

CEQ's Proposed Changes to the National Environmental Policy Act of 1970 (NEPA)



On January 9, 2020, the White House Council on Environmental Quality (CEQ) announced its proposed rule to update the regulations for implementing NEPA.

Overview

This is the first major update since NEPA's inception over 50 years ago. The proposed changes aim to modernize and clarify NEPA regulations such that agency reviews of proposed federal actions may be executed in a more efficient, effective, and timely manner. Many industry and government practitioners agree that this reform is long overdue. However, select proposed changes to the NEPA analysis process are controversial and will likely lead to legal challenges and short-term regulatory uncertainty.

Major Changes

Overall, the proposed changes to the NEPA regulations aim to reduce paperwork and delays while promoting improved federal decision-making. While the new rule proposes many major and minor changes, the focus of this update is major changes, which include: a fundamental change in the way a project's impacts are assessed and considered; a renewed emphasis on public engagement and consultation; a reduction in what alternatives need to be

considered; a change in the interpretation of the term "major federal action"; and, time and page limits for NEPA documents.

Assessing Impacts and Effects

Under the proposed new rule, assessing the cumulative and/ or indirect impacts of a project is excluded from NEPA analysis as these impacts are not "reasonably foreseeable" and do not have a "reasonably close causal relationship to the proposed action or alternative." Similarly, CEQ states that effects should not be considered significant if they are "remote in time, geographically remote, or the result of a lengthy causal chain". CEQ also excludes effects from projects that the "agency has no authority to prevent or would happen even without the agency action".

Public Engagement and Consultation

The proposed new rule clarifies that Tribal entities should be engaged and consulted similar to state and local governments and that tribal input be allowed on heritage lands outside recognized Tribal Reservations. There is also a new requirement that objections to an action must be made within 30 days of the Notice of Availability (NOA) for the Draft Environmental Impact Statement (EIS). The new rule requires a Senior Agency Official

to "certify" in writing that public input was considered in the EIS, and include a summary of all alternatives, information, and alternatives public input submitted by the public.

Alternatives Analysis

According to the proposed new rule, for an alternative to be reasonable, it must be "technically and economically feasible," meet the purpose and need of the proposed action, and "consider the goals of the applicant when the agency's action involves a non-federal entity." This essentially replaces the previous requirement for assessment of all reasonable alternatives with a "practicable alternative" concept (i.e., allows an agency to exclude an alternative over which they have no control or influence).

Major Federal Project vs. Non-Major Federal Project

In a "change in position" to CEQ's previous interpretation of the statute, the CEQ specifically excludes certain categories of "non-major" Federal actions from NEPA analysis, because these categories involve "minimal Federal funding or minimal Federal involvement" and because the agency "cannot control the outcome on the project." The new rule requests public comment to define "minimal Federal funding" and identification of other

categories of actions common to all Federal agencies to be considered non-major Federal projects.

Time and Page Limits for NEPA Documents

According to the proposed new rule, Environmental Assessments (EAs) must be completed within one year (and be < 76 pages) and EISs must be completed within two years (and be < 301 pages) from the date of the Notice of Intent (NOI), not including appendices. Any variations from these requirements must be approved by the Senior Agency Official, who is defined as the Assistant Secretary level. The Senior Agency Official is then expected to create a new timeline and/or page limit.

Implications

Importantly, NEPA remains intact and in force, as eliminating NEPA would take an Act of Congress. The effects of the proposed rule changes depend on how quickly the CEQ is able to finalize the rule, whether political administration changes occur during the 2020 election, and probably ensuing legal challenges. If CEQ finalizes the rule in time to avoid a Congressional Review Act reversal, it is still likely a few provisions will be the source of litigation after they are fully adopted by government agencies. The new rule includes a severability clause, which states that if any sections or portions of the regulations are stayed or invalidated, the validity of the remainder of the sections shall not be affected.

Removal of cumulative and indirect impacts from consideration is likely to be one of the most controversial changes. Combined with CEQ's revised stance on significance, these changes effectively eliminate the need to address greenhouse gas emissions and the effects of climate change in future NEPA analyses. However,

early communications with federal agencies indicate that they will continue to implement NEPA analysis according to their existing regulations and best practices, without current consideration to these proposed rule changes until such time that they are finalized and the agency has developed their own implementing regulations (which may be up to a year later).

Takeaways

The public comment period ended on March 10, 2020, and the CEQ received more than 80,000 comments. No major revisions to the rule are expected as a result of public comment. This is in accordance with the current administration's stated policy goals, and efforts to streamline the environmental permitting and approval process.

The proposed rule will take effect 60 days after publication in the Federal Register, barring legal challenge. Numerous legal challenges have already been filed, including a request for withdrawal of the proposed rule from eighteen state attorneys general.

Final publication is anticipated to be as soon as late 2020. After final publication, agencies have one year to update their own NEPA-implementing regulations and policies, which means that over the next year we can expect most agencies to stick to the status quo, until their regulations are finalized.

Agencies can now begin the scoping process for a project as soon as the proposed project is "sufficiently developed," rather than requiring publication of a NOI as a precondition to scoping.

Almost all large construction and infrastructure projects will continue to require NEPA analysis, provided that they involve more than "minimal Federal funding or minimal Federal involvement."

The proposed rule would allow an applicant to prepare or select a contractor to prepare an EIS. The contractor would not be required to certify that they do not have a conflict of interest, but the lead federal agency would be required to "independently evaluate" and take "responsibility" for the scope and content of the EIS.

The new rule strengthens the Federal lead agency role and gives that lead agency sole authority to approve a project, which may or may not be realistic in multi-agency jurisdictions.

The new rule would only apply to actions begun after the effective date of the final rule, though agencies will have discretion to apply to ongoing reviews.

Because extensive litigation is expected, expect regulations and enforcement to vary by geography over the next few years. Permitting and consultations may also vary within the same agency in different areas.

States, Tribes and local governments will struggle to provide uniform guidance during litigation, so early and often consultation will be especially important until (and if) a nationwide policy is enacted.

Jacobs has NEPA specialists across the country and is ready to assist you with your questions and concerns about the new Rule and how it might affect your projects

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