

CEQ's NEPA regulatory overhaul: highlights and predictions

15 January 2020

The National Environmental Policy Act (NEPA) is a cornerstone of environmental law that Congress enacted in 1970. NEPA celebrated its 50th anniversary earlier this month. NEPA has been the focus of extensive litigation and debate, impacting a wide range of projects from energy development and pipelines to highways and infrastructure improvements. In simplest terms, the statute requires federal agencies to conduct environmental reviews and obtain public input when undertaking a "major Federal action significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). The courts have ruled that NEPA is a procedural statute that does not mandate specific results or a substantive outcome. *Dept. of Transp. v. Pub. Citizen*, 541 U.S. 752, 756-57 (2004). Rather, federal agencies must take a "hard look" at the environmental impacts of an agency's actions. *Kleppe v. Sierra Club*, 427 U.S. 390 (1976).

There has not been a major revision to the NEPA regulations since 1978. The Council on Environmental Quality (CEQ) is the agency within the Executive Office of the President that is charged with administering federal agency implementation of NEPA. 42 U.S.C. §§ 4342, 4344. On 10 January 2020, CEQ issued proposed amendments to its regulations, which contain many significant changes. The public comment period is open until 10 March 2020. 85 FR 1684 (10 January 2020). In the discussion below, we provide the highlights and practical implications of these changes.

What are the changes in the proposed regulations?

The regulatory changes are extensive and reduce the scope of NEPA's application and streamline the often cumbersome environmental review process, including the preparation of voluminous environmental impact statements. Below is a summary of the most significant proposed changes:

- **Definition of effects:** The long-standing CEQ regulations define "effects" of the proposed federal action to include "direct and indirect effects" and "cumulative effects" of the proposed action. These terms are not in NEPA. The proposed amendment would omit these terms and provides that an actionable effect must be one which is related to the proposed action, subject to the agency's control, and "reasonably foreseeable." The proposal explains that the effects analysis should evaluate effects that have a close causal relationship to the proposed action, along the lines of proximate cause in the tort context (i.e., not a "but for" analysis). The proposal provides "[e]ffects should not be considered significant if they are remote in time, geographically remote, or result in a lengthy causal chain."

- **Definition of major federal action:** The proposed change seeks to limit the application of NEPA and exclude from NEPA's purview projects that have a minimal federal nexus. To that end, the proposal clarifies that "a major federal action" is one which is subject to Federal control or authority and whose effects are significant. The proposal further provides that this term does not include non-Federal projects with minimal federal funding or involvement, and also makes clear that a failure to act or an activity that is not a final agency action is not within the scope of NEPA.
- **Presumptive Time and Page Limits:** In an effort to avoid undue delay and establish a more efficient process, the proposal provides page limits of 75 pages for environmental assessments (EA) and 150 pages for environmental impact statements (EIS) or 300 pages if a proposal is of unusual scope or complexity. The proposal also provides a one-year limit for preparation of an EA and a two-year limit for preparation of an EIS. Both the page and time limits may be modified by an authorized senior agency official based on certain enumerated considerations.
- **Changes to EIS:** The proposed regulations make the following changes to the contents of an EIS:
 - Purpose & Need Statement: provides that this opening statement must be concise, focused on the proposed action, grounded in a statutory authority, and consistent with the goals of the applicant.
 - Alternatives analysis: limits the analysis to only "reasonable" alternatives (e.g., those that are technically and economically feasible) and those actions that are within the jurisdiction of the lead agency.
 - Existing information: clarifies that agencies do not need to conduct new scientific research and that reliance on existing data and research is appropriate.
 - Supplementation: clarifies that a supplemental EIS is required when there is new information or a change in the proposed action, but only if a major Federal action remains to occur.
- **Public comment content and exhaustion requirement:** The proposal provides new requirements for public comments to ensure they are material and helpful to the decision-making process. In addition, the proposal provides the agency need only consider substantive and timely comments.
- **One Federal Decision:** The proposal codifies the current administration's policy to designate one lead agency to develop a single EIS/EA and a joint record of decision for multi-agency projects.
- **Applicant participation:** The proposal provides flexibility for the agency to give applicants and contractors a greater role in preparing environmental documents as long as the agency independently evaluates the materials.
- **Mitigation:** The proposed regulations discuss mitigation, stating that it must be voluntary, there must be a nexus with the proposed action, and if compensatory mitigation is used, the agency must show it has a nexus to the effects of the action, proportionality, and durability. The proposed regulations also codify the concept of a mitigated "finding of no significant impact."

