) *Definition.* The term "designated representative" means Coast Guard Patrol Commanders, including Coast Guard coxswains, petty officers, and other officers operating Coast Guard vessels, and Federal, state, and local officers designated by or assisting the

Captain of the Port St. Petersburg in the enforcement of the regulated area.

(c) *Regulations.* (1) All persons and vessels are prohibited from entering, transiting through, anchoring in, or remaining within the regulated area unless authorized by the Captain of the Port St. Petersburg or a designated representative.

(2) Persons and vessels desiring to enter, transit through, anchor in, or remain within the regulated area may contact the Captain of the Port St. Petersburg by telephone at (727) 824-7524, or a designated representative via VHF radio on channel 16, to request authorization. If authorization to enter, transit through, anchor in, or remain within the regulated area is granted by the Captain of the Port St. Petersburg or a designated representative, all persons and vessels receiving such authorization must comply with the instructions of the Captain of the Port St. Petersburg or a designated representative.

(3) The Coast Guard will provide notice of the regulated area by Local Notice to Mariners, Broadcast Notice to Mariners, and on-scene designated representatives.

(d) *Effective Date.* This rule is effective from 8 p.m. until 10 p.m. on March 22, 2012.

Dated: February 21, 2012.

**S.L. Dickinson,**

*Captain, U.S. Coast Guard, Captain of the Port.*

[FR Doc. 2012-5858 Filed 3-9-12; 8:45 am]

**BILLING CODE 9110-04-P**

### COUNCIL ON ENVIRONMENTAL QUALITY

#### 40 CFR Parts 1500, 1501, 1502, 1503, 1505, 1506, 1507, and 1508

#### Final Guidance on Improving the Process for Preparing Efficient and Timely Environmental Reviews Under the National Environmental Policy Act

**AGENCY:** Council on Environmental Quality.

**ACTION:** Notice of availability, final guidance.

**SUMMARY:** The Council on Environmental Quality (CEQ) is issuing its final guidance on Improving the Process for Preparing Efficient and Timely Environmental Reviews under the National Environmental Policy Act. The National Environmental Policy Act (NEPA) and CEQ Regulations implementing NEPA provide numerous techniques for preparing efficient and timely environmental reviews. CEQ is issuing this guidance for Federal

departments and agencies to emphasize and clarify that these techniques are available for all NEPA Environmental Assessments and Environmental Impact Statements. These techniques are consistent with a thorough and meaningful environmental review and agencies using these techniques should keep in mind the following basic principles: NEPA encourages straightforward and concise reviews and documentation that are proportionate to potential impacts and effectively convey the relevant considerations in a timely manner to the public and decision makers, while rigorously addressing the issues presented; NEPA shall be integrated into project planning to ensure planning and decisions reflect environmental considerations, avoid delays later in the process, and anticipate and attempt to resolve issues, rather than be an after-the-fact process that justifies decisions already made; NEPA reviews should coordinate and take appropriate advantage of existing documents and studies, including through adoption and incorporation by reference; early and well-defined scoping can assist in focusing environmental reviews on appropriate issues that would be meaningful to a decision on the proposed action; agencies are encouraged to develop meaningful, predictable, and expeditious timelines for environmental reviews; and agencies should respond to comments in proportion to the scope and scale of the environmental issues raised. This guidance applies equally to the preparation of an Environmental Assessment or an Environmental Impact Statement consistent with legal precedent and agency NEPA experience and practice. This guidance does not change or substitute for any law, regulations, or any other legally binding requirement. It does provide CEQ's interpretation of existing regulations promulgated under NEPA.

**DATES:** The guidance is effective March 12, 2012.

**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. 4321-4346b, 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 or take action.<sup>1</sup> Our ongoing review of the CEQ Regulations implementing NEPA at 40 Code of Federal Regulations Parts 1500–1508 confirms the benefits of integrating planning and environmental reviews, coordinating multi-agency or multi-governmental reviews and approvals, and setting clear schedules for preparing EAs and EISs. This guidance promotes a sufficient and effective process that is tailored to avoid excessive burden. This guidance also reflects CEQ's continuing commitment to implement its Plan for Retrospective Review of Existing Regulations (Plan) in accordance with Executive Order 13563.<sup>2</sup>

The guidance addresses numerous individual issues associated with the NEPA review process in a manner that meets the CEQ goals of promoting techniques that will modernize the use of NEPA, enabling agencies to more effectively and efficiently make use of the NEPA. The individual issues addressed include the use of concise NEPA documents focused on particular environmental issues, the integration of NEPA into preliminary parts of the planning process, and a more prevalent role of scoping in the development of NEPA reviews. The guidance also advises agencies to collaborate with other Federal, State, local, or Tribal agencies and representatives as well as to coordinate reviews and documents with other laws to allow for greater efficiency. It further explains the procedures to adopt other Federal agency reviews and to incorporate by reference information and analyses contained in other documents, and emphasizes the need for reasonable and proportionate responses to comments within the NEPA process. Finally, the guidance recommends agencies use appropriate time limits to promote efficiency. Thus, this guidance offers concrete tools for NEPA reviews to facilitate a more targeted, efficient, and informative analysis of environmental issues and impacts.

This guidance provides CEQ's interpretation of existing regulations promulgated under NEPA, and does not change agencies' obligations with regard

to NEPA and the CEQ Regulations implementing NEPA.

The **Federal Register** notice announcing the draft Guidance on Improving the Process for Preparing Efficient and Timely Environmental Reviews under the National Environmental Policy Act was published on December 13, 2011.<sup>3</sup> CEQ appreciates the thoughtful responses to its request for comments on the draft guidance. Commenters included private citizens, corporations, environmental organizations, trade associations, Federal agencies, and state agencies. CEQ received 61 comments, which are available online at [www.whitehouse.gov/administration/eop/ceq/initiatives/nepa/comments](http://www.whitehouse.gov/administration/eop/ceq/initiatives/nepa/comments). 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.

#### What's New in This Guidance

Many commenters felt that the draft guidance was merely a rehash of previous guidance issued by the CEQ, with no new insights or procedures for making the NEPA process more efficient. This guidance highlights and focuses on the existing provisions under the CEQ Regulations implementing NEPA and clarifies that they are available for the preparation of Environmental Assessments, as well as Environmental Impact Statements, so that Federal agencies can focus on specific techniques that provide the best use of agency resources in ensuring a timely, effective, and efficient NEPA review. This guidance applies equally to the preparation of Environmental Assessments and Environmental Impact Statements consistent with legal precedent and agencies' NEPA experience and practice. It does not create or endorse any new requirements or obligations that would lengthen the process.

