

NEPA Documentation: Latest Council on Environmental Quality Guidance

Leveraging Mitigation Measures to Meet NEPA Requirements; Expediting Federal Agency Reviews

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NEPA Documentation and CEQA Guidance Webinar:

The Context – the Law, the Regulations,
the Court Decisions

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CEQ GUIDANCE

- Today we will focus on two Council on Environmental Quality Guidance Documents:
 1. One, dealing with Mitigation and Monitoring was issued almost precisely a year ago – on January 21, 2011
 2. The other, dealing with expediting the NEPA process (“Improving the Process for Preparing Efficient and Timely Environmental Reviews Under the National Environmental Policy Act”) was just issued (in draft form) on December 13, 2011

Starting with Mitigation and Monitoring

NEPA § 102(2)(C), 42 USC § 4332(2)(C)

- “[A]ll agencies of the Federal Government shall ---
 -
 - (C) Include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible officials on –
 - (i) The environmental impact of the proposed action,
 - (ii) Any adverse environmental effects which cannot be avoided should the proposal be implemented.
 - (iii) Alternatives to the proposed action,
 - (iv) The relationship between local short-term use of man’s environment and the maintenance and enhancement of long-term productivity, and
 - (v) Any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented . . .
- (Emphasis added.)

What is mitigation?

- 40 CFR § 1508.20:

- § 1508.20 Mitigation.

- “Mitigation” includes:
 - (a) Avoiding the impact altogether by not taking a certain action or parts of an action.
 - (b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation.
 - (c) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment.
 - (d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.
 - (e) Compensation for the impact by replacing or providing substitute resources or environments.

How is mitigation to be discussed?

- 40 CFR § 1502.14(f) (Alternatives Including the Proposed Action):

“[A]gencies shall:

(f) Include appropriate mitigation measures not already included in the proposed action or alternatives.”

40 CFR § 1502.16(h) (Environmental Consequences).

Section “shall include discussion of:

. . .

(h) Means to mitigate adverse environmental impacts (if not fully covered under § 1502.14(f)).”

Record of Decision (ROD)

- 40 CFR § 1505.2(c):

The ROD “shall:

. . .

(c) State whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why they were not. A monitoring and enforcement program shall be adopted and summarized where applicable for any mitigation.”

Implementing the Decision

- 40 CFR § 1505.3:

- § 1505.3 Implementing the decision.

Agencies may provide for monitoring to assure that their decisions are carried out and should do so in important cases. Mitigation (§ 1505.2(c)) and other conditions established in the environmental impact statement or during its review and committed as part of the decision shall be implemented by the lead agency. The lead agency shall:

- (a) Include appropriate conditions in grants, permits or other approvals.
 - (b) Condition funding of actions on mitigation.
 - (c) Upon request, inform cooperating or commenting agencies on progress in carrying out mitigation measures which they have proposed and which were adopted by the agency making the decision.
 - (d) Upon request, make available to the public the results of relevant monitoring.

CEQ's initial position on "mitigated FONSI" (mitigated Findings of No Significant Impact).

- Balancing of factors:
 - Achieving environmental protection efficiently vs.
 - Potential for misuse and bypassing public input.
- CEQ, Forty Most Asked Questions Concerning CEQ's NEPA Regulations ("Forty Questions"). 46 Fed. Reg. 18026, 18038 (Mar. 23, 1981), Q. 40:

40 Q. If an environmental impact assessment indicates that the environmental effects of a proposal are significant but that, with mitigation, those effects may be reduced to less than significant levels, may the agency make a finding of no significant impact rather than prepare an EIS? Is that a legitimate function of an EA and scoping?

A. Mitigation measures may be relied upon to make a finding of no significant impact only if they are imposed by statute or regulation, or submitted by an applicant or agency as part of the original proposal. As a general rule, the regulations contemplate that agencies should use a broad approach in defining significance and should not rely on the possibility of mitigation as an excuse to avoid the EIS requirement. Sections 1508.8, 1508.27. (cont.)

CEQ's initial position on "mitigated FONSI" (mitigated Findings of No Significant Impact).

