

A NEW NORMAL? TRUMP ADMINISTRATION RETOOLING OF CORE NEPA ELEMENTS

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INTRODUCTION

On 15 July 2020, the Trump administration—through the Council on Environmental Quality (CEQ)—released its long-anticipated overhaul to the regulations that implement the National Environmental Policy Act's (NEPA) (Updated Regulations). Following a two-year process, the Updated Regulations establish new requirements designed to streamline the environmental review process.

The Updated Regulations are the first major modification to the NEPA procedure in more than 50 years and will establish a new normal for the NEPA process. The new rule will influence a wide swath of federal decision making related to construction of roads and bridges, rail projects, transmission lines, conventional and renewable energy projects, broadband deployment, water infrastructure, as well as management decisions on federal lands, such as grazing, forestry, mining, utility corridors, wildfire protection, and restoration.

The Updated Regulations will go into effect on 14 September 2020, at which point, each federal agency will have one year to revise their implementing NEPA regulations consistent with CEQ's new rules. Because the Updated Regulations codify existing case law, executive orders, and agency guidance, many NEPA processes will remain the same.

However, the Updated Regulations also revise several core NEPA considerations, which will limit the scope and timeframe to complete environmental reviews. The revisions offer project developers and federal agencies greater certainty in an amorphous and highly litigious area of environmental law.

Legal challenges to the Updated Regulations are inevitable, however, and may ultimately temper the scope and effect of the final rule. As a result, understanding the parameters of NEPA's new normal will take time.

KEY COMPONENTS TO THE UPDATED REGULATIONS

As one of the nation's oldest environmental laws, NEPA's primary function is to ensure that federal agencies take a "hard look" at significant environmental effects prior to undertaking any major federal action. NEPA requirements are triggered in a wide array of federal actions, which include permitting, programmatic policy development, authorizations, real estate transactions, and infrastructure development. The NEPA process typically culminates in an Environmental Assessment (EA) or Environmental Impact Statement (EIS), each of which evaluates impacts from the proposed action, the degree to which those impacts are significant, and alternatives to the proposed course of action.

The stated purpose of the Updated Regulations is to modernize the NEPA process to make the environmental review more efficient, effective, and timely.¹ Key components to the Updated Regulations are: (1) implementing

time limits on environmental reviews, (2) limiting the scope of what projects constitute major federal action, (3) aggregating categorical exclusions across executive agencies, (4) limiting the scope of review by eliminating cumulative impacts analysis, and (5) heightening the standard for comments to be considered on projects.

| Historic NEPA Process | New NEPA | CEQ's Rationale |
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| No time limits on EIS/EA; "agencies encouraged to set limits as appropriate" | EIS are restricted to two years and EAs to one year for completion | The quicker process will promote timely reviews to expedite project completion |
| Expansive definition of "major federal actions" including projects with limited federal involvement and jurisdiction | Creates a floor for major federal actions, excluding smaller projects from review | Excluding smaller projects will reduce costs and delays by limiting the scope of NEPA |
| Categorical Exclusions are specific to individual federal agencies | All categorical exclusions are pooled to allow different agencies to draw from other agencies' historically used categorical exclusions | Aggregating categorical exclusions will allow for greater efficiency in handling environmental analyses |
| NEPA analysis requires a broad scope of review, e.g., cumulative impact study, comprehensive alternatives analysis; tiering of environmental studies not encouraged | Cumulative impacts will not be considered under an environmental study; only reasonable alternatives and impacts within close proximity to the project will be considered; environmental studies may be tiered | Eliminating cumulative impacts analysis will increase processing efficiency |
| Reviewing agency must assess, consider, and respond to comments | Comments are only to be considered if they are "exhaustive" | Limiting agency consideration and responses to exhaustive comments will ensure informed decision-making and reduce delays |

The Updated Regulations seek to shorten and accelerate the review period to evaluate environmental effects. Comprehensive EISs are to be completed within two years, while EAs must be completed within one year. Both periods can be extended with permission from a senior agency official in writing.²

The Updated Regulations also modify the definition of “major federal action,” which now excludes certain projects from federal NEPA review, effectively expanding the scope of categorical exclusions. Under the Updated Regulations, the application of NEPA is required only for those “major federal actions” that significantly affect the quality of the human environment, rather than non-major federal actions that “simply have some degree of federal involvement.”³ CEQ states that federal actions stemming from non-discretionary decisions, or for projects located entirely outside of the United States, or projects with minimal federal funding or involvement do not rise to the level of a major federal action.⁴ For example, projects that fall outside the scope of “major federal action” would include those where federal funding only supported the infrastructure design and projects that require loans or financial assistance where the federal agency does not exercise control and responsibility over the effects of the action (e.g., loans granted under the Small Business Act).⁵

