Updating NEPA: An Evaluation of the Proposed CEQ Rule

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This whitepaper is based on extensive comments that were prepared by Professor Richard Epstein and submitted on behalf of ConservAmerica to the White House Council of Environmental Quality on March 10, 2020. Those comments are available at the following link.

1. EXECUTIVE SUMMARY

On January 10, 2020, the White House Council on Environmental Quality (CEQ) issued a Notice of Proposed Rulemaking (85 Fed. Reg. 1684) announcing changes to the way federal agencies implement the National Environmental Policy Act (NEPA).

NEPA, signed into law on January 1, 1970, requires federal agencies to assess the environmental and related social and economic effects of their proposed actions prior to issuing project permits. Agencies must also consider the cumulative impact of their actions and assess how those actions may contribute to climate change and other long-term, indirect environmental issues.

Groundbreaking ceremony of the Purple Line on August 28, 2017

The NEPA process is applicable to a broad range of projects, including roads, bridges, highways, and airports, conventional and renewable energy production and distribution, electricity transmission, water infrastructure, broadband deployment, and federal management activities on public lands. Among those management activities are leases and authorizations for energy production, mining, grazing, and environmental restoration projects.

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NEPA has an essential place among the nation's foundational environmental laws. Since the 1970s, however, the process has become unduly long and cumbersome. A federal agency spends an average of four and a half years completing a NEPA-required environmental impact statement (EIS). Meanwhile, an EIS for a federal highway project takes an average of seven years to complete. The average length of an EIS document now runs over 600 pages.[1]

The NEPA process is also open to court challenges and has increasingly been used to block large infrastructure projects by plaintiffs who argue that any list of potential environmental impacts is incomplete or that the public comment period was insufficient to meet NEPA requirements. If court challenges do not block a project outright, they typically impose burdensome delays and litigation costs – often for issues that could more efficiently be addressed during the construction phase.

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This NEPA update becomes even more critical as lawmakers in both parties call for a coronavirus-related stimulus package to advance public and private infrastructure projects. Having a modernized NEPA process would go a long way towards expediting and strengthening infrastructure development in the United States.

After 50 years, NEPA should be updated to account for advances in environmental risk management that routinely reduce the frequency and severity of a particular project's effect on the environment. Outdated provisions should be removed, and the EIS process should reflect President Donald Trump's One Federal Decision order that established a two-year goal for completing environmental reviews for major infrastructure projects.[2]

Enforcement of environmental law is essential to the well-being of our complex ecosystem. What also matters, though, is the conceptual approach taken toward these issues.

ConservAmerica's analysis of CEQ's proposal can be summarized as follows:

- Delays from excessive permit review not only damage economic growth and delay critical infrastructure projects, but also expose the nation to unreasonable environmental risks as aging and often dangerous facilities are not replaced with newer, safer, and less polluting ones.
- The use of NEPA's "procedural" system of injunctive relief (or vacatur) to stop major projects for minor faults should be replaced with one that allows projects to go forward on the condition that environmental risks are mitigated and that systems for inspection, monitoring, insurance, and liability are in place.
- Judicial review of projects should not use a dual standard that lets administrative agencies stop major projects for trivial reasons, imposing a "hard-look" for tiny defects on projects that have passed exacting administrative review. In the absence of evidence of irreparable harm, it's an abuse of agency power to allow a highly deferential standard to cause rejections of major projects.
- Projects that involve multiple agency review and approval, but particularly linear projects such as pipelines that cross many overlapping jurisdictions, should be handled with coordinated interagency review and time limits to avoid unnecessary delays caused by slow and inconsistent agency responses.
- It is unwise to require that a particular project be assessed for its potential cumulative effects on climate change when the issues raised are better addressed through a systemwide approach that does not make each new project the object of separate and incomplete analysis.

