



Insight

Will Proposed NEPA Rule Achieve its Goals?

DAN BOSCH, EWELINA CZAPLA | JANUARY 14, 2020

EXECUTIVE SUMMARY

- The Trump Administration's Council on Environmental Quality (CEQ) recently proposed a rule updating its National Environmental Policy Act regulations in an effort to reduce the duration and litigation of environmental reviews.
- To reduce review time, CEQ proposed a two-year deadline to complete final environmental impact statements.
- To reduce litigation, CEQ revised definitions of critical terms and proposed preventing legal challenges until a final decision is issued.
- While the imposition of a review deadline is likely to help reduce review times, the proposed changes in sum will do little to reduce legal challenges.

INTRODUCTION

The White House's Council on Environmental Quality (CEQ) recently published a proposed [update](#) to its National Environmental Policy Act (NEPA) regulations. The regulations specify how federal agencies must consider the effect of their decisions – on everything from approving permits for infrastructure projects to promulgating new rules – on the environment. The regulations' requirements substantially affect the time it takes to complete important infrastructure, energy, and other land-use projects.

When federal agencies are tasked with permitting certain projects that could affect the environment, such as roads, bridges, or power plants, NEPA requires an analysis of those potential impacts before a permit application can be approved. The most thorough of these is the environmental impact statement (EIS), which CEQ says applies to about 170 projects each year. CEQ data shows that the average length of time to complete an EIS is more than four years. This review substantially delays much needed infrastructure projects that can yield significant economic benefits. President Trump [cited](#) three examples of economically beneficial infrastructure projects that were delayed more than 10 years because of environmental reviews during his announcement of the proposed rule.

The proposed changes are a core part of the Trump Administration's [One Federal Decision](#), which called for cooperation among federal agencies in conducting NEPA review in an effort to speed things up. The goal of this proposed rule is twofold: to reduce the time it takes agencies to complete environmental impact statements, and to reduce the amount of litigation that also contributes to long delays.

Critics on the left counter that the proposed revisions aim to undermine NEPA and environmental protections. Still, over the decades since the existing NEPA regulations were issued in the late 1970s, the need for reform has been recognized in executive actions taken by administrations of both parties. The CEQ's new proposal, however, is particularly contentious because of the Trump Administration's commitment to deregulation and

because it would be the first substantial reformulation of NEPA regulations.

The Trump Administration CEQ's proposal seeks to address NEPA delays while still ensuring the legal requirements of NEPA are upheld. This analysis will explain how the proposed rule aims to deal with these issues and offer perspective on how likely it is to achieve its objectives.

TIME LIMITS FOR ENVIRONMENTAL REVIEW

Under NEPA, when an agency considers a major federal action it must prepare a “detailed statement” about possible adverse environmental impacts, whether those impacts can be avoided, and alternatives to the action, among other considerations. These environmental review documents (the most detailed of which is the EIS) are not meant to be an exhaustive recording of every possible issue, but rather a specific and brief analysis of potential critical adverse impacts. The current NEPA regulations did not set specific timeframes for review but were clearly never intended to be used as a mechanism for lengthy delays. Over time, however, the length of review (in both the time to complete and page count) has expanded.

A Heritage Foundation [report](#) on NEPA found that in the 1970s, the average length to EIS completion was 2.2 years. According to a 2018 [report](#) issued by CEQ in December, the average length of time had grown to 4.5 years for reviews completed between 2010 and 2017 and 25 percent of reviews took more than six years to complete. A similar [report](#) on page length from 2019 found that the average final EIS from 2013-2017 was 586 pages — despite existing CEQ regulations limiting page length specifically to 300 pages in most cases. The length of these reports also adds to the amount of time it takes get a permit approved.

The Trump Administration's proposal aims to address these issues by establishing a two-year time limit for agencies to complete an EIS from the time it issues a Notice of Intent (NOI) although it can be extended by a senior agency official. The proposal does little to strengthen the page limit requirement in existing regulations, though it does require a senior official to sign off on documents longer than 300 pages. This latter provision should help ensure that agencies perform their due diligence on serious environmental impacts when necessary.

