Modernizing Environmental Reviews under the National Environmental Policy Act

New NEPA Regulations from the White House Council on Environmental Quality Will Benefit the Environment and the Economy

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The Trump administration has finalized a new set of rules to implement the National Environmental Policy Act (NEPA), which requires federal agencies to study the potential environmental impacts of major actions and infrastructure projects.[1] On July 16, 2020, it published the final rule.[2] The changes are measured, and should benefit virtually all stakeholders, including taxpayers, agencies, project proponents, local residents, renewable energy producers, and even the very environmental advocacy groups that oppose the new rule. The new rule should bring lasting improvements to the NEPA process.

This is the first time since its adoption of the original NEPA regulations in 1978 that the White House Council on Environmental Quality (CEQ) has comprehensively revised its regulations under the Act. In the decades since the original rule was adopted, the NEPA process has become a thicket of red tape and litigation risk that often serves to block or endlessly delay needed infrastructure projects, including ecological restoration projects. While the new rule raises certain important questions and concerns, on balance it should help make the NEPA process less time-consuming, less burdensome, and more predictable, while offering greater environmental benefits and making the process more inclusive. This paper examines some of the key issues and changes in the new rule.

Legal Challenges and Status of the New NEPA Rule. NEPA does not give CEQ express rulemaking authority. The 1978 CEQ regulation was adopted pursuant to Executive Order 11514 (March 5, 1970), as amended by E.O. 11991 (May 24, 1977), which is still in effect and established a continuing mandate to improve NEPA. The new proposal is based on those two orders, as well as E.O. 13807 (August 15, 2017), which authorized CEQ to take such actions, including "issuing such regulations, guidance, and directives as CEQ may deem necessary" to advance the goals of the order.

The Supreme Court observed in *Department of Transportation v. Public Citizen* that CEQ was "established by NEPA with authority to issue regulations interpreting it."[3] The Court had previously held, in *Robertson v. Methow Valley Citizens*, that CEQ's regulation of NEPA is entitled to "substantial deference."[4] But courts may find that the source of this "substantial deference" is persuasive rather than the controlling authority normally accorded to agencies exercising a delegation of rulemaking authority, as in *Chevron* deference, and that CEQ is not entitled to the latter.[5]

Effective Date and Application to Ongoing NEPA Reviews. The new rule came into effect on September 1, 2020 (60 days after publication in the Federal Register). It applies to NEPA reviews that begin after that date with the publication of a Notice of Intent (NOI) to prepare an Environmental Impact Statement (EIS). However, agencies have discretion to apply the rule to activities and environmental reviews that were already in progress on that date.[6]

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[1] 42 U.S.C. §§ 4331 et seq.
[2] 85 Fed. Reg. 43,304.
[3] 541 U.S. 752 (2004).
[4] *Robertson v. Methow Valley Citizens*, 490 U.S. 332 (1989).
[5] *See, Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984).
[6] 40 C.F.R. § 1506.13

That is a potential source of inconsistency with respect to current NEPA reviews, as different agencies may apply different rules to different projects at the same time. With respect to multi-agency reviews already underway on the effective date, the lead agency will have to decide whether to follow the new rule or the old rule, after consultation with any cooperating agencies. It may be preferable for agencies to adopt the new rule uniformly for all ongoing projects for which the draft EIS (DEIS) is not yet complete or nearing completion. It may be preferable for each new draft and final EIS and environmental assessment (EA) for a NEPA review already underway on the effective date to indicate, prominently, which version of the rule is being followed.

One Federal Decision. The new rule codifies key elements of the "One Federal Decision" (OFD) policy established in E.O. 13807 and subsequent guidance.[7] The OFD policy established expedited authorization and environmental review procedures for "major infrastructure projects," including a maximum of two years for completion of an EIS and several procedures for enhanced interagency coordination.

The final rule codifies and builds upon key elements of the OFD policy. Federal agencies would be required to agree on a joint project schedule at the outset, as follows.[8]

- Environmental Impact Statements would have to be completed in no more than two years;
- Environmental Assessments would have to be completed in no more than one year;[9]
- EISs would have to be no longer than 300 pages; and
- EAs would have to be no longer than 75 pages.

Exceptions to the above requirements would apply in cases in which a senior agency official approves longer limits.[10] Moreover, the broader OFD policy remains in effect and agencies should continue to implement the policy consistent with the new rule.

Notice of Intent and Scoping. Under the new rule, issuance of the Notice of Intent is now part of the scoping process. Scoping may begin at the agency's discretion, but the agency is now required to publish an NOI as soon as practicable after the agency determines that the proposal is sufficiently developed to allow for meaningful public comment and that an EIS will be required.[11] As a completed permit application will normally satisfy both requirements, this should give project proponents more control of the timing of the review process.

However, the new rule's more detailed provision on the contents of the NOI may prove to be a source of significant overall delay in the NEPA process. That is because the new rule's

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[7] The One Federal Decision policy was established by E.O. 13807 (August 5, 2017) and elaborated in a CEQ/OMB Memorandum to Heads of Federal Departments and Agencies titled "One Federal Decision Framework for the Environmental Review and Authorization Process for Major Infrastructure Projects under Executive Order 13807" (March 20, 2018) and the related interagency Memorandum of Understanding Implementing One Federal Decision under Executive Order 13807 (April 10, 2018).

