

# Rules and Regulations

Federal Register

Vol. 82, No. 188

Friday, September 29, 2017

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

The Code of Federal Regulations is sold by the Superintendent of Documents.

## NATIONAL CAPITAL PLANNING COMMISSION

### 1 CFR Part 601

#### National Environmental Policy Act Regulations

**AGENCY:** National Capital Planning Commission.

**ACTION:** Final rule.

**SUMMARY:** The National Capital Planning Commission (NCPC or Commission) rescinds its current Environmental and Historic Preservation Policies and Procedures (2004 Policies) and hereby adopts new rules governing NCPC's implementation of the National Environmental Policy Act (NEPA).

**DATES:** This rule is effective October 30, 2017.

**FOR FURTHER INFORMATION CONTACT:** Anne R. Schuyler, (202) 482-7223 or [NEPA@ncpc.gov](mailto:NEPA@ncpc.gov).

#### SUPPLEMENTARY INFORMATION:

##### I. Summary of Changes

###### A. Background

NCPC's 2004 Policies were adopted in 2004 (69 FR 41299, July 8, 2004) and generally remain appropriate. However certain portions of the 2004 Policies require revision to simplify, streamline, and improve the effectiveness of NCPC's process for complying with NEPA. Accordingly, this document adopts a complete new rule.

###### B. Elimination of Section 106 Procedures

One of the most significant changes reflected in the new rule is the elimination of procedures for complying with Section 106 of the National Historic Preservation Act (NHPA). In 2004, when it adopted the 2004 Policies, NCPC opted to issue combined NEPA and NHPA guidance to ensure coordinated implementation of both procedures. However, regulations promulgated by the Advisory Council on Historic Preservation (ACHP) do not

require agencies to adopt agency specific processes and procedures (see 36 CFR chapter VIII). Instead ACHP regulations establish the processes and procedures all Federal Agencies must follow. This resulted in the inclusion of duplicative information in NCPC's 2004 Policies. While this information proved helpful, it diverted attention away from NCPC's agency-specific NEPA procedures mandated by the Council on Environmental Quality (CEQ). Accordingly, this rule does not include detailed references to the Section 106 consultation process. It does include a reference to coordination between NEPA and NHPA and consideration of historic resources in the NEPA process.

###### C. Federal and Non-Federal Agencies

To clarify roles and responsibilities, these Regulations distinguish between Federal Agency applicants and Non-Federal Agency applicants. Federal Agency applicants include cabinet level departments and executive agencies such as the U.S. General Services Administration (GSA). Non-Federal Agency applicants include, without limitation, the Smithsonian Institution, the John F. Kennedy Center for the Performing Arts, the National Gallery of Art, the U.S. Institute of Peace, the Government of the District of Columbia, the Maryland National Capital Park and Planning Commission (MNCPPC), and private parties and entities implementing projects on Federal land. NCPC's jurisdiction extends to Non-Federal Agency applicants when they undertake projects on federally-owned land. Under this rule, NCPC serves as the Lead Agency for Non-Federal Agency applications. This is necessitated by the fact the Non-Federal Agencies are not subject to NEPA. However, if the Commission takes an approval action on a Non-Federal Agency application, the requirements of NEPA apply to the Commission's decision-making process. This means NCPC must undertake the requisite steps of the NEPA process for a Non-Federal Agency application to meet its legal obligation.

###### D. Timing and Sequencing of Submission of NEPA Documents

These Regulations also alter the timing and sequencing of an applicant's submission of NEPA documentation for applications governed by the National

Capital Planning Act and the Commemorative Works Act. Under the 2004 Policies, an applicant was required to complete the NEPA process at the time of preliminary review. Under this rule, an applicant must complete its NEPA process at the time of final review. This revised approach allows the Commission an opportunity to provide input on a project when it is still in the developmental phase. It also provides a NEPA sequencing consistent with Federal Agency project development schedules. This eliminates the pressure on Federal Agency applicants to expedite its NEPA process to meet NCPC's current sequencing requirements.

###### E. Categorical Exclusions

NCPC's rule also includes changes to the list of projects eligible for application of a Categorical Exclusion (CATEX). The Regulations include several new CATEXs. NCPC eliminated several existing CATEXs because they were based on old, antiquated authorities which have little to no relationship to NCPC's present day review roles. The rule also increase the number of extraordinary circumstances which negate the application of a CATEX.

## II. Summary of and Response to Comments

### A. General

NCPC published a Proposed Rule (82 FR 42570, May 30, 2017) addressing revisions to its 2004 Policies, establishing a 45-day public comment period. The public comment period closed on July 14, 2017.

NCPC received a little under 100 comments on its proposed NEPA rule Regulations. Comments were submitted by the General Services Administration, the U.S. Department of the Interior and it's National Park Service, and the National Aeronautics and Space Administration; the Smithsonian Institution; the Washington Area Metropolitan Transit Authority; the National Trust for Historic Preservation; The Committee of 100 on the Federal City; approximately 21 members of the general public; and two private consulting firms. A summary chart of all the comments received and NCPC's response thereto can be found on NCPC's Web site at [www.ncpc.gov/subnepa](http://www.ncpc.gov/subnepa).

The major comments can be grouped into six categories: (1) The elimination of detailed reference to compliance with Section 106 of the NHPA; (2) the treatment of Non-Federal Agencies in the Regulations; (3) the timing and sequencing of submitting NEPA Documents/Co-Signing a Finding of No Significant Impact (FONSI) or a Record of Decision (ROD); (4) NCPC's reliance on the CATEX of other government agencies; and (5) the minimal focus on public participation in the NEPA process/lack of public knowledge of process for administering CATEXs.

#### B. Revised Name for the Regulations

NCPC decided to rename its NEPA requirements the National Environmental Policy Act Regulations (Regulations). This title is more descriptive of the true nature of the Regulations versus the title of Environmental Policies and Procedures conferred on the 2004 Policies.

#### C. Elimination of NHPA Section 106 Requirements

Several comments addressed the elimination of NHPA Section 106 procedures from the Regulations. The National Trust for Historic Preservation generally agreed with the elimination, but it suggested designating the NEPA Lead and Cooperating Agencies as the Lead and Consulting Parties for the Section 106 process. NCPC disagrees with this suggestion. NCPC maintains it is inappropriate to designate roles for the Section 106 process in its NEPA Regulations. To compensate for the elimination, a member of the public suggested reference to ACHP guidance on the ACHP for integrating NEPA and the Section 106 processes. While NCPC found merit to this comment and initially inserted an endnote to the ACHP Web site and the CEQ Web site for general NEPA guidance, CEQ believed the references unnecessary. Finally, the Committee of 100 on the Federal City maintained the elimination of references to the Section 106 process sent a negative message about the connection between the two processes. NCPC notes this was not its intention as evidenced by the clearly articulated policy in § 601.2(d) to integrate the requirements of NEPA with, among others, the requirements of the NHPA.

#### D. Role of Non-Federal Agencies

The role of Non-Federal Agencies in the NEPA process generated a number of comments. The Smithsonian Institution (designated a Non-Federal Agency in the Regulations) recommended the re-designation of Federal and Non-Federal Agencies as

Executive and Non-Executive Agencies on the theory that this might be less confusing. NCPC declined to make this change because of the repeated use of the term "federal" in the National Capital Planning Act (40 U.S.C. 8701 *et seq.*). However, for clarification purposes, NCPC revised the definition of Non-Federal Agencies to indicate this designation applies only for purposes of NEPA.

One member of the public challenged the legality of designating Non-Federal Agencies as "Cooperating Agencies" given that the CEQ regulatory definition only designates "federal agencies" as capable of serving in this capacity. NCPC notes this statement is only partially correct. The definition of Cooperating Agency in 40 CFR 1508.5 also extends to state or local agencies rendering such agencies eligible to serve as Cooperating Agencies. This makes Cooperating Agency status appropriate for the Government of the District of Columbia and the Maryland National Capital Park and Planning Commission. As to the others listed in the definition—Smithsonian Institution, the John F. Kennedy Center for the Performing Arts, the National Gallery of Art, the U.S. Institute of Peace, and private parties undertaking development on Federal land—NCPC agrees an alternative approach is necessary.

NCPC also agrees with the same individual's multiple comments that NCPC does not undertake NEPA "on behalf" of Non-Federal Agencies. NCPC recognizes that the NEPA obligation for a Non-Federal Agency application belongs to NCPC. NCPC believes a minor wording change to "undertakes NEPA for a Non-Federal Agency application" solves this concern.

Turning to an alternative approach for NEPA compliance for Non-Federal Agency applications, NCPC notes it is not alone in confronting the issue of Non-Federal Agency applications to which NEPA applies because of the Federal Agency's approval/permitting authority. NCPC looked at the NEPA regulations for similarly situated Federal Agencies to ascertain how they handle the issue. One Federal Agency lists in its regulations the information that the Non-Federal Agency (permittee and owner of the project) must submit to facilitate staff's preparation of the requisite NEPA document. Because this approach increased the complexity of the agency's regulations, and NCPC's goal is to streamline its regulations consistent with the Administration's articulated regulatory reduction goals, NCPC adopted a modified version of this approach.

