



## CEQ Proposes Revisions to Regulations Governing Federal Agency Implementation of NEPA

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The Council on Environmental Quality (“CEQ”) is proposing major revisions to update its procedural regulations on implementation of the National Environmental Policy Act (“NEPA”) for the first time in over forty years. Today, CEQ published a [Notice of Proposed Rulemaking](#) (“NOPR”) entitled “Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act.” The NOPR follows a June 2018 [Advance Notice of Proposed Rulemaking](#) requesting initial public input on ways to modernize the NEPA review process.

Comments on the NOPR are due by March 10, 2020. CEQ also announced two public hearings: in Denver, Colorado on February 11, 2020, and Washington, DC on February 25, 2020.

### The Trump Administration’s Efforts to Streamline the NEPA Review Process

CEQ is responsible for issuing regulations addressing federal agency compliance with the NEPA review requirements. CEQ promulgated its existing NEPA regulations in 1978 at the direction of President Carter’s Executive Order (“EO”) 11991, and since then, substantively amended the regulations only once in 1986. The NEPA review requirements apply to a broad range of actions, including federal permit applications, federal land management decisions, and highway construction and other infrastructure development. CEQ’s proposed changes are part of a larger effort by the Trump Administration to streamline and modernize federal permitting processes, and continue the Administration’s efforts to pivot away from Obama-era actions designed to address climate change.

A key precursor to this present NOPR was the August 2017 EO 13807 which established a “One Federal Decision” policy to improve agency coordination and accountability in the environmental review of infrastructure projects. Twelve federal agencies, including the Departments of Interior (“DOI”), Transportation, and Energy, the Environmental Protection Agency (“EPA”), the U.S. Army Corps of Engineers (“USACE”), and the Federal Energy Regulatory Commission (“FERC”), subsequently executed a [memorandum of understanding](#) (“MOU”) to implement the policy with the goal of expediting infrastructure project environmental reviews through improved coordination.

Several agencies have taken steps to implement EO 13807’s streamlining goals through changes in their NEPA practices. For example, in August 2017, DOI issued [Secretarial Order 3355](#), which set page and time limits for preparation of environmental impact statements (“EISs”) and environmental assessments (“EAs”). In September 2018, the USACE issued [Director’s Policy Memorandum 2018-12](#) and [Implementation Guidance for Regulatory Compliance with Executive Order 13807](#), which, among other things, established a permitting timetable and sought to focus agency environmental reviews on issues directly relevant to USACE permit decisions. And, in June 2019, the U.S. Forest Service issued a [NOPR](#) to revise its agency-specific NEPA regulations, in response to which the agency received over 47,000 comments.

Separately, the Trump Administration also has moved to curtail the evaluation of greenhouse gas emissions (“GHG”) and climate change within federal permitting decisions and environmental reviews. The Administration’s actions on these matters have been at least in part driven by a string of court decisions, particularly involving natural gas pipelines, requiring more in-depth review of GHG emissions and climate change impacts within federal agencies’ NEPA reviews. Notably, in April 2017, the Trump Administration rescinded the 2016 Obama Administration guidance on GHG emissions in NEPA reviews. Further, in June 2019, CEQ issued draft guidance encouraging federal agencies to apply a “rule of reason” in determining whether and to what degree the effects of GHG emissions should be evaluated, and suggesting that agencies are not required to consider “indirect” climate-related effects of a proposed action where there is not a sufficiently close causal relationship. The comment period for the draft guidance closed in August 2019. It has not yet been finalized.

This NOPR, formally proposing changes to the NEPA implementing regulations, adds another element in the effort to streamline federal permitting decisions and competing need to address key emerging issues, such as climate change and GHG emissions.

### Overview of Proposed Changes

The proposed changes within the NOPR touch upon many of the core elements of the NEPA review process and include these key changes:

