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The Legal Framework of the National Environmental Policy Act

The National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4321 *et seq.*, declared a national policy “to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.” To implement this policy, NEPA requires federal agencies to identify and evaluate impacts of “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C). Although an agency must consider these impacts, it need not elevate these environmental concerns above others. Instead, NEPA requires agencies to “take a *hard look* at environmental consequences” of their proposed actions, consider alternatives, and publicly disseminate such information before taking final action. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (emphasis added).

NEPA also established the Council on Environmental Quality (CEQ), which issues regulations and guidance detailing how federal agencies must implement NEPA. 40 C.F.R. pts. 1500–18. Each federal agency must also develop its own regulations, which must be consistent with the CEQ regulations. *Id.* § 1507.3. In January 2020, CEQ proposed a revision of its regulations.

This In Focus describes the legal obligations that NEPA and the CEQ regulations impose on federal agencies, highlights proposed changes to the regulations, and discusses how climate change effects are considered in NEPA reviews.

Federal Actions Subject to NEPA

Generally, NEPA’s procedural mandates apply to all proposed “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332. NEPA does not define “major Federal action,” except to limit the phrase to actions “subject to Federal control and responsibility.” *Id.* The CEQ regulations clarify that such actions qualify as “major” only if they significantly impact the environment. 40 C.F.R. § 1508.18. In determining whether an action is significant, an agency must look at the “context” (societal, affected region and interests, and locality) and “intensity” (severity of impact) of its proposed action. *Id.* § 1508.27.

The CEQ regulations also identify three classes of federal action based on an agency’s prior experience with similar actions. The next sections discuss how an agency must proceed under NEPA based on whether the proposed action has (1) significant impacts, (2) uncertain impacts, or (3) no significant impacts.

Environmental Impact Statements: Significant Impacts

For actions with significant impacts, an agency must prepare, “to the fullest extent practicable,” a “detailed statement” known as an environmental impact statement (EIS). 42 U.S.C. § 4332. In its EIS, the agency must address (1) the environmental impacts of the proposal; (2) unavoidable adverse environmental effects; (3) alternatives to the proposed action; (4) the relationship between the short-term uses of the environment and maintenance of long-term productivity; and (5) any irretrievable resource commitments involved if the proposal is implemented. 42 U.S.C. § 4332(2)(C). To determine the EIS’s scope, the CEQ regulations require an agency to consider (1) connected, cumulative, or similar actions; (2) three types of alternatives (no action, other “reasonable” actions, and mitigation measures); and (3) direct, indirect, or cumulative impacts. 40 C.F.R. § 1508.25.

An agency must release its draft EIS for comment from other agencies and the public. 40 C.F.R. § 1503.1. The final EIS must consider comments by modifying the proposal, developing alternatives, or explaining why comments do not merit substantive replies or changes.

In some circumstances, an agency may also need to create a supplemental EIS (SEIS) after preparing a draft or final EIS if the agency makes “substantial changes” to its initial proposal or learns of “significant new circumstances or information” related to environmental concerns. 40 C.F.R. § 1502.9. As with other NEPA documents, the agency must make the SEIS available for public comment.

At the end of the NEPA process, an agency creates a record of its final decision (i.e., to proceed with the proposed action or with an alternative action). 40 C.F.R. § 1505.2. The agency must memorialize its decision in a written statement called a Record of Decision (ROD), which is issued at least 90 days after publishing a draft EIS or 30 days after issuing a final EIS.

Environmental Assessments: Uncertain Impacts

For actions that may have some level of impact, but potentially not significant impacts, agencies must prepare an environmental assessment (EA) according to their agency-specific regulations. 40 C.F.R. § 1501.3. An EA is an initial analysis of an action’s potential to have significant environmental effects. While preparing an EA, an agency must consult with other agencies that may be affected or have jurisdiction over part of the proposed action and with the public “to the extent practicable.” An EA may lead to a decision to complete a more detailed analysis (i.e., an EIS) or to a finding of no significant impact (FONSI).

Categorical Exclusions: No Significant Impacts

As part of its NEPA regulations, an agency may identify “categorical exclusions” (CEs)—categories of actions that do not individually or cumulatively have significant effects on the human environment. The agency may exclude CEs from further analysis in an EA or EIS. 40 C.F.R. §§ 1507.3(b), 1508.4. The CEQ regulations, however, also create procedures to address “extraordinary circumstances” when actions that usually qualify as CEs may have significant environmental impacts and thus require further NEPA review.

