Updates
January 13, 2020

White House Proposes Overhaul of NEPA Regulations

Taking the next step in its efforts to streamline the environmental review process for projects under federal jurisdiction, the White House Council on Environmental Quality (CEQ) published proposed regulations on January 10 that would revamp the rules implementing the National Environmental Policy Act. NEPA (43 U.S.C. §§ 4321–4347) applies to a host of projects, programs, and activities that involve federal participation or approval, mandating that federal agencies fully consider the potential environmental consequences of their proposed actions before making a final decision. CEQ regulations apply to all federal agencies, although many agencies supplement these regulations with their own rules or guidance.

As NEPA turns 50 years old, the new rules—if finalized as proposed—would be the first comprehensive overhaul of the statute's implementing regulations since they were adopted in 1978. Since their enactment, NEPA and the CEQ regulations have been a source of friction between proponents and critics of the federal environmental review process. Hundreds of court cases have interpreted the statute and regulations.

The proposed rules are controversial and wide-ranging, and have significant ramifications for many types of actions that are carried out by the federal government, receive federal funding, or require a permit or other approval from a federal agency. CEQ published an advanced notice for the proposed rules in June 2018, requesting input on a variety of issues concerning how the current regulations should be revised. The agency received over 12,500 comments. Thousands of additional comments are anticipated before the public review period concludes on March 10, 2020. If CEQ adopts the new rules as a final set of regulations, it is certain that numerous stakeholders, such as environmental groups, will challenge the regulations in court.

In summary, the proposed rules:

- Shift the emphasis of the NEPA regulations toward procedural efficiency and predictability, while narrowing consideration of potential environmental impacts.
- Encourage agencies to identify circumstances that could obviate the need to apply NEPA to a proposed action, such as insufficient federal control over a non-federal project or conflicting requirements under another law.
- Strengthen the scoping process, which is used to delimit the environmental issues to be analyzed, and allow agencies to begin this process earlier on in the NEPA review.
- Consolidate multiple agency reviews into a single NEPA document and project approval.
- Eliminate the requirement that NEPA reviews consider the cumulative impacts of a proposed action in light of the effects of other activities, instead mandating consideration only of the action's "reasonably foreseeable" impacts.
- Limit the number and scope of "reasonable alternatives" that must be evaluated by, for example, excluding alternatives beyond the agency's jurisdiction and, for non-federal projects, alternatives that do not meet the goals of the project applicant.
- Establish presumptive time limits for the completion of the NEPA process and presumptive page limits for environmental documents.
- Allow a project proponent to prepare an Environmental Impact Statement (EIS) when federal agency approval is required for a non-federal project.
- Encourage agencies to exempt actions from more detailed environmental review through expanded use of categorical exclusions.

- Modernize the means of public engagement in the NEPA process by greater use of contemporary technology, and clarify the obligations of commenting parties and of agencies in responding to comments.

This update explains the key components of the proposed rules, with citations to the revisions to 40 C.F.R. parts 1500–1508. The update concludes by highlighting the implications of the proposed rules for the NEPA review process. We will continue to closely monitor any new developments on the CEQ rules; explore in depth the potential ramifications of the rules, if enacted; and identify key questions and topics that may warrant comments on the proposed rules.

Key Components of the Proposed NEPA Regulations

Introductory Purpose and Policy

The existing regulations emphasize that NEPA is an "action-forcing" statute that requires federal agencies to "take actions that protect, restore and enhance the environment," and that the purpose of an EIS is to ensure that NEPA's environmental goals and policies are "infused into the ongoing programs and actions of the federal government." The introductory provisions of the proposed rules remove this text, emphasizing instead that NEPA is a "procedural statute" and that its requirements are satisfied "if Federal agencies have considered relevant environmental information and the public has been informed regarding the decision-making process." (Sections 1500.1(a), 1502.1)

Applicability of NEPA

The proposed rules instruct federal agencies to assess as a threshold matter whether NEPA applies to a proposed action. (Section 1501.1) Under the proposed rules, NEPA review is *not* required for:

- Actions that are excluded from the definition of "major Federal action," such as: (1) "non-Federal projects with minimal funding or minimal Federal involvement where the agency cannot control the outcome of the project"; (2) "non-discretionary decisions made in accordance with the agency's statutory authority or activities that do not result in final agency action"; and (3) "loans, loan guarantees, or other forms of financial assistance where the Federal agency does not exercise significant control and responsibility over the effects of the action." (Sections 1501.1(a)(1), 1508.1(q))
- A wholly or partly non-discretionary action for which "the agency lacks authority to consider environmental effects as part of its decision-making process." (Section 1501.1(a)(2))
- An action for which compliance with NEPA "would clearly and fundamentally conflict with the requirements of another statute." (Section 1501.1(a)(3))
- An action for which NEPA compliance "would be inconsistent with Congressional intent due to the requirements of another statute." (Section 1501.1(a)(4))
- An action for which the function of NEPA compliance is served by "other analyses or processes under other statutes." (Section 1501.1(a)(5))

Agencies may make this threshold determination either in their NEPA procedures or on an individual project basis. (Section 1501.1(b))

Scoping

Scoping represents the beginning of the process for the EIS and is used to engage interested parties and agencies to define the environmental issues to be evaluated. The proposed rules eliminate the existing requirement that an agency may not start the scoping process until it first publishes a notice of intent (NOI) indicating that an EIS will be prepared. Instead, the proposed rules allow agencies to start the scoping process "as soon as the proposal

for action is sufficiently developed for agency consideration." (Section 1501.9(a)) CEQ explains that these revisions are intended to avoid "the artificial distinction between scoping and pre-scoping."

The proposed rules further instruct agencies to publish the NOI "as soon as practicable after determining that a proposal is sufficiently developed to allow for meaningful public comment and requires an [EIS]." (Section 1501.9(d)) The NOI must include a variety of additional details, including the purpose and need for the proposed action, a brief summary of expected impacts, anticipated permits and other authorizations, a schedule for the decision-making process, and a specific request for comments on potential alternatives and impacts. (Section 1501.9(d))

Multiple Agency Approvals

The proposed rules provide that where a proposed action requires review by more than one federal agency, to the extent practicable, all of the federal agencies involved must evaluate the proposal in a single EIS and issue a joint record of decision (ROD), or in a single environmental assessment (EA) and finding of no significant impact (FONSI), depending on which level of review the lead agency determines is appropriate. (Section 1501.7(g)) According to CEQ, these changes are motivated by the administration's "One Federal Decision" policy to ensure coordinated and timely reviews.

The lead agency must determine the purpose and need for the proposed action and the alternatives to be evaluated in consultation with cooperating agencies. (Section 1501.7(h)) The lead agency also must develop a schedule with milestones for all the environmental reviews and project authorizations. (Section 1501.7(i)) If a milestone is missed, the matter must be elevated within the responsible agencies "for timely resolution." (Sections 1501.7(j), 1501.8(b)(6)) Cooperating agencies are charged with meeting the lead agency's schedule and must limit their comments on the lead agency's NEPA review to those matters where they have jurisdiction by law or special expertise concerning the environmental issues. (Section 1501.8(b)(7))

Environmental Impact Statements

The proposed rules make a number of significant revisions to the requirements for preparing an EIS. The most notable revisions are:

- The assessment of whether a project's impacts are significant, and thus whether to prepare an EIS, is based on "the potentially affected environment and the degree of the effects of the action." This revision substantially simplifies the requirements in the existing regulations, which define "significantly" in terms of the project's "context" and 10 enumerated factors of "intensity." This revision also eliminates the references in the existing rules to impacts on "society as a whole" and "the world as a whole," and instead focuses on "the affected area (national, regional, or local)." (Section 1501.3(b))
- An EIS cannot be more than 150 pages (or 300 pages for proposed actions of "unusual scope or complexity") or take more than 2 years to complete (as measured from the date the NOI is published to the date of the ROD). These page and time limits can be exceeded only when a "senior agency official" provides written approval and sets new limits. (Sections 1502.7, 1501.10(b)(2)) The existing rules state only that an EIS must "normally" meet the page limits and that, while agencies are encouraged to set time limits on a case-by-case basis, "prescribed universal time limits for the entire NEPA process are too inflexible."
- A private project applicant may prepare an EIS, so long as the responsible federal official provides guidance, participates in its preparation, independently evaluates it prior to approval, and takes responsibility for its scope and content. (Section 1506.5(c)) The existing rules authorize this practice only for EAs and specify that an EIS must be prepared directly by the lead agency or its contractor (or where appropriate, by a cooperating agency). The proposed rules also eliminate the requirement that a contractor preparing an EIS certify that it has no financial or other interest in the outcome of the project.

