

The Council on Environmental Quality Proposes to Revise Its Rules Implementing the National Environmental Policy Act

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On January 10, 2020, the Council on Environmental Quality (CEQ) published a proposal to comprehensively revise the regulations implementing the National Environmental Policy Act (NEPA). 85 Fed. Reg. 1684 (Jan. 10, 2020). This proposal, if finalized, would be the first meaningful alteration to CEQ's NEPA regulations, which have remained largely untouched since 1978.

With these changes, CEQ intends to “facilitate more efficient, effective, and timely NEPA reviews.” 85 Fed. Reg. at 1685. In the private sector, the proposed regulatory revisions would have the greatest impact on entities seeking permits or authorizations from federal agencies, such as permits under section 404 of the Clean Water Act, permits to drill from the Bureau of Land Management (BLM), or rights-of-way from BLM or the Forest Service.

CEQ's proposed regulations would alter nearly every element of the existing NEPA regulations. Most significant for oil and gas operators developing federal minerals or seeking rights-of-way, the proposed regulations would change the federal actions analyzed in NEPA analysis, effects analyzed, and agencies' consideration of private applicants' interests. The proposed regulations would also impose presumptive limits on the length of NEPA documents and the time to prepare them. These changes are detailed below.

Federal Actions Analyzed

- CEQ proposes to revise the definition of “major Federal action” to reinterpret the term “major.” *See* Proposed § 1508.1(q). Under the existing regulations, a “major” federal action simply was one that had “significant” impacts. 85 Fed. Reg. at 1708; *see* 40 C.F.R. § 1508.18 (“Major reinforces but does not have a meaning independent of significantly (§ 1508.27).”).
- The proposed regulations define “major Federal action” as “an action subject to Federal control and responsibility with effects that may be significant.” Proposed § 1508.1(q). This definition also expressly excludes “non-Federal projects with . . . minimal Federal involvement such that the agency cannot control the outcome of the project.” *See id.* Further, the proposed definition sets forth categories of activities that constitute major Federal actions. *Id.*
- CEQ invites comment on whether the definition of “major Federal action” should be “further revised to exclude other *per se* categories of activities or to further address what NEPA analysts have called ‘the small handle problem.’” 85 Fed. Reg. at 1709.

Effects Analysis

- CEQ proposes to substantially revise the definition of “effects” to remove the sub-categories of “direct effects” and “indirect effects.” CEQ based this proposed change on public comments that the current definition of “effects” has expanded the scope of NEPA

analyses and resulted in excessive litigation. *See* 85 Fed. Reg. at 1707–08; Proposed § 1508.1(g).

- Citing the same concerns of expansive scope and excessive litigation, CEQ also proposes to eliminate the requirement that agencies analyze the “cumulative impacts” of agency actions. *See* 85 Fed. Reg. at 1708. CEQ reasons this change is needed because “[a]gencies are not expected to conduct exhaustive research on identifying and categorizing actions beyond the agency’s control.” *Id.* CEQ’s proposed exclusion of cumulative impacts is widely seen as an attempt to limit the scope of analysis of the aggregated impacts of greenhouse gas emissions and climate change effects in NEPA documents.
- CEQ instead recommends a narrower definition of “effects.” The proposed definition would limit review to effects or impacts “that are reasonably foreseeable and have a reasonably close causal relationship to the proposed action or alternative.” *See* Proposed § 1508.1(g). The proposed definition would also clarify that “effects should not be considered significant if they are remote in time, geographically remote, or the result of a lengthy casual chain” or if an agency lacks authority to prevent them. *See* Proposed § 1508.1(g).
- Further, the proposed definition would specify that a “‘but for’ causal relationship is insufficient” to require analysis under NEPA. *Id.*

Consideration of Non-Federal Project Applicants

- CEQ proposes to expand the role of project applicants by allowing applicants and their contractors to prepare environmental impact statements (EISs) under the direction of the lead agency. *See* Proposed §1506.5; *see also* 85 Fed. Reg. at 1705.
- CEQ also proposes a stronger focus on applicants’ goals by changing the definition of “purpose and need” to explicitly state that the “agency shall base the purpose and need on the goals of the applicant and the agency’s authority.” *See* 85 Fed. Reg. at 1701; Proposed § 1502.13.
- Consistent with the proposed revisions to the definition of “purpose and need,” CEQ proposes a new definition of “reasonable alternative” that would require that an agency consider a project applicant’s goals. *See* Proposed § 1508.1(z).

Public Participation

- CEQ proposes to require agencies to request comments for 30 days on the alternatives, information, and analysis in a final EIS. *See* Proposed § 1503.1(b). The existing CEQ regulations do not offer a formal comment opportunity after issuance of a final EIS, even though agencies may accept comments on them. *See* 40 C.F.R. § 1506.10(a)(2).
- CEQ proposes to revise its regulations to expressly recognize that individual agencies may develop NEPA procedures that allow for imposition of bond or security requirements when a private party seeks to stay an agency’s final decision pending administrative or judicial review. Proposed § 1500.3(c); *see* 85 Fed. Reg. at 1694.

Time and Page Limits

- The proposed regulations impose a presumptive page limit of 75 pages for EAs. Proposed § 1502.7. They also affirm the existing presumptive page limit of 150 pages for EISs or, for EISs for proposals of unusual complexity or scope, 300 pages. *Id.* A senior agency official can approve a longer length and establish a new page limit. *Id.*
- CEQ also proposes presumptive time limits for preparation of EAs and EISs of one and two years, respectively. *See* Proposed § 1501.8. A senior agency official may approve a longer time period. *Id.*

Conclusion

CEQ's proposed revisions to its regulations would significantly shift federal agencies' implementation of NEPA. Private entities seeking federal permits or authorizations should consider submitting comments to CEQ on these regulations. CEQ is accepting public comment on the proposed regulations through March 10, 2020. CEQ likely will issue final regulations later this year.