- **Injunctive relief/irreparable harm:** The proposed regulations provide that a showing of a NEPA violation is not a basis for injunctive relief or sufficient to show irreparable harm.
- **Exempt from NEPA review:** The proposed regulations provide that early in the process, an agency may determine if the action in question is mandatory, and therefore, exempt from NEPA review. Similarly, an agency may identify non-major Federal actions or actions exempt from NEPA by other statutes.
- **State, tribal and local governments:** Proposed changes include encouraging cooperation and consideration of these entities' views and prior environmental reviews, as well as inclusion of the term "tribe" where state and local governments are referenced throughout the regulation.

What is the practical effect of these changes?

If finalized, these changes will likely reduce the applicability of NEPA to various projects in a number of ways. First, the removal of the terms "indirect" and "cumulative effects" and the requirement of demonstrating a causal connection between an environmental effect and the proposed action will narrow the scope of the effects analysis to only those impacts that are more akin to direct effects. However, the proposed regulations continue to incorporate the concept of "reasonably foreseeable," which is a term in the statute. It remains to be seen how agencies and courts interpret the scope of this term, which some will assert at least includes the concept of "indirect" effect. For instance, courts have recognized that emissions from oil and gas drilling activities under a federal lease authorization will have a direct effect that is reasonably foreseeable, but under the new regulation, an agency may not need to assess effects further down the causal chain – which are more akin to cumulative impacts - such as the contribution of those emissions to regional or national greenhouse gas emissions. See, e.g., *WildEarth Guardians v. Zinke*, 368 F.Supp.3d 41 (D.D.C. 2019). The proposed changes also may impact the ongoing debate over whether the Federal Energy Regulatory Commission is required to assess anticipated downstream greenhouse gas emissions associated with new pipeline projects.

Another area where the proposed regulations would reduce the applicability of NEPA is in their definition of major federal action. This proposed change would likely remove a number of projects from review, such as non-federal projects that receive minimal federal funding, or projects that are not within the jurisdiction or control of the federal agency. CEQ identifies loans and loan guarantees where the federal agency does not exercise sufficient control over the effects of the action as examples of minimal federal funding. On the other hand, private actions that require a federal permit would remain within the scope of the regulations assuming the existence of a causal link to significant effects. This new definition also appears to try to address the "small handle" issue where projects have a small, federal approval component but are largely non-federal. Notably, CEQ requests public comment on whether additional guidance would be helpful on the "small handle" topic in particular.

Other regulatory provisions propose to trim the content of environmental reviews. The page and time limits are an effort to reduce the lengthy and sometimes burdensome review processes. The alternatives analysis also will only focus on actions within the authority of the agency and that are technically and economically feasible. Agencies also would not need to conduct new scientific and technical research to support the environmental evaluation. CEQ proposes that the focus of analysis be limited to existing information of this nature.

The new regulations also would remove from NEPA review those agency actions that are mandatory, agency failures to act, or any actions that are exempt from review per other statutes. In practice, this provision would arguably remove from NEPA review federal activities such as the

operation of statutorily-mandated deliveries of water or land acquisitions. Courts have issued rulings along these lines. See, e.g., *Grand Canyon Trust v. U.S. Bureau of Reclamation*, 691 F.3d 1008, 1021-22 (9th Cir. 2012).

Will this proposed regulation face legal opposition?

While CEQ's proposed regulations may be a welcomed change for some, it will not be for others who will undoubtedly challenge the regulations in court. As CEQ notes in the proposal, NEPA itself does not create a private cause of action, but plaintiffs will likely bring suit under the Administrative Procedures Act, arguing that the new regulations are a significant change in position that is arbitrary and capricious and that they do not adhere to the statutory requirements of NEPA. In response, CEQ can be expected to argue that many of the changes are supported by court precedent. In this regard, CEQ was careful to link certain rule changes to specific court rulings. See, e.g., 85 FR at 1708 (citing the Supreme Court's *Public Citizen* ruling for the proposition that remote effects are not "significant" effects under NEPA).

