

Expediting Environmental Reviews of Infrastructure Under New Executive Order and Revised NEPA Regulations

Meeting Imminent Risk Requirements and Potential Legal Challenges

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Expediting Environmental Reviews of Infrastructure Projects Under Federal Streamlining Efforts and Revised NEPA Regulations

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Mr. Ashe counsels clients on issues arising under federal and California environmental law, including the California Environmental Quality Act (CEQA), National Environmental Policy Act (NEPA), Clean Water Act (CWA), Endangered Species Act (ESA), Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), Coastal Zone Management Act (CZMA) and California Coastal Act. He has substantial experience performing environmental due diligence in connection with equity and asset purchases, mergers and financings involving energy, manufacturing and technology companies, as well as negotiating environmental provisions in transactional documents.

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Mr. Petersen's environmental practice includes environmental compliance, enforcement and litigation, with an emphasis on water and natural resource issues under the National Environmental Policy Act (NEPA), the Clean Water Act (CWA), the Endangered Species Act (ESA), the Marine Mammal Protection Act (MMPA), the Bald and Golden Eagle Protection Act and the Migratory Bird Treaty Act.

Mr. Petersen assists clients in complex permitting and regulatory issues related to energy development, commercial and residential projects, mining and infrastructure. He is experienced in environmental litigation at both trial and appellate levels and defends clients in enforcement actions in administrative and federal courts. In addition, Mr. Petersen also assists clients in responding to rulemaking efforts by federal agencies and in litigating agency actions under the Administrative Procedure Act (APA).

Agenda

- The National Environmental Policy Act (NEPA): A Primer
- Executive Order (EO) 13807 and Other Federal Streamlining Efforts
- Council on Environmental Quality's Updated Regulations Implementing NEPA
 - NEPA: Before and After
 - Compliance
- Recent Cases
- Pros and Cons of Streamlined Environmental Reviews

The National Environmental Policy Act (NEPA)

- Statute: 42 U.S.C. §§ 4321 et seq.
- CEQ Regulations: 40 C.F.R. § 1500 et seq., agency-specific regulations, guidance, handbooks, orders, tool kits and other sources
- Applies to “major federal actions significantly affecting the quality of the human environment.”
- NEPA is a "process-forcing" statute designed to ensure that environmental considerations are factored into the decision-making process of federal agencies.
- Requires Federal agencies to:
 - Take a “hard look” at potential environmental impacts of their actions
 - Evaluate alternatives and mitigation measures
 - Consider and respond to public comments
 - Make informed-decisions – but no substantive obligation to protect environment, after satisfying the “hard look” requirement.
- NEPA compliance is often the centerpiece of litigation