#### Strength of Guidance

Comments on the strength of the draft guidance varied widely, with some commenters finding that the guidance did not do enough to force agencies to expedite review and other commenters feared the guidance weakened the importance of NEPA for agency decision making. The guidance reinforces and

clarifies what Federal agencies should do, and are already allowed to do, under NEPA and the CEQ's NEPA implementing regulations. For example, the second principle on integrating NEPA with planning now states that agencies "shall" integrate NEPA into project planning which reflects the direction provided in current regulations. When Congress enacted NEPA, it charged CEQ with interpreting the statute. Pursuant to its authority, over the years CEQ has issued guidance on a variety of topics. Today's guidance provides CEQ's interpretation of its already established regulations promulgated for NEPA implementation and does not change agencies' obligations with regard to those regulations.

#### Public Participation

Some comments desired further emphasis on the public participation component of NEPA as a part of this guidance, or felt that the lack of public participation guidance in this document suggested that public participation is not viewed by the CEQ to be an integral part of the NEPA process. The CEQ believes that public participation is a crucial and integral part of NEPA, and the portions of this guidance which address public participation do nothing to change or deemphasize this fact. The focus of much of this guidance is on the review and implementation procedures of agencies, especially the physical writing of NEPA documents and internal agency review procedures which do not have a direct interaction with the public. Earlier CEQ guidance has emphasized the importance of public participation; see, for example the guidance for developing and using categorical exclusions available at [http://ceq.hss.doe.gov/ceq\\_regulations/NEPA\\_CE\\_Guidance\\_Nov232010.pdf](http://ceq.hss.doe.gov/ceq_regulations/NEPA_CE_Guidance_Nov232010.pdf).

#### The Final Guidance

For reasons stated in the preamble, above, CEQ issues the following guidance on Improving the Process for Preparing Efficient and Timely Environmental Reviews under the National Environmental Policy Act. The final guidance is provided here and is available on the National Environmental Policy Act Web site (<http://www.nepa.gov>) at [http://ceq.hss.doe.gov/ceq\\_regulations/guidance.html](http://ceq.hss.doe.gov/ceq_regulations/guidance.html) and on the CEQ Web site at <http://www.whitehouse.gov/administration/eop/ceq/initiatives/nepa>.

<sup>1</sup> 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 [ceq.hss.doe.gov/nepa/Citizens\\_Guide\\_Dec07.pdf](http://ceq.hss.doe.gov/nepa/Citizens_Guide_Dec07.pdf).

<sup>2</sup> "Improving Regulation and Regulatory Review," E.O. 13,563, 76 FR 3821 (January 21, 2011), available at [www.gpo.gov/fdsys/pkg/FR-2011-01-21/pdf/2011-1385.pdf](http://www.gpo.gov/fdsys/pkg/FR-2011-01-21/pdf/2011-1385.pdf).

<sup>3</sup> National Environmental Policy Act (NEPA) Draft Guidance, *Improving the Process for Preparing Efficient and Timely Environmental Reviews under the National Environmental Policy Act*, 76 FR 77,492, Dec. 11, 2011.

## Memorandum for Heads of Federal Departments and Agencies

FROM: NANCY H. SUTLEY, Chair,  
Council on Environmental Quality  
SUBJECT: *Improving the Process for  
Preparing Efficient and Timely  
Environmental Reviews Under the  
National Environmental Policy Act*

A wide array of tools is available to meet the goal of high quality, efficient, and timely environmental reviews under the National Environmental Policy Act (NEPA). The Council on Environmental Quality (CEQ) Regulations implementing NEPA contain a number of opportunities for achieving this goal. CEQ is issuing this guidance for Federal departments and agencies to emphasize and clarify those opportunities, fully consistent with a thorough and meaningful environmental review. The guidance also makes it clear that many of the provisions of the CEQ Regulations which specifically refer to an Environmental Impact Statement (EIS) provide efficiencies that can also be used to prepare an Environmental Assessment (EA). This guidance applies equally to the preparation of an EA or an EIS consistent with legal precedent and agency NEPA experience and practice.

In conducting all environmental reviews pursuant to NEPA, agencies should use the methods set out in the CEQ Regulations and in their own agency NEPA implementing procedures in a way that is mindful of the following basic principles:

- NEPA encourages straightforward and concise reviews and documentation that are proportionate to potential impacts and effectively convey the relevant considerations to the public and decisionmakers in a timely manner while rigorously addressing the issues presented;

- NEPA shall be integrated into project planning to ensure planning and decisions reflect environmental considerations, avoid delays later in the process, and anticipate and attempt to resolve potential issues rather than be an after-the-fact process that justifies a decision already made;

- NEPA reviews should coordinate and take appropriate advantage of existing documents and studies, including through adoption and incorporation by reference;

- Early and well-defined scoping can assist in focusing environmental reviews on appropriate issues that would be meaningful to a decision;

- Agencies are encouraged to develop meaningful and expeditious timelines for environmental reviews; and

- Agencies should respond to comments in proportion to the scope and scale of the environmental issues raised.

This guidance also reflects CEQ's continuing commitment to implement its Plan for Retrospective Review of Existing Regulations ("Plan") in accordance with Executive Order 13563.<sup>4</sup> Our ongoing review of the CEQ Regulations confirms the benefits of integrating environmental reviews into the decisionmaking process, coordinating multi-agency or multi-governmental reviews and approvals, and setting clear schedules for preparing EAs and EISs. This guidance promotes a sufficient and effective process that is tailored to avoid excessive burden. This guidance provides CEQ's interpretation of existing regulations promulgated under NEPA, and does not change agencies' obligations with regard to NEPA and the CEQ Regulations.<sup>5</sup>

### *Introduction and Steps to Date*

CEQ was created by NEPA in 1970 and is charged with overseeing NEPA implementation by Federal agencies. In 1978, CEQ issued the CEQ Regulations implementing NEPA.<sup>6</sup> From time to time, CEQ issues guidance for the Federal agencies, to clarify the requirements and applicability of various provisions of NEPA and the CEQ Regulations, and to ensure that those requirements can be met in a timely and effective fashion.<sup>7</sup> These guidance documents represent CEQ's interpretation of NEPA, which the U.S. Supreme Court has said is "entitled to substantial deference."<sup>8</sup>

NEPA requires Federal agencies to consider the potential environmental consequences of their proposed action,

<sup>4</sup> Improving Regulation and Regulatory Review, E.O. No. 13,563, 76 Fed. Reg. 3,821 (Jan. 21, 2011), available at [www.gpo.gov/fdsys/pkg/FR-2011-01-21/pdf/2011-1385.pdf](http://www.gpo.gov/fdsys/pkg/FR-2011-01-21/pdf/2011-1385.pdf).

