

INSIGHTS

Trump Administration Proposes Unprecedented and Comprehensive Revisions to NEPA Regulations

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The National Environmental Policy Act (“NEPA”) -- a law that has been referred to as the “Magna Carta” of the nation’s environmental laws – turned 50 years old on January 1, 2020. On January 10, the White House Council on Environmental Quality (“CEQ”) published a [Notice of Proposed Rulemaking](#) (“NPRM”) that would revise NEPA’s implementing regulations.^[1] The rulemaking is the first significant revision of the NEPA regulations since the original regulations were promulgated in 1978. The proposal aims to modernize the NEPA regulations and facilitate more efficient, effective, and timely NEPA reviews. Because of NEPA’s broad applicability to nearly every federal action of consequence (including federal projects, permits for private activity, grants, funding decisions, and rulemakings), changes to its implementing regulations carry significant implications.

Background

NEPA requires Federal agencies to consider the environmental impact of major Federal actions significantly affecting the quality of the human environment before taking such actions in a “detailed statement.” The statute also requires agencies to consider alternatives to proposed actions. Under the current regulations, agencies comply with NEPA and the regulations by (i) developing Environmental Impact Statements (“EIS”) for major federal actions significantly affecting the quality of the environment, (ii) preparing an Environmental Assessment (“EA”) to determine whether an EIS is required or to document the agency’s determination that an EIS is not required or (iii) identifying an applicable categorical exclusion for actions that do not individually or cumulatively have a significant effect on the environment. The statute imposes procedural requirements, but does not mandate agencies to make particular decisions or to impose mitigation.^[2]

CEQ’s NPRM

CEQ’s NPRM states the purpose of the regulatory revision is to modernize and clarify the regulations to facilitate more efficient, effective, and timely NEPA reviews by Federal agencies.^[3] The proposal explains that the “lengthy, costly, and complex” NEPA process has slowed or prevented the development of certain new infrastructure. CEQ’s proposal aims to simplify

regulatory requirements, reflect current technologies and agency practices, and improve the format and readability of the regulations.

The NPRM notes that many NEPA implementation challenges persist despite numerous clarifications of the existing regulations.^[4] CEQ's proposal aims to codify certain sources of this clarification, including (i) judicial interpretations; (ii) CEQ guidance documents; (iii) Presidential directives; and (iv) legislation.^[5]

CEQ's NPRM addresses, among other topics, (i) the applicability and appropriate level of NEPA reviews; (ii) the scope of environmental "effects;" (iii) the implementation and requirements of EISs; (iv) aspects of judicial review of agency decisions; and (v) procedures related to agency cooperation, decision-making, and compliance. Summaries of key aspects of the proposal are provided below.

NEPA Applicability and Appropriate Level of Review

The NPRM proposes to add provisions that address the threshold question of when NEPA applies to an agency action.^[6] The provisions provide five considerations to assist agencies in analyzing whether compliance with NEPA is necessary. The proposed rule also clarifies that agencies may either (i) conduct these threshold analyses on a case-by-case basis or (ii) identify specific actions not subject to NEPA in their NEPA procedures.

The NPRM would revise the definition of a "major federal action" to exclude "non-Federal projects with minimal Federal funding or minimal Federal involvement where the agency cannot control the outcome of the project." For example, CEQ notes that this revision might exclude a NEPA review of the entirety of a project for which a small amount of Federal funding is provided to help design an infrastructure project that is otherwise funded through private or local funds.^[7]

In addition, the NPRM would create new provisions that provide additional clarity on the appropriate "level" of NEPA review.^[8] The phrase "level of NEPA review" refers to whether the preparation of an EIS or EA is most appropriate or whether the action constitutes a "categorical exclusion" that does not require an EIS or EA to be prepared. A categorical exclusion is defined in the existing regulations as "a category of actions which do not individually or cumulatively have a significant effect on the human environment...and for which, therefore, neither an [EA] or [EIS] is required."^[9] The proposed rule would revise the definition to mean a "category of actions which the agency has determined in its agency NEPA procedures (§ 1507.3) normally do not have a significant effect on the human environment."^[10] The NPRM would also clarify that agencies must prepare an EA or EIS if a proposed action cannot be categorically excluded.^[11]