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NEPA has multiple laudable objectives. The review process collects valuable information that allows federal agencies to make informed decisions about the environmental effects of public projects. It also serves an important democratic function by enabling the public to raise concerns at an early stage of project development, something that can both improve the final project and provide a greater sense of public legitimacy.

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What is true of ordinary private disputes between two parties is also true of large-scale federal initiatives under the purview of NEPA. Much of the criticism of CEQ's proposal focuses on potential risks to the environment. However, the critics not only begin with the premise that streamlined environmental protections will be insufficient under the proposal, but they also fail to consider the negative impact of keeping the current rules in place.

The NEPA process is often used to defend the status quo. But consideration needs to be given to the environmental and economic impacts of inhibiting change, including the failure to eliminate existing environmental hazards and public health risks through the implementation of new technologies.

2. PERMITTING DELAYS HAVE ECONOMIC AND ENVIRONMENTAL CONSEQUENCES

In his statement in support of the proposed new NEPA guidelines, President Trump highlighted the risks of delay that have become endemic under the current process.

"America is a nation of builders. But it takes too long to get a permit, and that's big government at its absolute worst," he said.[3] The CEQ proposal would establish a review period of no more than two years from the date that the notice of intent is issued for a particular project.[4] The proposal would also limit the length of an EIS for a major project to 150 pages,[5] while less involved, but more common

Environmental Assessments (EAs) for smaller projects would be limited to 75 pages and a one-year timetable.[6] These streamlined criteria are warranted, given numerous cases where permitting delays have blocked or unreasonably delayed worthwhile projects. For example, the Cape Wind renewable energy project in Nantucket Sound was delayed for 16 years over claims that the environmental review was inadequate to meet NEPA requirements. The offshore project was eventually cancelled because of escalating costs caused by the delay. The Bayonne Bridge connecting New York and New Jersey took more than 10 years to complete, in part because of a drawn out NEPA review process. And proposed renovations of the Seattle-Tacoma International Airport took 15 years to get underway because of legal challenges to the EIS.

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It is important to keep in mind the heavy economic costs of delays caused by the environmental review process and to reduce them wherever possible. Any major project must incur high up-front costs before it even reaches the NEPA review process. Yet these costs can only be recouped years later, if the project is approved and successfully completed. As a result, it is often difficult for longer-term proposals to secure early stage financing. In many cases, the uncertainty associated with the review process is too great to attract investors.

Many of those analyses are incomplete in that they ignore the positive change of eliminating various forms of pollution from older projects, and they understate the gains of securing adequate and reliable energy.

Unfortunately, the current NEPA process does not reflect the environmental risks and costs associated with maintaining the status quo. The potential for aging facilities to cause environmental harm increases over time. Proposals to replace aging facilities and older infrastructure are disadvantaged because the current NEPA process downplays the costs of large front-end capital expenditures for design, land acquisition, and interim financing.

Massachusetts' Vineyard Wind Project

These new projects also suffer because NEPA downplays other environmental costs that fall outside its purview under current implementation practices. For instance, efforts to advance more efficient modes of energy production over older, less efficient ones are frequently blocked in court by plaintiffs who claim new fossil fuel energy projects would contribute to global climate change.

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3. A "PROCEDURAL" STATUTE THAT WARRANTS INJUNCTIVE RELIEF

A common misconception about NEPA is that it is purely a procedural statute meant to ensure government agencies take into account the environmental or social consequences of their actions and to ensure the public receives full and accurate information about a proposed undertaking. The Supreme Court has written that "Congress in enacting NEPA, however, did not require agencies to elevate environmental concerns over other appropriate considerations."[7] This might leave the appearance that once the environmental costs have been identified and analyzed, an agency is free to approve a project. That is not always the case.

Under current practice, the length of each delay is compounded by the practice of allowing different groups to separately challenge agency approvals. This often results in multiple challenges being filed during the review process, requiring additional studies and reviews thereby, increasing the length of time necessary to complete an EIS.