- Revising the definition of environmental “effects.” The proposed changes would eliminate references to “direct,” “indirect,” and “cumulative” effects and instead focus analysis on effects that are reasonably foreseeable and have a reasonably close causal relationship to the proposed action. The NOPR also specifies that a “but for” causal relationship is not sufficient.
- Eliminating the requirement that agencies analyze cumulative effects, which had become a means for requiring climate change analyses.
- Exempting from the definition of “major Federal action,” and thus NEPA analysis, non-Federal projects with “minimal Federal funding or minimal Federal involvement where the agency cannot control the outcome of the project.”
- Clarifying that “reasonable alternatives” must be “technically and economically feasible” and meet the purpose and need for the proposed action.
- Setting presumptive time limits of one year for EAs and two years for EISs, and page limits of 75 pages (including appendices) for EAs, 150 pages for a routine EIS, and 300 pages for an EIS covering a matter of “unusual scope or complexity.” Senior agency officials would have the authority to grant exceptions to both the time and page limits.
- Allowing applicants and contractors to prepare both EAs and EISs, under the direction of an agency.
- Authorizing and requiring federal agencies to cooperate with State, Tribal, and local agencies to reduce duplication, including through the use of prior and joint environmental review documents and decisions. Clarifying that NEPA does not require reconciliation of inconsistencies with State, Tribal, or local laws.
- Ensuring consultation with Tribal entities by adding “Tribal” to the phrase “State and local” throughout the regulations, and eliminating provisions that currently limit Tribal interests to reservations.
- Prioritizing a single NEPA review consistent with the One Federal Decision policy. Where multiple federal agencies have discretionary decisions for a proposed project, CEQ is requiring that the federal agencies coordinate on scheduling and, where practicable, on the completion of a single environmental document that can be relied upon for the issuance of each agency’s permitting or authorization decision.
- Facilitating use of categorical exclusions as a means to streamline NEPA review, including providing that a categorical exclusion may still be applied even if extraordinary circumstances are present, if mitigating circumstances or conditions are sufficient to avoid significant effects, and allowing agencies to utilize categorical exclusions that have been adopted by other agencies.
- Making certain changes that could impose additional obligations on commenters and potentially relax agencies’ existing duties to respond to comments.

### Further Implementation and Impact on Other NEPA Guidance

Agencies would be required to develop or revise their NEPA procedures for consistency with the new regulations within one year of publication of the final rule. Once finalized, the revised regulations would apply to any NEPA process commenced after the date of the final rule. However, agencies would have the discretion to apply them to ongoing activities and environmental reviews commenced prior to that date.

In addition to the CEQ regulations and an extensive body of case law, agency implementation of NEPA is guided by a number of CEQ guidance documents as well as agency-specific procedural regulations and guidance. If the NOPR is finalized, CEQ has stated that the new final rule will supersede all previous CEQ

NEPA guidance, which would include CEQ's "Forty Most Asked Questions," and that it would be its intent to withdraw all of its existing NEPA guidance and issue new guidance. At that time, CEQ also would review its June 2019 "Draft National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions" for potential revisions consistent with the new regulations.

## Conclusion

This Administration is not unique in recognizing that NEPA can delay and/or add significant costs to important infrastructure projects and that the environmental review process can and should be improved. Since President Nixon signed NEPA into law in 1970 and the issuance of the CEQ existing regulations in 1978, Administrations of both parties and Congress have taken action to improve the environmental review process and make it more efficient, and there is broad agreement that certain elements of NEPA implementation remain confusing (e.g., "indirect" vs. "cumulative impacts").

By further clarifying and streamlining the process for environmental reviews under NEPA, elements of the proposed rule could help reduce costs and delays that have hampered, and in some cases prevented, energy, transportation, and other infrastructure projects, as well as other permitting decisions. Environmental groups, however, already have raised concerns about the proposal, in particular that the proposal will allow agencies to ignore climate change impacts and that it fundamentally departs from the "hard look" doctrine that has been the hallmark of NEPA reviews. If finalized, these proposed changes will face multiple legal challenges. It is worth noting that the proposed rule recognizes as much, and includes a severability provision that seeks to allow other sections to remain in effect in the event that any section is stayed or determined to be invalid.

Of course, the proposed rule, if finalized, will not mean that projects will be insulated from NEPA litigation that could still add to project costs and delays. In particular, regardless of the outcome of this rulemaking effort, one can expect continued litigation over the scope of federal agencies' obligations to consider climate-related effects in the NEPA review process.

CEQ faces pressure to finalize the proposed changes before the final rule would become subject to the Congressional Review Act ("CRA"). The CRA permits a new session of Congress to enact a "resolution of disapproval" for any regulation issued within 60 legislative days of the end of the Congressional session. Disapproved rules are treated as if they were never enacted, and may not be reissued in substantially the same form.

## FOR MORE INFORMATION

Van Ness Feldman closely monitors and counsels clients on NEPA-related issues. If you would like more information on how these updates may impact your business please contact [Jonathan Simon](#), [Matthew Love](#), [Joe Nelson](#), [Molly Lawrence](#), or any member of the firm's Land, Water, and Natural Resources practice in Washington, D.C. at (202) 298-1800 or in Seattle, WA at (206) 623-9372.

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