If a proposal appears to have adverse effects which would be significant, and certain mitigation measures are then developed during the scoping or EA stages, the existence of such *possible* mitigation does not obviate the need for an EIS. Therefore, if scoping or the EA identifies certain mitigation possibilities without altering the nature of the overall proposal itself, the agency should continue the EIS process and submit the proposal, and the potential mitigation, for public and agency review and comment. This is essential to ensure that the final decision is based on all the relevant factors and that the full NEPA process will result in enforceable mitigation measures through the Record of Decision.

In some instances, where the proposal itself so integrates mitigation from the beginning that it is impossible to define the proposal without including mitigation, the agency may then rely on the mitigation measures in determining that the overall effects would not be significant (e.g., where an applicant for a permit of a small hydro dam is based on a binding commitment to build fish ladders, to permit adequate down stream flow, and to replace any lost wetlands, wildlife habitat and recreational potential.)

(cont.)

CEQ's initial position on "mitigated FONSI" (mitigated Findings of No Significant Impact).

In those instances, agencies should make the FONSI and EA available for 30 days of public comment before taking action. Section 1501.4(e)(2).

Similarly, scoping may result in a redefinition of the entire project, as a result of mitigation proposals. In that case, the agency may alter its previous decision to do an EIS, as long as the agency or applicant resubmits the entire proposal and the EA and FONSI are available for 30 days of review and comment. One example of this would be where the size and location of a proposed industrial park are changed to avoid affecting a nearby wetland area.

The Courts of Appeals and mitigated FONSI's.

The Courts of Appeals have unanimously upheld the concept of mitigated FONSI's as bypassing the paperwork, but achieving an environmentally protective end.

- Examples:

- Cabinet Mountain Wilderness v. Peterson, 685 F.2d 678 (D.C. Cir. 1982).

- C.A.R.E. Now, Inc. v. Federal Aviation Administration, 844 F.2d 1569 (11th Cir. 1988).

- City of Auburn v. United States, 154 F.3d 1025 (9th Cir. 1998).

Mitigation must be feasible and supported by the record.

- O'Reilly v. U.S. Army Corps of Engineers, 477 F.3d 225, 234 (5th Cir. 2007).
- Environmental Protection Information Center v. U.S. Forrest Service, 451 F.3d 1005 (9th Cir. 2006).

The Supreme Court:

- NEPA as “essentially procedural.”
 - Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 558 (1978).
- NEPA does not require adoption of a mitigation plan as part of an EIS.
 - Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989).
- Supreme Court has never had the occasion to decide a mitigated FONSI case.

Courts of Appeal:

- However Courts of Appeal have held that if a mitigation plan is adopted by an agency, it is enforceable.
 - see, e.g. Tyler v. Cisneros, 136 F.3d 603 (9th Cir. 1998).

Putting Things Into Perspective

- According to CEQ in a typical year:
 - 450 Environmental Impact Statements (EISs) are prepared.
 - 45,000 Environmental Assessments (EAs) are prepared.
- CEQ, Considering Cumulative Effects Under the National Environmental Policy Act at 4 (1997); available at NEPA.gov.

In conclusion with respect to mitigation:

- Mitigation is a vital part of the implementation of NEPA.
- Mitigation is enforceable through either (a) the adoption of mitigation on a ROD or (2) the commitments to mitigation in a mitigated FONSI.
- Such mitigated FONSIs have unanimously been upheld by the Courts of Appeals.
- The Supreme Court has never had the occasion to decide a mitigated FONSI case.
- This is the background under which CEQ has issued its mitigation guidance, the specifics of which will be addressed by the next two speakers.

Moving on to Expediting and Otherwise Improving the NEPA Process:

- Existing law – the CEQ NEPA Regulations
- 40 CFR § 1500.5 – Reducing Delay
- Agencies shall reduce delay by:
 - (a) Integrating the NEPA process into early planning (§ 1501.2).
 - (b) Emphasizing interagency cooperation before the environmental impact statement is prepared, rather than submission of adversary comments on a completed document (§ 1501.6).
 - (c) Insuring the swift and fair resolution of lead agency disputes (§ 1501.5).
 - (d) Using the scoping process for an early identification of what are and what are not the real issues (§ 1501.7).
 - (e) Establishing appropriate time limits for the environmental impact statement process (§ § 1501.7(b)(2) and 1501.8).
 - (f) Preparing environmental impact statements early in the process (§ 1502.5).

(cont.)