<sup>5</sup> This guidance is not a rule or regulation, and the recommendations it contains may not apply to a particular situation based upon the individual facts and circumstances. This guidance does not change or substitute for any law, regulations, or any other legally binding requirement and is not legally enforceable. The use of non-mandatory terminology such as "guidance," "recommend," "may," "should," and "can," is intended to describe CEQ policies and recommendations. The use of mandatory terminology such as "shall," "must," and "required" is intended to describe controlling requirements under NEPA and the CEQ Regulations, but this document does not establish legally binding requirements in and of itself.

<sup>6</sup> The Council on Environmental Quality (CEQ) Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act, 40 CFR parts 1500–1508 (2011) [hereinafter CEQ Regulations], available on [www.nepa.gov/ceq.hss.doe.gov/ceq\\_regulations/regulations.html](http://www.nepa.gov/ceq.hss.doe.gov/ceq_regulations/regulations.html).

<sup>7</sup> These guidance documents are available online at [ceq.hss.doe.gov/ceq\\_regulations/guidance](http://ceq.hss.doe.gov/ceq_regulations/guidance).

<sup>8</sup> *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979).

and any reasonable alternatives, before deciding whether and in what form to take an action. Environmental reviews prepared under NEPA should provide a decisionmaker and the public with relevant and timely information, and the CEQ Regulations make it clear that "NEPA's purpose is not to generate paperwork—even excellent paperwork—but to foster excellent action."<sup>9</sup>

NEPA compliance can take three forms, a Categorical Exclusion, an EA, or an EIS:

- Categorical Exclusion (CE): A CE describes a category of actions that are expected not to have individually or cumulatively significant environmental impacts.<sup>10</sup> Each agency's procedures for implementing NEPA sets out that agency's CEs, which are established after CEQ and public review. A proposed action within such a category does not require further analysis and documentation in an EA or an EIS.<sup>11</sup> A CE can be used after determining that a proposed action falls within the categories of actions described in the CE and that there are no extraordinary circumstances indicating further environmental review is warranted.

- Environmental Assessment (EA): When a CE is not appropriate and the agency has not determined whether the proposed action will cause significant environmental effects, then an EA is prepared. If, as a result of the EA, a Finding of No Significant Impact (FONSI) is made, then the NEPA review process is completed with the FONSI, including documentation of its basis in the EA; otherwise an EIS is prepared.<sup>12</sup>

- Environmental Impact Statement (EIS): The most intensive level of analysis is the EIS, which is typically reserved for the analysis of proposed actions that are expected to result in significant environmental impacts. When an EIS is prepared, the NEPA review process is concluded when a record of decision (ROD) is issued.<sup>13</sup>

CEQ has been working with agencies to modernize and reinvigorate NEPA implementation in several ways. CEQ issued guidance on the development and use of Categorical Exclusions in November 2010.<sup>14</sup> Properly developed and applied, CEs provide an efficient

<sup>9</sup> 40 CFR 1500.1(c).

<sup>10</sup> Categorical exclusions can also be created through legislation.

<sup>11</sup> 40 CFR 1508.4, 1500.5(k).

<sup>12</sup> 40 CFR 1508.9.

<sup>13</sup> 40 CFR 1505.2.

<sup>14</sup> CEQ, "Establishing, Applying, and Revising Categorical Exclusions under the National Environmental Policy Act" (Nov. 23, 2010), available at [ceq.hss.doe.gov/ceq\\_regulations/NEPA\\_CE\\_Guidance\\_Nov232010.pdf](http://ceq.hss.doe.gov/ceq_regulations/NEPA_CE_Guidance_Nov232010.pdf).

tool to complete the NEPA environmental review process for proposals that normally do not require more resource-intensive EAs or EISs. The use of CEs can reduce paperwork and delay for proposed actions that do not raise the potential for significant environmental effects.<sup>15</sup> In January 2011, CEQ provided guidance that specifically addressed the appropriate use of a FONSI or mitigated FONSI to conclude a NEPA review process relying on an EA. A mitigated FONSI is appropriate when mitigation is used to avoid or lessen potentially significant environmental effects of proposed actions that would otherwise need to be analyzed in an EIS.<sup>16</sup> In addition, in May 2010, CEQ issued guidance on ensuring efficient and expeditious compliance with NEPA when agencies must take exigent action to protect human health or safety and valued resources in a timeframe that does not allow sufficient time for the normal NEPA process.<sup>17</sup>

In August 2011 the President called for further steps to enhance the efficient and effective permitting and environmental review of infrastructure development “through such strategies as integrating planning and environmental reviews; coordinating multi-agency or multi-governmental reviews and approvals to run concurrently; setting clear schedules for completing steps in the environmental review and permitting process; and utilizing information technologies to inform the public about the progress of environmental reviews as well as the progress of Federal permitting and review processes.”<sup>18</sup> This guidance sets forth straightforward means by which the CEQ Regulations support these strategies.

### 1. Concise NEPA Documents

Agencies are encouraged to concentrate on relevant environmental

<sup>15</sup> See 40 CFR 1500.4(p) (recommending categorical exclusions as a tool to reduce paperwork) and 1500.5(k) (recommending categorical exclusions as a tool to reduce delay).

<sup>16</sup> CEQ, “Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact” (Jan. 14, 2011), available at [ceq.hss.doe.gov/current\\_developments/docs/Mitigation\\_and\\_Monitoring\\_Guidance\\_14Jan2011.pdf](http://ceq.hss.doe.gov/current_developments/docs/Mitigation_and_Monitoring_Guidance_14Jan2011.pdf).

<sup>17</sup> CEQ, “Emergencies and the National Environmental Policy Act,” (May 12, 2010), available at [ceq.hss.doe.gov/ceq\\_regulations/Emergencies\\_and\\_NEPA\\_Memorandum\\_12May2010.pdf](http://ceq.hss.doe.gov/ceq_regulations/Emergencies_and_NEPA_Memorandum_12May2010.pdf).

