

## Proposal Raises More Questions Than Answers About NEPA Future



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The National Environmental Policy Act recently celebrated its semicentennial. Soon after, the administration proposed a major rework of its implementing regulations. Describing NEPA as “outrageously slow” (President Trump), “unnecessarily complex” (Council on Environmental Quality Chair Mary Neumayr), and “too bureaucratic and burdensome” (EPA Administrator Andrew Wheeler), the administration pledged to streamline and simplify. Environmental practitioners are well familiar with these critiques, as multiple administrations have pursued reforms. The recently proposed changes, however, would constitute the most comprehensive makeover in decades.

CEQ proposes changes to nearly every section of its NEPA regulations. Many of the changes codify existing case law, CEQ guidance, and agency practice. Others represent a significant departure from the current legal framework. Especially noteworthy are new definitions for *major federal action*, *reasonable alternatives*, *effects*, *significance*, and *mitigation*, and presumptive time and page limits for Environmental Impact Statements and Environmental Assessments.

CEQ also proposes to reduce duplication and improve coordination by encouraging preparation of joint EAs and Findings of No Significant Impact and joint EISs and Records of Decision with other federal, state, local, and tribal agencies; allowing adoption of other agencies’ Categorical Exclusions; and expanding the concept of *functional equivalency*. Other changes are ostensibly designed to circumscribe NEPA litigation, concerning timing of challenges, standard of review, and available remedies. Or as Wheeler commented, “NEPA was

not meant to be a welfare program for trial attorneys.”

The proposed changes raise many questions.

Arguably the most significant change is the new definition of the effects of an agency action, including deletion of the concept of *cumulative effects*. Some have warned that this would spell the end of climate change analysis and have dire impacts on environmental justice communities. Other observers see it differently, as agencies would arguably still be required to consider such issues so long as they are “reasonably foreseeable”; CEQ indicated that its new proposal is meant to be consistent with its earlier proposed greenhouse gas guidance. Moreover, some cumulative effects

would still be analyzed under other federal environmental statutes (e.g., the Endangered Species Act and Clean Water Act Section 404) and many state versions of NEPA.

Will the presumptive time limit of two years from Notice of Intent to ROD in an EIS lead to faster project implementation? President Trump speculated that under the new regulations, “I really think that you’ll hit much less than two, even for major projects.” This is an ambitious prediction given that CEQ reports that an EIS takes 4.5 years to be prepared on average. To be sure, a number of changes should help agencies work toward meeting these goals (e.g., allowing agencies to start scoping well before issuing a NOI). However, some practitioners have expressed concern that the rush to complete NEPA reviews may make them more vulnerable to legal challenge, ultimately undermining the purported goal to stop “endless delays” that “keep projects from breaking ground.”

On what grounds would the rule-making be challenged? Litigants will surely raise procedural arguments,

including fly specking the factual record support for overhauling a regulation that has been in place for some 40 years. Litigants may also focus on whether the policies established in Section 101 of NEPA, “recognizing the profound impact of man’s activity on the interrelations of all components of the natural environment” — and the mandate in Section 102 to implement these policies “to the fullest extent possible” — can truly be fulfilled under the new regulatory regime. Finally, the government can be expected to try to ward off facial challenges to the regulations based on standing and ripeness.

If upheld, how would courts respond? CEQ acknowledges that courts have filled in many of the gaps in the regulations over the past four decades, which begs the question, What impact will the regulatory changes have on the wealth of NEPA case law that has evolved over time? How much weight will the courts give to CEQ’s new interpretations? Will they be susceptible to reversal in a subsequent administration? The future of NEPA has perhaps never been more uncertain.

CEQ will have a small window before election day to review and respond to thousands of comments. Will these changes prove to be, as Wheeler believes, “the most significant deregulatory proposal” implemented by this administration? Or will they plunge NEPA — and projects that require agency permitting and approvals — into years of intensive litigation?

**After 40 years, a new set of regulations implementing the foundational statute**