CEQ also modified the definition of categorical exclusions to encourage cross-agency use. Historically, each federal agency published its own set of categorical exclusions that could be applied through its NEPA evaluation process. A categorical exclusion covers type of action that has no significant individual or cumulative effect on the quality of the human environment, and therefore neither an EA nor an EIS is required. According to CEQ, the definition change will group all categorical exclusions into one pool, from which any agency may draw and apply to its NEPA evaluation.⁶

The Update Regulations also narrow the definition of what “effects” rise to the level of scrutiny in a NEPA process. Specifically, the Updated Regulations eliminate the concepts of “direct,” “indirect,” and “cumulative” effects because, according to the agency, those terms have been a source of confusion and cause for litigation. In place of “direct,” “indirect,” and “cumulative” effects, CEQ defines “effect” to mean those “reasonably foreseeable” outcomes of a project that have “a reasonably close causal relationship to the proposed action or alternatives.”⁷ CEQ further narrows this definition of “effect” by stating that a traditional “but-for” causal relationship between a project and its potential effects is insufficient to make an agency responsible for such effects under NEPA.⁸

Specifically, CEQ clarifies that an environmental effect is not “significant” if it is “generally . . . remote in time, geographically remote, or the product of a lengthy causal chain.”⁹ This revision in the final rule codifies the limitation on what effects are properly considered under NEPA, as set forth by the U.S. Supreme Court in *Department of Transportation v. Public Citizen*, 541 U.S. 752, 767–68 (2004).

CEQ’s revised definition of “effects” also is likely to impact agencies’ consideration of climate change in NEPA reviews. The Updated Regulations are silent on the whether agencies are required to consider climate change under NEPA. CEQ states in its response to comments that the Updated Regulations do “not preclude consideration of the impacts of a proposed action on any particular aspect of the human environment,” and, therefore, the “analysis of the impacts on climate change will depend on the specific circumstances of the proposed action.”¹⁰ CEQ’s Updated Regulations leave to agency discretion which impacts to analyze, including any climate change impacts of a proposed action. However, the revised definition of “effects,” which includes a higher standard for causation, will likely limit the scope of climate change impacts analyzed under NEPA.

The Updated Regulations also require that public comments on NEPA analyses be exhaustive. The standard of public comment “exhaustion” will require comments to be “as specific as possible” and timely. Comments that are not submitted in a timely manner are considered “unexhausted and forfeited.”¹¹ The Updated Regulations mechanism to ensure timely comments also limits commenters’ subsequent litigation to their own comments, not comments submitted by others.¹²

POTENTIAL OPPORTUNITIES UNDER THE NEW NEPA

The Updated Regulations have the potential to streamline the NEPA process, which are expected to quicker federal action across a wide array of activities ranging from rulemaking to permitting, and from land management to infrastructure development.

The Updated Regulations encourage the use of “tiering” any environmental review performed subsequent to an original review on the same action in an effort to “eliminate repetitive discussions of the same issues.”¹³ This can avoid time consuming and costly review measures taken for simple revisions or modifications to projects.

CEQ's changes exclude certain effects of projects from being considered significant and, relatedly, seek to expand the number of projects that need a lower level of NEPA review (i.e., through an EA rather than preparation of a more robust EIS). The Updated Regulations also increase the number of projects that qualify for a categorical exclusion designation.¹⁴

The Updated Regulations expand the role that project proponents can play in the environmental review process for their own projects. Under the new rule, project proponents may take the lead in preparing a draft EIS or hire a contractor to do so.¹⁵ Under the previous regulations, project proponents could prepare a draft EA, but not an EIS, for agency review and final decision-making. To standardize this process, the Updated Regulations require contractors and applicants preparing a draft EA or EIS to submit a statement to the lead NEPA agency disclosing any financial or other interest in the outcome of the action.¹⁶