NCPC will enter into a Memorandum of Agreement (MOA) (renamed from a Memorandum of Understanding or MOU in the proposed rule) with Non-Federal Agencies. The MOA will specify, among others, the information the Non-Federal Agency must submit to enable preparation of the requisite environmental document by NCPC staff and the timing of the information's submission. Contrary to the comments on one individual, NCPC disagrees the MOA approach is legally insufficient. This comment implies NCPC is relinquishing its NEPA responsibilities by entering into a MOA. This is not the case. NCPC considers the MOA an internal operating procedure within its authority to implement. It is also an efficient and effective way to fulfill its NEPA obligation and avoid some of the pitfalls associated with the prior approach of Cooperating Agency status. The problems avoided include budgetary issues if the Non-Federal Agency provides money to NCPC to retain a contractor, Non-Federal Agency participation in NCPC's retention of the Non-Federal Agency funded contractor, and the potential for two A&E contractors working on different aspects of the same project. To facilitate public awareness, NCPC will post the completed MOA on the NCPC's Web site.

NCPC notes that in a follow-up conversation with the commenter to explore the rationale for opposing an MOA, the commenter agreed the MOA approach as outlined above is legally sufficient. NCPC conducted the follow-up conversation after the comment period closed, and no new comments were discussed during the conversation.

#### E. Timing and Sequencing of Submitting NEPA Documents/Co-Signing FONISIs and RODs

All the government agencies supported NCPC's process change of moving NEPA completion to coincide with the Commission's final approval. There was one concern expressed about the sequencing of NEPA and the Commemorative Works Act's review process, but NCPC believes the comment was the result of a misunderstanding of the process.

Multiple Federal Agencies also advised against incorporation of a provision allowing NCPC to co-sign another agency's FONSI or ROD. NCPC notes that the Regulations render this practice discretionary. However, if both agencies agree on the contents of a FONSI or ROD, it makes no sense for NCPC to prepare a duplicated document for NCPC to sign. Obviously, if the two agencies have different reasons for

reaching a FONSI or a ROD, co-signature is not an option, and each agency will have to prepare its own document. Co-signature is also not an option if there is disagreement over the ability to reach a FONSI or ROD. This disagreement points to problems with the Environmental Document that must be resolved before the project can be presented to the Commission. Finally, NCPC reminds Federal Agencies that co-signing a FONSI or ROD is entirely consistent with the Administration's efforts to streamline regulatory processes especially NEPA.

#### F. Use of Another Agency's CATEX

The inclusion of five Categorical Exclusions that allowed NCPC to use the exclusion of another agency when it had no corresponding CATEX generated a number of comments pro and con. Federal Agencies supported the concept because it removed the possible need for them to prepare an EA if they used a Categorical Exclusion for their project but NCPC had no exclusion it could apply. The National Trust for Historic preservation and a member of the general public objected to the approach noting it was inconsistent with CEQ's long standing policy to disallow such an approach.

As required, NCPC submitted an administrative record to CEQ for all of its proposed CATEX, most of which are carry-overs from several iterations of prior regulations. The administrative record noted that the five CATEXs predicated upon use of another agency's exclusion had not been enlarged in scope and the CATEX continued to be appropriately limited by extraordinary circumstances, the number of which has been significantly increased in the Regulations.

NCPC's Administrative Record for the five CATEXs at issue was initially accepted, but upon further reflection CEQ has decided to adhere to its long standing policy to disallow such an approach. Consequently, NCPC has removed all five of the CATEXs at issue. Since four of the five CATEX at issue have been put to little use for a prolonged period of time, NCPC does not believe its implementation of NEPA will be unduly burdened by this removal. The addition of new CATEX may also fill the gap.

#### G. Public Participation/Public Knowledge of Process for Administering CATEX

The Committee of 100 on the Federal City commented on the silence of the proposed regulation on the goals, criteria and process for meaningful public participation. They encouraged

the incorporation of meaningful public participation policy and goals to rectify this deficiency.

NCPC is fully committed to open government and transparency and believes its past actions amply substantiate this commitment not only in the NEPA and Section 106 processes but to all of its significant planning activities. Accordingly, the Regulations clearly articulate a policy of using the NEPA process to “. . . foster meaningful public involvement in NCPC's decisions.” Moreover, throughout the Regulations, there are repeated opportunities for public participation to include in the EIS scoping process with an option for NCPC to conduct a public scoping process for Environmental Assessments as well; in the review of draft Environmental Assessments (EAs) (at NCPC's option) and Environmental Impact Statements (EISs); and in the review of FONSIs and RODs. Moreover, at the suggestion of another commenter, documents required to be published in the **Federal Register** (Notice of Intent to Prepare an EIS and Notice of Availability of an EIS) will also be published on the NCPC Web site where parties interested in NCPC activities are more likely to go to stay abreast of current NCPC events.

The Committee of 100 on the Federal City also expressed concern about the Regulation's silence on the administrative process for the application of a CATEX. NCPC notes that among the Commission's official delegations is one conferring administrative responsibility for NEPA on the Executive Director. In the future, owing to the recent redesign of NCPC's Web site, the delegations will be listed on the Web site. However, NCPC notes this responsibility, how and when it is made, and how the public is notified of the decision is set forth in §§ 601.11(c) and 601.12(b) of the Regulations.

#### H. CEQ Comments

As required by CEQ Regulations, NCPC submitted a draft of this final rule to CEQ for its review and approval following revisions to the Regulations to reflect comments received during the public comment period. CEQ responded with a number of recommendations. Most of the recommendations were minor in nature and involved language clarifications, addition of cross-references to relevant sections of CEQ's regulations, and inclusion of additional language.

The one recommendation falling outside the minor category related to the timing of the signing FONSIs and RODs by Federal Agency applicants and NCPC

for Non-Federal Agency applications. NCPC has in the past accepted signed FONSIs and RODs at the time an application for final approval is submitted to the Commission. This practice reflects the close coordination between NCPC and its applicants and the likelihood that the Commission, with rare exceptions, will approve the final application. CEQ (and one commenter) pointed out that notwithstanding the high probability the signed FONSI or ROD would reflect the Commission's decision, it was technically incorrect. The signature of a FONSI or ROD can only occur after the Commission takes a final action and cannot precede a future, anticipated decision of approval.

In response to CEQ's comment, the rule requires NCPC to sign its decision documents following Commission final approval of an application. As to Federal Agencies, the rule is silent as to when the Federal Agency may sign its FONSI or ROD. However, there is now an express provision that places the burden on Federal Agency applicants to review their Environmental Documents and their FONSI or ROD to determine if revisions are necessary if at the time of final approval the Commission disapproves an application and requires changes to the project.

Following incorporation of all of CEQ's recommended changes into the regulations, NCPC received final CEQ sign off on September 21, 2017.

### III. Compliance With Laws and Executive Orders

#### *Executive Orders 12866 and 13563*

By Memorandum dated October 12, 1993 from Sally Katzen, Administrator, Office of Information and Regulatory Affairs (OIRA) to Heads of Executive Departments and Agencies, and Independent Agencies, OMB rendered the NCPC exempt from the requirements of Executive Order 12866 (See, Appendix A of cited Memorandum). Nonetheless, NCPC endeavors to adhere to the provisions of the Executive Order.

#### *Executive Order 13771*

NCPC is exempt from this Executive Order because it is exempt from E.O. 12866, NCPC confirmed this fact with OIRA.

#### *Regulatory Flexibility Act*

As required by the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), the NCPC certifies that the rule will not have a significant economic effect on a substantial number of small entities.

*Small Business Regulatory Enforcement Fairness Act*

This is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. It does not have an annual effect on the economy of \$100 million or more; will not cause a major increase in costs for individuals, various levels of governments or various regions; and does not have a significant adverse effect on completion, employment, investment, productivity, innovation or the competitiveness of U.S. enterprises with foreign enterprises.

*Unfunded Mandates Reform Act (2 U.S.C. 1531 et seq.)*

A statement regarding the Unfunded Mandates Reform Act is not required. The rule neither imposes an unfunded mandate of more than \$100 million per year nor imposes a significant or unique effect on State, local or tribal governments or the private sector.

*Federalism (Executive Order 13132)*

In accordance with Executive Order 13132, the rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment. The rule does not substantially and directly affect the relationship between the Federal and state governments.

*Civil Justice Reform (Executive Order 12988)*

The General Counsel of NCPD has determined that the rule does not unduly burden the judicial system and meets the requirements of Executive Order 12988 3(a) and 3(b)(2).

*Paperwork Reduction Act*

The rule does not contain information collection requirements, and it does not require a submission to the Office of Management and Budget under the Paperwork Reduction Act.

*National Environmental Policy Act*

The rule is of an administrative nature, and its adoption does not constitute a major Federal action significantly affecting the quality of the human environment. NCPD's adoption of the rule will have minimal or no effect on the environment; impose no significant change to existing environmental conditions; and will have no cumulative environmental impacts.

*Clarity of the Regulation*

Executive Order 12866, Executive Order 12988, and the Presidential Memorandum of June 1, 1998 requires the NCPD to write all rules in plain

language. NCPD maintains the rule meets this requirement.