<sup>18</sup> Presidential Memorandum, “Speeding Infrastructure Development Through More Efficient and Effective Permitting and Environmental Review” (Aug. 31, 2011), available at [www.whitehouse.gov/the-press-office/2011/08/31/presidential-memorandum-speeding-infrastructure-development-through-more](http://www.whitehouse.gov/the-press-office/2011/08/31/presidential-memorandum-speeding-infrastructure-development-through-more).

analysis in their EAs and EISs, not to produce an encyclopedia of all applicable information.<sup>19</sup> Environmental analysis should focus on significant issues, discussing insignificant issues only briefly.<sup>20</sup> Impacts should be discussed in proportion to their significance, and if the impacts are not deemed significant there should be only enough discussion to show why more study is not warranted.<sup>21</sup> Scoping,<sup>22</sup> incorporation by reference,<sup>23</sup> and integration of other environmental analyses<sup>24</sup> are additional methods that may be used to avoid redundant or repetitive discussion of issues.<sup>25</sup>

All NEPA environmental documents, not just EISs, shall be written in plain language,<sup>26</sup> follow a clear format, and emphasize important impact analyses and information necessary for those analyses rather than providing extensive background material. Clarity and consistency ensure that the substance of the agency’s analysis is understood, avoiding unnecessary confusion or risk of litigation that could result from an ambiguous or opaque analysis. The CEQ Regulations indicate that the text of a final EIS that addresses the purpose and need, alternatives, affected environment, and environmental consequences should normally be less than 150 pages and a final EIS for proposals of unusual scope or complexity should normally be less than 300 pages.<sup>27</sup>

In light of the growth of environmental requirements since the publication of the CEQ Regulations, and the desire to use the EIS to address, via integration, those requirements, it is recognized that there will be a range of appropriate lengths of EISs. Nevertheless, agencies should keep EISs as concise as possible (continuing to relegate to appendices the relevant studies and technical analyses used to support the determinations and conclusions reached in the EIS) and no longer than necessary to comply with NEPA and the other legal and regulatory requirements being addressed in the EIS, and to provide decision makers and the public with the information they

<sup>19</sup> 40 CFR 1500.4(b), 1502.2(b).

<sup>20</sup> 40 CFR 1502.2(c); see also 40 CFR 1502.2(a) (“Environmental impact statements shall be analytic rather than encyclopedic.”).

<sup>21</sup> 40 CFR 1502.2(b).

<sup>22</sup> 40 CFR 1500.4(g).

<sup>23</sup> 40 CFR 1500.4(j).

<sup>24</sup> 40 CFR 1500.4(k).

<sup>25</sup> See generally 40 CFR 1502.1 (EISs should be written in clear language so that decisionmakers and the public can understand them).

<sup>26</sup> 40 CFR 1502.8; see also [www.plainlanguage.gov](http://www.plainlanguage.gov).

<sup>27</sup> 40 CFR 1502.7.

need to assess the significant environmental effects of the action under review. Length should vary with the number, complexity and significance of potential environmental problems.<sup>28</sup>

Similarly, the CEQ guidance issued in 1981 indicated that 10–15 pages is generally appropriate for EAs.<sup>29</sup> This guidance must be balanced with the requirement to take a hard look at the impacts of the proposed action. As with EISs, an EA’s length should vary with the scope and scale of potential environmental problems as well as the extent to which the determination of no significant impact relies on mitigation, rather than just with the scope and scale of the proposed action.<sup>30</sup> The EA should be no more detailed than necessary to fulfill the functions and goals set out in the CEQ Regulations: (1) Briefly provide sufficient evidence and analysis for determining whether to prepare an EIS; (2) aid an agency’s compliance with NEPA when no EIS is necessary, i.e., the EA helps to identify and analyze better alternatives and mitigation measures; and (3) facilitate preparation of an EIS when one is necessary.<sup>31</sup>

### 2. Early NEPA Integration in Planning

An agency should first consider integrating the NEPA process into planning when it structures its internal process for developing a proposed policy, program, management plan, or project. Agencies must integrate the NEPA process into their planning at the earliest possible time to ensure that planning and decisions reflect environmental values, avoid delays later in the process, and anticipate and

<sup>28</sup> 40 CFR 1502.2(c) (EISs “shall be kept concise and \* \* \* [l]ength should vary first with potential environmental problems and then with project size”).

<sup>29</sup> See CEQ, “Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations” (Mar. 16, 1981), available at [ceq.hss.doe.gov/nepa/regs/40/30-40.HTM#36](http://ceq.hss.doe.gov/nepa/regs/40/30-40.HTM#36) (Question 36a and Answer). Note that at the time of Forty-Questions memorandum CEQ was of the opinion that mitigated Findings of No Significant Impact were only appropriate if the mitigation measures were imposed by statute or regulation, or submitted by an applicant or agency as part of the original proposal. See *Id.* (Question 40 and Answer). CEQ has since published guidance accepting mitigated FONSIs as another means of efficiently concluding the NEPA process without producing an EIS. CEQ, “Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact” (Jan. 14, 2011), available at [ceq.hss.doe.gov/current\\_developments/docs/Mitigation\\_and\\_Monitoring\\_Guidance\\_14Jan2011.pdf](http://ceq.hss.doe.gov/current_developments/docs/Mitigation_and_Monitoring_Guidance_14Jan2011.pdf).

<sup>30</sup> See 40 CFR 1508.9 (stating the EA is “a concise public document”) and 40 CFR 1502.2(c) (interpreting the conciseness requirement for an EIS to mean that “[l]ength should vary first with potential environmental problems and then with project size”).

<sup>31</sup> 40 CFR 1508.9(a).

attempt to resolve potential issues.<sup>32</sup> NEPA should not become an after-the-fact process that justifies decisions that have already been made.<sup>33</sup>

The CEQ Regulations emphasize early NEPA planning in the context of an EIS. The scoping process can be used before an agency issues a notice of intent to seek useful information on a proposal from agencies and the public.<sup>34</sup> For example, agencies can commence the process to prepare an EIS during the early stages of development of a proposal, to ensure that the environmental analysis can be completed in time for the agency to consider the final EIS before making a decision on the proposal.<sup>35</sup> Further, an agency shall prepare an EIS so that it can inform the decisionmaking process in a timely manner “and will not be used to rationalize or justify decisions already made.”<sup>36</sup>

To prepare efficient EAs, agencies should adhere to these same principles and ensure that the EA is prepared in conjunction with the development of the proposed action in time to inform the public and the decisionmaker. Agencies should review their NEPA implementing procedures as well as their NEPA practices to ensure that NEPA is integrated into overall project planning and management to the fullest extent possible.