Even though agencies can get around the time and page limits in needed instances, setting an expectation for a time limit is an improvement in the process that should help reduce the duration of reviews. The time limit should also help reduce the page length of documents. Like previous administrative attempts to reduce the duration of review time, however, the proposed rule does not provide any enforcement mechanisms to keep agencies accountable, nor does it provide applicants any course of redress in the case agencies fail to meet deadlines.

The success of this proposed reform will ultimately depend on the motivation of agency officials. One could envision most Trump Administration agencies, with their commitment to deregulation, adhering closely to the limits of CEQ's proposal. Should a subsequent administration not have the same zeal, however, it is easy to see reviews continuing to creep longer and longer. The shortcomings of these proposed limits have more to do with the inherent nature of CEQ's rules. CEQ's rules, despite being regulations, lack a strong enforcement authority. A more effective reform would have to come from Congress.

ADDRESSING THE RISK OF LITIGATION

Throughout the course of NEPA review there are many stakeholders at play, including the applicant company, its contractors, state and federal agencies, members of the public, and public interest groups. Each of these

stakeholders, under various laws, has legal standing to challenge the proposed project. As a result, not only does the timeframe of agency review delay infrastructure projects, but legal challenges that these various stakeholders bring do as well.

Due to the complicated nature of environmental review, the stakeholders have a seemingly infinite number of points in the process where issues can be brought to court. The applicant under review must prepare various studies that employ experts across many areas to meet the regulatory criteria for not only the lead agency but other cooperating agencies' review. Throughout, agencies as well as the applicant engage with the public and public interest groups to negotiate alternatives. Meanwhile, various federal and state-level agencies attempt to coordinate their reviews with the lead agency.

As a result, stakeholders can raise challenges at various points in a project's review and construction in an effort to undermine the adequacy of environmental review, question the basis of the agency's final decision, and ultimately prevent or halt the construction of the infrastructure. To reduce the impact of these inevitable hurdles, the proposed rule aims to eliminate for legal challenges by simplifying NEPA's language and requirements. Most controversially, several elements of the proposed changes could reduce or eliminate the review of greenhouse gas emissions.

Procedurally, the proposed rule seeks to establish that challenges should not be brought against the lead agency until its final decision is issued. As noted, however, a number of other agencies must issue permits during the NEPA process, and since these other federal and delegated permits can also be challenged independently of the lead agency's decision, it is unclear if there will be a marked improvement in delays as a result. On a more positive note, the new rule proposes modifying tiered documents to allow the lead agency to validate the findings of another agency and incorporate them as its own, eliminating duplicative environmental review by different agencies and likely speeding up the process. In a similar vein, the proposed rule seeks to modify the approach to evaluating alternative actions as well as dedicate a section of each EIS to suggested alternatives. Claims that alternatives went unconsidered have often cropped up late in review. The solicitation of proposed alternatives in the NOI to collect stakeholder input as early in the process as possible and include these alternatives in the Draft EIS is a meaningful way to reduce the impact of legal challenges.

NEPA review currently calls for the review of direct, indirect, and cumulative effects. Under the proposed rule, these three categories would be eliminated, and only those effects considered "significant" would be subject to review. While this change simplifies language, it will certainly incur legal scrutiny, and the process will not speed up any time soon as a result. Each agency conducting NEPA review is adjudicating a unique action within a particular industry and subject to specific precedent that guides its greenhouse analysis. It is difficult to believe that the sweeping attempts to eliminate such precedent by changing the language will go unchallenged. Those looking to construct projects in the next few years will likely incur delays as they test the new regulations for industry.

OUTLOOK

Even if the administration does manage to finalize these changes, they are unlikely to proceed unimpeded. The release of the proposed rule immediately generated criticism from many on the left charging that these changes would undermine NEPA analyses. Some congressional Democrats threatened legislative action to overturn any changes should the proposed rule become finalized. It is important to note, however, that the proposed rule is subject to a 60-day public comment period. After that period, CEQ will consider incorporating public feedback into a final version. Regardless, once a rule is finalized it is all but certain to face legal challenges.