

# White House Proposes Significant Rollbacks to the National Environmental Policy Act

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The Trump administration proposed rules intended to speed up approval of major projects subject to the National Environmental Policy Act (NEPA), such as pipelines, power facilities, mines, highways, and other public infrastructure projects. The proposal would allow federal agencies to approve projects subject to NEPA review without considering cumulative environmental impacts such as climate change. The proposed rule is expected to face legal challenges citing concerns relating to public health, climate change, and species protection. If adopted as final, it will be the first significant change to NEPA in over 40 years.

In its current form, NEPA is the principal federal law in the United States governing the environmental review process for projects with a federal nexus. This nexus can be the need for a federal permit or the involvement of federal land, federal money or a federally-managed transmission line. NEPA currently requires that the federal agency proposing a major federal action in connection with a project prepare an Environmental Assessment (EA) that analyzes information necessary to understand the environmental effects of the project. Based on the results of the EA, the federal agency may then prepare a more rigorous environmental assessment subject to public review and comment, and the agency may also provide responses to substantive public comments. This more rigorous assessment is an Environmental Impact Statement (EIS), which assessment process can delay a project's timeline due to public comments.

The Trump administration's notice of proposed rulemaking (NPRM) that contains its proposed regulations intends to streamline the procedural components of NEPA.<sup>1</sup> Key changes include a narrowing of the definition of what environmental "effects" must be considered by excluding the terms "direct," "indirect" and "cumulative" from the definition. The proposal would instead require an agency to only consider a project's environmental effects that are "reasonably foreseeable" and have a "reasonably close causal relationship" to the project. Projects' cumulative environmental effects would no longer have to be considered. For example, an agency would no longer be required to consider the climate impact of allowing greenhouse gases (GHGs) into the atmosphere from a proposed project in combination with other past, present and reasonably foreseeable

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<sup>1</sup> In 2017, President Trump issued an executive order establishing a "One Federal Decision" policy that required that only one federal agency oversee the environmental review of each NEPA project, included a goal to complete NEPA environmental reviews within two years, and directed the Council on Environmental Quality to consider revisions to NEPA to streamline permitting processes. On June 20, 2018, the administration published an advanced notice of proposed rulemaking (ANPR) seeking public comment on how the Council on Environmental Quality could ensure a more effective, timely, and efficient NEPA process. During the 60-day comment period on the ANPR, the CEQ received more than 12,500 comments. See our related client alert [here](#).

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future GHG emissions from other sources or the blocking of fish passage by multiple hydropower dams and reservoirs in the same river basin. If the proposed rule takes effect, it could remove a key tool that environmental groups and others use when challenging environmental permitting approvals under NEPA.

In addition, the proposal redefines what constitutes a “major Federal action” to exclude privately-financed projects that have “minimal” federal funding or involvement; however, the proposal does not set a dollar threshold for what constitutes “minimal” federal funding or involvement. This proposed change would limit the number of projects that undergo NEPA review and potentially exclude major projects from NEPA review.

The proposed rule would also (i) rescind the requirement to notify national organizations reasonably expected to be interested in the proposed action, allow for electronic meetings and hearings, and allow agencies to require a private party challenging an agency action to provide a financial assurance until the challenge is resolved, and (ii) set a two-year time limit for the completion of EISs and a one-year time limit for the completion of EAs. According to the Council on Environmental Quality (CEQ), a division of the Executive Office of the President that coordinates federal environmental efforts, the current average time for federal agencies to conduct NEPA reviews is four and a half years. Other changes in the NPRM include (i) mandatory page limits for EAs and EISs and (ii) to the extent practicable, a single EIS and a single record of decision when multiple agencies are involved in reviewing the proposed action.

Under the proposed rule, federal agencies could still consider a proposed project's GHG emissions, but would be limited in the scope of such analysis. The NPRM states that GHG-emission evaluation would follow the format outlined in draft guidance issued by the CEQ in June 2019.<sup>2</sup> The guidance would replace Obama-era guidance on consideration of GHG emissions and would require that federal agencies evaluate GHG emissions under the same “close causal relationship” standard outlined in the NPRM's revised definition of “effects.” As a single project's “close causal” impact on climate change is often difficult to ascertain, and climate change is the result of cumulative impacts from numerous sources, the proposed rule could remove consideration of climate change impacts from NEPA review. Litigation on whether and how agencies are required to calculate and consider GHG emissions under NEPA may increase in response to this change.<sup>3</sup>

The proposed rule is likely to impact a wide range of projects involving the federal government, including pipelines and oil and gas operations, infrastructure projects, renewable energy facilities, and mines. However, many projects will remain subject to state environmental review and permitting laws, some of which may require more thorough assessments of environmental impacts. In addition, some lenders now require that developers of projects that are located in the United States assess and manage environmental risks under international environmental standards, such as the Equator Principles and the International Finance Corporation's Performance Standards, which also may require more comprehensive environmental assessments than the proposed rule.

While the proposed rule is aimed at streamlining the NEPA process, if made final, the changes could result in greater delays for project development, given that federal agencies may be more likely to be sued for inadequate reviews.

The NPRM is now subject to a 60-day public comment period, which will expire on March 10<sup>th</sup>, and two public hearings before a final rule can be issued. Interested parties are expected to request an extension to the public comment period, given how significant some of the changes are and that NEPA regulations have remained substantially the same for many years. If made final, Congress could also issue a formal disapproval of the rule. Legal challenges to the proposed rule are expected, including claims asserting that the proposed rule is inconsistent with NEPA's intent and the Administrative Procedures Act.

The NPRM can be found [here](#).

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<sup>2</sup> A copy of the CEQ's draft June 2019 guidance can be found [here](#)

<sup>3</sup> See our related client alert on a judicial action ordering the US Bureau of Land Management to consider the cumulative impacts of a project with regard to climate change in a NEPA review, [here](#)

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