



Draft NEPA Guidance Presents Significant Issues for Industry

By: [Bret Sumner](#)

On February 18, 2010, the Council on Environmental Quality (CEQ) issued three draft National Environmental Policy Act (NEPA) guidance documents for public review and comment. 75 Fed. Reg. 8045-46 (Feb. 23, 2010). These proposals each raise significant issues particularly relevant for energy companies operating on federal lands. These three draft NEPA guidance documents are titled:

- (1) "Establishing, Applying, and Revising Categorical Exclusions Under NEPA." Public comments are due by April 9, 2010.
- (2) "Consideration of the Effects of Climate Change and Greenhouse Gas Emissions." Public comments are due by May 24, 2010.
- (3) "NEPA Mitigation and Monitoring." Public comments are due by May 24, 2010.

In meetings with IPAMS representatives during the Washington D.C. call-up earlier this month, CEQ expressly requested that oil and gas companies provide specific comments to each of these proposals. CEQ indicated that they are particularly interested in obtaining both positive and negative illustrative examples of how these proposed policies may impact oil and gas operations in the field.

Categorical Exclusions:

CEQ is seeking comments on their proposed guidance on establishing, applying, and revising administrative categorical exclusions (CXs) by April 9, 2010. While this proposed guidance focuses on administrative categorical exclusions, there is an important intersection with the statutory CXs created by Section 390 of the Energy Policy Act of 2005.

The CEQ regulations establish a process where, after public notice and comment, each agency creates categories or a list of actions that normally do not require preparation of an Environmental Assessment (EA) or Environmental Impact Statement (EIS) under NEPA. 40 C.F.R. §§ 1507.3(b)(2)(ii) & 1508.4. BLM's current list of these administrative categorical exclusions are found in the BLM regulations at 43 C.F.R. § 46.210. Under section 1508.4 of the CEQ regulations, the agency establishing the categorical exclusion must provide for "extraordinary circumstances in which a normally excluded action may have a significant environmental effect." 40 C.F.R. § 1508.4. BLM's regulations currently list extraordinary circumstances that could preclude the use of its categorical exclusions. See 43 C.F.R. § 46.215.

The Energy Policy Act of 2005 (EPAAct) statutory CXs, however, do not utilize the extraordinary circumstances concept in the CEQ regulations. Instead, these CXs provide that there is a rebuttable presumption that statutory CXs are appropriate to use. Neither CEQ's nor BLM's regulations, however, contain any explanation or discussion of a "rebuttable presumption" in detailing the categorical exclusion process. Similarly, nothing in Section 390 of EPAAct discusses "extraordinary circumstances."

During the prior presidential administration, BLM construed the statutory CXs established under Section 390 of the EPAAct as independent of the CEQ process for establishing CXs under 40 C.F.R. § 1507.3. This interpretation is premised on the basic point that because they have an independent source of authority, EPAAct statutory CXs are distinct from the administrative CXs created under the CEQ regulations. Thus, under this interpretation, the EPAAct CXs do not fall under the CEQ regulations implementing NEPA found in 40 C.F.R. §1507.3.

It appears that the current administration, however, is interpreting Section 390 of EPAAct so that the presence of "extraordinary circumstances" (as created by BLM through the administrative process) are enough to rebut the presumption that application of statutory CXs are appropriate. Under this interpretation, BLM will have to apply the traditional "extraordinary circumstances" factors found in 43 C.F.R. § 46.215 when analyzing the applicability of EPAAct CXs.

It will be very important for industry to provide feedback to CEQ on their draft guidance regarding categorical exclusions, particularly the need to limit the scope of extraordinary circumstances and that applying these factors to statutory CXs is not appropriate. Providing specific examples to the CEQ would be most effective in comments. For example, providing an explanation as to why climate change issues should not be considered an "extraordinary circumstance" that would preclude use of a CX to approve drilling additional wells on an existing well pad.

Analysis of Climate Change and Greenhouse Gas Emissions

CEQ is seeking comments on their proposed guidance on analyzing the effects of climate change and greenhouse gas (GHG) emissions in NEPA documents. These comments are due by May 24, 2010. The issue of whether to address global warming, climate change, and greenhouse gas emissions in NEPA documents is becoming increasingly important for federal agencies and industry with regard to upstream oil and gas exploration and development on federal lands.

It is well documented that GHG emissions from upstream oil and gas activities are negligible compared to other GHG emission sources in the energy, commercial, and transportation sectors of the United States. The bulk of GHG emissions in the energy sector come from fossil fuel combustion at the end-use stage, rather than exploration and development activities for oil and natural gas at the upstream stage.

Nonetheless, numerous non-government organizations and anti-industry activist groups, and even some NEPA staff in EPA Region 8, are advocating that BLM and industry must conduct detailed NEPA analysis for upstream projects regarding the potential effects of the proposed project's GHG emissions on global warming and climate change.

Moreover, these groups are advocating that cumulative impacts analysis must aggregate upstream oil and gas emissions with midstream and downstream emissions. This aggregation, in turn, would then open the door for these groups to advocate the presence of significant impacts, and also seek to require imposition of mitigation measures to address these emissions.

CEQ's current draft does not propose to make the guidance applicable to federal land and resource management actions. CEQ is requesting comments on "the appropriate means of assessing GHG emissions and sequestration that are affected by federal land and resource management decisions." In addition to submitting comments on this issue, it will also be important for industry to submit comments supporting CEQ's current position to not apply this guidance to federal land actions.

Mandatory Mitigation and Monitoring

CEQ is seeking comments on their proposed guidance for NEPA mitigation and monitoring by May 24, 2010. This proposal seeks to affect a fundamental shift in the contours of NEPA by essentially making mitigation mandatory and enforceable.

CEQ's stated goals for this guidance include: (1) requiring consideration of mitigation throughout the NEPA process, and making mitigation measures binding commitments on the project proponent; (2) creating a mandatory monitoring program in project level NEPA documents to ensure mitigation measures are implemented and effective; and, (3) promoting public participation through proactive disclosure of agency mitigation monitoring reports and documents.

This proposal is a dramatic departure from long established NEPA legal precedent. The U.S. Supreme Court has long held that analysis of mitigation measures is merely a procedural analytic requirement under NEPA, and that NEPA, a procedural statute, does not impose a substantive requirement for implementing mitigation measures. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351-52 (1989).

The draft guidance also seeks to impose ongoing and cumulative NEPA obligations on a project proponent after a Record of Decision is issued in the event mitigation is not successfully implemented. For example, if an Environmental Assessment is approved through application of mitigation (known as a mitigated Finding of No Significant Impact), and mitigation is not found to be effective, then preparation of an Environmental Impact Statement may be required. In other words, it would impose a duty on federal agencies to re-open past decisions in response to monitoring of mitigation results and conduct additional analysis. This requirement, in turn, would dramatically increase agency NEPA responsibilities and further delay processing of NEPA documents.

The proposal to require monitoring and disclose monitoring files to the public will also dramatically expand NEPA litigation. By making mitigation mandatory and requiring substantive and successful results, the door would be open for project opponents to file legal challenges based upon their own subjective determination as to whether mitigation measures are being successfully implemented. This flood of litigation, in turn, would require federal agencies to expend even more staffing and resources to prepare mitigation monitoring reports to withstand scrutiny and legal challenge.

Please contact [Bret Sumner](#) for additional information on the CEQ draft guidance and the public comment process.