

THE COUNCIL ON ENVIRONMENTAL QUALITY PROPOSES TO AMEND NEPA REGULATIONS

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I. Introduction

On January 10, 2020, the Council on Environmental Quality (CEQ) published a notice of proposed rulemaking in the Federal Register to revise regulations implementing the National Environmental Policy Act of 1969 (NEPA). These revisions could significantly affect projects in several industries, including infrastructure development, that require approval by federal agencies.

NEPA is a procedural statute that requires federal agencies to evaluate environmental impacts associated with proposed major actions. Major actions are actions subject to federal control and responsibility with potential significant effects. CEQ's regulations that implement NEPA aim to ensure that environmental effects from such actions are considered before they are undertaken. These regulations have never been comprehensively revised since they were promulgated in 1978, despite statutory changes that provided for a more streamlined NEPA review of certain infrastructural projects. The Trump administration first signaled its intent to update the NEPA regulations in 2017, when it issued an Executive Order directing CEQ to review the environmental review process to enhance its efficiency, specifically for major infrastructure projects. In June 2018, CEQ published an advance notice of proposed rulemaking (ANPRM) soliciting comments on potential revisions to the NEPA regulations. CEQ considered those comments when developing the current proposed rule.

II. Summary of CEQ's Proposed Changes

CEQ has proposed extensive revisions to its regulations in an effort to create a more efficient and timely NEPA review process. The proposed changes would impact several fundamental aspects of the NEPA process, such as the application and scope of NEPA review, analysis of alternatives, and timing requirements. Key proposed changes include:

- **Revision of the Term “Effects.”** This revision would alter the scope of an agency's effects analysis under NEPA. Under existing regulations, the term “effects” is defined to include all direct, indirect, and cumulative (incremental) effects of an action. However, effects are not subdivided into these categories in the statute. In the proposed rule, CEQ proposes to include only those effects that are “reasonably foreseeable and have a reasonably close causal relationship to the proposed action or alternative.” This revision explicitly eliminates an agency's obligation to analyze cumulative effects, as well as those direct or indirect effects that are remote in time or geography, or the product of an attenuated causal chain.
- **Climate Change Considerations as “Effects.”** The proposed rule does not address the extent to which an agency would be required to analyze potential climate change impacts from greenhouse gas (GHG) emissions, but it does note that any such analysis must be consistent with the proposed definition of “effects.” Draft NEPA Guidance on GHG

Emissions, released last June, would give agencies latitude in determining when quantification and analysis of GHG emissions and their effects are warranted. CEQ solicits input on whether the proposed regulation should incorporate any aspects of this draft guidance.

- **Clarification of NEPA Scope.** Currently, NEPA applies to major actions that are potentially subject to federal control and responsibility. CEQ proposes narrowing the definition to major federal agency actions that are both affirmatively undertaken and clearly subject to federal control and responsibility. Loans, loan guarantees, or other federal financial assistance in cases where the federal agency does not have sufficient control and responsibility over the effects of the action would not trigger NEPA.
- **Narrowing Scope of Alternatives.** Under current regulations, a lead agency must analyze all reasonable alternatives, including those not within its jurisdiction. The proposed regulations would strike the term “all” from this requirement, allowing the agency to consider a more limited range of alternatives, including only those within its jurisdiction and that are technically and economically feasible.
- **Streamlining the NEPA Process.** Under the proposed rule, agencies are encouraged to identify and apply efficiencies, such as the use of Categorical Exclusions (CEs), and adoption of prior NEPA, state, tribal, and local analyses, to avoid duplication of effort and unnecessary expense. Other proposed streamlining efforts include clarifying the process by which an agency can create a CE and use exclusions created by other agencies, implementing presumptive time limits for NEPA reviews (two years for Environmental Impact Statements (EISs) and one year for Environmental Assessments), and imposing presumptive page limits for EISs (300 pages). Agencies would be required to develop (or revise) their NEPA procedures and subagencies are encouraged to adopt their own procedures. This proposed change is significant because certain governmental agencies, such as the Pipeline and Hazardous Materials Safety Administration (PHMSA), do not currently have specific NEPA procedures and/or CEs.

The proposed revisions, if adopted as a final rule, would supersede all previous CEQ NEPA guidance, and CEQ anticipates that it would withdraw all CEQ NEPA guidance that is currently in effect.

III. Potential Impacts of Proposed Rule on the Regulated Community

The proposed revisions to NEPA, if implemented, would likely have a significant impact on several industries, particularly on privately developed infrastructure projects, including pipelines, electricity transmission lines, water resource projects, and communications infrastructure projects. For example, the construction of interstate natural gas transmission facilities requires a Certificate of Public Convenience and Necessity from the Federal Energy Regulatory Commission, which customarily serves as the lead agency for the NEPA review of such projects. Although these and other federal approvals are likely to trigger NEPA obligations under the proposed rule, revision of the term “effects” and the potential incorporation of the draft GHG Guidance into the NEPA rules are expected to expedite the environmental reviews, which

in the past have contributed to costly delays for project approvals. In addition, the proposed rule could make it more difficult for project opponents to successfully seek an injunction based on alleged NEPA violations. Finally, the presumptive time limits for NEPA review would substantially reduce the current average timeframe for NEPA review (about 4.5 years), which would provide for more certainty to the business community when planning projects.

IV. Next Steps

The public comment period closed on March 10, 2020. More than 600,000 comments were submitted in response to this proposed rulemaking.