The CEQ Regulations call upon agencies to provide for situations where the initial planning process is in the hands of an applicant or other non-Federal entity.<sup>37</sup> The Regulations require Federal agencies to address these situations in their NEPA implementing procedures.<sup>38</sup>

Consequently, agencies that have a reasonably foreseeable role in actions that are initially developed by private applicants or other non-Federal entities must plan for those situations. The NEPA implementing procedures for such agencies must provide access to designated staff or the policies that can inform applicants and other non-Federal entities of studies or other information foreseeably required for later Federal action.<sup>39</sup>

Advanced planning prior to Federal involvement in an action must also ensure that the Federal agency is able to initiate early consultation with appropriate Tribes, States, local agencies, and interested private persons and organizations when Federal involvement is reasonably foreseeable.<sup>40</sup> For actions initiated at the request of a non-Federal entity, Federal agencies should begin the NEPA process for preparing their EA or EIS as early as possible but no later than upon receipt of a complete application.<sup>41</sup> Federal agencies should, whenever possible, guide applicants to gather and develop the appropriate level of information and analyses in advance of submitting an application or other request for Federal agency action. For example, several agencies require an applicant to prepare and submit an environmental report to help prepare the NEPA analyses and documentation and facilitate the lead agency's independent environmental review of the proposal.

### 3. Scoping

To effectuate integrated decision making, avoid duplication, and focus the NEPA review, the CEQ Regulations

should therefore provide Federal personnel with the direction they need to implement NEPA on a day-to-day basis. The procedures must also provide a clear and uncomplicated picture of what those outside the Federal government may do to become involved in the environmental review process under NEPA. See CEQ, “Agency Implementing Procedures Under CEQ's NEPA Regulations” (Jan. 19, 1979), available at [ceq.hss.doe.gov/nepa/regs/exec11979.html](http://ceq.hss.doe.gov/nepa/regs/exec11979.html). Some examples of agency NEPA implementing procedures are the Department of the Interior, “Department Manual: Managing the NEPA Process—National Park Service” (May 27, 2004), available at [http://206.131.241.18/app\\_dm/act\\_getfiles.cfm?relnum=3622](http://206.131.241.18/app_dm/act_getfiles.cfm?relnum=3622) and the Department of the Interior, “Departmental Manual: Managing the NEPA Process—Bureau of Land Management” (May 8, 2008), available at [http://elips.doi.gov/app\\_dm/act\\_getfiles.cfm?relnum=3799](http://elips.doi.gov/app_dm/act_getfiles.cfm?relnum=3799).

<sup>39</sup> 40 CFR 1501.2(d)(1).

<sup>40</sup> 40 CFR 1501.2(d)(2). Agencies should be cognizant of their obligations under current Executive Orders 13175 (Consultation and Coordination with Indian Tribal Governments, Nov. 6, 2000) and 112898 (Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, Feb. 11, 1994), available at [ceq.hss.doe.gov/laws\\_and\\_executive\\_orders/executive\\_orders.html](http://ceq.hss.doe.gov/laws_and_executive_orders/executive_orders.html).

<sup>41</sup> 40 CFR 1501.2(d)(3).

provide for “scoping.”<sup>42</sup> In scoping, the lead agency determines the issues that the EA or EIS will address and identifies the significant impacts related to the proposed action that will be considered in the analysis.<sup>43</sup> To increase efficiency, the lead agency can solicit cooperation at the earliest possible time from other agencies that have jurisdiction by law or special expertise on any environmental issue that should be considered.

Cooperating agencies with jurisdiction by law or special expertise can work with the lead agency to ensure that, whenever possible, one NEPA review process informs all the decisions needed to determine whether and, if so, how a proposed action will proceed.<sup>44</sup>

The CEQ Regulations explicitly address the role of scoping in preparation of an EIS. Agencies can also choose to take advantage of scoping whenever preparing an EA. Scoping can be particularly useful when an EA deals with uncertainty or controversy regarding potential conflicts over the use of resources or the environmental effects of the proposed action, or where mitigation measures are likely to play a large role in determining whether the impacts will be reduced to a level where a Finding of No Significant Impact can be made. A lead agency preparing an EA may use scoping to identify and eliminate from detailed study the issues that are not significant or that have been covered by prior environmental review.<sup>45</sup> The scoping process provides a transparent way to identify significant environmental issues and to deemphasize insignificant issues,<sup>46</sup> thereby focusing the analysis on the most pertinent issues and impacts.<sup>47</sup> We recommend that agencies review their NEPA implementing procedures, as well

<sup>42</sup> See 40 CFR 1501.7 (“There shall be an early and open process for determining the scope of issues to be addressed and for identifying the significant issues related to a proposed action. This process shall be termed scoping.”).

<sup>43</sup> 40 CFR 1500.4(b), (g) and 1501.7.

<sup>44</sup> See 40 CFR 1501.6, 1508.5 (responsibilities of the lead agency include the requirement to request the participation of any other Federal agency which has jurisdiction by law). CEQ has released previous guidance on engaging other agencies with jurisdiction over permits and other approvals required for a proposal to proceed. CEQ, “Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act” (Jan. 30, 2002), available at [ceq.hss.doe.gov/nepa/regs/cooperating/cooperatingagenciesmemorandum.html](http://ceq.hss.doe.gov/nepa/regs/cooperating/cooperatingagenciesmemorandum.html); CEQ, “Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations” (Mar. 16, 1981), available at [ceq.hss.doe.gov/nepa/regs/40/11-19.HTM#14](http://ceq.hss.doe.gov/nepa/regs/40/11-19.HTM#14) (Question and Answer 14).

<sup>45</sup> 40 CFR 1501.7(a)(3).

<sup>46</sup> 40 CFR 1500.4(g).

<sup>47</sup> See generally 40 CFR 1501.4(b) (agencies are to involve the public in the preparation of EAs; the manner in which they do so is left to the agency).

<sup>32</sup> 40 CFR 1501.2.

<sup>33</sup> 40 CFR 1502.2(g).

<sup>34</sup> See CEQ Memorandum to Agencies, “Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations” (Mar. 16, 1981), available at [ceq.hss.doe.gov/nepa/regs/40/11-19.HTM#13](http://ceq.hss.doe.gov/nepa/regs/40/11-19.HTM#13) (Question 13 and Answer).

<sup>35</sup> See 40 CFR 1508.23 (explaining that a proposal exists as soon as an agency “has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the effects can be meaningfully evaluated”).