POTENTIAL RISKS UNDER THE NEW REGULATORY SCHEME

Litigation of the Updated Regulations is also a certainty. Several states attorneys general already have committed to challenging the Update Regulations in court.¹⁷ One particular area of litigation may be challenges to the Updated Regulations' elimination of the cumulative impacts analysis given that certain federal appellate courts have held that consideration of cumulative impacts is necessary to satisfy NEPA's “hard look” requirements.¹⁸ Litigation may stall implementation of the final rule if courts side with plaintiffs and stay the rule's effectiveness pending outcome of the litigation. Further, if such litigation is successful on the merits, it will lead to additional and lengthy rulemaking proceedings by CEQ to amend the Updated Regulations.¹⁹

Within one year of the effective date of the Updated Regulations, federal agencies are required to issue their own NEPA implementing regulations consistent with the Updated Regulations.²⁰ Given potentially shifting political positions in November 2020, it is reasonable to expect that some agencies will work hard to implement the Updated Regulations for their agencies as quickly as possible. Interested parties—particularly companies with jurisdictional projects in process or on the horizon—should participate in the relevant agencies' proceedings to ensure the proposed implementing regulations properly reflect the desired outcome of the regulatory process. Of course, there may be further delays and challenges related to those agency-specific NEPA rulemaking proceedings.

Another major issue for consideration will be the applicability of the Updated Regulations to existing, ongoing NEPA reviews. Once finalized, the Updated Regulations provide agencies with discretion to choose whether to apply the revised NEPA procedures to ongoing NEPA processes. Each agency must decide—and clearly indicate to interested and affected parties—which set of regulations it is applying to each ongoing proposed action. While the Updated Regulations do not explicitly address this issue, agencies likely cannot blend the procedures of both the prior and Updated Regulations.

The November 2020 elections could ultimately dictate whether the Updated Regulations are ever implemented. The Congressional Review Act allows the House and Senate 60 legislative days after CEQ sends the rules to Congress to pass a “disapproval resolution” by simple majority vote and presidential approval. It is possible that the 60 legislative day period would extend to the start of the 118th Congress, and if the November 2020 election results in a change in majority in the U.S. Senate, the Democrats retain the House and a Democratic White House, the CEQ final rule could be overturned through the Congressional Review Act.

Moreover, if the Democrats win the White House in November, we expect such administration would roll back the Updated Regulations and re-establish the “old normal” under NEPA.

With the team's extensive experience in permitting and litigating NEPA projects, we are well positioned and ready to help clients navigate the Updated Regulations, analyze the implications of litigation challenging the final rule, and efficiently complete NEPA project reviews while minimizing legal challenges. The firm will continue to provide updates on litigation and rulemaking related to the Updated Regulations.

FOOTNOTES

¹ COUNCIL ON ENVTL. QUALITY, FACT SHEET: MODERNIZING CEQ'S NEPA REGULATIONS 1 (2020).

² Update to the Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43304, 43338 (July 16, 2020) (to be codified at 40 C.F.R. § 1500 et seq.).

³ Id. at 43345.

⁴ Id. at 43373 (to be codified at 40 C.F.R. § 1507.3(d)(5)).

⁵ Id. at 43348–49.

⁶ Id. at 43322.

⁷ Id. at 43375 (to be codified at 40 C.F.R. § 1507.4(g)).

⁸ Id. at 43348.

⁹ Id. at 43375 (to be codified at 40 C.F.R. § 1507.4(g)(2)).

¹⁰ Id. at 43344.

¹¹ Id. at 43368.

¹² Id. at 43318.

¹³ Id. at 43363 (to be codified at 40 C.F.R. § 1501.11).

¹⁴ Id. at 43360.

¹⁵ Id. at 43371 (to be codified at 40 C.F.R. § 1506.5(b)).

¹⁶ Id. at 43371 (to be codified at 40 C.F.R. § 1506.5(b)(4)).

¹⁷ Nina H. Farah & Jennifer Hijazi, *'Blow up in their face.'* Trump NEPA rule faces legal assault, E&E NEWS, 16 July 2020.

¹⁸ See, e.g., *Twp. of Bordentown, New Jersey v. Fed. Energy Regulatory Comm'n*, 903 F.3d 234, 258 (3d Cir. 2018).

¹⁹ See e.g. *N. Plains Res. Council v. U.S. Army Corps of Engineers*, No. CV-19-44-GF-BMM, 2020 WL 1875455 (D. Mont. Apr. 15, 2020) (where in a pipeline case, the U.S. District Court Judge initially issued a temporary restraining order on all projects that were issued Nationwide Permit 12).

²⁰ 85 Fed. Reg. at 43373 (to be codified at 40 C.F.R. § 1507.3(b)).

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