Limits to NEPA’s Applicability

When an agency performs a NEPA review, certain actions or effects may fall outside the statute’s scope. For instance, Congress has expressly exempted certain actions from NEPA review. For example, Congress declared that “[n]o action taken under the Clean Air Act shall be deemed a major federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act.” 15 U.S.C. § 793(c)(1).

Additionally, courts have recognized some limits to the scope of what an agency must include in its NEPA evaluation. For instance, when an agency lacks discretion or control over certain aspects of a proposed action, it need not address the environmental effects of these aspects. As the Supreme Court held in *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004), because an agency lacked authority to control the cross-border operations of Mexican trucks, it was not required to analyze the environmental impacts of such operations.

Judicial Review of NEPA Compliance

NEPA does not expressly provide for judicial review. Thus, legal challenges to an agency’s NEPA compliance, including FONSI and RODs, are subject to federal judicial review under the Administrative Procedure Act. 5 U.S.C. §§ 701–06, 551 *et seq.*; 40 C.F.R. § 1508.18. When reviewing an agency’s final action, the court’s role is “to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious.” *Balt. Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 97–98 (1983). According to CEQ, the Supreme Court has directly addressed NEPA in 17 opinions, and federal courts have issued approximately 100 to 140 opinions annually interpreting and enforcing NEPA obligations.

Proposed Changes to NEPA Regulations

CEQ’s NEPA regulations have been largely unchanged since they were promulgated in 1978. In January 2020, CEQ proposed revisions intended to “modernize and clarify the CEQ regulations to facilitate more efficient, effective, and timely NEPA reviews.” 85 Fed. Reg. 1684 (Jan. 10, 2020). To achieve this objective, CEQ proposes to replace the existing NEPA regulations in their entirety and supersede all of its previous NEPA guidance.

CEQ proposes to “codify” in the new regulations certain executive guidance or directives and case law about NEPA to “reflect current” practice. For example, the regulations propose to adopt a single definition of “effects or impacts,”

eliminating separate definitions for direct, indirect, and cumulative effects. The proposed definition includes, among other things, language from *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004), stating that “‘but for’ causation is insufficient to make an agency responsible for a particular effect under NEPA.” This language seeks to clarify that agencies need not analyze effects of their proposed actions that are beyond the agency’s control.

CEQ’s proposed regulations also aim to facilitate “efficient” or “timely” reviews by inserting several provisions that may affect NEPA litigation. First, relying on federal case law, the new regulations could limit an individual’s ability to challenge an agency’s NEPA compliance in federal court if that individual failed to submit a comment during the public comment period on the issue raised in court. Second, the proposal would amend the actions that qualify as “final agency action.” Generally, judicial review of an agency’s NEPA compliance may occur only after final agency action. The proposal replaces references to filing an EIS or FONSI as “final agency action” with language stating that CEQ “intend[s] that judicial review ... not occur before an agency has issued the [ROD] or taken other final agency action.”

CEQ’s proposal includes other revisions, such as clarifying an agency’s use of CEs and FONSI; modifying coordinating procedures for states, Tribes, and local governments; changing the public comment process; and “improving the format and readability of the regulations.” CEQ closed the comment period on March 10, 2020.

NEPA and Climate Change

Various court decisions, executive orders, and CEQ guidance have addressed how climate change factors into NEPA reviews. For example, in 2016, CEQ issued guidance clarifying how all federal agencies should consider potential greenhouse gas (GHG) emissions in NEPA reviews. In 2017, President Trump rescinded this guidance in Executive Order 13783.

In addition to these executive actions, federal courts have addressed how federal agencies consider GHG emissions when reviewing the direct, indirect, and cumulative effects of proposed actions. Various courts have held that an agency’s NEPA review should consider the “reasonably foreseeable” direct and indirect effects from the proposed action’s GHG emissions. However, courts have taken varying approaches regarding an agency’s review of the proposed project’s upstream and downstream GHG emissions. CEQ’s proposed regulatory changes, which might not require agencies to consider indirect or cumulative effects in their NEPA review, could affect how agencies consider the climate change effects of their proposed actions.

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