*Public Availability of Comments*

Be advised that personal information such as name, address, phone number electronic address, or other identifying personal information contained in a comment may be made publically available. Individuals may ask NCPD to withhold the personal information in their comment, but there is no guarantee the agency can do so.

**List of Subjects in 1 CFR Part 601**

Environmental impact statements, Environmental protection.

■ For the reasons stated in the preamble, the National Capital Planning Commission adds 1 CFR part 601 to read as follows:

**PART 601—IMPLEMENTATION OF THE NATIONAL ENVIRONMENTAL POLICY ACT****Subpart A—General**

Sec.

- 601.1 Purpose.
- 601.2 Policies.
- 601.3 Definitions.

**Subpart B—Lead and Cooperating Agencies**

- 601.4 Designation of Lead Agency.
- 601.5 Lead Agency obligations.
- 601.6 Resolving disputes over Lead Agency status.
- 601.7 Cooperating Agencies.

**Subpart C—NEPA Submission Schedules**

- 601.8 NEPA submission schedule for applications governed by the National Capital Planning Act.
- 601.9 NEPA submission schedule for applications governed by the Commemorative Works Act.

**Subpart D—Initiating the NEPA Process**

- 601.10 Characteristics of Commission actions eligible for a Categorical Exclusion.
- 601.11 Extraordinary Circumstances.
- 601.12 National Capital Planning Commission Categorical Exclusions.

**Subpart E—Environmental Assessments**

- 601.13 Characteristics of Commission actions eligible for an Environmental Assessment.
- 601.14 Commission actions generally eligible for an Environmental Assessment.
- 601.15 Process for preparing an Environmental Assessment.
- 601.16 Finding of No Significant Impact.
- 601.17 Supplemental Environmental Assessments.

**Subpart F—Environmental Impact Statements**

- 601.18 Requirement for and timing of an Environmental Impact Statement.
- 601.19 Context, intensity, and significance of impacts.

- 601.20 Streamlining Environmental Impact Statements.
- 601.21 Programmatic Environmental Impact Statements and tiering.
- 601.22 Contents of an Environmental Impact Statement.
- 601.23 The Environmental Impact Statement process.
- 601.24 Final Environmental Impact Statement.
- 601.25 Record of Decision.
- 601.26 Supplemental Environmental Impact Statement.
- 601.27 Legislative Environmental Impact Statement.

**Subpart G—Dispute Resolution**

- 601.28 Dispute resolution.
- 601.29 [Reserved]

Authority: 40 CFR 1507.3.

**Subpart A—General****§ 601.1 Purpose.**

This part establishes rules that supplement the Council on Environmental Quality's (CEQ) National Environmental Policy Act (NEPA) regulations that the National Capital Planning Commission (NCPD or Commission) and its applicants shall follow to ensure:

(a) Compliance with NEPA, as amended (42 U.S.C. 4321 *et seq.*) and CEQ regulations for implementing the procedural provisions of NEPA (40 CFR parts 1501 through 1508).

(b) Compliance with other laws, regulations, and Executive Orders identified by NCPD as applicable to a particular application.

**§ 601.2 Policies.**

Consistent with 40 CFR 1500.1 and 1500.2, it shall be the policy of the NCPD to:

(a) Comply with the procedures and policies of NEPA and other related laws, regulations, and orders applicable to Commission actions.

(b) Provide applicants sufficient guidance to ensure plans and projects comply with the rules of this part and other laws, regulations, and orders applicable to Commission actions.

(c) Integrate NEPA into its decision-making process at the earliest possible stage.

(d) Integrate the requirements of NEPA and other planning and environmental reviews required by law including, without limitation, the National Historic Preservation Act, 54 U.S.C. 306108 (NHPA), to ensure all such procedures run concurrently.

(e) Use the NEPA process to identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects on the quality of the human environment in the National Capital Region.

(f) Use all practicable means to protect, restore, and enhance the quality of the human environment including the built and socioeconomic environments and historic properties within the National Capital Region.

(g) Streamline the NEPA process and Environmental Impact Statements (EIS) to the maximum extent possible.

(h) Use the NEPA process to assure orderly and effective NCPC decision-making and to foster meaningful public involvement in NCPC's decisions.

### § 601.3 Definitions.

For purposes of this part, the following definitions shall apply:

*Administrative Record* means a compilation of all materials (written and electronic) that were before the agency at the time it made its final decision. An Administrative Record documents an agency's decision-making process and the basis for the decision.

*Categorical Exclusion* or *CATEX* means, as defined by 40 CFR 1508.4, a category of actions which do not individually or cumulatively have a significant effect on the human environment except under Extraordinary Circumstances and which have been found to have no such effect in procedures adopted by a Federal Agency (NCPC) in implementation of CEQ's regulations and for which, therefore, neither an Environmental Assessment (EA) nor an EIS is required.

*Central Area* means the geographic area in the District of Columbia comprised of the Shaw School and Downtown Urban Renewal Areas or such other area as the District of Columbia and NCPC shall subsequently jointly determine.

*Chairman* means the Chairman of the National Capital Planning Commission appointed by the President, pursuant to 40 U.S.C. 8711(c).

*Commemorative Works Act* or *CWA* means the Federal law codified at 40 U.S.C. 8901 *et seq.* that sets forth the requirements for the location and development of new memorials and monuments on land under the jurisdiction of the National Park Service (NPS) or the General Services Administration (GSA) in the District of Columbia and its Environs.

*Commission* means the National Capital Planning Commission created by 40 U.S.C. 8711.

*Comprehensive Plan* means The Comprehensive Plan for the National Capital: Federal Elements prepared and adopted by the Commission pursuant to 40 U.S.C. 8721(a).

*Cooperating Agency* means, as defined in 40 CFR 1508.5, any Federal Agency other than a Lead Agency that

has jurisdiction by law or special expertise with respect to a proposal (or reasonable alternative) for legislation or other major action significantly affecting the quality of the human environment; a state or local agency of similar qualifications; or when the effects are on a reservation, an Indian Tribe when agreed to by the Lead Agency.

*Cumulative impact* means, as defined in 40 CFR 1508.7, the impact on the environment that results from the incremental impact of an action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or Non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor, but collectively significant, actions taking place over a period of time.

*Emergency Circumstances* means a sudden and serious occurrence or situation requiring immediate attention to protect the lives and safety of the public and protect property and ecological resources and functions from imminent harm.

*Environmental Assessment* or *EA* means, as defined in 40 CFR 1508.9, a concise document for which a Federal Agency is responsible that serves to briefly provide sufficient evidence and analysis for determining whether to prepare an EIS or a FONSI; aid an agency's compliance with NEPA when no EIS is necessary; facilitate preparation of an EIS when one is necessary; and includes a brief discussion of the need for the proposal, alternatives as required by section 102(2)(E) of NEPA, the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.

*Environmental Document* means, as set forth in 40 CFR 1508.10, an Environmental Assessment, and Environmental Impact Statement, and for purposes of these regulations, a Categorical Exclusion determination.

*Environmental Impact Statement* or *EIS* means, as defined in 40 CFR 1508.11, a detailed written statement as required by 42 U.S.C. 4332(2)(C).

*Environs* means the territory surrounding the District of Columbia included in the National Capital Region pursuant to 40 U.S.C. 8702(a)(1).

*Executive Director* means the Executive Director employed by the National Capital Planning Commission pursuant to 40 U.S.C. 8711(d).

*Executive Director's Recommendation* or *EDR* means a concise written report and recommendation prepared by NCPC staff under the direction of NCPC's Executive Director regarding a proposed

action that is transmitted to the Commission for its consideration.

*Extraordinary Circumstances* means special circumstances that when present negate an agency's ability to categorically exclude a project and require an agency to undertake further NEPA review.

*Federal Agency* means the executive agencies of the Federal government as defined in 5 U.S.C. 105.

*Finding of No Significant Impact* or *FONSI* means, as defined at 40 CFR 1508.13, a document prepared by NCPC or a Federal Agency applicant that briefly presents the reasons why an action, not otherwise excluded (40 CFR 1508.4), will not have a significant effect on the human environment and for which an EIS will not be prepared. It shall include the EA or a summary of it and shall note any other EAs or EISs related to it (40 CFR 1501.7(a)(5)). If the EA is included in the FONSI, the FONSI need not repeat any of the discussion in the EA but may include the EA by reference.

*Lead Agency* means, as defined in 40 CFR 1508.16, the agency or agencies preparing or having primary responsibility for preparing an EA or an EIS.

*Memorandum of Agreement* or *MOA* means for purposes of implementing the regulations in this part, a written agreement entered into between a Lead, Co-lead, Cooperating Agency, or a Non-Federal Agency to facilitate implementation of NEPA and preparation of the requisite environmental documentation. A MOA can be written at a programmatic level to apply to all projects involving NCPC and particular applicant or on a project-by-project basis.

*Mitigation* means, as defined in 40 CFR 1508.20, avoiding an impact altogether by not taking a certain action or parts of an action; minimizing impacts by limiting the degree or magnitude of the action and its implementation; rectifying the impact by repairing, rehabilitating, or restoring the affected environment; reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action; and compensating for the impact by replacing or providing substitute resources or environments.