Environmental Review under NEPA

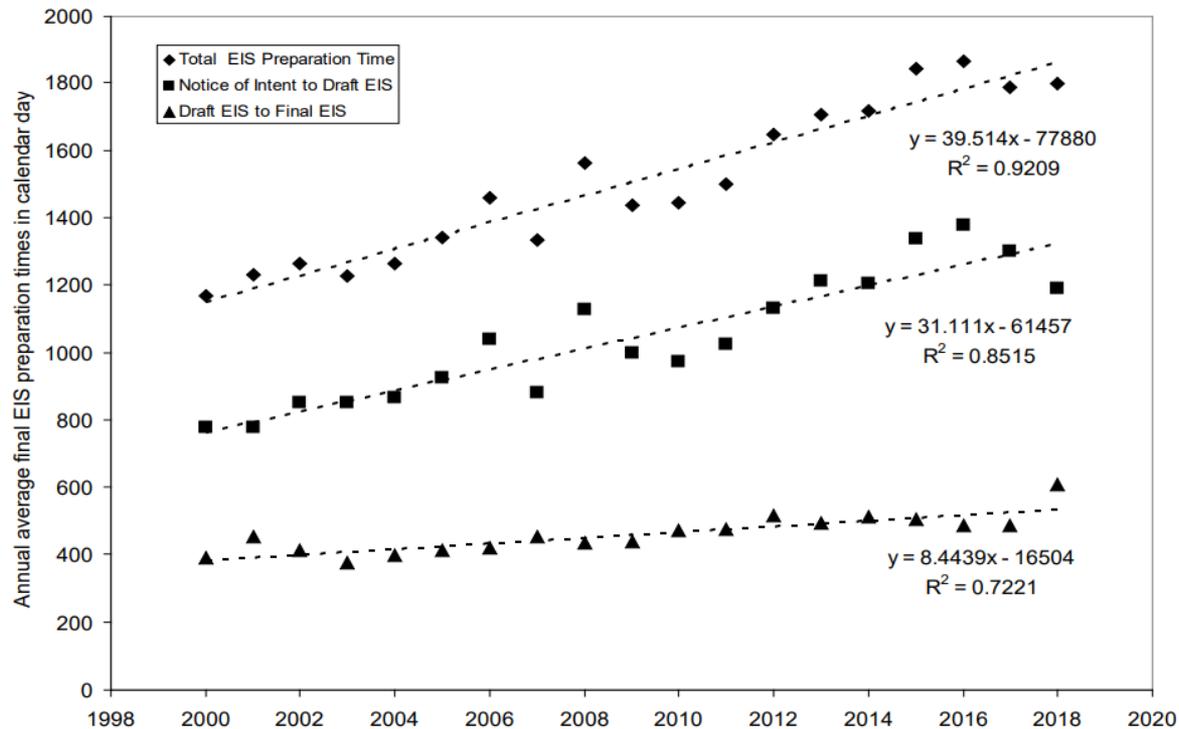
- Is there a federal nexus to the project?
- Is project exempt? **Categorical Exclusion (CE or CatEx)**
- If not exempt → **Environmental Assessment (EA)**
- If no significant environmental effects → **Finding of No Significant Impact (FONSI)**
- If significant environmental effects can be mitigated to insignificance → **Mitigated FONSI**
- If significant environmental effects, not all of which can be mitigated → **Environmental Impact Statement (EIS)**.
- EISs are the hallmark of the NEPA process, and typically include
 - “Statement of Purpose and Need”
 - Impact analyses (e.g., project impacts on water quality, sensitive species, air quality and GHG)
 - Alternatives
 - Mitigation measures
- **Record of Decision (ROD)** = The agency’s final decision and basis for approval.

Perception of the Problem

- Candidate Trump promised vast changes to the business environment including by identifying job-killing regulations and streamlining the approval process for infrastructure
- The Administration has reversed course on nearly 100 environmental rules, regulations and other Obama-era policies



National Association of Environmental Professionals, *Annual NEPA Report 2018*



Others Have Tried ...

- Title 41 of the Fixing America's Surface Transportation Act ("FAST-41"), 42 U.S.C. § 4370m (2015), was designed to improve the timeliness, predictability, and transparency of the Federal environmental review and authorization process of certain infrastructure projects.
- FAST-41 created a new entity – the Federal Permitting Improvement Steering Council (FPISC), composed of agency Deputy Secretary-level members and chaired by an Executive Director appointed by the President.
- FAST-41 establishes an online permitting "dashboard" on which the progress of a project's environmental reviews by different federal agencies can be tracked. 42 U.S.C. § 4370m-2(b)(1)(A).
- Projects must meet certain metrics of eligibility or covered by FAST-41 under the "discretionary standard" if the Council determines that its size and complexity make it likely to benefit from enhanced oversight and coordination.
- But ultimately FAST-41 has only applied to a limited number of projects.

Recent “Streamlining” Initiatives of Trump Administration

- January 2017 – Executive Order (EO) 13766 and the List of 50 “Priority List of Emergency & National Security Projects”
- August 2017 – EO 13807 “Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects”
 - Directed CEQ to develop list of initial actions items to enhance and modernize the Federal environmental review and approval process.
 - Two important provisions:
 - Establishment of “CAP Goals” (Federal priorities for accelerating progress in priority areas)
 - Get reviews to under 2 years for infrastructure projects
 - Continues “One Federal Decision” concept for major infrastructure (lead agency, timetable, single ROD)
- April 2018 – Twelve federal agencies sign MOU to Implement EO 13807.

June 4, 2020 - Executive Order (EO) 13927

- Titled: “Accelerating the Nation’s Economic Recovery From the COVID–19 Emergency by Expediting Infrastructure Investments and Other Activities”
- Mandates Depts. of Transportation, Army, Agriculture, Interior and Defense, within 30 days, to create lists of infrastructure projects that may be subject to expedited review/approvals.
- Directs CEQ to provide "flexible alternatives" to NEPA process for projects on the expedited list.
- Encourages agencies to use their "emergency authorities" to facilitate expedited approvals (e.g., NEPA’s emergency reviews).
 - Under CEQ’s regulations, when emergency circumstances make it necessary to take an action with a significant environmental impact *without* going through full NEPA process, federal agencies may consult with CEQ for "alternative arrangements" to proceed with such actions.
- Over the last 40 years, CEQ has approved emergency alternative arrangements 47 times.