The proposal would retain the requirement that agency-specific NEPA regulations include provisions providing for extraordinary circumstances in which actions (otherwise considered an categorical exclusion) may still have a significant environmental effect (and, thus, may no longer be considered a categorical exclusion).^[12] It would, however, also suggest that agencies consider whether mitigating circumstances or other conditions are sufficient to avoid

those significant effects (and permit agencies to apply a categorical exclusion). In addition, CEQ is requesting comment on whether CEQ should establish government-wide CE's in this rulemaking to address routine administrative orders.[\[13\]](#)

Definition of Environmental "Effects" or "Impacts"

The NPRM proposes to redefine "effects" or "impacts" as the effects "that are reasonably foreseeable and have a reasonably close causal relationship to the proposed action or alternatives."[\[14\]](#) The NPRM emphasizes the causal relationship that is necessary. The proposal states that a "but for" causal relationship is insufficient to require analysis under NEPA.[\[15\]](#) The proposal also states that effects should not be considered significant if they are remote in time, geographically remote, or the product of a length causal chain.[\[16\]](#) The proposal would eliminate the categories of effects as "direct," "indirect," or "cumulative" that exist in the current regulations. In addition, in a significant shift from the current rules, the proposed rule would expressly state that analysis of cumulative effects (as defined in the current regulations) is not required.[\[17\]](#)

Purpose and Need Statement and "Reasonable Alternatives"

The proposed rule would revise provisions related to the purpose and need statement and the definition of reasonable alternatives. Specifically, the NPRM proposes to require agencies to base the purpose and need statement for an authorization for private action on (i) the goals of the applicant and (ii) the agency's authority.[\[18\]](#)

The NPRM also proposes to define "reasonable alternatives" as alternatives that are (i) technically and economically feasible; (ii) meet the purpose and need for the proposed action; and (iii) meet the goal of the applicant (where applicable).[\[19\]](#)

Exhaustion Requirement and Judicial Review

CEQ proposes to require that comments and objections to environmental analyses that are untimely submitted or not submitted shall be deemed forfeited.[\[20\]](#) CEQ notes that this provision is intended to prohibit parties from challenging analyses based on issues they did not raise during the public comment period.[\[21\]](#) The NPRM also proposes to limit the opportunity for judicial review to the issuance of a signed ROD or other final agency action.[\[22\]](#)

Lead and Cooperating Agencies

The NPRM addresses several modifications related to responsibilities of "lead agencies" and "cooperating agencies." The current regulations define a "lead agency" as "the agency or agencies preparing or having taken primary responsibility for preparing the environmental impact statement."[\[23\]](#) The NPRM would clarify that this term includes joint lead agencies.[\[24\]](#) "Cooperating agencies" are defined in the current regulations as Federal agencies (or State, Tribal, or local agencies) involved with a Federal action. The proposed rule would expressly state that the concept of lead and cooperating agencies applies to EAs in addition to EISs.[\[25\]](#) It would also clarify that the lead agency is responsible for determining the purpose and need and

alternatives in consultation with cooperating agencies. [\[26\]](#)

In addition, the lead agency would also be required to develop a schedule including milestones and authorizations required for EA and EIS reviews in consultation with any applicant and all joint lead, cooperating, and participating agencies, as soon as practicable. [\[27\]](#) The proposal would require agencies to issue a single EIS and ROD (or, for EAs, a single EA and joint FONSI) for actions involving multiple agencies when practicable. [\[28\]](#) If any scheduled milestones are missed, the proposal would also require the lead agency provide notice to the agencies responsible for the missed milestone. [\[29\]](#) The proposed rule would require agencies to designate a senior official to be responsible for NEPA compliance (such as disputes among agencies and enforcing page and time limits). [\[30\]](#)

Applicant-Prepared NEPA Analysis

With respect to private projects seeking government approval, the NPRM would formalize what is a current practice in many agencies – the preparation of EISs and EAs by the applicant or applicant’s contractors. Also consistent with current practice, that work would be done under the direction of the lead agency to ensure that the document complies with NEPA and meets the needs of the agency. [\[31\]](#)

Scoping Process

In another effort to make the process more efficient, the proposed rule would permit the scoping process (i.e., the process for determining the scope of issues for analysis in the EIS) to “begin as soon as practicable after the proposal for action is sufficiently developed for agency consideration.” [\[32\]](#) The current regulations direct agencies to start the scoping process after publishing a Notice of Intent to perform an EIS. [\[33\]](#) The proposed rule would require the lead agency to publish a Notice of Intent when it determines that a proposal requires an EIS and is sufficiently developed to allow for meaningful public comment. [\[34\]](#) The NPRM also proposes to include a list of necessary criteria for a Notice of Intent. [\[35\]](#)

Tiering

The NPRM addresses “tiering,” the use of existing studies and environmental analysis in the NEPA process. The proposed rule would add specific scenarios when tiering would be appropriate, but retains the general direction that tiering is appropriate when it would help agencies focus on issues that are ripe for decision. [\[36\]](#) The proposed rule would also permit agencies to tier environmental analyses to defer detailed analysis of specific program elements until they would involve an irreversible or irretrievable commitment of resources.