Moving on to Expediting and Otherwise Improving the NEPA Process:

- (g) Integrating NEPA requirements with other environmental review and consultation requirements (§ 1502.25).
- (h) Eliminating duplication with State and local procedures by providing for joint preparation (§ 1506.2) and with other Federal procedures by providing that an agency may adopt appropriate environmental documents prepared by another agency (§ 1506.3).
- (i) Combining environmental documents with other documents (§ 1506.4).
- (j) Using accelerated procedures for proposals for legislation (§ 1506.8).
- (k) Using categorical exclusions to define categories of actions which do not individually or cumulatively have a significant effect on the human environment (§ 1508.4) and which are therefore exempt from requirements to prepare an environmental impact statement.
- (l) Using a finding of no significant impact when an action not otherwise excluded will not have a significant effect on the human environment (§ 1508.13) and is therefore exempt from requirements to prepare an environmental impact statement.

Moving on to Expediting and Otherwise Improving the NEPA Process:

- 40 CFR § 1500.4 – Reducing Paperwork
- Agencies shall reduce excessive paperwork by:
 - (a) Reducing the length of environmental impact statements (§ 1502.2(c)), by means such as setting appropriate page limits (§ § 1501.7(b)(1) and 1502.7).
 - (b) Preparing analytic rather than encyclopedic environmental impact statements (§ 1502.2(a)).
 - (c) Discussing only briefly issues other than significant ones (§ 1502.2(b)).
 - (d) Writing environmental impact statements in plain language (§ 1502.8).
 - (e) Following a clear format for environmental impact statements (§ 1502.10).
 - (f) Emphasizing the portions of the environmental impact statement that are useful to decisionmakers and the public (§ § 1502.14 and 1502.15) and reducing emphasis on background material (§ 1502.16).
 - (g) Using the scoping process, not only to identify significant environmental issues deserving of study, but also to deemphasize insignificant issues, narrowing the scope of the environmental impact statement process accordingly (§ 1501.7).

(cont.)

Moving on to Expediting and Otherwise Improving the NEPA Process:

- (h) Summarizing the environmental impact statement (§ 1502.12).and circulating the summary instead of the entire environmental impact statement if the latter is unusually long (§ 1502.19).
- (i) Using program, policy, or plan environmental impact statements and tiering from statements of broad scope to those of narrower scope, to eliminate repetitive discussions of the same issues (§ § 1502.4 and 1502.20).
- (j) Incorporating by reference (§ 1502.21).
- (k) Integrating NEPA requirements with other environmental review and consultation requirements (§ 1502.25).
- (l) Requiring comments to be as specific as possible (§ 1503.3).
- (m) Attaching and circulating only changes to the draft environmental impact statement, rather than rewriting and circulating the entire statement when changes are minor (§ 1503.4(c)).

(cont.)

Moving on to Expediting and Otherwise Improving the NEPA Process:

- (n) Eliminating duplication with State and local procedures, by providing for joint preparation (§ 1506.2), and with other Federal procedures, by providing that an agency may adopt appropriate environmental documents prepared by another agency (I 1506.3).
- (o) Combining environmental documents with other documents (§ 1506.4).
- (p) Using categorical exclusions to define categories of actions which do not individually or cumulatively have a significant effect on the human environment and which are therefore exempt from requirements to prepare an environmental impact statement (§ 1508.4).
- (q) Using a finding of no significant impact when an action not otherwise excluded will not have a significant effect on the human environment and is therefore exempt from requirements to prepare an environmental impact statement (§ 1508.13).

The December 2011 Draft Guidance

- What Does the New Guidance Do?
- I would suggest three issues to focus on:

1. As the Federal Register notes:

This guidance does not change or substitute for any law, regulations, or any other legally binding requirement. Rather, it provides CEQ's interpretation of existing regulations promulgated under NEPA.

(Full Notice available at <http://www.gpo.gov/fdsys/pkg/FR-2011-12-13/html/2011-31983.htm>)

2. In what I think is the single most important development in the draft guidance states:

The guidance also makes clear that many of the provisions of the CEQ Regulations which specifically refer to an Environmental Impact Statement (EIS) can also apply to an Environmental Assessment (EA). This guidance applies to the preparation of an EA or an EIS consistent with legal precedent and agency NEPA experience and practice.

(cont.)