If the proposed page and time limits are honored in practice, litigation challenges will likely attack them as arbitrary and assert that they improperly truncate a full environmental review. The revised definitions of "major federal action" and "effects" will also likely be challenged, with opponents arguing that the exclusion of certain effects and projects from NEPA's scope is contrary to existing precedent and Congress' intent under NEPA. Courts have relied on the regulatory definitions of "cumulative impacts" and "indirect effects" to find effects under NEPA, such as in the climate change cases, but with those terms no longer in the regulation, it will remain to be seen how courts address their omission.

With regard to greenhouse gases, CEQ believes that it would not be appropriate to focus its regulation on a specific medium, but requests public comment on whether any parts of its June, 2019 draft greenhouse gas emission guidance should be codified in the regulation. The proposed guidance adopted a similar approach to the proposed regulations by concluding that in the case of greenhouse gas emissions, the agency's consideration of "a proposed action's direct and reasonably foreseeable indirect GHG emissions may be used as a proxy for assessing potential climate effects." 84 FR 80097, 30098 (26 June 2019). Thus, the proposed regulations could limit the scope of review of climate change impacts by excluding analysis of impacts further down the causal chain; however, indirect effects would likely remain part of the analysis under the "reasonably foreseeable" standard.

Another potential issue affecting the regulations arises under the Congressional Review Act. The current administration would need to finalize the regulations by early spring to avoid the possibility that a newly-elected administration and Congress can preemptively invalidate the new regulations under this Act. If the timing does not allow for this option, a new administration could also repeal CEQ's rule changes. In the event the election does not result in a change, the current administration also would need to assess how existing court rulings, including any injunctions, will affect future application of the new regulations. Lastly, if the rule survives an initial facial challenge, there will almost certainly be "as applied" challenges, which will raise legal questions about whether the agency in question is entitled to deference for its interpretation of the regulations. As a result, sponsors of projects requiring NEPA analysis may be concerned that some of the streamlining, however welcome in theory, creates a new litigation risk for them.

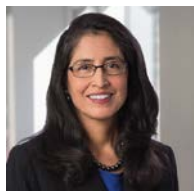
The bottom line is there will be significant litigation and potential intervening events that could impact the viability of this proposed rule change. Opponents will bear the burden of demonstrating that prospective application of these new regulations is inconsistent with the language and intent of NEPA, which remains unchanged.

What happens next?

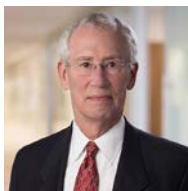
The proposed rule was published in the Federal Register on 10 January 2020, with a 60 day public comment period that closes on 10 March 2020. CEQ will also be holding public hearings in Denver on 11 February and in Washington, D.C. on 25 February to receive comments on the proposed rule. CEQ also requests public comment on specific issues in the rule, such as with regard to greenhouse gases, whether to exclude certain categories from NEPA review altogether, and whether there should be a threshold dollar amount for triggering whether an agency action is "major."

Once CEQ obtains public comment, it will assess the comments and will likely move to finalize the regulation. The proposed CEQ regulations also instruct federal agencies to update their NEPA regulations to conform with CEQ's new regulations when they become final.

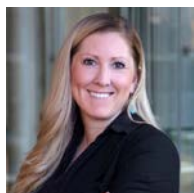
Contacts



Hilary Tompkins
Partner, Washington, D.C.
T +1 202 637 5617
hilary.tompkins@hoganlovells.com



Jim T. Banks
Partner, Washington, D.C.
T +1 202 637 5802
james.banks@hoganlovells.com



Ana Maria Gutierrez
Partner, Denver
T +1 33 454 2514
ana.gutierrez@hoganlovells.com



Stefan M. Krantz
Partner, Washington, D.C.
T +1 202 637 5517
stefan.krantz@hoganlovells.com



Joanne Rotondi
Partner, Washington, D.C.
T +1 202 637 6470
joanne.rotondi@hoganlovells.com



Mary Anne Sullivan
Senior Counsel, Washington, D.C.
T +1 202 637 3695
maryanne.sullivan@hoganlovells.com



Douglas P. Wheeler
Senior Counsel, Washington, D.C.
T +1 202 637 5556
douglas.wheeler@hoganlovells.com

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