

Ch. 8: Environmental Impact Assessment

TRUMP INTERIOR DEPARTMENT SPEEDS ENVIRONMENTAL REVIEWS OF DRILLING IN ANWR

On Monday December 3, 2018, the New York Times reported that the Trump administration is rushing to jump start oil drilling in the Alaska National Wildlife Refuge (ANWR) by accelerating environmental reviews that are necessary before drilling permits can be issued. Henry Fountain and Steve Eder, "In the Blink of an Eye, a Hunt for Oil Threatens Pristine Alaska," N.Y. Times, Dec. 3, 2018,

<https://www.nytimes.com/2018/12/03/us/oil-drilling-arctic-national-wildlife-refuge.html>. The article reports that during the Obama administration "the environmental review of drilling prospects in another part of Alaska ran well over 1,000 pages and took two and a half years to complete." However, the Trump administration is planning to complete an environmental impact statement (EIS) for drilling in ANWR by next spring, one year after it started the process, and to limit the EIS to a few hundred pages. Interior Department officials argue that it is possible to accelerate the review process because ANWR has been extensively studied in the past. However, scientists with the U.S. Fish and Wildlife Service report that the process has been so rushed that they often had less than 48 hours to comment on drafts and that their comments have been ignored. To further accelerate approval of seismic testing for oil, the Interior Department is performing an environmental assessment (EA) of the impact of such testing, a process that it expects to complete in only a few months.

TRUMP ORDERS ACCELERATED NEPA REVIEWS; CEQ CONSIDERING SIGNIFICANT CHANGES IN NEPA REGULATIONS

President Trump has been keenly interested in truncating the environmental assessment process for infrastructure projects. As noted in the casebook, on March 28, 2017, President Trump issued Executive Order 13,783, entitled "Promoting Energy Independence and Economic Growth". 82 Fed Reg. 16093. This executive order rescinded the Council on Environmental Quality's August 5, 2016 guidance on how agencies should consider greenhouse gas emissions and the effects of climate change in NEPA reviews. On August 15, 2017 President Trump issued Executive Order 13,807, entitled "Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure". 82 Fed. Reg. 40463. Section 5(e) of this executive order directed CEQ to develop an initial list of actions to enhance modernize the federal environmental review and authorization process. In response to this directive, CEQ on September 14, 2017, published in the Federal Register its response to the executive order. CEQ stated that it intended to review its existing NEPA regulations in order to identify changes needed to update and clarify them. 82 Fed. Reg. 43226.

On June 20, 2018, CEQ issued an advance notice of proposed rulemaking requesting comments on potential revisions to update and clarify its existing NEPA regulations. A copy of the ANPR is available at:

<https://www.federalregister.gov/documents/2018/06/20/2018-13246/update-to-the-regulations-for-implementing-the-procedural-provisions-of-the-national-environmental> CEQ asked commenters to respond to the following twenty questions:

NEPA Process

1. Should CEQ's NEPA regulations be revised to ensure that environmental reviews and authorization decisions involving multiple agencies are conducted in a manner that is concurrent, synchronized, timely, and efficient, and if so, how?
2. Should CEQ's NEPA regulations be revised to make the NEPA process more efficient by better facilitating agency use of environmental studies, analysis, and decisions conducted in earlier Federal, State, tribal or local environmental reviews or authorization decisions, and if so, how?
3. Should CEQ's NEPA regulations be revised to ensure optimal interagency coordination of environmental reviews and authorization decisions, and if so, how?

Scope of NEPA Review

4. Should the provisions in CEQ's NEPA regulations that relate to the format and page length of NEPA documents and time limits for completion be revised, and if so, how?
5. Should CEQ's NEPA regulations be revised to provide greater clarity to ensure NEPA documents better focus on significant issues that are relevant and useful to decisionmakers and the public, and if so, how?
6. Should the provisions in CEQ's NEPA regulations relating to public involvement be revised to be more inclusive and efficient, and if so, how?
7. Should definitions of any key NEPA terms in CEQ's NEPA regulations, such as those listed below, be revised, and if so, how?
 - a. Major Federal Action;
 - b. Effects;
 - c. Cumulative Impact;
 - d. Significantly;
 - e. Scope; and
 - f. Other NEPA terms.
8. Should any new definitions of key NEPA terms, such as those noted below, be added, and if so, which terms?
 - a. Alternatives;
 - b. Purpose and Need;
 - c. Reasonably Foreseeable;
 - d. Trivial Violation; and
 - e. Other NEPA terms.
9. Should the provisions in CEQ's NEPA regulations relating to any of the types of documents listed below be revised, and if so, how?
 - a. Notice of Intent;

- b. Categorical Exclusions Documentation;
- c. Environmental Assessments;
- d. Findings of No Significant Impact;
- e. Environmental Impact Statements;
- f. Records of Decision; and
- g. Supplements.

10. Should the provisions in CEQ's NEPA regulations relating to the timing of agency action be revised, and if so, how?

11. Should the provisions in CEQ's NEPA regulations relating to agency responsibility and the preparation of NEPA documents by contractors and project applicants be revised, and if so, how?

12. Should the provisions in CEQ's NEPA regulations relating to programmatic NEPA documents and tiering be revised, and if so, how?

13. Should the provisions in CEQ's NEPA regulations relating to the appropriate range of alternatives in NEPA reviews and which alternatives may be eliminated from detailed analysis be revised, and if so, how?

General

14. Are any provisions of the CEQ's NEPA regulations currently obsolete? If so, please provide specific recommendations on whether they should be modified, rescinded, or replaced.

15. Which provisions of the CEQ's NEPA regulations can be updated to reflect new technologies that can be used to make the process more efficient?

16. Are there additional ways CEQ's NEPA regulations should be revised to promote coordination of environmental review and authorization decisions, such as combining NEPA analysis and other decision documents, and if so, how?

17. Are there additional ways CEQ's NEPA regulations should be revised to improve the efficiency and effectiveness of the implementation of NEPA, and if so, how?

18. Are there ways in which the role of tribal governments in the NEPA process should be clarified in CEQ's NEPA regulations, and if so, how?

19. Are there additional ways CEQ's NEPA regulations should be revised to ensure that agencies apply NEPA in a manner that reduces unnecessary burdens and delays as much as possible, and if so, how?

1. 20. Are there additional ways CEQ's NEPA regulations related to mitigation should be revised, and if so, how?

A group of law professors responded to the ANPR by stating that NEPA compliance data “demonstrate that NEPA procedures are generally well calibrated and that grounds do not exist for major modifications to CEQ NEPA regulations that have stood the test of time.” Their comments addressed the following key points:

1. (1)A small percentage (1%) of federal actions that may affect the environment require an environmental impact statement (EIS); most such federal actions are covered by categorical exclusions (CEs) or environmental assessments (EAs).
2. (2)The small subset of actions that require an EIS involve significant decisions that warrant full NEPA analyses and public review processes.
3. (3)While EISs may take several years to complete, the time required to finalize decisions informed by full EIS’s is only partially attributable to NEPA procedures; other factors, such as project or EIS funding, public opposition, and competing agency priorities are frequently factors that extend the time for project approval.
4. (4)Given that multiple factors contribute to the time and resources it takes to finalize federal actions, CEQ must ground any modifications to the regulations governing NEPA processes on empirical studies of and representative experience with them in practice—ideally, broken down by agency and project type. Currently, the existing information does not support major revisions to the NEPA regulations. In addition, CEQ has completed a new study on EISs that will be released in the fall and should inform any regulatory changes.