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NEPA Update 2019

Jean M. Mosites
PBI ELF Administrative Law Panel
April 3, 2019

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Road map

- NEPA
- Regulations and Guidance
- Federal Agencies and implementation
- NAEP annual report
- Executive Order and CEQ Proposed Rulemaking
- Recent Challenges and Case law

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The National Environmental Policy Act of 1969 (NEPA)

42 U.S.C. 4321 *et seq.*

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NEPA

- § 102 mandates procedural requirements for federal agency decision-making
 - Reliance on natural and social sciences in decision-making
 - identify and weigh alternatives
 - outline irreversible effects
 - make information publically available
- § § 202-209 outline responsibilities and functions of Council of Environmental Quality

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NEPA Regulations 40 CFR § § 1500-1508

CEQ regulations implementing NEPA

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NEPA Implementing Regulations

- § 1500.3 makes regulations applicable to all federal agencies.
- § 1501.4. Environmental Impact Statements.
 - When an EIS is required
 - If no EIS, prepare a Finding of No Significant Impact
- § 1501.7. Scoping.
 - Issue spotting for proposed action
- § 1502.1-25 (contents/scope of an EIS)
 - § 1502.5 addresses timing
 - § 1502.14 addresses alternatives
 - § 1502.16 environmental consequences

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NEPA Implementing Regulations

- § 1503 outlines public comment procedures.
- § 1505 describes agency decision-making requirements
 - § 1505.2 Record of decision due at decision
- § 1505.10 sets timing requirements
 - § 1505.10(a) notice of EIS must be filed in federal register
 - § 1505.10(b) no decision may come before 90 days after publication of draft EIS or 30 days after publication of final EIS

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Typical Federal Actions under § 1508.15

- Adoption of official policy, rules, regulations and interpretations under AP that substantially alter agency programs
- Adoption of formal plans guiding use of federal resources
- Adoption of programs to implement a specific policy or plan, statutory program or executive directive
- Approval of specific projects located in defined geographic area, e.g. permitting and federal assistance.

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Agency Implementation Example

- FERC procedures, supplement CEQ regulations
- 36 categorical exclusions, subject to review
- 14 actions requiring EA
- 5 actions normally requiring EIS – Natural Gas Act and DOE Delegation Order for LNG; NGA Section 7 certification for underground storage; major pipeline projects in ROW with no existing pipeline
- Public notice and participation
- 13 Resource reports for certain projects – water, species, cultural resources, land use, air, noise, etc.

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National Association of Environmental Professionals, www.naep.org

- Annual report – statistics:
 - 381 NOAs for EISs published in FR in 2015; 312 in 2016
 - USFS published the most – 71; 57 in 2016
 - BLM and USACOE - 40 each
 - California – 67; 42 in 2016
 - Colorado – 20; 16 in 2016
 - 4 EPA adverse ratings in both 2015 and 2016
 - 183 final EISs had average preparation time of 1,841 days, 1,864 in 2016 - the longest recorded since 1997
 - 5 final EISs were completed within one year of NOA

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Executive Order 13807

Establishing Discipline and Accountability in the
Environmental Review and Permitting Process for
Infrastructure Projects

82 Fed. Reg. 40,463 (August 24, 2017)

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EO 13807 of August 24, 2017

- Policy: protect environment but implement timely and modernized review to encourage infrastructure development
 - Unified agency review process- one lead agency
 - Dashboard tracking of reviews
 - Specific timeframes for review processes
- **CEQ** to enhance the environmental review process through interagency coordination, and use of earlier federal, state, tribal or local environmental reviews, reduce unnecessary burdens and delays.

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Council on Environmental Quality Rulemaking

Complying With EO 13807

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CEQ Rulemaking

- Published list of actions to comply with EO on September 14, 2017 (82. Fed. Reg. 43,226)
 - Permitting improvement, revised guidance, review of regulations, address ESA, NHPA, CWA consultations
- Published ANPR June 20, 2018 (83 Fed. Reg. 23, 981)
 - Seeking public comments on 20 topics (process, scope, definitions, tiering, alternatives analysis, new technologies, etc.)
 - Comment period closed July 20, 2018 - 12,541 comments

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Recent Challenges and Cases

- WildEarth Guardians v. Zinke, 2019 WL 1273181 (D. D.C. 2019) (summary judgment granted, remand to supplement, not vacated)
 - Challenged oil and gas lease sales, stage 2 of 3 stages
 - EIS was provided at land use planning stage; issued FONSI at leasing stage
 - EA's acknowledge climate impacts but refer to inconsistency of scientific models – better to conduct specific analysis at permitting stage?
 - **When can EIS be deferred?** Not beyond irrevocable commitment
- Western Organization of Resources Councils v. Zinke, 892 F.3d 1234 (D.C. 2018)
 - Sought order to compel update to PEIS for the coal management program
 - Tiering allows steps – PEIS and supplements
 - Each lease a new federal action with specific EIS, not the program as a whole
 - **NEPA obligation for the program** terminated with its adoption in 1979

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Recent NEPA cases

- In re Border Infrastructure Environmental Litigation, 2019 WL 509813 (9th Cir. 2019) (summary judgment affirmed)
 - **IRIRIRA of 1996 allows waiver** of all legal requirements for border barrier projects
 - Waiver decision was challenged as violating APA and NEPA
 - Court has jurisdiction for claims that do not arise from waiver determinations
 - DHS Secretary did not act in excess of statutory authority by ordering border walls
- *Dine v. Citizens Against Ruining Our Environment v. Jewell*, 312 F.Supp.3d 1031 (10th Cir. 2018)
 - Challenge at stage 3 of 3– approval to drill permits in New Mexico
 - Standing to challenge some but not all of the APDs
 - Reliance on 2003 EIS not a NEPA violation based on changes in technology
- *Wilderness Workshop v. US BLM*, 342 F.Supp.3d 1145 (D. Col. 2018)
 - Challenge at stage 1 of 3 for oil and gas development
 - Failed to take a hard look at indirect effects of combustion, to consider reasonable alternatives; did take a hard look at cumulative climate change impacts, predicted effect of emissions; no violation to not perform cost benefit analysis

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Recent NEPA cases

- *Sierra Club v. FERC*, 867 F.3d 1357 (D.C. 2017)
 - Challenge to single EIS developed for three pipelines
 - Reasonably foreseeable that the gas will be burned, which will release GHG, that contribute to climate change
 - Remanded for EIS to consider effect of combustion of gas transported by the pipelines to power plants in Florida
- *American Wild Horse Preservation Campaign v. Perdue*, 873 F.3d 914 (D. D.C. 2017) (reversing summary judgment)
 - Challenge to an adjusted wild horse territory border, excising a portion from the forest plan 1975 map containing an administrative error
 - Elimination of the section failed to consider whether EIS required
 - Exclusion and FONSI vacated

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Recent NEPA cases

- Kentucky Coal Association, Inc. v. TVA, 804 F.3d 799 (6th Cir. 2015)
 - Association sought declaratory judgment that TVA violated NEPA in deciding to switch power plant from coal to gas
 - No violation of NEPA to prepare an EA and not EIS
- Native Village of Point Hope v. Jewell, 740 F.3d 489 (9th Cir. 2014)
 - Challenge to EIS of proposed lease for oil and gas development
 - Missing information was not essential – impacts would be similar under all alternatives
 - Estimated production was not supported by the record – best case scenario failed to adequately consider environmental harm

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Questions?

Thank you!

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