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Proposed NEPA Rulemaking Accelerates Environmental Reviews

Jennifer A. Smokelin, Todd O. Maiden, Justin J. Mirabal, Randa M. Lewis, and Colette D. Honorable*

In this article, the authors discuss the National Environmental Policy Act and explore some of the most important modifications to the law proposed by the Council on Environmental Quality.

Earlier this year, the Council on Environmental Quality ("CEQ") issued a notice of proposed rulemaking ("NPRM") recommending extensive changes to the governing regulations of the National Environmental Policy Act ("NEPA").[1] In order to expedite the development of federal projects across the country, the CEQ proposes to streamline the environmental review process required under NEPA. Among other modifications, the NPRM accelerates the NEPA timetable, clarifies the scope of NEPA review, and facilitates coordination with NEPA stakeholders.

The proposed revisions to NEPA's regulatory architecture promise to have wide-ranging effects on the energy, environmental, and infrastructure sectors. Indeed, on January 21, 2020, more than 100 Democratic legislators sent a letter to the CEQ urging the agency to allow for more public input.

This article discusses NEPA, identifies five significant aspects of the proposed modifications, and then provides a more detailed look at some of the proposed changes.

NEPA OVERVIEW

NEPA states a broad national policy to "prevent or eliminate damage to the environment" and "enrich the understanding of the ecological systems and natural resources important to" the United States.[2] At its core, NEPA requires the federal government to take a "hard look" at the environmental consequences of its actions by engaging in a thorough and public environmental review and planning process.[3]

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[1] *Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act*, 85 FR 1684 (Jan. 10, 2020).

[2] 42 U.S.C. § 4321, *et seq.*

[3] *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350–51 (1989).

Under NEPA, whenever major federal actions will significantly affect the environment, federal agencies must incorporate informed and careful consideration of environmental impacts into their decision-making processes.[4] Agencies must also apprise the public of the environmental concerns they assessed and enable the public to participate in determining how those agencies will proceed.

NEPA, therefore, is a procedural statute; it does not prescribe substantive outcomes. Instead, NEPA "prohibits uninformed—rather than unwise—agency action"[5] and ensures that federal agencies engage in "fully informed and well-considered" decision-making.[6]

Critics of NEPA contend that the NEPA framework unnecessarily draws out the environmental review process, thus hindering the progress of worthwhile federal projects. In 2017, the Trump Administration directed the CEQ, the agency vested with primary responsibility for NEPA, to revamp its regulations to provide a two-year goal for completing environmental reviews for major infrastructure projects.[7] Accordingly, the CEQ issued an advance notice[8] of proposed rulemaking ("ANPRM") in 2018 to request recommendations to modernize NEPA's governing regulations.[9] The CEQ crafted the NPRM based on the feedback gleaned from the ANPRM comment process.

In its current form, the NEPA review process first requires federal agencies to evaluate whether new legislation or other major federal actions will "significantly affec[t] the quality of the human environment."[10] This analysis guides whether the agency can claim a categorical exclusion ("CE")[11] from NEPA review or whether the agency must prepare an environmental assessment ("EA")[12] or an environmental impact statement ("EIS").[13] A CE is a category of agency actions that the agency previously determined do not individually or

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[4] 42 U.S.C. § 4332(2)(C).

[5] *Robertson*, 490 U.S. 332 at 351.

[6] *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 558 (1978).

[7] Executive Order 13807, 82 FR 40463 (Aug. 24, 2017).

[8] https://www.federalregister.gov/documents/2018/09/28/2018-21115/advance-notice-of-proposed-rulemaking-request-for-information.

[9] *Update to the Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act*, 83 FR 28591 (June 20, 2018).

[10] 42 U.S.C. § 4332(2)(C).

[11] 40 C.F.R. § 1508.4.

[12] 40 C.F.R. § 1508.9.