- The proposed rules eliminate the requirement to consider "direct," "indirect," and "cumulative" effects. Instead, an EIS need only evaluate the "effects" of the action, which are defined to include only those impacts "that are reasonably foreseeable and have a reasonably close relationship to the proposed action or the alternatives." Under the proposed rules, a "but for" causal relationship "is insufficient to make an agency responsible for a particular effect under NEPA." Similarly, effects "should not be considered significant if they are remote in time, geographically remote, or the product of a lengthy causal chain." The definition also excludes "effects that the agency has no ability to prevent due to its limited statutory authority or would occur regardless of the proposed action." Lastly, an "[a]nalysis of cumulative effects is not required." (Section 1508.1(g), (aa))
- When the agency has a statutory duty to review an application to authorize a non-federal project (such as issuance of a permit), the purpose and need of the proposed action must be based on "the goals of the applicant and the agency's authority." (Section 1502.13)
- An EIS must "[e]valuate reasonable alternatives to the proposed action." (Section 1502.14) "Reasonable alternatives" are defined as "a reasonable range of alternatives that are technically and economically feasible, meet the purpose and need for the proposed action, and, where applicable, meet the goals of the applicant." (Section 1508.1(z)) The proposed rules eliminate the requirement that a lead agency consider reasonable alternatives not within its jurisdiction. The proposed rules also eliminate the text requiring an EIS to examine "all" reasonable alternatives. As CEQ explains, "an EIS need not include every available alternative where the consideration of a spectrum of alternatives allows for the selection of any alternative within that spectrum. The reasonableness of the analysis of alternatives in a final EIS is resolved not by any particular number of alternatives considered, but by the nature of the underlying agency action."
- The proposed rules clarify that agencies "are not required to undertake new scientific and technical research to inform their analysis," and "may make use of any reliable data sources, such as remotely gathered information or statistical models." (Section 1502.24) Further, an agency must obtain relevant information only if it is essential to a reasoned choice among alternatives and the overall costs of getting the information are not "unreasonable." (Section 1502.22)
- "Where applicable," the discussion of environmental consequences must include "economic and technical considerations, including the economic benefits of the proposed action." (Section 1502.16(a)(10))
- The cover of the EIS must include the estimated total cost of preparing the EIS. (Section 1502.11(g))
- An EIS may be published and transmitted electronically (unless a paper copy is requested due to economic or other hardship). (Section 1502.21)

Comments on an Environmental Impact Statement

The proposed rules establish new requirements for comments submitted on an EIS:

- Comments should provide sufficient detail to explain why the issue raised is significant to the consideration of the potential impacts of the proposed action or the alternatives. Comments on the draft EIS should reference specific sections or pages of the EIS, propose specific changes to the EIS where possible, and include or describe supporting data and methodology. (Section 1503.3(a))
- The draft EIS must include a summary of all alternatives, information, and analyses submitted by commenters during the scoping process. (Section 1502.17) The lead agency must request comments on the completeness of this summary in the draft EIS, and it must further provide a 30-day comment period on this summary after publication of the final EIS. (Section 1503.1(a)(3), (b)) Based on the summary, the lead agency decision-maker must certify in the ROD that the agency has considered all of the alternatives, information, and analyses submitted by public commenters—the agency is then entitled to a "conclusive presumption" that it considered the information included in the summary of submitted alternatives, information, and analyses in the EIS. (Section 1502.18)
- There is no duty for the agency to respond to comments that are not substantive or that are not timely submitted during the public comment period. The proposed rules provide that the agency must explain

