

Trump Administration Proposes Revisions to Streamline Environmental Review Process under National Environmental Policy Act

March 3, 2020 – Cross-Border Counselor
by Wells Parker

For many mining and infrastructure projects in the United States, a primary cause of permitting uncertainty, expense, and delay is compliance with the environmental review process under the National Environmental Policy Act (NEPA). On January 10, 2020, the Council on Environmental Quality (“CEQ”) proposed comprehensive revisions to the regulations implementing the NEPA. 85 Fed. Reg. 1684. NEPA documentation is generally required for any project, public or private, that requires approvals from the federal government. The proposed revisions to the NEPA regulations are part of the Trump administration’s efforts to streamline their NEPA review processes. The proposed regulatory revisions include the following changes, among others:

1. More Exemptions from NEPA Review – The proposed rules encourage expanded use of categorical exemptions, which exclude projects for the environmental review requirements of NEPA. In addition, the proposed rules require that the governmental agency making a permitting decision undertake a “threshold NEPA applicability analysis” to formally determine whether NEPA applies. The rules also propose to define a new category of “non-major” federal actions that have minimal federal involvement or funding and do not require NEPA review.
2. Revisions to front-load public comments and strengthens waiver defenses – CEQ proposes to require agencies to solicit public input on alternatives, impacts, and information early in the process following the preparation of the Notice of Intent to Prepare an EIS (“NOI”). If commenters fail to provide information in response the NOI, they may be subject to a waiver defense if they try to bring up new issues they could have raised at the NOI stage.
3. Limits on agency jurisdiction – The proposed rules provide that agencies are not required to analyze environmental effects and alternatives over which they have no jurisdiction or control. In addition, the new regulations would eliminate the distinction between “direct” and “indirect” effects, and require agencies to only analyze those impacts that have a “reasonably close causal connection to the proposed action and alternatives.”
4. Elimination of Requirement to Analyze Cumulative Effects – CEQ proposes to eliminate the need to analyze cumulative effects, on the grounds that it is not required under the statute, and such analyses have been difficult, confusing, and unhelpful to decision makers.

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5. Timing and Page Limits – The new regulations would impose a 75 page/1 year time limit for Environmental Assessments, and a 300 page/2 year limit for EIS's, which could only be waived in writing by agency official at the Assistant Secretary level or higher.
6. Greater Role for Applicants and Contractors – The proposed regulations would eliminate many of the current restrictions on the role of the applicant and contractor(s) in preparing NEPA documents. Applicants and contractors would be able to directly prepare and submit draft NEPA documents for agency review, under agency guidance. The agency must still certify that it independently reviewed and adopted the information provided.

The CEQ has requested public comments on the proposed regulations, which must be received by CEQ no later than March 10, 2020. The proposed rules and opportunity to comment present a valuable opportunity for Canadian companies with mining or infrastructure projects in the United States and other interested parties to help influence the revisions to the NEPA regulation. CEQ will be under significant political pressure to finalize the regulations before the 2020 election, and early enough to minimize exposure under the Congressional Review Act.

Dorsey regularly represents companies in rulemaking processes through the submission of comments that communicate to the regulatory agencies our clients' concerns and objectives. If you have any questions or would like to learn more about participating in this important comment process, please contact us.