Trump administration proposes sweeping changes to National Environmental Policy Act regulations

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Introduction

At a White House event on January 9, President Trump, flanked by the Chair of the Council on Environmental Quality ("CEQ"), the Interior Secretary, the Administrator of the Environmental Protection Agency, and representatives of industry and labor, unveiled a proposed rule that would make significant changes to current National Environmental Policy Act (NEPA) regulations. The proposed rule appeared the next day in the *Federal Register*, 85 Fed. Reg. 1685.

Signed into law in 1970 by President Nixon, NEPA requires that the federal government consider the environmental impacts associated with major federal actions. Trump, Republicans and a variety of industry stakeholders have argued that NEPA imposes unnecessary delays and costs on major infrastructure projects, including energy projects. Democrats and environmental organizations, on the other hand, have largely defended NEPA, arguing that it ensures public participation and consideration of environmental impacts, including climate effects, as part of federal decision making.

The CEQ has not updated the NEPA regulations in a substantial way since they were promulgated in 1978. President Trump, in 2017, issued an executive order to streamline the NEPA process and the CEQ in 2018 began the process of reviewing existing NEPA regulations by issuing an advanced notice of proposed rulemaking. The proposed rule incorporates some of the elements of the 2017 executive order, such as establishing a lead federal agency for NEPA reviews.

The alert below summarizes and analyzes some of the major proposed changes to NEPA in the proposed rule.

Summary of key provisions

Change to definition of 'effects' **-** The proposed rule deletes from the definition of "effects" the references to "direct and indirect effects" and "cumulative effects" of the proposed action. Instead, "effects" must be reasonably foreseeable and have a reasonably close causal relationship to the proposed actions or alternatives." The stated intent of the change is to save agency time and resources that had been spent on categorizing effects and focus on analyzing only effects that are "significant and would occur as a result the agency's decision." The proposed rule also expressly states that federal agencies no longer have to consider "cumulative effects." Current regulations define a "cumulative impact" as "the impact on the environment which results from incremental impact of the action when added to other past, present, and reasonably foreseeable future actions." Furthermore, the proposed rule states that federal agencies should not consider effects "significant" if they "are remote in time, geographically remote, or the product of a lengthy causal chain."

Critics of the proposed rule contend that these changes would, among other things, prevent federal agencies from

assessing the climate change impacts associated with major federal actions such as construction of natural gas pipelines and other energy projects. Notably, there has been significant debate over whether and to what extent the Federal Energy Regulatory Commission must consider the downstream climate change effects associated with interstate natural gas pipelines. Further complicating this provision is the fact that there is case law that requires the analysis of cumulative impacts on greenhouse gas emissions.

Change to definition of 'major federal actions' **-** The proposed rule would provide that projects with limited federal funding or involvement do not constitute "major federal actions" subject to NEPA review. In particular, the proposed rule states that such actions would not include loans, loan guarantees or other forms of assistance where the federal agency does not exercise sufficient control and responsibility over the effects of the action.

One federal decision **-** Though existing NEPA regulations establish roles for a lead agency and cooperating agencies, the proposed rule includes changes designed to promote "collaboration" among agencies to improve efficiency of the process. Among other things, the proposed rule directs agencies to evaluate proposals involving multiple agencies in a single environmental impact statement (EIS) and a single (joint) record of decision. In addition, the proposed rule would require the development of and adherence to a schedule for an environmental review, authorizations associated with a proposed federal action, and a resolution of disputes that could cause delays in the schedule. It would also clarify that lead agencies can invite states, tribes and local agencies to participate as cooperating agencies in the NEPA process.

Presumptive time limits and page limits **-** The proposed rule would establish a presumptive time limit of one year for environmental assessments (EAs) and two years for EISs unless a senior official of the lead agency approves a longer period. It also would prescribe a presumptive page limit of 75 pages for EAs and 150 pages for EiSs (300 pages for projects of unusual scope or complexity) unless a senior official with a lead agency approves a longer EIS.

Alternatives to a proposed action **-** NEPA regulations currently require a federal agency to "evaluate all reasonable alternatives" to a proposed action. The proposed rule would revise the definition of "reasonable alternative" so that a federal agency would only have to analyze a "reasonable range of alternatives that are technically and economically feasible." In addition, the proposed rule would clarify that a lead federal agency is not required to assess alternatives that are outside its jurisdiction.

Project sponsor participation **-** The proposed rule would permit a project sponsor to assume a greater role in preparing environmental documents as part of the NEPA review—allowing an applicant to prepare or select a contractor to prepare an EIS, a role that was reserved under existing regulations for the lead agency (or cooperating agency in some instances). The lead federal agency would, however, need to independently evaluate environmental documents submitted by a project sponsor. Nevertheless, this provision has been criticized as effectively undoing the conflict-of-interest provisions applicable to the NEPA compliance process.

Remedies **-** The proposed rule adds a new provision clarifying that NEPA itself does not create a private right of action and disclaiming any presumption that a violation of NEPA will result in irreparable harm. In other words, the rule reiterates case law holding that legal challenges based on NEPA are made under the Administrative Procedure Act at the time of the final agency action, which occurs at the issuance of the record of decision, not the EIS.

Tribal participation **-** The draft rule would include the term "Tribal" wherever the phrase "State and local" appears in the regulations, according to the proposal, "to ensure consultation with Tribal entities and to reflect existing NEPA practice to coordinate or consult with affected Tribal governments…." The draft rule also clarifies that tribes may participate as joint lead agencies. In addition, the proposed regulation removes the limitation on the participation of tribes to cases where the effects are only on the reservation, so that tribes can more easily participate in the NEPA process in a much broader and appropriate set of circumstances—including as cooperating agencies—receiving public notice and providing comments.

Next steps

The January 10 publication of the proposed rule in the *Federal Register* opened a 60-day public comment period that expires on March 10, 2020. The CEQ plans to hold two public hearings—one in Washington, DC, and one in Denver. Opponents are already petitioning the CEQ to extend the public comment period. On January 21, more than 100 congressional Democrats sent a letter to CEQ Chair Mary Neumayr requesting that the public comment period be extended from 60 days to six months.

The Trump administration hopes to finalize the proposal later this year but any final rule is expected to be challenged through litigation that will likely extend well past the November 2020 Presidential election.

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