*Monumental Core* means the general area encompassed by the U.S. Capitol grounds, the National Mall, the Washington Monument grounds, the White House grounds, the Ellipse, West Potomac Park, East Potomac Park, the Southwest Federal Center, the Federal Triangle area, President's Park, the Northwest Rectangle, Arlington

Cemetery and the Pentagon area, and Joint Base Myer-Henderson Hall.

*National Capital Planning Act* means the July 1952 legislative enactment, codified at 40 U.S.C. 8701 *et seq.* that created the present day National Capital Planning Commission and conferred authority upon it to serve as the planning authority for the Federal government in the National Capital Region.

*National Capital Region* means, as defined in 40 U.S.C. 8702(2), the District of Columbia; Montgomery and Prince Georges Counties in Maryland; Arlington Fairfax, Loudon, and Prince William Counties in Virginia; and all cities in Maryland or Virginia in the geographic area bounded by the outer boundaries of the combined area of the counties listed.

*Non-Federal Agency* for purposes of the National Environmental Policy Act and the regulations in this part means those applicants outside the definition of Federal Agency that prepare plans for or undertake projects on land within the National Capital Region subject to NCPC's jurisdiction. Non-Federal Agencies include, without limitation, the Smithsonian Institution, the John F. Kennedy Center for the Performing Arts, the National Gallery of Art, the United States Institute of Peace, the Government of the District of Columbia, private parties undertaking development on Federal land, and the Maryland National Capital Parks and Planning Commission. In most instances, the Non-Federal Agency has legal jurisdiction over the project and special expertise relative to the project's components.

*Notice of Availability* or *NOA* means a public notice or other means of public communication that announces the availability of an EA or an EIS for public review.

*Notice of Intent* or *NOI* means, as defined in 40 CFR 1508.22, a notice published in the **Federal Register** that an EIS will be prepared and considered. The notice shall briefly describe the proposed action and possible alternatives; describe the agency's proposed Public Scoping process including whether, when, and where any Public Scoping meeting will be held; and state the name and address of a person within the agency who can answer questions about the proposed action and the EIS. For purposes of NCPC implementation of NEPA, NCPC may determine, at its sole discretion, to publish an NOI that an EA will be prepared and considered.

*Purpose and need* as described in 40 CFR 1502.13 means the underlying purpose and need for agency action to

which the agency is responding in proposing the alternatives including the proposed action.

*Programmatic NEPA Review* means a broad or high level NEPA review that assesses the environmental impacts of proposed policies, plans or programs, or projects for which subsequent project or site-specific NEPA analysis will be conducted. A Programmatic NEPA Review utilizes a tiering approach.

*Record of Decision* or *ROD* means a concise public record of an agency's decision in cases requiring an EIS that is prepared in accordance with 40 CFR 1505.2.

*Scope* means, as defined in 40 U.S.C. 1508.25, the range of actions (connected, cumulative and similar); alternatives (no action, other reasonable courses of action; and Mitigation measures not included in the proposed action); and impacts (direct, indirect and cumulative) considered in an EIS or an EA. The process of defining and determining the scope of issues to be addressed in an EIS or EA with public involvement shall be referred to as *Public Scoping*. Internal scoping activities shall be referred to by the word scoping without capitalization.

*Submission Guidelines* means the formally-adopted document which describes the application process and application requirements for projects requiring review by the Commission.

*Tiering* means, as defined in 40 CFR 1508.28, an approach where Federal Agency applicants, NCPC on behalf of Non-Federal Agency applicants, or NCPC for its own projects initially consider the broad, general impacts of a proposed program, plan, policy, or large scale project—or at the early stage of a phased proposal—and then conduct subsequent narrower, decision focused reviews.

## **Subpart B—Lead and Cooperating Agencies**

### **§ 601.4 Designation of Lead Agency.**

(a) A Federal Agency applicant shall serve as the Lead Agency and prepare an EA or an EIS for:

- (1) An application that requires Commission approval; and
- (2) An application for action on a master plan that includes future projects that require Commission approval; provided that:

(i) The applicant intends to submit individual projects covered by the master plan to the Commission within five years of the date of Commission action on the master plan; and

(ii) The applicant intends to use the master plan EA or EIS to satisfy its

NEPA obligation for specific projects referenced in the master plan.

(b) NCPC shall serve as Lead Agency and prepare an EA or an EIS for:

- (1) An application submitted by a Non-Federal Agency that requires Commission approval;
- (2) An application submitted by a Non-Federal Agency for action on a master plan that includes future projects that require Commission approval; provided that:

(i) The Non-Federal Agency applicant intends to submit individual projects covered by the master plan to the Commission within five years of the date of Commission action on the master plan; and

(ii) The Non-Federal Agency applicant intends to use the master plan EA or EIS to satisfy its NEPA obligation for a specific project referenced in the master plan; and

(3) An application for approval of land acquisitions undertaken pursuant to 40 U.S.C. 8731–8732.

### **§ 601.5 Lead Agency obligations.**

(a) The obligations of a Federal Agency applicant designated as the Lead Agency in accordance with § 601.4(a) shall include, without limitation, the following:

(1) Act as Lead Agency as defined in 40 CFR 1501.5 for the NEPA process.

(2) Integrate other environmental reviews and other applicable regulatory requirements to include, without limitation, Section 106 of the NHPA.

(3) Allow NCPC, to participate as a Co-lead or Cooperating Agency, as appropriate, and consult with Commission staff as early as possible in the planning process to obtain guidance with respect to the goals, objectives, standards, purpose, need, and alternatives for the NEPA analysis.

(4) Invite affected Federal, state, regional and local agencies to participate as a Cooperating Agency in the NEPA process.

(5) Consult with the affected agencies as early as possible in the planning process to obtain guidance on the goals, objectives, standards, purpose, need, and alternatives for the NEPA analysis.

(6) Work with Cooperating Agencies and stakeholders in the following manner:

(i) Keep them informed on the project schedule and substantive matters; and

(ii) Allow them an opportunity to review and comment within reasonable time frames on, without limitation, Public Scoping notices; technical reports; public materials (including responses to comments received from the public); potential Mitigation measures; the draft EA or EIS; and the draft FONSI or ROD.

(7) Prepare the appropriate Environmental Document consistent with the applicant's NEPA regulations, the requirements of this part, and CEQ regulations. If the Lead Agency applies a CATEX and NCPC as Cooperating Agency does not have a corresponding CATEX that it can apply, the Lead Agency shall prepare an EA to satisfy NCPC's NEPA requirement.

(8) Determine in its Environmental Document whether an action will have an adverse environmental impact or would limit the choice of reasonable alternatives under 40 CFR 1505.1(e) and take appropriate action to ensure that the objectives and procedures of NEPA are achieved.

(9) Prepare, make available for public review, and issue a FONSI or ROD.

(10) Ensure that the draft and final EIS comply with the requirements of 40 CFR 1506.5(c) and include a disclosure statement executed by any contractor (or subcontractor) under contract to prepare the EIS document and that the disclosure appears as an appendix to the EIS.

(11) Compile, maintain, and produce the Administrative Record.

(12) Provide periodic reports on implementation of Mitigation measures to NCPC and other Cooperating Parties consistent with a schedule established in the Environmental Document. All such reports shall be posted on NCPC's Web site.

(13) For an application that has yet to obtain final Commission approval, re-evaluate and update Environmental Documents that are five or more years old as measured from the time of their adoption when either or both of the following criteria apply:

(i) There are substantial changes to the proposed action that are relevant to environmental concerns.

(ii) There are significant new circumstances or information that are relevant to environmental concerns and have a bearing on the proposed action or its impacts.

(14) Consult with NCPC on the outcome of the re-evaluation of its Environmental Document; provided that if NCPC disagrees with the Lead Agency's conclusion on the need to update its Environmental Document, NCPC may, at its sole discretion, either prepare its own Environmental Document or decline to consider the application.

(b) When NCPC serves as Lead Agency in accordance with § 601.4(b), in addition to the obligations listed in paragraphs (a)(1) through (14) of this section, NCPC shall:

(1) Require Non-Federal Agency applicants other than the District of

Columbia and the Maryland National Capital Parks and Planning Commission to enter into a MOA with NCPC. In the MOA, and in subsequent implementation thereof, the Non-Federal Agency shall commit to providing all necessary assistance to facilitate and ensure NCPC's compliance with its NEPA obligation.

(2) The MOA may be prepared as a programmatic MOA that addresses a uniform approach for the treatment of all applications from a particular Non-Federal Agency applicant or address a specific Non-Federal Agency application. The request to enter into a project specific MOA shall be made after a determination is made as to the inability to utilize a CATEX.

(3) A MOA with a Non-Federal Agency shall specify, without limitation, roles and responsibilities; project information necessary to prepare the proper Environmental Document; project timelines and submission schedules; the submission of periodic reports on implementation of Mitigation measures, principal contacts and contact information; and a mechanism for resolving disputes.

(4) Upon adoption of the MOA, NCPC shall publish the MOA in the **Federal Register** and post it on NCPC's Web site.

#### **§ 601.6 Resolving disputes over Lead Agency status.**

(a) In the event of a dispute with a Federal Agency applicant over Co-Lead Agency status, the parties shall use their best efforts to cooperatively resolve disputes at the working levels of their respective agencies and, if necessary, by elevating such disputes within their respective agencies.