Revised NEPA Regulations CEQ Rulemaking Process

- June 2018 - CEQ issued an advance notice of proposed rulemaking (ANPR) requesting comment on potential updates to the CEQ regulations. (“if so, how?”).
- January 2020 – CEQ issued notice of a proposed rule.
 - Received approximately 1,145,571 comments on the proposed rule
- July 16, 2020 - CEQ adopts Final Rule in *Federal Register* updating NEPA Regulations.
 - Final Rule notes that NEPA has “become increasingly complicated” and “can involve excessive paperwork and lengthy delays.”
 - The revised regulations represent the first significant update in over 40 years.
 - This is a total overhaul of the regulations.

Revised NEPA Regulations: Shorter and Quicker Environmental Reviews

- Section 102 of NEPA requires federal agencies to prepare for every "major Federal action significantly affecting the quality of the human environment" a detailed statement on the environmental impact of the proposed action.
- Final Rules notes that the average EIS is more than 600 pages and takes an average of 4½ years to produce.
- Revised Regulations:
 - **Time Limits:** EAs must be prepared within 1 year, and EISs in 2 years (measured from NOI), *unless* a senior official at the lead agency agrees to an extension.
 - **Page Limits:** EAs must be 75 pages or fewer, not including appendixes; and EISs must be 150 pages or fewer, or 300 for "unusual or complex" proposals, unless a senior agency official agrees to extend those limits.
 - **Word Limits:** Each "page" is limited to 500 words, excluding maps, diagrams and graphs.
- The regulations focus on eliminating duplication with state and other procedures (joint documents, tiering, reliance on other studies and prior NEPA documents)

EIS Requirements

- Commence writing as soon as practicable after application
- The EIS should not be encyclopedic
- Must discuss impacts in proportion to significance
- Shall be analytic, concise and no longer than necessary
- Shall focus on alternatives to be considered by the decisionmaker
- Use plain language and clear prose
- Set format (purpose and need, alternatives, affected environment, submitted alternatives and preparers)
- Two stage process of draft and final
 - Final statements should address all substantive comments
- Supplement if the impacts change or “if the purposes of the Act will be furthered by doing so”

Environmental Consequences

- This section is the main part of the analysis for comparing alternatives
 - Impacts of the action and reasonable alternatives
 - Adverse effects
 - Energy requirements and conservation potential of alternatives
 - Natural or depletable resource requirements
 - “economic and technical considerations including the economic benefit of the proposed action
- There is also a provision for cost-benefit analysis to aid in evaluating environmental consequences

Revised NEPA Regulations: New Key Definitions

Term	Revision
“Major Federal Action”	Now excludes nondiscretionary decisions where agency does not exercise sufficient control over the outcome of project (e.g., loan guarantees)
“Cumulative Impact”	Deletes traditional terminology of “direct” “indirect” and “cumulative effects” in place of new “reasonably foreseeable” standard
“Reasonably Foreseeable”	Agencies now limited to considering effects that have “ reasonably close causal relationship ” to the project, but not remote in time or geographically remote. New “prudent decision maker” standard.
“Reasonable Alternatives”	Heart of NEPA. Agencies now limited to analyzing the alternatives that are “ technically and economically feasible ” and meet goals of the agency/applicant.
“Mitigation”	Only mitigation with "nexus" to the effects should be considered. Clarifies that NEPA does "not mandate the form or adoption of any mitigation."

Implications of New “Reasonably Foreseeable” Standard

- For four decades, Federal agencies were required to study a project’s foreseeable direct, indirect, and cumulative environmental effects.
- Cumulative impacts meant “the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions.”
 - Example: Criteria pollutant emissions in non-attainment zone.
- Implication:
 - Revisions likely intended to reduce consideration of downstream greenhouse gas (“GHG”) impacts that have often resulted in legal challenge,
 - The Federal Energy Regulatory Commission and U.S. Department of Interior's consideration of downstream greenhouse gas impacts resulting from pipeline and mineral leasing decisions, respectively.

Revised NEPA Regulations: Encouraging Inter-Agency CatExs

- CatExs may be used to exempt certain common classes of projects from NEPA.
 - Ex: routine maintenance of federal land,
- When adopting CatEx, lead agency must determine that the category of action do not have a significant effect on the environment individually or cumulatively. (40 CFR Part 1508.4).
- Each agency publishes their own CatExs in their own NEPA regulations.
- Revised Regulations:
 - CEQ's revised regulations now allow agencies to utilize *other agencies'* CEs for covered projects.

