

It's as Big as It Gets: The New NEPA Beginning

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CEQ's Proposed Amendments to NEPA Regulations

- Update on the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 1684 (January 10, 2020)

 **1684** Federal Register / Vol. 85, No. 7 / Friday, January 10, 2020 / Proposed Rules

COUNCIL ON ENVIRONMENTAL QUALITY
40 CFR Parts 1500, 1501, 1502, 1503, 1504, 1505, 1507, and 1508
[CEQ-2019-0003]
RIN 0331-AA03

Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act

AGENCY: Council on Environmental Quality.
ACTION: Notice of proposed rulemaking.

Instructions: All submissions received must include the agency name and docket number for this rulemaking. All comments received will be posted without change to <https://www.regulations.gov>, including any personal information provided. Do not submit electronically any information you consider to be private, Confidential Business Information (CBI), or other information whose disclosure is restricted by statute.
Docket: For access to the docket to read background documents or comments received, go to <https://www.regulations.gov>.

5. Alternatives (§ 1502.14)
6. Affected Environment and Environmental Consequences (§§ 1502.15 and 1502.16)
7. Submitted Alternatives, Information, and Analyses (§§ 1502.17 and 1502.18)
8. Other Proposed Changes to Part 1502
E. Proposed Revisions To Commenting on Environmental Impact Statements (Part 1503)
F. Proposed Revisions to Pre-Decisional Referrals to the Council of Proposed Federal Actions Determined To Be Environmentally Unsatisfactory (Part 1504)
G. Proposed Revisions to NEPA and Agency Decision Making (Part 1505)
H. Proposed Revisions to Other Requirements of NEPA (Part 1506)

- Fact Sheet issued by the White House
- Regulatory Docket CEQ-2019-003
 - Comments on proposal available for review
 - Redline of proposed changes against current regulations

Q: What is the status and what will happen next?

- Deadline to submit comments is March 10, 2020
 - Numerous stakeholders have requested an extension of the comment period and additional public hearings
 - House Democrats – minimum 6 months and 5 public hearings
 - Other commenters requested 60-day and 180-day extensions
 - Administration granted a 30-day extension for comments to the ANPRM
- Public Meetings
 - Feb. 11, 2020 in Denver, Colorado (expanded sessions)
 - Feb. 25, 2020 in Washington, DC

Q: What is the Council on Environmental Quality's role?

- CEQ is an Executive Office of the President created by NEPA in 1970
- E.O. 11991 (1977), Carter, instructed CEQ to issue regulations to Federal agencies for implementation of NEPA
- CEQ promulgated its regulations in 1978 (40 CFR Parts 1500 – 1508)
- CEQ has also issued many guidance documents interpreting NEPA
- The Supreme Court has given “substantial deference” to CEQ’s interpretation of NEPA
 - *Andrus v. Sierra Club*, 422 U.S. 347 (1979) – “CEQ's interpretation of NEPA is entitled to substantial deference. . . .The Council was created by NEPA, and charged in that statute with the responsibility ‘to review and appraise the various programs and activities of the Federal Government in the light of the policy set forth in ... this Act ..., and to make recommendations to the President with respect thereto.’”

Q: What prompted CEQ to propose NEPA reform?

- Since initially issued in 1978, there has been only one substantive change in the regulations, in 1986
- CEQ has issued numerous guidance documents to clarify regulations
- Significant statutory changes in intervening years
- Duration of NEPA review and length of EIS have ballooned
 - CEQ Guidance suggests EIS for complex projects should not exceed 1 year
 - Average time to complete EIS and ROD, measured from date of NOI publication, is **4.5 years**
 - EIS are on average almost **600 pages** long
- NEPA process, sufficiency of EIS, and ROD are heavily litigated

Q: What aspects of the Proposal were most expected?

- NEPA Reform supported under Democratic and Republican administrations
 - E.O. 13807 (2017), signed by President Trump
 - E.O. 13604 (2012), signed by President Obama
 - E.O. 13212 (2001), signed by President Bush
- Current federal policy on agency coordination and timing incorporated into Proposal
 - One Federal Decision
 - Moving Ahead for Progress in 21st Century (MAP21) Act (2012)
 - Fixing America's Surface Transportation (FAST) Act (2015)
 - CEQ 40 Questions Guidance
- Current best practices incorporated into Proposal
 - Early action and use of pre-scoping efforts
 - Narrowing down of alternatives

Q: What are the adverse reactions to the Proposal and how justified are they?

