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CEQ Invites Comments on Potentially Sweeping Changes to NEPA Regulations

The Council on Environmental Quality yesterday issued an [advance notice of proposed rulemaking](#) inviting input on potential changes to the CEQ regulations under the National Environmental Policy Act, the federal law that requires environmental impact assessment for projects involving federal funding or other federal approvals. Revisions to the CEQ regulations would have potentially far-reaching significance because NEPA requirements are largely defined in the regulations themselves, and the regulations have remained essentially unchanged for nearly 40 years. The deadline to submit comments is July 20, 2018. Given the relatively short time allowed for comments, it is likely that CEQ will receive requests to extend the comment period.

In this update, we explain why CEQ is considering updates to its regulations; provide an overview of what's at stake if the regulations are revised; and identify several issues on which interested parties may wish to submit comments.

Why CEQ Is Considering Updates to Its Regulations

The current CEQ regulations were issued in 1980, when NEPA itself was only a decade old and the practice of environmental impact assessment was still emerging. The regulations reflect a world in which environmental documents were published in paper format, public notices were issued in newspapers, and public comments were submitted by attending a meeting or submitting a letter through the mail. Today, with the internet and other technological advances, agencies have a vastly different set of tools for producing documents and engaging the public. The CEQ rulemaking process provides an opportunity to modernize NEPA practices in a way that reflects current technologies and public expectations.

CEQ's announcement also can be viewed as the latest step in a long-running effort to reduce the burden, time and cost involved in environmental reviews under NEPA. Over the past two decades, presidents of both political parties have sought to streamline environmental reviews through various administrative actions, including, most recently, [Executive Order 13807](#) in August 2017. Congress, too, has sought to streamline the environmental review process by enacting a series of laws mandating streamlined procedures for specific types of projects, including the so-called [FAST-41 process](#) enacted in December 2015. By updating its regulations, CEQ also could incorporate or otherwise address recent Executive Orders and laws such as FAST-41.

What's at Stake in This Process

The requirements of NEPA are defined only briefly in the statute: NEPA requires federal agencies to prepare, for all "major Federal actions significantly affecting the quality of the human environment," a "detailed statement" that addresses the environmental impact of the proposed action, alternatives to the proposed action, and other specified topics. The specifics of NEPA compliance—including such fundamental concepts as a Record of Decision, a Finding of No Significant Impact, and a Categorical Exclusion—are found not in the statute itself but in CEQ's NEPA regulations, codified at 40 C.F.R. Parts 1500–1508. Similarly, much of the NEPA caselaw involves interpretation not of NEPA itself but of the CEQ regulations. Because the statute itself includes few specifics, the opportunity to revise the CEQ regulations opens the door to potentially wide-ranging changes in NEPA requirements.

To the extent CEQ's discretion is constrained, it may be constrained less by NEPA itself than by the panoply of other environmental streamlining statutes that have been enacted in recent years, such as FAST-41. While separate from NEPA, those statutes bind federal agencies in their implementation of the NEPA process.

Potential Issues for Comments

CEQ's notice requests comment on 20 questions that together encompass virtually every aspect of the NEPA process. Key themes include:

- **Coordination Among Multiple Agencies.** CEQ invites comments on the integration of multiple federal agency environmental reviews and permitting decisions into a single coordinated process. These questions echo the Trump administration's policy requiring federal agencies to achieve ["One Federal Decision"](#) in the NEPA process for infrastructure projects.
- **Page Lengths and Readability.** CEQ invites comments regarding page lengths for NEPA documents, which have been a frequent focus of concern as NEPA documents have become increasingly lengthy—often far exceeding the lengths recommended in the existing CEQ regulations. CEQ also invites comments regarding ways to improve clarity and readability of NEPA documents.
- **Time Periods.** CEQ invites comments on "time limits for completion" of NEPA documents. While the current regulations do not set or recommend time periods for completing the NEPA process, Executive Order 13807 directs federal agencies to seek completion of the NEPA process within a two-year period for major projects.
- **Public Involvement.** CEQ seeks comments on ways to make public involvement more "inclusive and efficient." While the current regulations allow broad flexibility as to public involvement methods, they do not reflect current technologies, such as hosting web-based meetings or distributing documents electronically.
- **Existing Definitions.** CEQ invites comments on whether to revise existing definitions of key terms such as "major federal action," "significantly," and "effects." These definitions are foundational to many aspects of the NEPA requirements, so changes to the definitions could affect agency decisions on whether NEPA is required at all and, if so, what level of NEPA review is required.
- **New Definitions.** CEQ invites comments on whether to add new definitions, including commonly used terms such as "alternatives" and "purpose and need." Notably, CEQ also invites comments on whether to define the term "trivial violation." The implication, albeit unstated, is that a court could find a "trivial violation" without halting project activities or requiring additional NEPA review. Such a finding would be consistent with caselaw holding that courts should not "flyspeck" a NEPA document.
- **Timing of Agency Action.** CEQ invites comments on requirements regarding the "timing of agency action"—in other words, the extent to which the agency and/or the project sponsor can proceed with aspects of the proposed project prior to NEPA completion. The current regulations state that "no action...shall be taken" prior to NEPA completion if it would (1) "have an adverse environmental impact" or (2) "limit the choice of reasonable alternatives."
- **Conflicts of Interest.** CEQ invites comments on the role of contractors and project applicants in preparing NEPA documents. Existing regulations require contractors to certify that they have no "financial interest in the outcome" of the NEPA analysis and limit the extent to which project sponsors can be involved in preparing NEPA documents.
- **Range of Alternatives.** CEQ has invited comments on requirements concerning the range of alternatives considered in NEPA reviews, as well as the justification for eliminating alternatives without detailed study. The current regulations require detailed analysis of "all reasonable alternatives," and challenges to NEPA documents frequently focus on whether agencies have adequately justified eliminating alternatives.
- **Additional Issues.** CEQ also invites comment on the following:
 - Eliminating or modifying "obsolete provisions" in the regulations;
 - Updating the regulations to reflect new technologies;
 - Clarifying the role of tribal governments in the NEPA process;
 - Better facilitating use of prior federal, state, tribal or local environmental reviews or decisions;
 - Reducing unnecessary burden and delays; and

- Clarifying requirements related to mitigation.

Climate Change. It is also possible that CEQ will seek to address emerging issues in NEPA caselaw, such as the extent to which greenhouse gas emissions and climate change effects should be considered in the NEPA process. The CEQ issued guidance encouraging consideration of GHG emissions and climate change effects in August 2016, but that guidance was rescinded in April 2017 pursuant to Executive Order 13783.

Next Steps

Commenters may address any of the topics raised in the CEQ notice or any other issues related to the CEQ NEPA regulations. Unless the deadline is extended, comments must be submitted by July 20, 2018.

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