“One Federal Decision”

- Lead agency must issue a ROD that records “any individual agency decision[s]” by other federal agencies whose authorizations are required for the project.
 - All other agencies must issue their approvals within 90 days of the ROD.
 - The lead, cooperating, and participating agencies must agree to a single permitting timetable; and
 - Establish points of contact for each project.
- BUT, flexible – project sponsor may waive One Federal Decision to receive separate authorizations; AND lead agency and project sponsor may extend 90-day deadline under certain circumstances.

Revised NEPA Regulations: One Federal Decision

- EO 13807 directed federal agencies to comply with the *One Federal Decision* framework.
- Agencies directed to develop permitting timetables wherein a single EIS or EA is prepared, and issue all necessary approvals within 90 days of the lead agency's issuance of the ROD
- Revised Regulations:
 - Makes clear that the “lead agency” shall supervise the EIS
 - Require the preparation of single EISs and joint RODs "to the extent practicable";
 - Requires avoidance of duplication
 - Require lead agencies to develop permitting milestones and accountability processes for missed deadlines;
 - Requiring federal agencies to establish procedures to resolve interagency disputes/delays.

Revised NEPA Regulations: Greater Applicant Involvement

- Federal agencies have always maintained the ability to require the project proponent to pay for the EIS that is undertaken by the agency's chosen consultant.
- Revised Regulations:
 - Lead agency should involve the applicant in preparing the EA to the extent practicable
 - Project proponents and their consultants can now assume a greater role in preparing the EIS as long as their financial or other interest is disclosed and the work is supervised and independently evaluated by the federal agency.
- The purpose and need and alternatives are controlled by the applicant's goals
- Only examine a “reasonable” number of alternatives.

Revised NEPA Regulations: “Late-Hit” Comments

- NEPA requires lead agencies to provide meaningful opportunity for public involvement,
- This is accomplished through NEPA’s public comment process.
- Project opponents often challenge the sufficiency of the lead agency's review and the response to public comments.
- Revised Regulations:
 - Comments have to be substantive and specific to warrant being addressed.
 - Public comments received outside of an EIS' public comment period are "unexhausted and forfeited."
 - Agencies no longer need to consider and respond to “late hit” comments.

Implications of Updated NEPA Regulations?

- For project proponents, the revised regulations may be a welcome change.
 - Do not address practical problems that have resulted in lengthy permitting periods (e.g., limited agency resources and staff),
 - However, prospect of shorter and quicker EISs and interagency coordination are now codified in federal regulations.
- Once applied, CEQ's revised regulations may be challenged by project opponents.
- An EIS subject to shortened page limits (and now word limits) may be viewed by project opponents with increased scrutiny as to whether it fulfills the NEPA statute's obligation to provide informed decision-making.
 - (*i.e.*, in 150 pages, the EIS failed to take the required "hard look" at the project's impacts.)

Pros and Cons of Streamlined NEPA Review

Pros:

- Less time to reach project approval and implementation/construction?
- Cost savings for less-detailed EISs?
- Increased CatExs?
- Greater certainty on project timeline (improves financing)?

Cons:

- Agencies racing to satisfy time limits may lead to sloppier EAs/EISs
- Less-detailed alternatives analysis may prevent the rare situations where agencies have found project alternatives to be superior projects.
- Increased susceptibility to legal deficiencies, challenges?
- Increased skepticism/political backlash than already exists due to quickened review?

Next Steps in Implementing Revised Regulations

- The Final Rule took effect on September 14, 2020.
- Federal agencies must, by September 2021, update their internal NEPA regulations and policies to be consistent.
- What if Democrats win both Presidency and Congress in 2020 Elections?

Legal Challenges to CEQ's Revised Regulations

- A number of law suits have challenging CEQ's Final Rule are pending in federal court:
 - 1) *Wild Virginia et al v. CEQ*, (W.D.V)
 - 2) *Environmental Justice Health Alliance v. CEQ* (S.D.N.Y.).
 - 3) *Alaska Community Action on Toxics v. CEQ* (N.D. Cal).

While CEQ – like other federal agencies – is owed deference to the regulations it promulgates, reviewing courts may question the extent to which the updated regulations are consistent with the NEPA statute as interpreted for the past several decades.

Agencies and project proponents will be monitoring these NEPA to see how courts reconcile CEQ's updated regulations with NEPA jurisprudence and the Administrative Procedure Act.

Questions?



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