The use of presumptive injunctions under NEPA to block projects has become a significant problem. The use of such court orders under NEPA should be reserved for situations where there is evidence of imminent peril that requires prompt action to avoid irreparable harm.

CEQ's proposal states:

> The CEQ regulations create no presumption that violation of NEPA is a basis for injunctive relief or for a finding of irreparable harm. As the Supreme Court has held, the irreparable harm requirement, as a prerequisite to the issuance of preliminary or permanent injunctive relief, is neither eliminated nor diminished in NEPA cases. A showing of a NEPA violation alone does not warrant injunctive relief and does not satisfy the irreparable harm requirement.[8]

CEQ is correct in insisting that a court-ordered injunction under NEPA should only be allowed in cases where there is evidence of potentially irreparable harm, which does not automatically arise from a violation of the statute. Such an evaluation should take into consideration the full breadth of safeguards, like insurance and inspections, that are available to address any concerns raised by plaintiffs.

The critics not only begin with the premise that streamlined environmental protections will be insufficient under the proposal, but they also fail to consider the negative impact of keeping the current rules in place.

Under current implementation practices, NEPA does not uniformly integrate other safeguards into its analysis. Thus, it gives excessive weight to the "merely procedural" remedy of a blanket injunction to delay a project until a final judgment is reached years after multiple administrative and judicial decisions.

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4. CHOOSING THE RIGHT STANDARD OF REVIEW

The next critical stage of the NEPA process is to determine the standard of review for agency decisions. The underlying standard comes from the Administrative Procedure Act, whose key provision instructs courts to "hold unlawful and set aside agency action, findings, and conclusions" that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[9]

For projects that receive agency approval, the reviewing court should resolve all ambiguities in favor of the applicant because of the additional safeguards available to address issues at a later date. On the other hand, instances where an agency denies a permit deserve a closer look since there is no subsequent appeal process available to the applicant to correct the original mistake.

There are many cases in which a reviewing court could disagree with a decision and still hold that it falls under the purview of the agency and was not "arbitrary, capricious, [or] an abuse of discretion," given the complexity of the trade-offs necessary to reach a final decision.

The plusses and minuses of complex projects are often hard to assess fully. Some of these factors are likely to be quantitative but difficult to measure. Besides, many factors raise subjective issues that are not easily quantified, such as claims regarding environmental justice[10] or the importance of avoiding injecting controversial elements into community relations.[11]

Currently, the so-called "hard-look" doctrine applies to every stage of judicial review if an agency approves of a project. In effect, this turns the "arbitrary and capricious" standard into a much stricter one, where the smallest deficiency can be sufficient to derail a highly meritorious project.

Alaska's Allison Creek Hydroelectric Project

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The CEQ proposal notes that there is no unavoidable connection between a statutory violation and the irreparable harm standard. What is needed, therefore, is a standard that allows for a balancing of equities in situations where potential damages can be mitigated by means short of an outright injunction.

It is imperative to restore some sense of balance in this area so that trivial objections do not lead to endless demands for additional information that do not improve the decision process.

5. CUMULATIVE IMPACTS AND CLIMATE CHANGE

One of the most difficult challenges in applying NEPA is the scope of its general application to the direct and cumulative effects of a project. As initially drafted, NEPA considered the potential environmental impacts of each project individually. Every project has at least some indirect impacts, but for the most part, these impacts are often secondary considerations.

But more recently, the question of cumulative effects has come to the forefront. The current regulations define cumulative impact as follows:

> Cumulative impact is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions.[12]

Climate change policy should not be set and implemented through the NEPA process, but through other forms of direct action more tailored for the purpose.

The current cumulative impact standard has been used, for example, to measure the negative impact of a project on climate change based on the accumulating effects of previous development–not solely on the individual effects of the newly proposed project. Environmental groups have successfully argued that permits for new projects should be denied because they could add to the global problem of climate change–even though there is no synergistic relationship between the emissions at the project location and those at any other location. Carbon dioxide has the same effect, regardless of where it enters the atmosphere.

