# National Environmental Policy Act: Council on Environmental Quality Proposed Revisions

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The Council on Environmental Quality ("CEQ") on January 10th published a Federal Register Notice promulgating for the first time in 40 years revisions to the regulations that implement the National Environmental Policy Act ("NEPA"). See Fed. Reg. 1684.

CEQ was established in 1970 (as part of the Executive Office of the President) with its duties including oversight of federal agency implementation of NEPA.

The regulations issued by CEQ are intended to guide the federal agencies in interpreting NEPA's procedural requirements. However, the federal agencies themselves typically have in place regulations that address NEPA requirements applicable to its activities. Nevertheless, the CEQ regulations are generally viewed by the federal agencies as the guideposts for compliance.

Of course, CEQ's interpretations and the federal agencies themselves through their regulation and guidance are sometimes superseded by judicial decisions. In other words, regardless of CEQ and the federal agencies' rules, courts have not infrequently disagreed with CEQ/federal agency regulatory interpretations.

CEQ's rationale for issuing the revisions is its belief that there is a need for modernization and clarification of the regulations. It argues that the revisions would "facilitate more efficient, effective, and timely NEPA reviews by Federal agencies in connection with proposals for agency action." Further arguments include:

. . . advance the original goals of the CEQ regulations to reduce paperwork and delays, and promote better decisions consistent with the national environmental policy set forth in Section 101 of NEPA.

Several environmental organizations have immediately reacted negatively to the proposed revisions.

NEPA requires federal agencies to assess the environmental effects of their proposed actions prior to making decisions. The range of actions covered by NEPA has typically been broadly defined to include as examples:

- Making decisions by federal agencies on permit applications
- Federal land management actions
- Constructing and/or funding highways and other publically owned facilities

The federal agencies are required to evaluate the environmental and related social and economical effects of their proposed actions. Agencies are also required to provide opportunities for public review and a comment on those evaluations.

NEPA was arguably designed to force mission-oriented agencies to consider the environmental impacts of a particular decision or activity in addition to other objectives. For example, a decision by the Department of Defense to construct a base in a particular location would traditionally consider a variety of issues such as logistics, infrastructure, etc. In the event that this proposed activity triggers a review, the environmental issues would also have to be addressed. This would include situations in which a state or local government utilizes federal funds to construct infrastructure. In other words, the objective has been to ensure that environmental considerations are integrated into the planning of the agency actions as early as possible.

NEPA requires federal agencies to include environmental values and issues in their decision-making processes. This federal mandate is accomplished by agency consideration of environmental impacts of proposed actions and reasonable alternatives to those actions. The statute requires federal agencies in certain instances to prepare a detailed Environmental Impact Statement ("EIS"). However, the requirement to produce this document is only triggered in the event of a "major federal action" that will "significantly affect the environment." In other words, an EIS is only required to be produced if:

1. there is a federal action
2. that will significantly affect the environment

As opposed to an EIS, which is a much more detailed document, an Environmental Assessment ("EA") provides sufficient evidence and analysis for determining whether a finding of no significant impact for an EIS should be prepared. Neither an EA nor an EIS need be prepared if a particular federal action falls within the scope of a NEPA categorical exclusion. Categorical exclusions are promulgated by the federal agencies and are described actions which have been determined to not involve significant environmental impacts.

NEPA differs from action enforcing environmental statutory programs such as the Clean Air Act or Clean Water Act. It does not impose substantive mandates. Instead, it is limited to requiring federal agencies to meet procedural requirements such as preparation of an EA or EIS in certain defined instances. As a result, NEPA does not require a certain alternative or meet a particular standard.

Examples of recent situations in which NEPA has been litigated or attempted to be invoked in recent Arkansas activities include:

- Widening of I-630 (see previous blog item here)
- Reconstruction of I-630/40 (see previous blog item here)

The 47-page Federal Register Notice addresses issues such as:

- Time limits for EIS's and EA's
- Specifying when NEPA is applicable
- Placing parameters on what public comments can be considered
- Clarification of the key phrase "major federal action" (i.e., what amount of federal funding triggers NEPA's application)
- Addressing lead agencies' role
- Addressing issues such as the phrase "cumulative" and what constitutes secondary effects for purposes of NEPA application and the EIS (this will invoke debate regarding whether or not climate change has to be considered)

Litigation is certain in various contexts regarding whether or not CEQ's interpretations fit within the thousands of judicial decisions that have addressed NEPA.

A link to the Federal Register Notice can be found here.