<sup>36</sup> 40 CFR 1502.5. For guidelines specific to different agency activities, see 40 CFR 1502.5(a)–(d). Misuse of the NEPA process to justify decisions already made is counterproductive and can result in litigation that could delay and ultimately prevent a proposed action from proceeding.

<sup>37</sup> See 40 CFR 1501.2(d) (non-Federal entities plan activities prior to Federal involvement that trigger NEPA requirements).

<sup>38</sup> 40 CFR 1507.3(b)(1). All agencies are required to adopt procedures that supplement the CEQ Regulations and provide NEPA implementing guidance that both provides agency personnel with additional, more specific direction for implementing the procedural provisions of NEPA and informs the public and State and local officials of how the CEQ Regulations will be implemented in agency decisionmaking. Agency procedures

as their NEPA practices, to ensure they have the option of scoping for EAs.

The scoping process can be particularly helpful in identifying opportunities to coordinate reviews and related surveys and studies required by other laws or by executive orders. Scoping can also be used to begin inter- and intra-governmental coordination if it is not already ongoing. To accomplish these goals, the lead agency preparing an EA or an EIS can choose to invite the participation of affected Federal, State, and local agencies, any affected Indian tribe, the proponent of the action, and "other interested persons (including those who might not be in accord with the action on environmental grounds)." <sup>48</sup> In addition to facilitating coordination and the development of required environmental reviews, scoping will help to identify the universe of matters that need to be addressed with particular care and flag issues for thorough consideration, thereby defusing potential conflict that, absent early attention, could arise later and potentially delay the timely completion of the relevant NEPA review and agency decision. <sup>49</sup>

In sum, the scoping process provides an early opportunity to plan collaboration with other governments, <sup>50</sup> assign responsibilities, <sup>51</sup> and develop

the planning and decisionmaking schedule. <sup>52</sup> It also affords lead agencies the option of setting page limits for environmental documents and setting time limits for the steps in the NEPA process. <sup>53</sup> Agencies may choose to use scoping whenever any of these techniques can provide for the more effective and efficient preparation of an EA.

#### 4. Inter-Governmental Coordination (State, Local, or Tribal Environmental Reviews)

CEQ encourages Federal agencies to collaborate with Tribal, State, and local governments to the fullest extent possible to reduce duplication, unless the agencies are specifically barred from doing so by some other law. <sup>54</sup> The CEQ Regulations explicitly provide for agencies to conduct joint planning processes, joint environmental research and studies, joint public hearings (except where otherwise precluded by statute), and joint environmental assessments. <sup>55</sup> Federal agencies should explore every reasonable opportunity to integrate the requirements of NEPA with the external planning and environmental reviews required on the Federal as well as the State, Tribal, and local levels of government so that those reviews can run concurrently rather than consecutively. <sup>56</sup>

Where State law or local ordinances contain environmental impact analysis and documentation requirements in addition to, but not in conflict with, those in NEPA, the CEQ Regulations provide authority for producing joint EISs. <sup>57</sup> In such cases, Federal agencies shall cooperate with the State, Tribal, and local governments to integrate environmental impact analysis and documentation requirements so that one document will suffice for complying with as many applicable environmental laws and requirements as practicable. Agencies should adhere to these same principles when preparing an EA. Federal agencies should seek efficiencies and avoid delay by attempting to meet applicable non-Federal NEPA-like requirements in

analysis among cooperating agencies during scoping).

<sup>52</sup> 40 CFR 1501.7(a)(7).

<sup>53</sup> 40 CFR 1501.7(b)(1)–(2), 1501.8.

<sup>54</sup> 40 CFR 1506.2(b) (calling for collaboration "to the fullest extent possible").

<sup>55</sup> 40 CFR 1506.2(b); *see also* 40 CFR 1500.4(n) (encouraging Federal agencies to eliminate duplication with State and local procedures through joint preparation of documents).

<sup>56</sup> 40 CFR 1500.2(c). This point is reiterated throughout the CEQ Regulations.

<sup>57</sup> 40 CFR 1506.2(c).

conjunction with either an EA or an EIS wherever possible. <sup>58</sup>

The CEQ Regulations also require that a Federal agency preparing an EIS better integrate the EIS into non-Federal planning processes by discussing and explaining any inconsistency of a proposed Federal action with any approved State or local plans and laws. <sup>59</sup> When preparing an EA or EIS, if an inconsistency with any approved Tribal, State, or local plan or law exists, the Federal agency should describe the extent to which it will reconcile its proposed action with the non-Federal plan or law. <sup>60</sup>

#### 5. Coordinating Reviews and Documents Under Other Applicable Laws

Agencies must integrate, to the fullest extent possible, their draft EIS with environmental impact analyses and related surveys and studies required by other statutes or Executive Orders. <sup>61</sup> Coordinated and concurrent environmental reviews are appropriate whenever other analyses, surveys, and studies will consider the same issues and information as a NEPA analysis. Such coordination should be considered when preparing an EA as well as when preparing an EIS. Techniques available to agencies when coordinating a combined or a concurrent process include combining the scoping, requests for public comment, and preparation and display of responses to public comments.

The goal should be to conduct concurrent rather than sequential processes whenever appropriate. In situations where one aspect of a project is within the particular expertise or jurisdiction of another agency an agency should consider whether adoption or incorporation by reference of materials prepared by the other agency would be more efficient.

A coordinated or concurrent process may provide a better basis for informed decision making, or at least achieve the same result as separate or consecutive processes more quickly and with less potential for unnecessary duplication of effort. In addition to integrating the reviews and analyses, the CEQ Regulations allow an environmental document that complies with NEPA to

<sup>58</sup> Although joint processes usually lead to greater efficiency and better decisionmaking, a joint process may become unwieldy and the result is that, for some projects, combining a State and Federal process is not practical.

<sup>59</sup> 40 CFR 1506.2(d).

<sup>60</sup> 40 CFR 1506.2(d).

<sup>61</sup> 40 CFR 1502.25(a). Examples provided in the Regulation are: The Fish and Wildlife Coordination Act (16 U.S.C. 661 *et seq.*); the National Historic Preservation Act (16 U.S.C. 470 *et seq.*); and the Endangered Species Act (16 U.S.C. 1531 *et seq.*).

<sup>48</sup> 40 CFR 1501.7(a)(1), 1501.4(b), 1506.6.

Establishing cooperating agency status is discussed in greater detail in a CEQ memorandum addressed to the heads of Federal agencies, entitled "Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act." CEQ, "Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act" (Jan. 30, 2002), available at [ceq.hss.doe.gov/nepa/regs/cooperating/cooperatingagenciesmemorandum.html](http://ceq.hss.doe.gov/nepa/regs/cooperating/cooperatingagenciesmemorandum.html).