[8] 40 C.F.R. § 1501.7(i); *but, cf.*, 40 C.F.R. § 1501.9(d).

[9] 40 C.F.R. § 1501.10(b)(2) sets the two-year limit for an EIS, while § 1501.10(b)(1) sets the one-year limit for an EA, to be measured from the date of the agency's decision to prepare an EA.

[10] 40 C.F.R. §§ 1502.7 and 1501.5(f).

[11] 40 C.F.R. § 1501.9(d).

detailed provisions on what an NOI must contain now require the agency to front-load key interagency concurrence points of the NEPA process, such as a permitting timetable, a purpose and need statement, and a preliminary description of alternatives to be studied.[12] Under the OFD policy, these are key concurrence points of the NEPA process itself that normally require extensive interagency coordination and, in some cases, extensive engagement with stakeholders as part of the scoping process.

A key question moving forward will be how much time agencies take to publish the NOI after receipt of a complete permit application. Under the OFD accountability system established by the Office of Management and Budget (OMB) pursuant to E.O. 13807, there is evidence that agencies are delaying publication of the NOI as a way to delay the start of the two-year clock under OFD. Thus, the OFD policy has apparently led to significant delays at the start of the NEPA process. With the new rule's added requirements of interagency coordination before the publication of an NOI, delays in the start of the NEPA process could get significantly worse. If the length of time between receipt of a completed application and publication of the NOI increases substantially, CEQ and OMB may have to issue further guidance to ensure timeliness and accountability.

Enhanced Coordination with States, Tribes, and Localities. The new rule makes several improvements to the process for intergovernmental coordination. It reduces duplication by facilitating use of documents required by other statutes or prepared by state, tribal, and local agencies to comply with NEPA. It also helps ensure appropriate consultation with affected tribal governments and agencies and eliminates provisions in the original regulation that limited tribal interest to reservations.

More Inclusive Process for Stakeholder Engagement. Agencies can now use modern communications technology to facilitate, shorten, and expand stakeholder engagement during the NEPA process and to communicate with interested parties.[13] This includes a new, technology-neutral definition of "publish" updated for the new forms of electronic publication.

Agency Responsibility and Proponent/Contractor Preparation of NEPA Documents. The original regulation established a burdensome scheme for preventing conflicts of interest in the preparation of EISs by third parties. Under the original rule, the project proponent could pay a contractor to prepare an EIS, but the contractor had to be chosen by the agency and was not beholden to the proponent. As a result, the contractor often failed to coordinate properly with the proponent, or even to respond to the proponent's inquiries. The new rule permits the proponent, or a contractor chosen by the proponent, to prepare the EIS subject to agency supervision and verification.[14] This should give project proponents considerably more control of the timing for preparation of the EIS. The requirement for agency supervision and verification should resolve any potential conflicts of interest, as is the norm in other aspects of the permit application process.

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[12] Ibid.
[13] 40 C.F.R. § 1501.9(c) and §1 1508.1(y) (definition of "publish" and "publication").
[14] 40 C.F.R. § 1506.5.

Major Federal Action. The core of NEPA is its requirement that agencies prepare an EIS for any proposal for "major federal action significantly affecting" the environment.[15] In the 1970s, the Council on Environmental Quality and several courts took the position that "major federal action" and "significantly affecting" were two separate thresholds that needed to be met before the requirement for an EIS was triggered. However, the 1978 regulation adopted a "unitary standard," under which any federal action that significantly affects the environment is automatically a "major federal action."

The unitary standard arguably violated a basic canon of statutory construction—that all words in a statute be given meaning. The new rule refines the definition of "major federal action" to restore fidelity to the statute, by deleting the unitary standard.[16] Courts will now be free to further clarify the meaning of "major federal action" in keeping with the preamble of the new rule, which makes clear that "major federal action" and "significantly affecting" are two separate thresholds that must both be met for the EIS requirement to be triggered.[17]

Under the proposal, a "major federal action" would have to be subject to federal control and responsibility and would not include "non-federal projects with minimal Federal funding or minimal Federal involvement where the agency cannot control the outcome of the project."

Purpose and Need, "Reasonable Alternatives." NEPA requires that an EIS discuss "alternatives to the proposed action."[18] The original rule established that agencies must consider alternatives that meet the agency's statement of purpose and need. However, the provision on purpose and need was ambiguously drafted in the original rule. As a result, agencies commonly conflate the purpose and need for the proposed federal action with the purpose and need for the proposed project. Hence, they often expanded the discussion of alternatives to include alternatives to the proposed project. This is problematic because the potential impacts of each alternative must be discussed in detail—perhaps the greatest source of increased page counts in lengthier EISs.