(b) If internal resolution at higher agency levels proves unsuccessful, at NCPC's sole discretion, one of the following actions shall be pursued: The parties shall request CEQ's determination on which agency shall serve as Lead, or NCPC shall prepare its own Environmental Document, or NCPC shall decline to take action on the underlying application.

(c) Disputes other than those relating to the designation of Lead Agency status or Cooperating Agency status as described in § 601.7(b), shall be governed by the requirements of subpart G of this part.

#### **§ 601.7 Cooperating Agencies.**

(a) When a Federal Agency applicant serves as the Lead Agency, NCPC shall act as a Cooperating Agency. As a Cooperating Agency, NCPC shall, without limitation, undertake the following:

(1) Act as a Cooperating Agency as described in 40 CFR 1501.6.

(2) Assist in the preparation of and sign a MOA with terms agreeable to NCPC if requested by the Lead Agency. At the Lead Agency's discretion, the MOA may be prepared as a programmatic MOA that addresses a uniform approach for the treatment of all applications where NCPC serves as a Cooperating Agency or address a specific application. The request to enter into a project specific MOA shall be made after a determination is made by the Lead Agency on the inability to utilize a CATEX.

(3) Participate in the NEPA process by providing comprehensive, timely reviews of and comments on key NEPA materials including, without limitation, Public Scoping notices; technical reports; documents (including responses to comments received from the public); the draft and final EA or EIS; and the Draft FONSI or ROD.

(4) Supply available data, assessments, and other information that may be helpful in the preparation of the Environmental Document or the Administrative Record in a timely manner.

(5) Make an independent evaluation of the Federal Agency applicant's Environmental Document and take responsibility for the scope and contents of the EIS or EA when it is sufficient as required by 40 CFR 1506.5.

(6) Prepare and, following Commission final approval of an application, sign a FONSI or ROD. Alternatively, if NCPC concurs with the contents of a Federal Agency's FONSI or ROD, NCPC may co-sign the Federal Agency's document following the Commission's final approval of an application if co-signing is consistent with the Federal Agency's NEPA regulations.

(7) Provide documentation requested and needed by the Lead Agency for the Administrative Record.

(b) In the event a Federal Agency applicant fails to allow NCPC to participate in a meaningful manner as a Cooperating Agency, the parties shall agree to use their best efforts to cooperatively resolve the issue at the working levels of their respective agencies, and, if necessary, by elevating the issue within their respective agencies. If internal resolution at higher agency levels is unsuccessful, the parties may agree to seek mediation. Alternatively, NCPC may prepare its own Environmental Document either as a stand-alone document or a supplement to the Federal Agency applicant's Environmental Document or

take no action on the underlying application.

### Subpart C—NEPA Submission Schedules

#### § 601.8 NEPA submission schedule for applications governed by the National Capital Planning Act.

(a) *NEPA compliance requirements.* Federal Agency applicants, and NCPC for non-Federal Agency applications, shall comply with NEPA for the following types of projects:

- (1) Projects requiring Commission approval; and
- (2) Master plans requiring Commission action with future projects requiring subsequent Commission approval; provided that:

- (i) The applicant intends to submit individual projects depicted in the master plan to the Commission within five years of the date of Commission action on the master plan; and

- (ii) The applicant intends to use the master plan EA or EIS to satisfy its NEPA obligation for specific projects referenced in the master plan.

(b) *Timing of NEPA compliance.* When Federal Agency and Non-Federal Agency applicants submit projects of the type described in paragraph (a) of this section, the Federal Agency applicant or NCPC for a Non-Federal agency application shall submit the requisite Environmental Documentation timed to coincide with the Commission's review stages as set forth in paragraphs (c) through (f) of this section.

(c) *Concept review.* The NEPA Public Scoping process shall have been initiated by the Federal Agency applicant or NCPC for a Non-Federal Agency application before the applicant submits an application for concept review. Alternatively, if the Federal Agency applicant or NCPC is contemplating use of a CATEX, the initiation of the Public Scoping process may be deferred until the final decision on use of a CATEX is made. Any NEPA information available at the time of concept review shall be submitted by the Federal Agency applicant or NCPC for a Non-Federal Agency application to facilitate effective Commission concept review.

(d) *Preliminary review.* A Draft Environmental Document shall be issued or published before the applicant submits an application for preliminary review. The NEPA information shall be provided to the Commission to facilitate the Commission's preliminary review and the provision of meaningful Commission comments and direction.

(e) *Final review.* (1) At the time a Non-Federal Agency submits an application

for final approval, the determination (FONSI or ROD) resulting from the Environmental Document shall be submitted by NCPC in a form consistent with the rules of this part. At the time a Federal Agency applicant submits an application to the Commission for final review, the Federal Agency applicant shall submit a determination (FONSI or ROD) in a form consistent with the applicant's NEPA regulations. As a Cooperating Agency, NCPC may co-sign the Federal Agency's FONSI or ROD following final Commission approval if co-signing is consistent with the Federal Agency's NEPA regulations.

Alternatively, NCPC may prepare and sign its own independent document in accordance with the requirements of §§ 601.16(a) or 601.25(a) through (c).

(2) If at the time of final review, the Commission denies a Federal Agency applicant's project and requests changes thereto, the Federal Agency applicant shall proceed in a manner consistent with applicable law. The Federal Agency applicant may pursue, among others, the option of revising the project in a manner responsive to the Commission's comments. If the Federal Agency pursues this option, it shall review and consider the need for possible changes to its Environmental Document and its FONSI or ROD. Upon resubmission of a revised application for final review, the applicant shall submit a revised Environmental Document and a revised FONSI or ROD if in its judgement revised documents are necessary. If NCPC and the applicant disagree regarding the need for a revised Environmental Document and FONSI or ROD, the parties shall work together to resolve their differences. The final decision regarding the need for a revised Environmental Document and a revised FONSI or ROD shall be made by the Commission's Executive Committee.

(f) *Deviations from the submission schedule for Emergency Circumstances.*

(1) This paragraph (f) applies when the following three conditions exist: NCPC is the Lead Agency; Emergency Circumstances exist; and an Extraordinary Circumstance as set forth in § 601.11 is present that precludes use of a CATEX.

(2) When the three conditions described above exist, NCPC shall undertake one of the following actions:

- (i) When Emergency Circumstances render it necessary to take an action that requires an EA, the Executive Director shall prepare a concise, focused EA consistent with CEQ guidance. At the earliest opportunity, the Commission shall grant approval for the EA.

- (ii) Where Emergency Circumstances make it necessary for the Commission to

take an action with significant environmental impact without observing the provisions of these regulations, NCPC shall consult with CEQ about alternative arrangements. NCPC will limit such arrangements to actions necessary to control the immediate impacts of the emergency. Other actions remain subject to NEPA review.

#### § 601.9 NEPA submission schedule for applications governed by the Commemorative Works Act.

(a) *Timing of NEPA compliance.* When, pursuant to the Commemorative Works Act, the National Park Service (NPS) or the General Services Administration (GSA) submits an application to the Commission for approval of a site and design for a commemorative work, NPS or GSA shall be required to comply with NEPA and submit the NEPA documentation timed to coincide with the Commission's review stages as set forth in paragraphs (b) through (e) of this section.

(b) *Concept site review.* (1) The NEPA Scoping Process shall have been initiated by NPS or GSA before the appropriate agency submits an application to the Commission for concept site review. Available NEPA documentation for all concept sites shall be included in the application to facilitate effective Commission concept review.

(2) The Commission shall provide comments to NPS or GSA on the multiple sites to assist the applicant in selecting a preferred site.

(c) *Concept design review for preferred sites.* (1) The NEPA Public Scoping Process shall have been initiated before NPS or GSA submits an application to the Commission for concept design review. Available NEPA documentation shall be included in the application to facilitate effective Commission concept review.

(2) The Commission shall provide comments to NPS or GSA on the preferred site(s) and the concept designs for each site to facilitate selection of a preferred site and refinement of the memorial design for that site. The Commission may establish guidelines for the applicant to follow in preparing its preliminary and final commemorative work design to avoid, minimize or mitigate environmental impacts including adverse effects on historic properties. If the Commission imposes guidelines to avoid, minimize or mitigate adverse impacts, the applicant shall address the guidelines in its Environmental Document.

(d) *Preliminary site and design review.* (1) NPS or GSA shall have issued or

published its Draft Environmental Document for the site selection process and the memorial design and shall have initiated the requisite public comment period before the applicant submits an application for preliminary site and design approval. The NEPA information shall be provided to the Commission to facilitate the Commission's preliminary review and the provision of meaningful Commission comments and directions.

(2) The Commission shall take an action on the preliminary site and design and provide comments to the applicant on the preliminary design to assist the applicant's preparation of a final design.

(e) *Final site and design review.* (1) At the time NPS or GSA submits an application to the Commission for final site and design review, the determination (FONSI or ROD) resulting from the Environmental Document shall be submitted by the applicant in a form consistent with its NEPA regulations. As a Cooperating Agency, NCPD may co-sign the applicant's FONSI or ROD following final Commission approval if co-signing is consistent with the applicant's NEPA regulations. Alternatively, NCPD may prepare and sign its own independent document in accordance with the requirements of § 601.16(a) or § 601.25(a) through (c).