The December 2011 Draft Guidance

3. What seems to be perfunctory attention to the issue of time limit authorized by 40 CFR § 1501.8.

Purpose of the Guidance

- What does the Guidance state its purposes to be? Both the Guidance and the Federal Register introduction state the following as “basic principles”:
 - 1) NEPA encourages simple, straightforward, and concise reviews and documentation that are proportionate to and effectively convey the relevant considerations in a timely manner to the public and decisionmakers, while comprehensively addressing the issues presented;
 - 2) NEPA should be integrated into project planning rather than be an after-the-fact add-on;
 - 3) NEPA reviews should coordinate and take appropriate advantage of existing documents and studies, including through adoption and incorporation by reference;

(cont.)

Purpose of the Guidance

- 4) 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;
- 5) Agencies are encouraged to develop meaningful and expeditious timelines for environmental reviews; and
- 6) Agencies should respond to comments in proportion to the scope and scale of the environmental issues raised.

The Guidance's Specific Provisions

Categorical Exclusions

- 40 CFR § 1508.4
- A category of actions which do not individually or cumulatively have a significant effect on the environment.
- CEQ approval needed. 40 CFR § 1507.3
- “Extraordinary circumstances” exception.

The Guidance's Specific Provisions

Concise NEPA Documents

- 40 CFR § 1502.2
- Guidance in CEQ Forty Questions (Mar. 16, 1981), available at ceq.hss.doe.gov/nepa/regs/40/11-19.htm#13

Early NEPA Integration in Planning

- 40 CFR § 1501.2

Scoping

- 40 CFR § 1501.7

Intergovernmental Consultation

- 40 CFR § 1506.2

The Guidance's Specific Provisions

Coordinating Review and Documents Under Other Applicable Laws

- 40 CFR § 1502.25

Adoption

- 40 CFR § 1506.3

Incorporation by Reference

- 40 CFR § 1502.21

Expediting Responses to Comments

- 40 CFR § 1503.4(c), 1500.4(m)