[13] 40 C.F.R. § 1502.

cumulatively produce significant environmental effects.[14] If the proposed agency action is not included in the list of CEs maintained by the agency, the agency must prepare an EA or an EIS.

An EA is a concise document that evaluates the significance of the projected environmental impact of the proposed agency action in order to determine whether an EIS is warranted. If an EA concludes that an agency's actions will not result in significant environmental effects, the agency can fulfill its obligations under NEPA by issuing a "finding of no significant impact." Alternatively, if the EA finds that an agency action will cause significant environmental effects, the agency must commence an EIS.

The EIS is the most onerous analysis required under NEPA. The EIS process begins with a scoping phase that identifies issues and entities, including other federal agencies and local and tribal governments, interested in the proposed federal action. After gathering input from the EIS stakeholders, the agency must issue a draft EIS for public comment. The draft EIS identifies the purpose and need of the federal project and contemplates reasonable alternatives, including a "no action" alternative, that could achieve the same objectives without the environmental impact. In preparing the draft EIS, the agency must consider all of the direct, indirect, and cumulative effects of the agency's preferred course of action and of the reasonable alternatives. The draft EIS is then issued for public comment.

After reviewing the comments on the draft EIS, the agency prepares the final EIS. The final EIS incorporates the feedback that was elicited during the comment period and presents the agency's final justification for the proposed federal action. The final EIS is published in the Federal Register and another round of public comments is accepted. Then either the Environmental Protection Agency or another federal agency determines whether proceeding with the proposed action is environmentally acceptable. Finally, the agency that initiated the NEPA process must publish a record of decision ("ROD") notifying the public if the federal action will proceed.

FIVE KEY ASPECTS OF THE PROPOSED NEPA MODIFICATIONS

Some of the major aspects of the NPRM include:

Initiating NEPA Review

As discussed above, the NEPA review process is initiated by "major Federal actions." The NPRM redefines "major Federal action," thereby triggering NEPA review only if the action is "subject to Federal control and responsibility,

[14] 40 C.F.R. § 1508.4.

and has effects that may be significant."[15] The modified definition of "major Federal action" excludes "nondiscretionary decisions made in accordance with the agency's statutory authority" and "non-Federal projects with minimal Federal funding or minimal Federal involvement where the agency cannot control the outcome of the project." Accordingly, an infrastructure project that receives a minimal percentage of federal funding for the design of the project would not constitute a "major Federal action" and would not warrant NEPA analysis.

Less Expansive Alternatives Analysis

The NPRM proposes modifications to the scope of the NEPA alternatives review. Under the CEQ's proposed changes, NEPA analysis would consider a "reasonable *range* of alternatives"[16] rather than all reasonable alternatives. The reasonable range of alternatives is limited to alternatives that are "technically and economically feasible and meet the purpose and need of the proposed action."[17] This modification will effectively require a less expansive alternatives analysis.

Redefining the Environmental "Effects" of a Major Federal Action

The CEQ also proposes to focus NEPA review on the direct environmental effects of a federal project. Under the NPRM, the definition of "effects" would not include indirect and cumulative environmental effects.[18] The CEQ's modifications appear to align the NEPA definition of "effects" with the U.S. Supreme Court's holding in *Department of Transportation v. Public Citizen*.[19] Consequently, these proposed definitional changes could exclude climate change considerations from NEPA reviews—lead agencies will only need to assess impacts tied directly to a project and not downstream impacts on the climate or greenhouse gas emissions.

Considering Mitigation Measures

The proposed rule also seeks to clarify the meaning of "mitigation." This change is aimed at helping to clarify that NEPA does not require the adoption of a particular mitigation measure. Accordingly, under the proposed changes to NEPA, where appropriate, a mitigation measure should be discussed sufficiently so as to ensure that environmental consequences have been evaluated without

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[15] 85 FR 1708.

[16] Emphasis in original.

[17] 85 FR 1710.

[18] 85 FR 1707.