(2) If at the time of final review, the Commission denies the NPS or GSA project and requests changes thereto, the applicant shall proceed in a manner consistent with applicable law. The Federal Agency applicant may pursue, among others, the option of revising the project in a manner responsive to the Commission's comments. If the Federal Agency pursues this option, it shall review and consider the need for possible changes to its Environmental Document and its FONSI or ROD. Upon resubmission of a revised application for final review, the applicant shall submit a revised Environmental Document and a revised FONSI or ROD if in its judgement revised documents are necessary. If NCPD and the applicant disagree regarding the need for a revised Environmental Document and FONSI or ROD, the parties shall work together to resolve their differences. The final decision regarding the need for a revised Environmental Document and a revised FONSI or ROD shall be made by the Commission's Executive Committee.

#### Subpart D—Initiating the NEPA Process

##### § 601.10 Characteristics of Commission actions eligible for a Categorical Exclusion.

(a) A Categorical Exclusion is a type of action that does not individually or

cumulatively have a significant effect on the human environment and which has been found to have no such effect by NCPD.

(b) Actions that generally qualify for application of a Categorical Exclusion and do not require either an EA or an EIS exhibit the following characteristics:

- (1) Minimal or no effect on the human environment;
- (2) No significant change to existing environmental conditions;
- (3) No significant cumulative environmental impacts; and
- (4) Similarity to actions previously assessed in an EA concluding in a FONSI and monitored to confirm the FONSI.

##### § 601.11 Extraordinary Circumstances.

(a) Before applying a CATEX listed in § 601.12, the Executive Director shall determine if a project or plan requires additional environmental review or analysis due to the presence of Extraordinary Circumstances. If any of the Extraordinary Circumstances listed in paragraphs (b)(1) through (11) of this section are present, the Executive Director shall not apply a CATEX and ensure that the proper Environmental Document (EA or EIS) shall be prepared and made available to the Commission before the Commission takes action on the matter.

(b) Extraordinary Circumstances that negate the application of a CATEX include:

- (1) A reasonable likelihood of significant impact on public health or safety.
- (2) A reasonable likelihood of significant environmental impacts on sensitive resources unless the impacts have been or will be avoided, minimized, or mitigated to non-significant levels through another process to include, without limitation, Section 106 of the NHPA. Environmentally sensitive resources include without limitation:
  - (i) Proposed federally listed, threatened or endangered species or their designated critical habitats.
  - (ii) Properties listed or eligible for listing on the National Register of Historic Places.
  - (iii) Areas having special designation or recognition based on Federal law or an Executive Order, to include without limitation, National Historic Landmarks, floodplains, wetlands, and National Parks.
  - (iv) Cultural, scientific or historic resources.
- (3) A reasonable likelihood of effects on the environment that are risky, highly uncertain, or unique.
- (4) A reasonable likelihood of violating an Executive Order, or Federal,

state or local law or requirements imposed for the protection of the environment.

(5) A reasonable likelihood of causing a significant increase in surface transportation congestion, disruption of mass transit, and interference with pedestrian and bicycle movements.

(6) A reasonable likelihood of significantly degrading air quality or violating air quality control standards under the Clean Air Act (42 U.S.C. 7401–7671q).

(7) A reasonable likelihood of significantly impacting water quality, public water supply systems, or state or local water quality control standards under the Clean Water Act (33 U.S.C. 1251 *et seq.*) and the Safe Drinking Act (42 U.S.C. 300f).

(8) A reasonable likelihood of a disproportionately high and adverse effect on low income and minority populations.

(9) A reasonable likelihood of degrading existing unsatisfactory environmental conditions.

(10) A reasonable likelihood of establishing a precedent for future action or making a decision in principle about future actions with potentially significant environmental effects.

(11) Any other circumstance that makes the action sufficiently unique in its potential impacts on the human environment that further environmental analysis and review is appropriate.

(c) The Executive Director shall include in his/her EDR, or the documentation of a delegated action, his/her decision to apply a Categorical Exclusion including consideration of possible Extraordinary Circumstances or not apply a Categorical Exclusion because of Extraordinary Circumstances.

##### § 601.12 National Capital Planning Commission Categorical Exclusions.

(a) Commission actions that may be categorically excluded and normally do not require either an EA or an EIS are listed in paragraphs (a)(1) through (13) of this section. An action not specifically included in the list is not eligible for a Categorical Exclusion even if it appears to meet the general criteria listed in § 601.10(b).

(1) Approval of the installation or restoration of onsite primary or secondary electrical distribution systems including minor solar panel arrays.

(2) Approval of the installation or restoration of minor site elements, such as but not limited to identification signs, sidewalks, patios, fences, curbs, retaining walls, landscaping, and trail or stream improvements. Additional features include water distribution lines

and sewer lines which involve work that is essentially replacement in kind.

(3) Approval of the installation or restoration of minor building elements, such as, but not limited to windows, doors, roofs, building signs, and rooftop equipment and green roofs.

(4) Adoption of a Federal Element of the Comprehensive Plan or amendment thereto or broad based policy or feasibility plans prepared and adopted by the Commission in response to the Comprehensive Plan.

(5) Approval of the installation of communication antennae on Federal buildings and co-location of communication antennae on Federal property consistent with GSA Bulletin FMR D-242, Placement of Commercial Antennas on Federal Property.

(6) Approval of Federal and District government agency proposals for new construction, building expansion, or improvements to existing facilities, when all of the following apply:

(i) The new structure and proposed use are in compliance with local planning and zoning and any applicable District of Columbia, state, or Federal requirements.

(ii) The site and the scale of construction are consistent with those of existing adjacent or nearby buildings.

(iii) The proposed use will not substantially increase the number of motor vehicles in the vicinity of the facility.

(iv) There is little to no evidence of unresolved resource conflicts or community controversy related to environmental concerns or other environmental issues.

(7) Approval of transfers of jurisdiction pursuant to 40 U.S.C. 8124 that are not anticipated to result in changes in land-use and that have no potential for environmental impact.

(8) Approval of a minor modification to a General Development Plan applicable to lands acquired pursuant to the Capper-Cramton Act, 46 Stat. 482 (1930), as amended, when non-significant environmental impacts are anticipated.

(9) Reorganization of NCPC.

(10) Personnel actions, including, but not limited to, investigations; performance reviews; award of personal service contracts, promotions and awards; reductions in force, reassignments and relocations; and employee supervision and training.

(11) Legal activities including, but not limited to, legal advice and opinions; litigation or other methods of dispute resolution; and procurement of outside legal services.

(12) Procurement of goods and services, transactions, and other types of

activities related to the routine and continuing administration, management, maintenance and operations of the Commission or its facilities.

(13) Adoption and issuance of rules, directives, official policies, guidelines, and publications or recommendations of an educational, financial, informational, legal, technical or procedural nature.

(b) The Executive Director shall include in his/her EDR, or the documentation of a delegated action, his/her decision to apply a Categorical Exclusion and the rationale for this decision.

#### **Subpart E—Environmental Assessments**

##### **§ 601.13 Characteristics of Commission actions eligible for an Environmental Assessment.**

(a) An EA is a concise document with sufficient information and analysis to enable the Executive Director to determine whether to issue a FONSI or prepare an EIS.

(b) Commission actions that generally require an EA exhibit the following characteristics:

(1) Minor but likely insignificant degradation of environmental quality;

(2) Minor but likely insignificant cumulative impact on environmental quality; and

(3) Minor but likely insignificant impact on protected resources.

##### **§ 601.14 Commission actions generally eligible for an Environmental Assessment.**

Commission actions that typically require preparation of an EA include without limitation:

(a) Approval of final plans for Federal public buildings in the District of Columbia, and the provisions for open space in and around the same, pursuant to 40 U.S.C. 8722(d) and D.C. Code 2-1004(c).

(b) Approval of final plans for District of Columbia public buildings and the open space around them within the Central Area pursuant to 40 U.S.C. 8722(e) and D.C. Code 2-1004(d).

(c) Recommendations to a Federal or District of Columbia agency on any master plan or master plan modification submitted to the Commission that include proposed future projects that require Commission approval pursuant to 40 U.S.C. 8722(d)-(e) and D.C. Code 2-1004(c)-(d) within a five-year timeframe.

(d) Approval of a final site and design for a commemorative work authorized under the Commemorative Works Act pursuant to 40 U.S.C. 8905.

(e) Approval of transfers of jurisdiction over properties within the

District of Columbia owned by the United States or the District among or between Federal and District authorities, pursuant to 40 U.S.C. 8124, unless such transfers met the criteria of § 601.12(a)(7).

##### **§ 601.15 Process for preparing an Environmental Assessment.**

An EA prepared by NCPC as the Lead Agency for a project requiring Commission approval shall comply with the following requirements:

(a) The EA shall include, without limitation, a brief discussion of the proposed action; the purpose and need for the proposed action; the environmental impacts of the proposed action; the environmental impacts of the alternatives considered; Mitigation measures, if necessary; and a list of agencies and persons consulted in preparation of the assessment.