The final rule refines the provision on purpose and need to make clear that agencies must focus on the purpose and need "for the federal action," not the purpose and need for the project.[19] As a result, in cases where NEPA reviews are triggered by applications for infrastructure permits, agencies will now be required to limit their consideration of purpose and need—and hence of alternatives—to the statutory authority that requires them to act on the permit application, as limited by the goals of the applicant. There may be cases where statutory authorities beyond NEPA require the agency to consider alternatives to the specific project proposal, but the new rule makes clear that NEPA itself requires no consideration of alternatives beyond the agency's own alternatives for decision. In the context of a permit application, the agency's alternatives will normally be to grant or deny the permit.

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[15] 42 U.S.C. § 4332(2)(C).
[16] 40 C.F.R. § 1508.1(q). The new definition deletes the original regulation's provision that "Major reinforces but does not have a meaning independent of significantly."
[17] 85 Fed. Reg. at 43,345-43,350.
[18] 42 U.S.C. § 4332(2)(C)(iii).
[19] 40 C.F.R. § 1502.13.

The new rule further clarifies this with a new definition of "reasonable alternatives" to clarify that the agency need only consider alternatives that meet the purpose of the need of the proposed agency action.[20]

Significant Effects and Impacts, Climate Change. The new rule eliminates the formal categories of "direct" and "indirect" effects, but the substance of the definition makes clear that both kinds of effects will remain the mainstays of NEPA review. The new rule essentially codifies the Supreme Court's holding in its most recent major NEPA decision, *Department of Transportation v. Public Citizen*, in which the Court likened the limiting principles on what effects an agency must consider to those of causation in tort law.[21]

Hence, the new rule requires agencies to study the "reasonably foreseeable" effects of their actions, rather than speculate about potential impacts far downstream or upstream from the project itself, where the agency has no authority to prevent the potential effects or where the effects would occur regardless of the federal action. The key changes here are in the definitions of "effects" and "reasonably foreseeable."[22]

Though "direct" and "indirect" arguably exhausted the metaphysical universe of an action's possible effects, the original rule created a third category of effects, "cumulative impacts," which practitioners and courts have struggled to understand in the decades since. The new rule eliminates "cumulative impacts" as a separate category of effects, but the practical impact is likely to be minor. Any cumulative impacts must still be noted in the EIS' description of the baseline "affected environment," which must now include "the reasonably foreseeable environmental trends and planned actions in the area(s)"—the essence, as far as was discernable, of the original definition of "cumulative impacts."[23]

Many have asked where these changes leave the analysis of potential climate impacts. CEQ has circulated proposed guidance to replace the Obama-era greenhouse gas guidance that it withdrew in 2017. The proposed guidance was significantly constrained by the D.C. Circuit's ruling in the "Sabal Trail" case, *Sierra Club v. Federal Energy Regulatory Commission*.[24] That decision held that agencies need to include any quantifiable projections of greenhouse gas emissions as part of the analysis of "indirect effects."[25] With the new rule's clarification of a "reasonable foreseeability" standard and other elements of actual and proximate causation as limiting principles on the downstream/upstream effects that agencies must consider, it is possible that the Sabal Trail decision will be further modified by subsequent federal court decisions. Meanwhile, the next shoe to drop will likely be CEQ's issuance of final guidance on greenhouse gas emissions, which will likely attempt to harmonize the new rule with existing case law.

Litigation. In practice, the purpose of the NEPA process has become litigation defense. Courts have facilitated this development through a narrow definition of trivial violations, as well as lax standing, bonding, and exhaustion rules for environmental advocacy groups. The

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[20] 40 C.F.R. § 1508.1(z).
[21] 541 U.S. 752 (2004).
[22] 40 C.F.R. §§ 1508.1(g) and (aa).
[23] 40 C.F.R. § 1502.15.
[24] 867 F.3d 1357 (2017).
[25] Not, it should be noted, as part of cumulative impacts.

new rule helps restore fidelity to the NEPA statute by more precisely defining the parameters of litigation.[26]

Trivial violations and harmless error. The 1978 CEQ Regulation seemed to shield "trivial violations" from injunctive relief, but courts subsequently interpreted "trivial violations" to mean the same as "harmless error" under the Administrative Procedure Act. Under the final rule, "minor, non-substantive errors" that have no effect on agency decision making are to be considered harmless and shall not invalidate any agency action.

Bonding requirements. The final rule would allow agencies to establish bonding requirements for challenges that seek injunctions against the agency on the basis of NEPA sufficiency.

Exhaustion of objections. Under the final rule, any comments or objections not submitted during the comment period of the draft Environmental Impact Statement would be deemed unexhausted and forfeited.

Remedies. The rule also makes clear that NEPA is a procedural statute and that litigants' access to injunctions that stop or delay agency action is accordingly limited, particularly in cases where the agency can remedy minor omissions in the NEPA documents.

Conclusion. Once fully implemented, the Council on Environmental Quality's new regulations for the implementation of the National Environmental Policy Act will have broad benefits. The new rule requires agencies to revise their NEPA procedures in accordance with the new rule. This will contribute significantly to federal agencies' years-long efforts to improve the NEPA process.

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[26] 40 C.F.R. § 1500.3.