[19] *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004).

requiring that a complete mitigation plan be formulated before an agency can make its decision.[20] The example provided is that if an agency believes that its proposed action will provide net environmental benefits via compensatory mitigation, the agency can incorporate by reference the documents that support its finding rather than formulating a complete mitigation plan before it can make a decision. The clarification of the meaning of "mitigation" could significantly reduce the time and costs associated with developing a complete mitigation plan.

Faster NEPA Reviews

Many of the proposed changes are aimed at facilitating more "efficient, effective, and timely NEPA reviews."[21] For example, the proposed changes establish a presumptive time limit for EAs of one year and a presumptive time limit for EISs of two years.[22] The proposed changes also set a presumptive 75-page limit for EAs.[23] Although the NPRM does not impose a new page limit on EISs, the rulemaking requires agencies to comply with the existing recommended page limit of 150 pages or 300 pages for unusually complex or extensive federal projects. The proposed change also empowers a lead agency to set a joint NEPA compliance schedule and implement procedures to resolve delays or disputes. The proposed regulations also permit agencies to prepare a single EIS and issue a joint ROD.[24]

OTHER PROPOSED CHANGES TO NEPA

In addition to the changes discussed above, the NPRM adopts a five-factor "NEPA threshold applicability analysis," to aid federal agencies in determining whether agency action or federal legislation triggers NEPA analysis.[25]

Moreover, the proposed regulations authorize agencies to classify certain actions as exempt from NEPA, including:

- Non-major federal actions;
- Non-discretionary actions;

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[20] 85 FR 1709.

[21] 85 FR 1684.

[22] 85 FR 1699.

[23] 85 FR 1697.

[24] 85 FR 1691.

[25] 85 FR 1695; 85 FR 1714 ((1) whether the proposed action is a major federal action; (2) whether the proposed action is a non-discretionary action; (3) whether complying with NEPA would conflict with another statute; (4) whether complying with NEPA would be inconsistent with congressional intent; or (5) whether the agency has determined that a different statutory process will serve the function of NEPA compliance).

- Actions expressly exempt from NEPA under another statute;
- Actions for which compliance with NEPA would clearly and fundamentally conflict with the requirements of another statute; and
- Actions for which compliance with NEPA would conflict with the congressional intent of another statute.[26]

The NPRM also grants agencies the discretion to identify certain actions that are not subject to NEPA on a case-by-case basis.[27]

The NPRM further amends the NEPA regulations by codifying case law, which stresses that NEPA does not mandate specific results or substantive outcomes. The NPRM reiterates that NEPA only requires federal agencies to consider relevant environmental information and inform the public regarding decision-making processes.[28] The proposed changes also provide that neither the CEQ's regulations nor other agencies' regulations create a cause of action for violation of NEPA.[29] Under the NPRM's revisions, harm stemming from the failure to abide with NEPA can ultimately be remedied by renewed compliance with NEPA's procedural requirements.

The NPRM also requires that any actions to review, enjoin, stay, or alter an agency decision on the basis of an alleged NEPA violation must be raised as soon as practicable.

However, under the proposed modifications, minor, non-substantive errors in the NEPA process that do not affect an agency's decision-making shall not invalidate an agency action.

Agencies are also afforded the discretion to defer their NEPA analyses to later points in the decision-making processes, although the NPRM states that the agency "should" apply NEPA as early in the process as "reasonable."[30] The NPRM contains a host of modifications intended to improve interagency consultation and cooperation among state, tribal, and local governments.[31]

Finally, the NPRM amends various definitions in NEPA to increase the efficiency and effectiveness of the environmental review and makes typographical revisions to the NEPA regulations for consistency and clarity.

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[26] 85 FR 1707.

[27] 85 FR 1695.

[28] 85 FR 1693.

[29] 85 FR 1694.

[30] 85 FR 1695.

[31] 85 FR 1692.

CONCLUSION

The bottom line: The modifications proposed in the NPRM will reshape the environmental review process mandated under NEPA.