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Amendments to the Council on Environmental Quality's NEPA Regulations: Ten Key Changes

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The Council on Environmental Quality (CEQ) has significantly amended its regulations implementing the National Environmental Policy Act (NEPA), which are binding on all federal agencies. The amendments are CEQ's first substantive changes since 1986, and just the second since the regulations were first issued in 1978.

Although styled as a "clarification" and "modernization" of existing requirements, the amendments make extensive changes affecting nearly every aspect of the NEPA regulatory framework. They are a fundamental departure from decades of settled regulatory standards, administrative practice, and case law, and will change the way the statute is implemented across the entire federal government.

Proponents of these changes have asserted they will reduce delay and inefficiency in the environmental review process without compromising environmental quality or public information. Critics have expressed concern that many of the amendments may eliminate environmental protections, and, by upsetting settled law and expectations, could introduce more delay into agency reviews. But neither side disputes that CEQ's regulatory amendments will fundamentally change the way the NEPA process works for all stakeholders.

Key elements of the new regulations include the following:

1. Threshold Determinations and Exemptions.

As amended, the regulations specify a threshold analysis for determining whether proposed actions are subject to NEPA in the first place. Several elements of the threshold analysis codify existing law. But other elements — including a revised approach to "small federal handle" projects — authorize new grounds for agencies to exempt proposed actions from NEPA. Importantly, CEQ will allow agencies to make these threshold exemption determinations either in agency-specific NEPA procedures or on a project-by-project basis.

2. Narrowing the Scope of Environmental Impacts to be Considered.

CEQ's previous regulations required consideration of all reasonably foreseeable direct, indirect, and cumulative impacts. The amendments make several fundamental changes: they strike all references to direct, indirect, and cumulative impacts; they provide that agencies need not consider effects that are not proximately caused by the proposed action; and, most controversially, they explicitly disclaim the obligation to consider cumulative effects — a change of position likely to limit NEPA analysis of climate change, among other impacts.

3. Changes to Significance Determiniations.

While the amendments narrow the scope of the environmental impacts agencies must evaluate, they simultaneously broaden agency discretion to determine the significance of impacts that are, in fact, considered. CEQ's previous regulations included a detailed definition of "significance," which described numerous environmental conditions and factors to be considered in determining whether an impact might be significant. The amendments eliminate the detailed "significance factors," replacing them with a more general mandate to evaluate significance in light of the propose action's environmental setting and degree of effect. The impact of these changes on decades of case law applying the "significance factors" is not yet clear. Although some factors (*e.g.,* impacts on endangered species and their habitats) should remain relevant to agency significance determinations, others (*e.g.,* public controversy) may not.

4. Flexible Application of Categorical Exclusions.

The amended regulations include two important changes addressing Categorical Exclusions (CEs), far and away the most common form of federal agency NEPA compliance. First, the amendments explicitly authorize each federal agency to rely on CEs promulgated by other federal agencies. Second, they clarify that the mere existence of "extraordinary circumstances" does not preclude the application of a CE; notwithstanding the existence of such circumstances, agencies may categorically exclude proposed actions by finding that project-specific characteristics will avoid significant impacts. Although this approach to "extraordinary circumstances" is consistent with existing practice for some agencies, it will represent a new approach for others.

5. Limits on Alternatives Analysis.

CEQ's previous regulations required EISs to address "all reasonable alternatives" to a proposed project, including alternatives outside the lead agency's jurisdiction. The amendments strike "all" from before "reasonable alternatives," and they further specify that alternatives outside the lead agency's jurisdiction need not be addressed. Reversing previous CEQ guidance, the amendments also provide that reasonableness of alternatives will depend on the project applicant's goals. Individually, none of these changes is entirely inconsistent with existing case law. Taken together, however, they represent an important change in focus from the federal agency to the project proponent: rather than requiring an examination of alternative ways to carry out federal policy goals (as under CEQ's prior regulations and guidance), the new regulations emphasize alternative means of achieving the proponent's more specific objectives.

6. Clarified and Explanded Roles for Project Proponents.

CEQ's previous regulations limited the role of non-federal actors, particularly in the context of EIS preparation. The amendments allow project applicants to help prepare EISs. They also authorize additional information-sharing between permit applicants and the lead agency, including information generated by the applicant prior to the scoping process. Proponents have suggested that these changes may help reduce delay and duplication of work. Critics, on the other hand, have expressed concern that an expanded role for project applicants may introduce bias into the NEPA process.

7. Presumptive Timelines and Page Limits

CEQ's previous regulations required federal agencies to establish project-specific time limits on environmental review if requested by a project proponent. That provision was often inadequate to prevent delay — project proponents frequently felt uncomfortable imposing additional requests on agency decision-makers, and agencies sometimes ignored the requests they did receive. The amendments attempt to address this issue by establishing specific presumptive limits of 1 year (and 75 pages) for EAs and 2 years (and 150 pages) for EISs. It remains unclear whether federal agencies will be able to comply with these limitations and, if so, whether such compliance will substantially increase litigation risk. Perhaps recognizing these considerations, the amendments permit "senior agency officials" to extend the presumptive time and page limitations for good cause.

8. Application of "One Federal Decision" Principles.

In addition to presumptive time and page limits, CEQ has incorporated into its amended regulations some of the general principles memorialized in the White House's "One Federal Decision" infrastructure policy. Examples include new regulatory language addressing simultaneous agency reviews, coordinated timelines, and combined Records of Decision, among other things.

9. Heightened Standards for Commenting and Exhaustion of Remedies.

The amendments include several important provisions addressing public comment and exhaustion of administrative remedies. For example, the amended regulations include a new procedure entitling federal agencies to a presumption that they have properly considered and responded to public comments. The

amendments also would limit NEPA litigation to matters raised in the administrative process *by the plaintiffs themselves*. This latter change would prevent NEPA plaintiffs from relying on comments submitted by others, and is likely to limit judicial exceptions to exhaustion requirements such as the Ninth Circuit's "so obvious" rule.

10. Further Rulemaking and Guidance.

In adopting the amended regulations, CEQ has stated its intent to withdraw all previous CEQ NEPA guidance — including frequently-cited resources like the "Forty Questions" document — and then re-issue, at an unspecified later date, new guidance consistent with Presidential directives. Moreover, the amendments will trigger a series of agency-specific rulemaking processes, as individual federal departments are required to establish and maintain their own NEPA procedures consistent with those of CEQ. It is unclear whether or how, in the absence of agency procedures and CEQ guidance, ongoing environmental reviews will be advanced in the near term.

The issues covered above are just a few of the most important amendments to CEQ's NEPA regulations. Other substantive changes address the role of tribal governments and tribal laws in the NEPA process; mitigation measures; federal agency approaches to incomplete or unavailable information; extraterritoriality; and resolution of inter-agency disputes.

In the coming months, practical application of the amendments will be refined by agency-specific NEPA procedures and CEQ guidance (see above). The amended regulations will also be challenged — and could be invalidated — in the federal courts. Moreover, the amendments may subject to Congressional Review Act proceedings, depending on the federal legislative calendar and election results.

Finally, the amended regulations will be challenged in federal court, and some or all of them may be invalidated.

All of this uncertainty leaves stakeholders — project proponents, project opponents, and local, state, tribal, federal agencies alike — with difficult decisions about whether, when, and how to address CEQ's amended regulations in project-specific contexts.

For additional information on CEQ's amended NEPA regulations or the challenges and opportunities they present for ongoing projects, please contact Matthew Adams, Katie van Heuven, or Peter Kirsch.