<sup>49</sup> In cases where a Federal agency uses scoping for an EA and subsequently determines it is necessary to conduct an EIS, the agency should refer to the guidance previously published by the CEQ. *See* CEQ, "Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations" (Mar. 16, 1981), available at [ceq.hss.doe.gov/nepa/regs/40/30-40.HTM#13](http://ceq.hss.doe.gov/nepa/regs/40/30-40.HTM#13) (Question 13 and the following answer state that scoping done before the assessment, and in aid of its preparation, cannot substitute for the normal scoping process after publication of the notice of intent, unless the earlier public notice stated clearly that this possibility was under consideration, and the notice of intent expressly provides that written comments on the scope of alternatives and impacts will still be considered).

<sup>50</sup> 40 CFR 1501.6, 1508.5. CEQ has published guidance encouraging lead agencies to establish a formal cooperating agency relationship with other Federal agencies as well as State, Tribal, and local governmental entities. CEQ, "Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act" (Jan. 30, 2002), available at [ceq.hss.doe.gov/nepa/regs/cooperating/cooperatingagenciesmemorandum.html](http://ceq.hss.doe.gov/nepa/regs/cooperating/cooperatingagenciesmemorandum.html).

<sup>51</sup> *See, e.g.*, 40 CFR 1501.7(a)(4) (a lead agency may allocate assignments for EIS preparation and

be combined with a subsequent agency document to reduce duplication and paperwork.<sup>62</sup>

#### 6. Adoption

The adoption of one Federal agency's EIS, or a portion of that EIS, by another Federal agency is an efficiency that the CEQ Regulations provide.<sup>63</sup> An agency preparing an EA should similarly consider adopting another agency's EA or EIS when the EA or EIS, or a portion thereof, addresses the proposed action and meets the standards for an adequate analysis under NEPA, the CEQ's Regulations, and the adopting agency's NEPA implementing procedures.

The CEQ Regulations require agencies to involve agencies, applicants, and the public when preparing an EA; however, they do not require agencies to do so by preparing a draft or final EA for public review or comment.<sup>64</sup> If an agency's implementing NEPA procedures establish requirements for public review and comment when preparing an EA, then the agency must provide a similar process when it adopts another agency's EA, but may use the same efficiencies that are available when adopting another agency's EIS.

If the actions covered by the original EIS and the proposed action are substantially the same, the agency adopting the EIS is not required to recirculate the EIS as a draft for public review and comment. The same is true for the adoption of another agency's EA when the original and proposed actions are substantially the same. In addition, in cases where the adopting agency is also a cooperating agency in the preparation of an EIS, it may adopt the lead agency's EIS without recirculating the EIS as a draft or as a final EIS when, after an independent review, it concludes that the lead agency has adequately addressed the adopting agency's comments and suggestions.<sup>65</sup> Similarly, when the adopting agency was a cooperating agency in the preparation of an EA, it may adopt the EA without recirculating the EA.

#### 7. Incorporation by Reference<sup>66</sup>

Incorporation by reference is another method that provides efficiency and timesaving when preparing either an EA

or an EIS. The CEQ Regulations direct agencies to incorporate by reference material into an EIS to reduce the size of the EIS and avoid duplicative effort.<sup>67</sup> An agency must provide a citation that clearly identifies the incorporated material in an EIS and briefly describe the content.<sup>68</sup> The brief description should identify the referenced materials and the entity (Federal or non-Federal) that prepared the materials, inform the reader of the purpose and value of those materials (e.g., explain how the information or analyses are relevant to the issues associated with the proposal under review), and synopsise the basis provided in those materials that support any conclusions being incorporated. An agency may not incorporate any material by reference in an EIS unless the material is reasonably available for inspection by potentially interested persons within the time allowed for comment.<sup>69</sup> There are many techniques available to make the referenced material readily available such as: Placing the relevant materials in an appendix; providing a hyperlink that provides Internet access to the materials; and placing materials in local libraries or facilities accessible to the public. Agencies can, consistent with NEPA and the CEQ Regulations, incorporate by reference analyses and information from existing documents into an EA provided the material has been appropriately cited and described, and the materials are reasonably available for review by interested parties.

#### 8. Expediting Responses to Comments

Agencies should provide a reasonable and proportionate response to comments on a draft EIS by focusing on the environmental issues and information conveyed by the comments. When preparing a final EIS, if the draft EIS complies with NEPA, CEQ regulations, and agency implementing procedures, the agency may use the draft EIS as the final EIS under certain conditions. If changes in response to comments are minor and are limited to factual corrections and/or explanations of why the comments do not warrant further agency response, agencies may write them on errata sheets and attach them to the statement instead of rewriting the draft statement.<sup>70</sup> In such cases, the agency must circulate and make available for public review as the

final EIS only the comments, the responses and the changes.<sup>71</sup> The comments, responses, and changes, as well as the draft document and a new cover sheet need to be filed to make the EIS final, under those circumstances.<sup>72</sup>

Similarly, if an agency issues an EA for comment and the changes in response to comments are minor and limited to factual corrections and/or explanations of why the comments do not warrant further agency response, then the agency may prepare a similar cover and errata sheet and use its draft EA as the final EA. When circulating draft EAs or EISs for public review and comment, we recommend agencies facilitate public review and comment by also publishing the EISs and EAs, and subsequently the comments received, on agency Web sites.

#### 9. Clear Time Lines for NEPA Reviews

Establishing appropriate and predictable time limits promotes the efficiency of the NEPA process.<sup>73</sup> The CEQ Regulations recommend that agencies designate a person (such as a project manager or a person in the agency's office with NEPA responsibilities) to lead and shepherd the NEPA review to expedite the process.<sup>74</sup> The CEQ Regulations do not prescribe universal time limits for the entire NEPA process; instead they set certain minimum time limits for the various portions of the NEPA process.<sup>75</sup> The CEQ Regulations do encourage Federal agencies to set appropriate time limits for individual actions, however, and provide a list of factors to consider in establishing timelines.<sup>76</sup> Those factors include: The potential for environmental harm; the size of the proposed action; other time limits imposed on the action by other statutes, regulations, or Executive Orders; the degree of public need for the proposed action and the consequences of delay; and the need for a reasonable opportunity for public review.