(b) The NCPC shall involve to the extent practicable applicants; Federal and District of Columbia agencies; the public; and stakeholders in the preparation of an EA.

(c) The NCPC, at the sole discretion of the Executive Director, may undertake Public Scoping for an action requiring an EA. The Public Scoping shall generally commence after issuance of a public notice in a media source with widespread circulation and the NCPC Web site of NCPC's intent to prepare an EA. The notice shall include the date, time and location of the Public Scoping meeting.

(d) The NCPC may solicit public review and comment of a Draft EA. The public comment period generally shall be thirty (30) calendar days. The public comment period shall begin when the Executive Director announces the availability of the Draft EA on the NCPC Web site ([www.ncpc.gov](http://www.ncpc.gov)). The NCPC, at its sole discretion, may decline to circulate a draft EA for non-controversial projects.

##### **§ 601.16 Finding of No Significant Impact.**

(a) If NCPC is the Lead Agency and the final EA supports a FONSI, NCPC shall prepare and execute a FONSI. The FONSI shall be prepared following closure of the discretionary public comment period on a Draft EA, or if no public comment period is deemed necessary, at the conclusion of the preparation of an EA. The FONSI shall briefly state the reasons why the proposed action will not have a significant effect on the environment and include the EA or a summary thereof, any Mitigation commitments, and a schedule for implementing the Mitigation commitments. The FONSI shall be signed following the

Commission final approval of the applicant's project.

(b) If NCPC is not the Lead Agency, it shall evaluate the adequacy of the Lead Agency's FONSI. If NCPC determines the FONSI to be adequate, NCPC shall proceed as follows. If consistent with the Federal Agency's NEPA regulations, NCPC may co-sign the Lead Agency's FONSI following the Commission final approval of the application. Alternatively, NCPC may prepare and execute its own FONSI consistent with the requirements of paragraph (a) of this section and sign the FONSI following the Commission's final approval of the project.

(c) In certain limited circumstances described in 40 CFR 1501.4(e)(2)(i) and (ii), a FONSI prepared by NCPC shall be available for public review for thirty (30) days before NCPC makes it final determination. NCPC shall also publish all FONSI on its Web site seven (7) calendar days before the Commission takes action on the underlying application.

(d) If the Commission determines a Lead Agency's EA does not support a FONSI, either the Lead Agency shall prepare an EIS, or the Commission shall not approve or consider further the underlying application.

#### **§ 601.17 Supplemental Environmental Assessments.**

(a) The NCPC shall prepare a supplemental EA if five or more years have elapsed since adoption of the EA and:

(1) There are substantial changes to the proposed action that are relevant to environmental concerns; or

(2) There are significant new circumstances or information that are relevant to environmental concerns and have a bearing on the proposed action or its impacts.

(b) The NCPC may supplement a Draft or Final EA at any time to further the purposes of NEPA.

(c) The NCPC shall prepare, circulate, and file a supplement to a Draft or Final EA, and adopt a FONSI in accordance with the requirements of §§ 601.15 and 601.16. If NCPC is not the Lead Agency, it shall proceed as outlined in § 601.16(b) and (c).

#### **Subpart F—Environmental Impact Statements**

##### **§ 601.18 Requirement for and timing of an Environmental Impact Statement.**

Prior to the Commission's approval of a major Federal action significantly affecting the quality of the human environment, the Executive Director shall prepare an EIS for a Non-Federal Agency application.

##### **§ 601.19 Context, intensity, and significance of impacts.**

(a) As required by 40 CFR 1508.27(a) and (b), NCPC's determination of whether an EIS is required and whether impacts are significant shall be made with consideration to the context and intensity of the impacts associated with a proposed action.

(b) The significance of an action is determined in the context of its effects on society as a whole, the National Capital Region and its Environs, the particular interests affected, and the specific locality or area within which the proposed action is located. The context will vary from project to project and will be based on the type, attributes, and characteristics of a particular proposal.

(c) The significance of an action is also determined based on the severity of impacts imposed by the proposal. Severity shall be determined based on an evaluation of a proposal in the manner outlined in 40 CFR 1508.27(b)(1) through (10). The evaluation shall also be informed by the relevant policies of "The Comprehensive Plan for the National Capital: Federal Elements" and other applicable Commission plans and programs. Proposed actions that conflict with or delay achievement of the goals and objectives of Commission plans and programs are generally more likely to be found to have significant impacts than proposals that are consistent with Commission plans and programs.

(d) Proposed actions shall also be deemed significant and require an EIS if they exhibit at least one of the following characteristics:

(1) The proposed action results in a substantial change to the Monumental Core.

(2) The proposed action causes substantial alteration to the important historical, cultural, and natural features of the National Capital and its Environs.

(3) The proposed action is likely to be controversial because of its impacts on the human environment.

##### **§ 601.20 Streamlining Environmental Impact Statements.**

The NCPC as Lead Agency shall use all available techniques to minimize the length of an EIS. Such techniques include, without limitation, drafting an EIS in clear, concise language; preparing an analytic vs. encyclopedic EIS; reducing emphasis on background information; using the scoping process to emphasize significant issues and de-emphasize non-significant issues; incorporating relevant information by reference; using a programmatic EIS and tiering to eliminate duplication in

subsequent EISs; and following the format guidelines of § 601.22.

##### **§ 601.21 Programmatic Environmental Impact Statements and tiering.**

(a) The NCPC shall prepare a programmatic Environmental Document (Programmatic EA or PEA or Programmatic EIS or PEIS) to assess the impacts of proposed projects and plans when there is uncertainty regarding the timing, location and environmental impacts of subsequent implementing actions. At the time NCPC undertakes a site or project specific action within the parameters of the PEA or PEIS, NCPC shall tier its Environmental Document by summarizing information in the PEIS or PEA, as applicable, and concentrate on the issues applicable to the specific action.

(b) A PEIS or PEA prepared by NCPC shall be governed by the CEQ regulations and the rules of this part.

##### **§ 601.22 Contents of an Environmental Impact Statement.**

(a) When NCPC serves as Lead Agency for an EIS, the following information shall be included in the EIS:

(1) A cover sheet. The cover sheet shall be one-page and include a list of responsible and Cooperating Agencies; the title of the proposed action that is the subject of the EIS; the name, address, and telephone number of the NCPC point of contact; the designation as to whether the statement is draft, final, or draft or final supplement; a one paragraph abstract of the EIS; and the date by which comments must be received.

(2) A summary. The summary shall accurately summarize the information presented in the EIS. The summary shall focus on the main conclusions, areas of controversy, and the issues to be resolved.

(3) A table of contents. The table of contents shall allow a reader to quickly locate subject matter in the EIS—either by topic area and/or alternatives analyzed.

(4) The purpose and need. A statement of the purpose of and need for the action briefly stating the underlying purpose and need to which the agency is responding.

(5) The identification of alternatives including the proposed action. This section shall provide a brief description and supporting documentation for all alternatives including the proposed action; the no action alternative; all reasonable alternatives including those not within the jurisdiction of the agency; alternatives considered but eliminated and the reason for their

elimination; the agency's preferred alternative, if one exists; the environmentally preferred alternative; and Mitigation measures not already included in the proposed action.

(6) The identification of the affected environment. This section shall provide a succinct description of the environment to be affected by the proposed action and the alternatives considered. This section shall include, if applicable, other activities in the area affected by or related to the proposed action.

(7) The identification of environmental consequences. This section shall focus on the environmental impacts of the alternatives including the proposed action, any adverse environmental effects which cannot be avoided should the proposal be implemented, the relationship between short-term uses of the environment and the maintenance and enhancement of long-term productivity, and any irreversible commitments of resources which would be involved if the proposal is implemented. The impacts shall be discussed in terms of direct, indirect and cumulative effects and their significance, as well as any appropriate means to mitigate adverse impacts. The discussion shall also include issues and impact topics considered but dismissed to reveal non-impacted resources. Resource areas and issues requiring consideration shall include those identified in the scoping process, and, without limitation, the following:

(i) Possible conflicts between the proposed action and the land use plans, policies, or controls (local, state, or Indian tribe) for the area concerned.

(ii) Natural and biological resources including topography, hydrology, soils, flora, fauna, floodplains, wetlands, and endangered species.

(iii) Air quality.

(iv) Noise.

(v) Water resources including wastewater treatment and storm water management.

(vi) Utilities including energy requirements and conservation.

(vii) Solid waste and hazardous waste generation/removal.

(viii) Community facilities.

(ix) Housing.

(x) Transportation network.

(xi) Socio-cultural and economic environments.

(xii) Environmental Justice and the requirements of Executive Order 12898 (Federal Actions to Address Environmental Justice in Minority Populations).

(xiii) Urban quality and design of the built environment including visual resources and aesthetics.

(xiv) Historic and cultural resources to include documentation of the results of the Section 106 Consultation process.

(xv) Public health and safety.

(8) A list of preparers. This list shall include all pertinent organizations, agencies, individuals, and government representatives primarily responsible for the preparation of the EIS and their qualifications.

(9) An index. The index shall be structured to reasonably assist the reader of the Draft or Final EIS in identifying and locating major topic areas or elements of the EIS information. The level of detail of the index shall provide sufficient focus on areas of interest to any reader not just the most important topics.