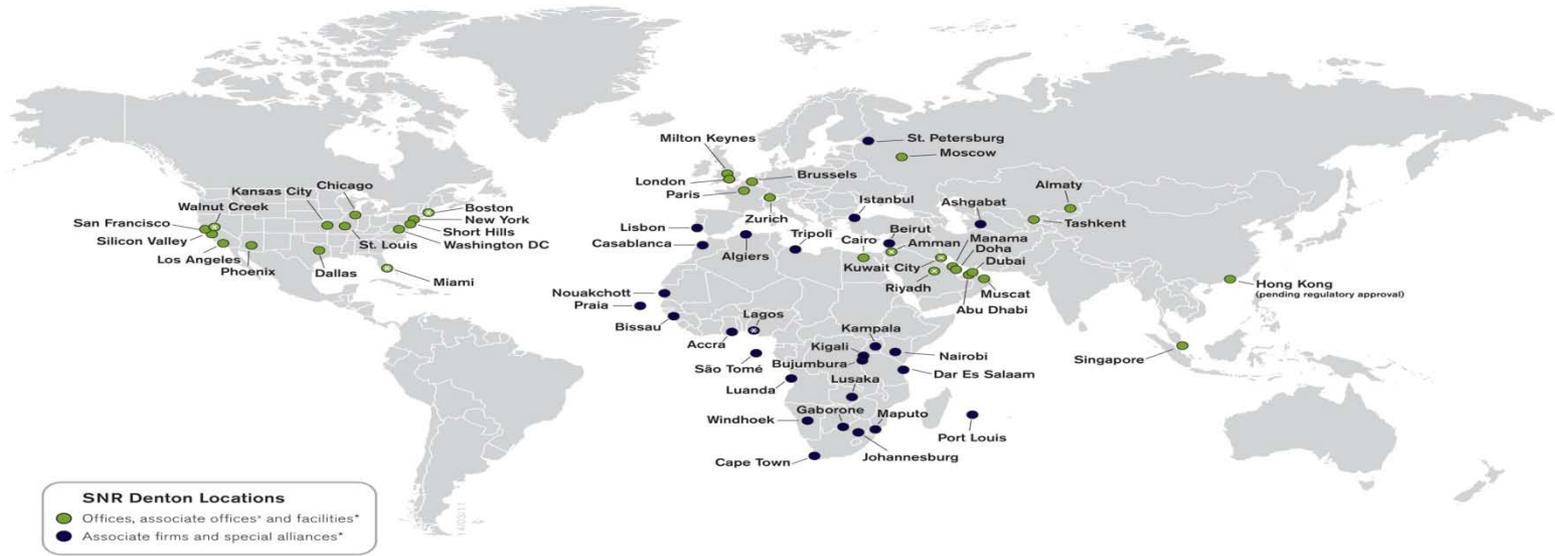
The Guidance's Specific Provisions

Clear Time Lines for NEPA Review

- 40 CFR § 1501.8
- Major importance of this section, specifically see: § 1501.8(a):
 - (a) The agency shall set time limits if an applicant for the proposed action requests them: Provided, that the time limits are consistent with the purposes of NEPA and other essential considerations of national policy.
- Background of the section.
- An underused and underemphasized provision, which the CEQ draft guidance mentions but does not highlight.

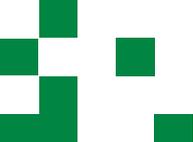
Conclusion

CEQ has issued guidance in two critical areas, (1) mitigation and monitoring and (2) expediting the NEPA process. These guidance documents do not break new ground, but they properly emphasize that which needs emphasis to make the NEPA process move more efficiently, consistent with the policy goals, of the Act.



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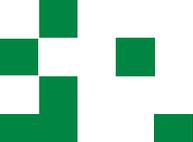
The CEQ Guidances And Their Implications

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CEQ: Four Guidances

- To “modernize and reinvigorate” NEPA, CEQ proposed three Guidances on February 18, 2010.
 - Establishing and applying categorical exclusions.
 - Mitigation and monitoring.
 - Consideration of GHG emissions and climate change in NEPA documents.
- The Final Guidance on categorical exclusions issued December 6, 2010. 75 Fed. Reg. 75628.
- The Final Guidance on mitigation and monitoring issued January 21, 2011. 76 Fed. Reg. 3843.
- The Final Guidance on the consideration of GHG emissions and climate change to be issued next.
- On December 13, 2011, CEQ also issued a Draft Guidance for improving the NEPA process. 76 Fed. Reg. 77492.



Today

- Focus on the Mitigation Guidance.
- Next, review the implications of the Draft Guidance on streamlining.

Why The Mitigation Guidance?

- So why this Guidance?
- CEQ regulations already require that:
 - EISs analyze mitigation measures; and
 - the final NEPA document identify mitigation measures being adopted. 40 C.F.R. §§1502.14(f) and 1505.2(c).
- Many observers felt there was no adequate system for monitoring and ensuring that promised mitigation in EISs occurred.
- Another major concern was the growth in the number of EAs (45,000 annually) and the number of mitigated FONSIIs.
 - Again, many observers felt the mitigation promised in a mitigated FONSI might not actually be happening.
- To address those issues, CEQ issued its mitigation and monitoring Guidance.

What Is The Legal Status Of The Guidance?

- CEQ states the Guidance is neither a rule nor a regulation.
- However, agencies will feel pressure to implement the Guidance.
 - Expect interested groups to have discussions with lead agencies.
- Courts give substantial deference to CEQ guidelines when considering NEPA compliance cases.
 - This Guidance may spawn new litigation.

When Does The Guidance Apply?

- The Guidance addresses mitigation that an agency has committed to implement as part of the NEPA process.
 - The EIS Record of Decision.
 - EAs and the mitigated FONSI.
- Once mitigation commitments are made, the Guidance states federal agencies should take steps to “ensure” they are implemented.
- But how do federal agencies “ensure” mitigation commitments are implemented?

How To Do It – Part I

- Mitigation commitments should have measurable performance standards to establish “clear performance expectations.”
- Agencies should not commit to mitigation measures “absent the authority or expectation of resources to ensure that the mitigation is performed.”
- Agencies can make funding and permitting decisions “conditional on the performance of mitigation commitments by third parties.”
 - If the third party does not, what happens next?

