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CEQ Proposes Revisions to NEPA Rules

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On January 10, 2020, the Council on Environmental Quality (CEQ) published a proposed rule that would significantly revise its regulations governing the National Environmental Policy Act (NEPA). The proposal, entitled "[Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act](#)," (the "NEPA Update Rule") would be the CEQ's first major revision of its NEPA regulations in over 40 years. Comments on the proposal are due by March 10, 2020. The CEQ also has scheduled two public hearings: in Denver, Colorado, on February 11, 2020, and in Washington, DC, on February 25, 2020.

The 1969 NEPA law is a procedural statute that requires federal agencies to consider the potential environmental impacts of proposed major federal actions. The CEQ is responsible for issuing regulations implementing NEPA's review requirements, but individual federal agencies issue their own regulations augmenting those issued by the CEQ. Thus, for example, the Army Corps of Engineers has issued its own extensive regulatory scheme (codified at 33 CFR Part 230). The CEQ's current regulations were issued in 1978, with only one limited substantive amendment in 1986.

Trump Administration Initiatives Regarding NEPA Reviews

On August 15, 2017, President Trump issued Executive Order 13087, "[Presidential Executive Order on Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure](#)," establishing a "One Federal Decision" policy and other policies to "ensure that the federal environmental review and permitting process for infrastructure projects is coordinated, predictable, and transparent."

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Executive Order 13087 also directed the CEQ to consider revisions to “modernize and enhance” the federal environmental review and authorization process, and, significantly, set a two-year goal for completing environmental reviews for major infrastructure projects. Current reviews can take substantially more than two years, with the CEQ reporting that environmental impact statements for federal highway projects have averaged over seven years to complete.

Separately, on March 28, 2017, President Trump issued Executive Order 13783, “[Presidential Executive Order on Promoting Energy Independence and Economic Growth](#),” a sweeping order directing the roll back of Obama Administration climate policies, including the CEQ’s 2016 guidance on consideration of greenhouse gas emissions and the effects of climate change in NEPA reviews. (For more information on Executive Order 13783 see our April 3, 2017 [alert](#).) Thereafter, on June 26, 2019, the CEQ published guidance, entitled “[Draft National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions](#),” to address how greenhouse gas emissions should be considered in NEPA reviews. The CEQ guidance noted that, following the “‘rule of reason’ that bounds all NEPA analysis,” federal agencies should assess effects when a sufficiently close causal relationship exists between the proposed action and the effect. The comment period for the draft guidance closed in August 2019; the guidance has not yet been finalized.

Overview of Proposed Changes in the NEPA Update Rule

The proposed NEPA Update Rule includes wide-ranging changes to the NEPA review process. Key changes include the following.

- The proposed NEPA Update Rule sets presumptive time limits of two years for the completion of an environmental impact statement (EIS) and one year for the completion of an environmental assessment (EA), and presumptive page limits of 150 pages for an EIS and 75 pages for an EA. Such limits can be exceeded if approved in writing by the lead agency.
- The CEQ proposes to “clarify” that environmental effects must be “reasonably foreseeable” and have a “reasonably close causal relationship to the proposed action or alternatives.” The proposed rule further specifies that a “but for” causal relationship is insufficient to make an agency responsible for a particular effect under NEPA. The CEQ explains that the required “close causal relationship” is analogous to proximate cause in tort law.
- The proposed NEPA Update Rule strikes the current requirement to consider “indirect” and “cumulative” impacts, which the CEQ notes are not terms used in NEPA. The CEQ explains that effects should not be considered if they are “remote in time, geographically remote, or the product of a long causal chain.” The CEQ further explains that effects do not include effects that the agency has no ability to prevent due to its limited statutory authority or that would occur regardless of the proposed action.

- The CEQ proposes to “clarify” the definition of major federal action to exclude non-federal projects with “minimal federal funding or minimal federal involvement” where “the agency cannot control the outcome of the project.”
- The CEQ proposes to “clarify” that “reasonable alternatives” to the proposed action (the identification of which is a typical element of NEPA process) must be “technically and economically feasible” and meet the purpose and need for the proposed action.
- The proposed NEPA Update Rule eliminates the current requirement that an EIS be prepared by a federal agency and allows an EIS to be prepared by an applicant or contractor under the direction of a federal agency.
- Consistent with President Trump’s One Federal Decision policy, if a proposal will require action by more than one federal agency, the proposed NEPA Update Rule directs, to the extent practicable, such agencies to prepare a single environmental review (EIS or EA) and to issue a joint record of decision or finding of no significant impact, as applicable.

Federal agencies would be required to develop or revise their NEPA procedures for consistency with the NEPA Update Rule within one year of publication of the final rule. The revised regulations would apply to any NEPA process commenced after the date of publication of the final rule; federal agencies would have the discretion to apply the revised regulations to environmental reviews commenced prior to that date.

The CEQ states that, if it finalizes the proposed NEPA Update Rule, such rule will supersede all previous CEQ NEPA guidance, and the CEQ will withdraw the same and issue new guidance. Notably, the CEQ states that it does not consider it appropriate to address a single category of impacts such as climate change in the NEPA regulations. The CEQ further states that if it finalizes the proposed NEPA Update Rule, it will review its draft 2019 guidance on greenhouse gas emissions.

Conclusion

The CEQ’s proposed NEPA Update Rule already has generated significant controversy, and several public and private stakeholders have indicated intent to challenge the NEPA Update Rule in the courts. In addition, regardless of the outcome of the CEQ’s current rulemaking and any subsequent litigation, individual federal agency actions/approvals still will be subject to challenge for failing to comply with NEPA. In addition, states also may need to consider reform of their own “mini NEPA” laws patterned after the federal statute and implementing regulations.

The CEQ also faces a unique timing issue on finalizing the proposed NEPA Update Rule: the Congressional Review Act (CRA) permits a new session of Congress to enact a “resolution of disapproval” for any regulation issued within 60 legislative days of the end of the prior Congressional session. Disapproved rules are voided, and the relevant agency may not issue a

subsequent rule in substantially the same form as the disapproved rule unless specifically authorized to do so by statute. Therefore, the CEQ may want to finalize the proposed NEPA Update Rule promptly to avoid CRA review in 2021 by the 117th Congress.

This memorandum is a summary for general information and discussion only and may be considered an advertisement for certain purposes. It is not a full analysis of the matters presented, may not be relied upon as legal advice, and does not purport to represent the views of our clients or the Firm. Eric B. Rothenberg, an O'Melveny partner licensed to practice law in Missouri and New York, and John D. Renneisen, an O'Melveny senior counsel licensed to practice law in the District of Columbia, contributed to the content of this newsletter. The views expressed in this newsletter are the views of the authors except as otherwise noted.

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