(10) An appendix. The appendix shall consist of material prepared in connection with an EIS (as distinct from material which is incorporated by reference) and material which substantiates any analysis fundamental to the EIS. The material in the appendix shall be analytical and relevant to the decision to be made. The appendix shall be posted on NCPC's Web site.

(b) [Reserved]

#### **§ 601.23 The Environmental Impact Statement process.**

(a) The NCPC shall involve the applicant, Federal and District of Columbia agencies, members of the public and stakeholders in the preparation of an EIS. Public participation shall be required as part of the Public Scoping process and review of the Draft EIS. The NCPC shall also consult with agencies having jurisdiction by law or expertise. Agencies with "jurisdiction by law" are those with ultimate jurisdiction over a project and whose assistance may be required on certain issues and those with other kinds of regulatory or advisory authority with respect to the action or its effects on particular environmental resources.

(b) To determine the scope of an EIS through a Public Scoping process, NCPC shall proceed as follows:

(1) Disseminate a NOI in accordance with 40 CFR 1501.7 and 1506.6.

(2) Publish a NOI in the **Federal Register** and on NCPC's Web site which shall begin the Public Scoping process.

(3) Include the date, time, and location of a Public Scoping meeting in the NOI. The public meeting shall be announced at least thirty (30) calendar days in advance of its scheduled date.

(4) Hold Public Scoping meeting(s) in facilities that are accessible to the

disabled; include translators if requested in advance; include signers or interpreters for the hearing impaired if requested in advance; and allow special arrangements for consultation with affected Indian tribes or other Native American groups who have environmental concerns that cannot be shared in a public forum.

(5) Consider all comments received during the announced comment period regarding the analysis of alternatives, the affected environment, and identification of potential impacts.

(6) Apply the provisions of this section to a Supplemental EIS if the Executive Director of NCPC, in his/her sole discretion, determines a Public Scoping process is required for a Supplemental EIS.

(c) A Draft EIS shall be available to the public for their review and comment, for a period of generally forty-five (45) calendar days. The public comment period shall begin when NCPC shares a copy of the Draft EIS with EPA in anticipation of EPA's publication of an NOA. The NCPC shall hold at least one public meeting during the public comment period on a Draft EIS. The public meeting shall be announced at least thirty (30) calendar days in advance of its scheduled occurrence. The announcement shall identify the subject of the Draft EIS and include the public meeting date, time, and location.

#### **§ 601.24 Final Environmental Impact Statement.**

(a) The NCPC shall prepare a Final EIS following the public comment period and the public meeting(s) on the Draft EIS. The Final EIS shall respond to oral and written comments received during the Draft EIS public comment period.

(b) The Commission shall take final action on an application following a thirty (30) day Commission-sponsored review period of the Final EIS. The thirty (30) day period shall start when the EPA publishes a NOA for the Final EIS in the **Federal Register**.

#### **§ 601.25 Record of Decision.**

(a) If NCPC is the Lead Agency and decides to recommend approval of a proposed action covered by an EIS, it shall prepare and sign a ROD stating the Commission's decision and any Mitigation measures required by the Commission.

(1) The ROD shall include among others:

(i) A statement of the decision.

(ii) The identification of alternatives considered in reaching a decision specifying the alternatives that were considered to be environmentally

preferable. The ROD shall discuss preferences among alternatives based on relevant factors including economic and technical planning considerations and the Commission's statutory mission. The ROD shall identify those factors balanced to reach a decision and the influence of various factors on the decision.

(iii) A statement as to whether all practicable means to avoid or minimize environmental harm from the alternative selected has been adopted, and if not, why they are not.

(iv) A monitoring and enforcement program that summarizes Mitigation measures.

(v) Date of issuance.

(vi) Signature of the Chairman.

(2) The contents of the draft ROD proposed for Commission adoption shall be summarized in the EDR and a full version of the draft document shall be included as an Appendix to the EDR. The Draft ROD, independently of the EDR, shall be made available to the public for review fourteen (14) calendar days prior to the Commission's consideration of the proposed action for which the EIS was prepared.

(3) The Commission shall arrive at its decision about the proposed action for which NCPC serves as the Lead Agency and its environmental effects in a public meeting of record as identified by the Commission's monthly agenda.

(b) If NCPC is not the Lead Agency, following the Commission final approval of a project to which a ROD pertains, and consistent with the Federal Agency's NEPA regulations, NCPC may take one of the following actions. It may either co-sign the Lead Agency's ROD following Commission approval of the project if NCPC agrees with its contents and conclusions or it shall prepare, sign, and sign and adopt its own ROD in accordance with the requirements of paragraphs (a)(1) through (3) of this section.

(c) If the Commission determines a Lead Agency's EIS fails to support a ROD, the Lead Agency shall revise its EIS, or, alternatively, the Commission shall not approve or give any further consideration to underlying application.

#### **§ 601.26 Supplemental Environmental Impact Statement.**

(a) The NCPC shall prepare a supplemental EIS if five or more years has elapsed since adoption of the EIS and:

(1) There are substantial changes to the proposed action that are relevant to environmental concerns; or

(2) There are significant new circumstances or information that are relevant to environmental concerns and

have a bearing on the proposed action or its impacts.

(b) The NCPC may supplement a Draft or Final EIS at any time, to further the purposes of NEPA.

(c) The NCPC shall prepare, circulate, and file a supplement to a Draft or Final EIS in accordance with the requirements of §§ 601.22 through 601.24 except that Public Scoping is optional for a supplemental EIS.

(d) The NCPC shall prepare a ROD for a Supplemental EIS. The ROD's contents, the procedure for public review, and the manner in which it shall be adopted shall be as set forth in § 601.25.

#### **§ 601.27 Legislative Environmental Impact Statement.**

(a) Consistent with 40 CFR 1506.8, the Executive Director shall prepare an EIS for draft legislation initiated by NCPC for submission to Congress. The EIS for the proposed legislation shall be included as part of the formal transmittal of NCPC's legislative proposal to Congress.

(b) The requirements of this section shall not apply to legislation Congress directs NCPC to prepare.

#### **Subpart G—Dispute Resolution**

##### **§ 601.28 Dispute resolution.**

Any disputes arising under this part, shall be resolved, unless otherwise otherwise provided by law or regulation by the parties through interagency, good faith negotiations starting at the working levels of each agency, and if necessary, by elevating such disputes within the respective Agencies. If resolution at higher levels is unsuccessful, the parties may participate in mediation.

##### **§ 601.29 [Reserved]**

Dated: September 21, 2017.

**Anne R. Schuyler,**

*General Counsel.*

[FR Doc. 2017-20614 Filed 9-28-17; 8:45 am]

**BILLING CODE P**

## **COMMODITY FUTURES TRADING COMMISSION**

### **17 CFR Part 38**

**RIN 3038-AE64**

#### **Commission Delegated Authority Provisions for Designated Contract Markets' System Safeguards Requirements**

**AGENCY:** Commodity Futures Trading Commission.

**ACTION:** Final rule.

**SUMMARY:** The Commodity Futures Trading Commission ("CFTC" or "Commission") is adopting final rules to establish a new delegation of authority to Commission staff under the Commission's system safeguards rules to notify each designated contract market ("DCM") of its percentage of the total annual trading volume among all DCMs regulated by the Commission for purposes of whether it is a covered DCM under the system safeguards rules.

**DATES:** This rule is effective September 29, 2017.

#### **FOR FURTHER INFORMATION CONTACT:**

Rachel Berdansky, Deputy Director, 202-418-5429 or [rberdansky@cftc.gov](mailto:rberdansky@cftc.gov); David Steinberg, Associate Director, 202-418-5102 or [dsteinberg@cftc.gov](mailto:dsteinberg@cftc.gov); David Taylor, Associate Director, 202-418-5488 or [dtaylor@cftc.gov](mailto:dtaylor@cftc.gov), Division of Market Oversight, Commodity Futures Trading Commission, Three Lafayette Centre, 1151 21st Street NW., Washington, DC 20581.

#### **SUPPLEMENTARY INFORMATION:**

#### **I. Delegation of Authority—Commission Regulation § 38.1051**

Section 38.1051 of the Commission's regulations, 17 CFR 38.1051, governs the system safeguards requirements for DCMs. Pursuant to § 38.1051(n), DCMs are required to provide the Commission with their annual total trading volume by January 31 each calendar year. Section 38.1051(n)(2) also requires the Commission to provide each DCM with their percentage of the combined annual total trading volume among all DCMs regulated by the Commission by February 28 each calendar year. This annual Commission notification informs each DCM whether it is a "covered DCM" as that term is defined in § 38.1051(h)(1). A covered DCM is a DCM whose annual trading volume in a given year is five percent or more of the combined annual trading volume of all DCMs regulated by the Commission. Covered DCMs are required to comply with enhanced requirements with respect to the frequency of cybersecurity testing and the use of independent contractors. The Commission is amending § 38.1051 by adding paragraph (n)(3) to delegate authority to the Director of the Division of Market Oversight and designated staff to notify DCMs of their annual trading volume percentage.

#### **II. Effective Date**

As the revisions to the Commission's regulations in this rulemaking will not cause any party to undertake efforts to comply with the regulations as revised, the Commission has determined to