How To Do It – Part II

- As to agency actions not involving third party permits, CEQ recognizes agencies cannot commit to future funding but:
 - “a commitment to seek future funding is considered essential”; and
 - if such funding may not be available, the agency should disclose and assess the resulting environmental effects.
- As to EAs, if the agency has disclosed and assessed the lack of funding, “the action could proceed ... unless the mitigation is essential to a mitigated FONSI....”
 - Often, mitigation is essential to the FONSI.
 - Will this mean more EISs?

How To Do It – Part III

- Agencies should create internal processes “to ensure that”:
 - mitigation commitments are implemented; and
 - “relevant funding, permitting, and other agency approvals or decisions are made conditional on performance of mitigation commitments.”
- Expect permits to impose mitigation conditions.

The Model

- Confirming the intent of the Guidance, it identifies Department of the Army NEPA regulations as an appropriate model.
- The Guidance notes the Army's NEPA regulations:
 - consider mitigation adopted in an EIS record of decision or in a mitigated FONSI as “legally binding”;
 - require full funding and implementation of adopted mitigation; and
 - provide the “proposed action cannot proceed until all adopted mitigation is fully resourced or until the lack of funding is addressed in the NEPA analysis.”

The Action Proceeds – Now We Monitor

- Monitoring has two purposes:
 - to determine if the mitigation actually works which will guide future agency decisions on appropriate mitigation measures; and
 - to “ensure” mitigation is actually occurring.
- For activities involving third parties (permittees or grantees), agencies can require the third party to do the monitoring.
 - Will this be a required part of permit applications?

The Role Of The Public In Monitoring

- The Guidance, consistent with NEPA, calls public involvement “key.”
- Thus, agencies are encouraged to provide for public involvement in mitigation monitoring.
 - “Agencies should provide for public access to mitigation monitoring information consistent with NEPA and the Freedom of Information Act.”
- “The public may also assist with actual monitoring through public-private partnership programs.”

■ What Happens If Mitigation Is Not Implemented? – Part I

- If mitigation is not implemented, or fails, agencies should consider preparing a supplemental NEPA analysis.
- If a supplemental EA or EIS is required, the agency “must avoid actions that would have adverse environmental impacts and limit its choice of reasonable alternatives.”

■ What Happens If Mitigation Is Not Implemented? – Part II

- Since agencies should not commit to mitigation absent sufficient legal authority and resources to carry it out, and since agencies can make funding, permitting, or other approvals conditional on mitigation performance:
 - “It follows that an agency must rely on its underlying authority ... to take remedial steps” and “to enforce conditions placed on funding, grants, permits, or other approvals.”
- Failed mitigation should also be considered when the agency evaluates future proposed actions.

What Does This Mean? – Part I

- Agencies, including their permittees and grantees, will be required to implement agreed upon mitigation via agency action or court decisions.
- The standard of securing mitigation funding and monitoring mitigation may change how agencies operate.
 - Agreements to monitor with private parties?
 - If actions are dependent on mitigation funding, will it change agency budgeting?
 - Will there be more litigation?

What Does This Mean? – Part II

- Although NEPA is a procedural, not a substantive, statute, the Guidance may move NEPA in the direction of a substantive statute by forcing action on mitigation.
- Agencies may avoid committing to mitigation.
 - There may be more EISs and fewer mitigated EAs.
- More NEPA litigation based on failed mitigation compliance.

■ THE DECEMBER 13, 2011 DRAFT GUIDANCE

- Intended to help “improve the process for preparing efficient and timely environmental reviews” under NEPA.
- Comments were due January 27, 2012.

What Does The Guidance Do?

- Mostly reminds agencies of what is already in the CEQ regulations.
- For example:
 - NEPA documents to be concise and incorporate other documents by reference;
 - NEPA should be integrated into the early planning process;
 - agencies should use scoping effectively to identify issues and options;
 - agencies should coordinate with state, local, and tribal governments to reduce duplication;
 - NEPA documents, including responses to comments, should focus on the key issues.

What Will Be The Practical Effect?

- Start with the footnotes!
 - Virtually every footnote supporting the Guidance's recommendations references part of the CEQ regulations.
 - The Guidance is more exhortation than new substance.
- The Guidance is, however, a constructive reminder and can refocus agencies.
 - Also makes clear that many provisions in the CEQ regulations regarding EISs also apply to EAs.
 - Emphasizes that agencies can ask applicants to submit environmental reports.
- Whether the Guidance changes any agency practice will likely depend on circumstances surrounding individual actions.