

Client Alert

CEQ Proposes Overhaul of NEPA Environmental Review for Project and Infrastructure Development in the US

January 14, 2020

In line with the Trump administration's deregulation efforts, on January 10, 2020, the Council on Environmental Quality ("CEQ") published a [notice of proposed rulemaking](#) that would make significant changes to the National Environmental Policy Act ("NEPA"). The proposed rule seeks to "simplify and modernize" the existing NEPA regulations in order to accelerate NEPA reviews and would be the most substantial and comprehensive revision of NEPA's implementing regulations since their promulgation in 1978. As a result, energy and infrastructure projects could face a reduced regulatory burden.

The proposed rule, if made final, would streamline the NEPA review process. The range of projects requiring NEPA review would be limited, and certain privately and locally financed projects with minimal federal funding or involvement (which would comprise a large portion of energy and infrastructure projects developed in the private sector) would be excluded. The proposed rule also seeks to accelerate the timeline of NEPA reviews, setting deadlines on the completion of assessments so that the most exhaustive NEPA reviews would be completed within two years.

NEPA is a procedural statute that requires review of the environmental consequences of "major federal actions" (such as issuance of a federal permit or provision of federal funding). Even if a NEPA review identifies significant impact, the issuing agency would not be required to take a specified action as a result of such finding. However, steps to mitigate identified risks are frequently taken. NEPA reviews are often required prior to issuance of major federal permits (including certain permits issued by the Federal Energy Regulatory Commission, the Army Corps of Engineers, the Bureau of Land Management and the Fish and Wildlife Service) that can be required for commercial, energy & infrastructure and transportation related development, such as pipelines, power plants and downstream oil and gas or petrochemical projects. Several states, including California and New York, have similar laws. Currently, the process can take more than five years and often faces legal challenge that can result in significant costs and project delays.

The proposed rule is the result of a process that began with the Trump administration's issuance of [Executive Order 13807](#) on August 15, 2017 directing CEQ to improve the NEPA process and was followed by an [advance notice of proposed rulemaking](#) ("ANPRM") that received 12,500 public comments in the summer of 2018. Given its broad scope, the proposed rule will most likely be subject to extensive comments from proponents and opponents and face legal challenge by various environmental groups and state governments.

The Proposed Rule

Some of the key revisions to the proposed rule are highlighted below.

Limiting the range of projects subject to NEPA review

- NEPA review will not be required in connection with:
 - Projects with minimal federal funding or federal involvement such that the agency cannot control the outcome of the proposed project. The definition of "minimal", as proposed, was not set by a percentage or dollar figure, but public comment on a specified threshold level is being solicited.

- Non-discretionary agency actions, which are actions for which the agency lacks authority to consider environmental effects as part of its decision-making process.

Accelerated NEPA review timeline and reduced page length

- Unless a senior agency official of the lead agency approves a longer period, agencies must complete:
 - Environmental assessments (“EAs”) within one year with final text no more than 75 pages.
 - Environmental impact statements (“EISs”) within two years with final text no more than 150 pages, although projects of unusual scope or complexity could be up to 300 pages.¹
- Additionally, the proposed rule contains several revisions providing for the early initiation of NEPA review-related processes, including the (1) coordination of environmental reviews by multiple agencies; (2) resolution of disputes among agencies; (3) using the scoping process for an early identification of issues to consider; and (4) public comment to draft EISs.

Narrowing scope of review

- To satisfy the requirements of the NEPA process, federal agencies have had to consider the individual and cumulative impacts as well as the direct and indirect effects of a project to the environment. The proposed rule redefines the term “effects” to refer to those that are reasonably foreseeable and have a reasonably close causal relationship to the project, striking the distinction between “direct” and “indirect”. Analysis of cumulative impacts would not be required.
- In the summer of 2019, CEQ issued a draft guidance document entitled [“Draft National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions”](#) (“Draft GHG Guidance”), which included guidance on a cumulative effects analysis of greenhouse gas (“GHG”) emissions and quantification of direct and indirect GHG emissions. The reduction in scope of review in the proposed rule appears to limit the consideration of climate change effects in the NEPA process. CEQ indicated that it will eventually review the Draft GHG Guidance for consistency with the regulations.
- Currently, NEPA review involves the identification and consideration of “reasonable alternatives”. The proposed rule states that agencies need not consider every available alternative or alternatives outside their respective jurisdictions. CEQ also proposes to introduce technical and economic feasibility into the identification and consideration of reasonable alternatives.

Increased interagency coordination

- The proposed rule requires more coordination among federal agencies involved in the same action or group of actions for a given project proposal, including the completion of one joint NEPA review among the lead agency and cooperating agencies.

Next Steps

CEQ is soliciting public comment on the notice of proposed rulemaking until March 10, 2020 and is holding public hearings on the proposed rule in February. In the absence of judicial order blocking the action, a proposed rule often becomes the final rule with some modifications. However, this proposed rule has already received polarizing reactions from environmental groups, industry groups and members of Congress. Legal challenges are very likely to be filed by environmental groups and state governments, which could ultimately stymie the rollout of the NEPA overhaul.

Timing for adoption of the proposed rule will be crucial. The Trump administration is aiming to finalize the proposed rule before the summer to avoid vulnerability under the Congressional Review Act² (“CRA”),

¹ In December 2018, based on its review of 1,161 EISs completed between 2010 and 2017, CEQ [found](#) that the average time for completion was 4.5 years, the median was 3.6 years and one quarter required more than six years. According to CEQ, the average length of an EIS is over 600 pages. Note that these estimates relate only to NEPA reviews which required an extensive EIS review; NEPA reviews for projects with less significant impact may only require an EA, which would be less extensive and take less time to complete.

² 5 U.S.C. §801 et seq.

which was enacted to prevent the passage of “midnight regulations” towards the end of an outgoing administration. In the event that Democrats take control of both the legislative and executive branches in this year’s election, the rule could be disapproved by a joint resolution of Congress and the President’s signature under the CRA. Disapproval of the proposed rule under the CRA is only one of the many challenges this proposed rule will face that could lead to a period of regulatory uncertainty.

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Environmental Practice Group

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