- Streamlined consideration of effects/impacts
 - Effects, § 1508.1 (g) – Eliminate direct/indirect distinction
 - Eliminate cumulative impact definition – GHG/climate change
- Incorporation of “small handle” concept
 - Changes suggest some federal actions may not trigger NEPA review
 - Major Federal Action, § 1508.1 (q) – *“Major Federal Action also does not include non-Federal projects with minimal Federal funding or minimal Federal involvement where the agency cannot control the outcome of the project.”*
 - CEQ considering whether to exclude other *per se* categories of activities and whether to establish government-wide categorical exclusions
- Preparation of NEPA documents by project sponsor
- Exhaustion
- Judicial review

Q: What does Proposal mean for GHG/climate impacts?

- Stakeholders have expressed concern that the Proposal would limit consideration of GHG/climate change effects
 - Proposed § 1508.1 (g) would eliminate the concept of direct effects and the need to analyze cumulative impacts
- CEQ rejected requests to explicitly address GHG/Climate impacts
 - June 26, 2019 – CEQ published Draft NEPA Guidance on Consideration of GHGs
 - CEQ intends to review proposed guidance for consistency if NEPA Proposal is finalized
- The Proposal postdates several recent decisions addressing consideration of GHGs
 - *Sierra Club v. FERC*, 827 F.3d 36 (D.C. Cir. 2016)
 - *Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017)
 - *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41 (D.D.C. 2019)
 - *Indigenous Env'tl. v. U.S. Dep't of State*, 347 F. Supp. 3d 561 (D. Mont. 2018)

Q: What legal challenges are anticipated?

- Provisions especially vulnerable to challenge:
 - Effects, § 1508.1 (g) – Eliminate direct/indirect/cumulative effects distinction
 - *Dep't of Transp. v. Public Citizen*, 541 U.S. 752 (2004) – “[A] ‘but for’ causal relationship is insufficient . . . NEPA requires ‘a reasonably close causal relationship’ between the environmental effect and the alleged cause.”
 - Exhaustion, § 1500.3 (b) – untimely comments deemed unexhausted/forfeited
 - Fast-41, 42 U.S.C. § 4370m-6 – review limited to timely comments putting agency on notice
 - Available remedies, § 1500.3 (d) – timely challenge, harm remedied with procedural compliance, no cause of action created, and harmless errors
- Other potential challenges under the APA
 - Failure to provide adequate explanation
 - Lack of support for statutory interpretation
 - Procedural issues, e.g., failure to consult with Tribes, or even comply with NEPA

Q: What is the practical impact for pending projects?

- If Proposal is finalized:
 - Any final rule will not apply to pending projects
 - Agency-specific NEPA regulations will then be updated to conform

- In meantime:
 - Agencies likely to use discretion to act consistent with proposal
 - E.g., Department of Interior Secretarial Order 3355, Streamlining NEPA Reviews and Implementation, implementing E.O. 13807
 - Potential to change outcome of currently pending litigation
 - E.g., “small handle” and the Keystone Pipeline litigation

Q: How will the election impact the Proposal?

- Potential to garner national attention in election year
 - President Trump announced Proposal from West Wing; suggests significant rulemaking for administration
 - Anticipated to be larger rulemaking in terms of comment volume
 - Docket shows over 25,000 comments already received
- Congressional Review Act 1996
 - Fast track congressional procedures to disapprove of regulations
 - Election presents potential for a change in parties' right during pendency of proposal/right after final rule

Q: What is the best approach to comments?

- Specific criticisms and recommendations
- Concrete relevant examples of impacted projects
 - Instead of general comment that NEPA causes severe project delays
 - State-specific cause and impact, e.g., “An untimely comment delayed our project schedule by six months”
- Engage directly with the areas of NEPA that cause the most concern
 - E.g., project proponent preparation of documentation
 - E.g., presumptive time limits
- Responsive to specific questions CEQ posed
 - E.g., whether there should be government-wide categorical exclusions



Questions?

Presenters



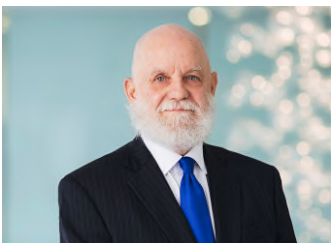
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