The CEQ Regulations refer to the EIS process when describing the "constituent parts of the NEPA process" to which time limits may apply, require agencies to set time limits at the request

<sup>71</sup> 40 CFR 1503.4(c).

<sup>72</sup> 40 CFR 1503.4(c).

<sup>73</sup> 40 CFR 1500.5(e).

<sup>74</sup> 40 CFR 1501.8(b)(3).

<sup>75</sup> See 40 CFR 1506.10 (setting 90 day time period between EPA publication of the notice of availability of a draft EIS and the Record of Decision, 30 day time period between EPA publication of the notice of availability of a final EIS and the Record of Decision, and 45 days for comment on a draft EIS).

<sup>76</sup> CEQ encourages Federal agencies to set time limits consistent with the time intervals required by § 1506.10. 40 CFR 1501.8.

<sup>62</sup> 40 CFR 1506.4, 1500.4(k), 1500.4(n).

<sup>63</sup> 40 CFR 1506.3.

<sup>64</sup> See generally 40 CFR 1501.4(b), 1506.6 (both regulations direct agencies to involve the public in the preparation of EAs; however, the manner in which they do so is left to the agency).

<sup>65</sup> 40 CFR 1506.3(c).

<sup>66</sup> This guidance does not address tiering. Further guidance will be developed to address the use of broad, programmatic, analyses to focus future reviews and the subsequent, tiered, review of site- or project- specific proposed actions.

<sup>67</sup> 40 CFR 1502.21.

<sup>68</sup> 40 CFR 1502.21.

<sup>69</sup> 40 CFR 1502.21 (material based on proprietary data which is itself not available for review and comment cannot be incorporated by reference).

<sup>70</sup> 40 CFR 1503.4(c), 1500.4(m).



of an applicant, and allow agencies to set time limits at the request of other interested parties.<sup>77</sup> It is entirely consistent with the purposes and goals of NEPA and with the CEQ Regulations for agencies to consider the same factors and determine appropriate time limits for the various phases of the EA process when requested by applicants, Tribes, States, local agencies, or members of the public.

#### Conclusion

This guidance highlights for agencies preparing either an EA or an EIS the ability to employ all the methods provided in the CEQ regulations to prepare concise and timely NEPA reviews. Using methods such as integrating planning and environmental reviews and permitting, coordinating multi-agency or multi-governmental reviews and approvals, and setting schedules for completing the environmental review will assist agencies in preparing efficient and timely EAs and EISs consistent with legal precedent and agency NEPA experience and practice.

**Nancy H. Sutley,**

*Chair, Council on Environmental Quality.*

[FR Doc. 2012-5812 Filed 3-9-12; 8:45 am]

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## DEPARTMENT OF DEFENSE

### Defense Acquisition Regulations System

#### 48 CFR Part 212

RIN 0750-AH61

### Defense Federal Acquisition Regulation Supplement: Commercial Determination Approval (DFARS Case 2011-D041)

**AGENCY:** Defense Acquisition Regulations System, Department of Defense (DoD).

**ACTION:** Final rule.

**SUMMARY:** DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement to require higher-level approval for commercial item determinations for acquisitions exceeding \$1 million when the determination is based on “of a type” or “offered for sale” language contained in the definition of commercial item. The rule also clarifies approval requirements for determinations for acquisitions of services exceeding \$1 million using part

12 procedures but which do not meet the definition of commercial item.

**DATES:** March 12, 2012.

**FOR FURTHER INFORMATION CONTACT:** Mr. Dustin Pitsch, telephone 703-602-0289.

#### **SUPPLEMENTARY INFORMATION:**

##### **I. Background**

DoD is revising the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a recommendation made by the Panel on Contracting Integrity and included in its 2009 Report to Congress concerning compliance with the DFARS documentation requirements for commercial item determinations. The Panel on Contracting Integrity working group concluded, after reviewing a sampling of commercial contract awards, that contracting officer determinations are not always sufficiently documented in accordance with DFARS 212.102.

DoD is issuing a final rule because this rule does not have a significant effect beyond the internal operating procedures of DoD and does not have a significant cost or administrative impact on contractors or offerors. This rule addresses DoD’s internal approval process for contracting officer determinations made pursuant to DFARS part 12 for actions in excess of \$1 million.

##### **II. Discussion and Analysis**

The DFARS changes are as follows:

- DFARS 212.102(a)(i) is revised to add “except for acquisitions made pursuant to Federal Acquisition Regulation (FAR) 12.102(f)(1).” This language clarifies that no additional contracting officer determination is required for acquisitions made pursuant to FAR 12.102(f)(1).
- DFARS 212.102(a)(i)(A) is revised to add “or meets the criteria at FAR 12.102(g)(1).” This language addresses the inconsistency between the existing DFARS language at 212.102(a)(i)(A) that all FAR part 12 acquisitions exceeding \$1 million must meet the commercial item definition, and the exception at FAR 12.102(g)(1) that allows for the use of part 12 procedures for services that do not meet the definition of commercial item in FAR 2.101, as long as it meets specific criteria listed in FAR 12.102(g)(1). The change clarifies that the contracting officer must determine that an acquisition exceeding \$1 million and using part 12 procedures either meets the commercial item definition in part FAR 2.101 or the criteria set out at FAR 12.102(g)(1).
- Adds DFARS 212.102(a)(i)(C) to require approval at one level above the

contracting officer when the commercial item determination relies on subsections (1)(ii), (3), (4), or (6) of the “commercial item” definition at FAR 2.101. The higher-level approval is required for commercial item determinations for actions that exceed \$1 million that are based on “of a type” commercial procurements or items “offered for sale” but not yet sold to the general public.

##### **III. Executive Orders 12866 and 13563**

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

##### **IV. Regulatory Flexibility Act**

The Regulatory Flexibility Act does not apply to this rule because this final rule does not constitute a significant DFARS revision as defined within the meaning at FAR 1.501-1, and 41 U.S.C. 1707 does not require publication for comment.

##### **V. Paperwork Reduction Act**

The proposed rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

##### **List of Subjects in 48 CFR Part 212**

Government procurement.

**Mary Overstreet,**

*Editor, Defense Acquisition Regulations System.*

Therefore, 48 CFR part 212 is amended as follows:

- 1. The authority citation for 48 CFR part 212 is revised to read as follows:

**Authority:** 41 U.S.C. 1303 and 48 CFR chapter 1.

##### **PART 212—ACQUISITION OF COMMERCIAL ITEMS**

- 2. Revise section 212.102 to read as follows:

<sup>77</sup> 40 CFR 1501.8(b), (c).