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NEPA Practice Without CEQ Regulations



By directing the Council on Environmental Quality (CEQ) to propose rescinding CEQ’s National Environmental Policy Act (NEPA) regulations, an executive order on “Unleashing American Energy” affects not only energy projects but every major federal agency action significant to the quality of the human environment, including federal infrastructure projects, land management planning, and regulations.

Section 5 of the order, “Unleashing Energy Dominance through Efficient Permitting,” starts with a rescission of CEQ authority to issue regulations by revoking President Carter’s Executive Order 11991, which directed CEQ to promulgate regulations that are binding on federal agencies. Instead of regulations, CEQ is directed to issue guidance and coordinate the revision of agency-specific NEPA regulations (where you get the specific requirements for the application of NEPA to particular authorities and categories of actions). Currently, NEPA implementation is governed by a framework of CEQ’s 2024 regulations and agency-specific NEPA procedures that are built upon CEQ’s 1978 regulations. That framework will now receive an update according to CEQ guidance, the contours of which should be spelled out within 30 days of the date of the executive order (February 19, 2025).

So, what can we expect this means for NEPA analysis of energy and other projects? CEQ guidance may interpret the statute (and be entitled to “substantial deference” under precedent of the Supreme Court of the United States), but it will not be legally operative until it is implemented in the form of updated NEPA regulations adopted by various agencies, subject to CEQ coordination “for consistency.” The new framework design will “expedite permitting approvals and meet deadlines established in the Fiscal Responsibility Act of 2023 (Public Law 118-5).” Aside from implementing the Fiscal Responsibility Act amendments to NEPA, the other aspects of NEPA practice are open to comment. Important aspects of NEPA practice have not been codified, including the identification of “significant” environmental effects, the requirements for “scoping” the environmental impact assessment, interagency coordination, and issue resolution. One can assume that CEQ guidance will be based on uncoded aspects of the 2020 CEQ regulations, which may be further codified in permitting reform legislation. Section 5 also directs the White House National Economic Council and Legislative Affairs to engage in

permitting reform legislation that will proceed in tandem with the regulatory revisions.

Section 3 of the executive order provides for a typical transition regulatory review but focuses on rulemaking actions that burden the prioritized energy resources. Section 5 is a more specific provision that applies to NEPA across the board, with subsection (d) emphasizing the expedition of NEPA processes for energy project decisions. The two provisions head in the same direction, but subsection (d) provides specific direction to use efficiencies in the NEPA process, including emergency authorities, to prioritize energy project permitting and “work closely with project sponsors to realize the ultimate construction or development of permitted projects.” CEQ’s role as policy leader uses CEQ authority to set policy direction that is implemented through the NEPA process and appears to be similar to its role under Section 5 of Executive Order 13807 (Establishing Discipline and Accountability in Infrastructure Permitting).

Authors

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