FONSI Mitigation

The NPRM proposes to add a provision requiring agencies to state the means and authority for any mitigation adopted to avoid or minimize potentially significant impacts otherwise requiring an EIS. [\[37\]](#) This requirement would apply to mitigation that is required under another statute or where an agency is issuing a mitigated FONSI. [\[38\]](#)

Time and Page Limits

The NPRM proposes to set presumptive time limits to prepare EAs (one year) EISs (two years), unless a senior agency official approves in writing a longer time period.^[39] Because agencies are permitted to set shorter time limits in their regulations, CEQ proposes to retain current factors informing this consideration.^[40]

The proposal would also limit the page length (not including appendices) of (i) EAs to 75 pages^[41] and (ii) EISs to 300 pages^[42] unless a senior agency official provides written approval to lengthen the document.

Invitation for Comment

Finally, CEQ has invited comment on a number of specific questions. These include whether an agency could allow “an irreversible and irretrievable commitment of resources” before the end of the NEPA process and what types of other reviews may be the “functional equivalent” of NEPA such that a review under NEPA should not be required.

Public comments responding to the NPRM are due March 10, 2020. CEQ will also hold public hearings in Denver Colorado (February 11, 2020) and Washington D.C. (February 25, 2020).

^[1] *Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act*, 85 Fed. Reg. 1684 (Jan. 10, 2020) (“NPRM”).

^[2] See *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 756 (2004).

^[3] NPRM at 1684.

^[4] *Id.* at 1684-85.

^[5] *Id.*

^[6] NPRM at 1695; Proposed §1501.1.

^[7] NPRM at 1709.

^[8] NPRM at 1695; Proposed §1501.3.

^[9] 40 C.F.R. §1508.4.

^[10] Proposed §1508.1(d).

^[11] NPRM at 1695-96; Proposed §1501.4(b)(2).

[\[12\]](#) *Id.*

[\[13\]](#) NPRM at 1696.

[\[14\]](#) NPRM at 1707; Proposed §1508.1(g).

[\[15\]](#) *Id.*

[\[16\]](#) *Id.*

[\[17\]](#) *Id.*

[\[18\]](#) NPRM at 1701; Proposed §1502.13.

[\[19\]](#) NPRM at 1702; Proposed §1508.1(z).

[\[20\]](#) NPRM at 1693; Proposed §1500.3(b).

[\[21\]](#) NPRM at 1693.

[\[22\]](#) NPRM at 1693; Proposed §1500.3(c).

[\[23\]](#) 40 C.F.R. §1508.16.

[\[24\]](#) NPRM at 1708; Proposed §1508.1(o).

[\[25\]](#) NPRM at 1698; Proposed §§1501.7 and 1501.8.

[\[26\]](#) NPRM at 1698; Proposed §1501.7(h)(4).

[\[27\]](#) NPRM at 1699; Proposed §1501.7(i).

[\[28\]](#) NPRM at 1698; Proposed §1501.7(g).

[\[29\]](#) NPRM at 1699; Proposed §1501.7(j).

[\[30\]](#) NPRM at 1706; Proposed §1508.2(a).

[\[31\]](#) NPRM at 1705; Proposed §1506.5(c).

[\[32\]](#) NPRM at 1699; Proposed §1501.9(a).

[\[33\]](#) 40 C.F.R. §1501.7.

[\[34\]](#) NPRM at 1699; Proposed §1501.9(d).

[\[35\]](#) *Id.*

[\[36\]](#) NPRM at 1699-70; Proposed 1501.11.

[\[37\]](#) NPRM at 1698; Proposed §1501.6(c).

[\[38\]](#) *Id.*

[\[39\]](#) NPRM at 1699; Proposed §1501.10(a).

[\[40\]](#) NPRM at 1699; Proposed §1501.10(d).

[\[41\]](#) Proposed §1501.5

[\[42\]](#) NRPM at 1700; Proposed §1502.7.