why comments do not warrant a response, but eliminate the existing requirement to cite "the sources, authorities, or reasons" that support this explanation. (Section 1503.4)
- Agencies may use electronic means to notify those who have requested notice for the proposed action. Agencies also may use electronic means (e.g., project or agency website, email, or social media) to provide notice to the public that a draft or final EIS has been published, except for proposed actions "occurring in whole or part in an area with limited access to high-speed internet." (Section 1506.6(b)) Agencies also must provide for electronic submission of comments. (Section 1503.1(c)) Agencies may conduct public hearings and meetings by "means of electronic communication," except where a traditional public meeting is required by law. (Section 1506.6(c))

Categorical Exclusions

Under the proposed rules, if extraordinary circumstances exist that could prevent the use of a categorical exclusion (CE), the agency "should consider whether mitigating circumstances or other conditions are sufficient to avoid significant effects" such that the CE would still apply. (Section 1501.4(b)) CEQ explains that this change "would clarify that the mere presence of extraordinary circumstances does not preclude the application of a CE." Rather, "the agency could modify the proposed action to avoid the extraordinary circumstances so that the action fits in the [CE]." Agencies also would be authorized to adopt another agency's determination that a CE applies to a proposed action, "if the adopting agency's proposed action is substantially the same." (Section 1506.3(f))

Environmental Assessments

The proposed rules require preparation of an EA if a proposed action is not likely to have significant effects or if the significance of the effects is unknown, unless a CE applies or the agency has decided to prepare an EIS. (Section 1501.5(a)) An EA cannot be more than 75 pages or take more than one year to complete (as measured from the date of decision to prepare an EA to the publication of a final EA), unless a "senior agency official" approves exceeding these limitations in writing and sets new limits. (Sections 1501.5(e) & 1501.10(b)(1))

Limitations on Actions During NEPA Process

In clarifying that ongoing NEPA processes do not preclude an applicant's development of project plans or designs, the proposed rules specify that an agency considering a proposed action for federal funding may authorize certain activities by the applicant, including acquisition of interests in land, purchase of long lead-time equipment, and purchase of options. (Section 1506.1(b))

Litigation and Remedies

The proposed rules specify that comments or objections that are not submitted in a timely manner will be deemed "unexhausted and forfeited"; that NEPA lawsuits challenging a completed EIS should not be filed until there is a ROD; and that the NEPA regulations "create no presumption that violation of NEPA is a basis for injunctive relief or for a finding of irreparable harm." (Section 1500.3(b)–(d))

Role of Tribes

The proposed rules add "Tribal" to the phrase "State and local" throughout the NEPA rules to ensure consultation with tribal entities and to reflect existing NEPA practice to coordinate or consult with affected tribal governments and agencies. The proposed rules also eliminate provisions in the current regulations that limit tribal interests to reservations.

Agency NEPA Procedures

If CEQ adopts the proposed rules, agencies would have 12 months after the effective date of the new rules to update their NEPA procedures. (Section 1507.3(a)) These procedures may not impose additional requirements beyond the CEQ rules "except as otherwise provided by law or for agency efficiency." (Sections 1500.3(a), 1507.3(a)) These procedures also must require the combination of environmental documents with other agency documents, and agencies may designate other statutory processes, reports or analyses that qualify as the "functional equivalent of an EIS" for purposes of complying with NEPA. (Section 1507.3(b))

CEQ's Request for Additional Input

In addition to the substantial set of changes reflected in its proposed revisions to the existing regulations, CEQ has requested comments by March 10, 2020, on a host of issues, including:

- Whether to eliminate the current requirement that an agency prepare an EIS when it proposes legislation to Congress, and the proposed legislation would cause significant environmental impacts (such as proposed legislation to withdraw public lands from military use for civilian reuse).
- Whether non-NEPA studies that one or more agencies already are conducting in relation to a proposed action can be used, "in whole or when aggregated," as a "functional equivalent" to an EIS for purposes of NEPA compliance.
- Whether to include in CEQ's proposed definition of "effects" the concept that the requisite close causal relationship is "analogous to proximate cause in tort law," and, if so, how CEQ could provide additional clarity regarding the meaning of this phrase.
- Whether existing CEQ guidance or handbooks should be adopted as part of the revised regulations.
- How greenhouse gas emissions should be addressed in the new regulations, and specifically, whether CEQ should codify any aspects of its Draft NEPA Guidance on Consideration of Greenhouse Gas Emissions, issued June 2019.
- Whether the regulations should clarify that NEPA does not apply extraterritorially, in light of the ordinary presumption against extraterritorial application when a statute does not clearly indicate that such application is intended by Congress.
- Whether there are circumstances under which an agency may authorize irreversible and irretrievable commitments of resources.
- Whether there should be a threshold (percentage or dollar figure) for the level of "minimal Federal funding" below which a project would not be considered a "major Federal action" subject to NEPA, and whether certain types of financial instruments or other *per se* categories of federal activities also should be considered exempt.
- Whether and subject to what procedures CEQ should specifically allow an agency to apply a CE established in another agency's NEPA procedures to its proposed action.
- Whether the revised regulations should establish government-wide CEs to exempt certain types of activities from additional NEPA review across the board.
- Whether the revised regulations should establish a presumptive *maximum* number of alternatives for evaluation of a proposed action (or for certain categories of proposed actions).
- Whether the "overall costs" to an agency of obtaining incomplete or unavailable information warrants further definition to address whether certain costs are or are not "unreasonable."
- Opportunities for agencies to combine data to streamline environmental review, such as a new single NEPA application that facilitates consolidation of datasets and can run several GIS analyses to help standardize analysis. CEQ envisions this application having a public-facing component to aid prospective project sponsors with site selection and project design and increase public transparency.

Implications of the Proposed Rules

The proposed rules have far-ranging implications for many projects and programs requiring federal government approval, funding, or participation. Some of the revisions clearly are part of the administration's broader ongoing effort to expedite, streamline, and consolidate the federal agency review process for major infrastructure and energy projects. These procedural changes track closely the concepts and requirements embodied in Title 41 of the Fixing America's Surface Transportation Act (FAST-41) and numerous executive orders.

Other revisions reflect a more fundamental debate around defining the parameters for NEPA review—what categories of federal actions are subject to NEPA, what level of environmental review is appropriate, and what types of impacts and alternatives need to be included in the analysis. Many of the proposed changes appear specifically tailored to advance the current administration's policies on energy and climate change. The proposal to allow a non-federal project proponent to prepare the EIS may, from a practical perspective, have the greatest impact on the NEPA process. From a legal standpoint, the most significant change from the existing regulations may be eliminating the requirement to evaluate cumulative impacts.

In a White House briefing on January 9, CEQ indicated it intended to make the proposed rules effective immediately upon final adoption, and that federal agencies with projects under NEPA review as of the rules' effective date would need to decide whether to proceed under the existing NEPA regulations or the revised rules. This may prove challenging given the number of federal agencies that would need to update their NEPA regulations to be consistent with the new rules. Project sponsors with proposals currently under NEPA review should watch developments closely.

As the comments on the new rules begin to pile up, CEQ will be developing its response with one eye firmly on the clock, in order to avoid negation of the final rule under the Congressional Review Act (5 U.S.C. § 801). This law authorizes Congress (via a joint resolution subject to a presidential veto) to disapprove of agency rulemakings. The law has been characterized as a way to prevent "midnight rulemakings" by lame-duck administrations, but it can have significant retroactive effect. The law gives Congress 60 working days to review rules. The clock starts when the rules are formally submitted to Congress or published in the Federal Register, whichever is later. Any rule finalized after September 1, 2020, could be vulnerable to congressional nullification, depending on the outcome of the November election.

If the new rules avoid this fate, ultimately it will fall to the courts to sort out the key question of whether the extensive changes in CEQ's longstanding regulations constitute a permissible interpretation of NEPA's statutory requirements. We will continue to monitor closely both CEQ's rulemaking process for its new regulations as well as the legal, policy, and practical issues raised by the first major regulatory proposal to update the implementation of NEPA since 1978.

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