The proposal addresses concerns about how this principle has been applied in NEPA cases as follows:

> (g) *Effects or impacts* means effects of the proposed action or alternatives that are reasonably foreseeable and have a reasonably close causal relationship to the proposed action or alternatives. Effects include reasonably foreseeable effects that occur at the same time and place and may include reasonably foreseeable effects that are later in time or further removed in the distance.
>
> > (5) A "but for" causal relationship is insufficient to make an agency responsible for a particular effect under NEPA. Effects should not be considered significant if they are remote in time, geographically remote, or the product of a lengthy causal chain. Effects do not include effects that the agency has no ability to prevent due to its limited statutory authority or would occur regardless of the proposed action. Analysis of cumulative effects is not required.[13]

This language is a major improvement, but it still falls short of capturing all the difficulties involved in measuring the impacts of any particular project. Low-level interactions that follow standard scientific laws are necessarily foreseeable, and indeed, commonplace. It is also the case that we could always have arcane disputes about the length and complexity of any given causal chain. Nonetheless, there is no reason why the scope of NEPA review for any individual project should be determined by whether the risks of climate change, for example, are part of a short or a long causal chain.

Colorado's I-70 Expansion

As noted earlier, NEPA review always carries the risk of delay, but these higher costs should be acceptable only in cases where the risk of environmental harm meets two conditions. First is when the potential harm is likely to be direct and substantial. Second is when the available remedy to the risk in connection with the design and construction of a project is significant enough to make a difference. While both conditions are almost certain to apply in the case of the imminent destruction of critical habitat of an endangered species, neither is likely to be satisfied by slowing construction of a new pipeline whose operation has a minuscule impact on climate change.

In making this point, the intention is in no way to minimize the importance of recognizing and dealing with climate change. It is to say, however, that climate change policy should not be set and implemented through the NEPA process, but through other forms of direct action more tailored for the purpose.

6. CONCLUSION

The broad scope of CEQ's proposed update to how federal agencies should implement NEPA means that it is likely to face judicial challenges. The specific changes outlined in this paper, however, stand a good chance of being upheld.

In many cases, there are strong arguments that the current practices of the lower federal courts, especially concerning the use of injunctions, conflict with U.S. Supreme Court decisions and with the intent of Congress. Moreover, a highly deferential standard that allows agencies to block projects when there is no evidence of irreparable harm amounts to an abuse of agency power that is a growing danger to the country's prosperity.

While CEQ's recommendations are not perfect, they succeed in advancing the twin goals that are at the heart of NEPA–allowing economic growth and advancement while ensuring the highest environmental protection.

Endnotes

1 "NEPA Modernization." *Fact Sheet: CEQ's Proposal to Modernize its NEPA Implementing Regulations. The White House,* The United States Government, 10 Jan. 2020, www.whitehouse.gov/ceq/nepa-modernization/.

2 "Presidential Executive Order on Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure." *The White House*, The United States Government, 15 Aug. 2017, www.whitehouse.gov/presidential-actions/presidential-executive-order-establishing-discipline-accountability-environmental-review-permitting-process-infrastructure/.

3 Kelsey Brugger, "*Trump unveils landmark rewrite of NEPA rules"*, E&E NEWS, January 9, 2020, available at https://www.eenews.net/stories/1062036913.

4 Proposal at 1717:

> (2) Environmental impact statements within 2 years unless a senior agency official of the lead agency approves a longer period in writing and establishes a new time limit. Two years is measured from the date of the issuance of the notice of intent to the date a record of decision is signed.
>
> (c) The senior agency official may consider the following factors in determining time limits:
>
> (1) Potential for environmental harm.
>
> (2) Size of the proposed action.
>
> (3) State of the art of analytic techniques.
>
> (4) Degree of public need for the proposed action, including the consequences of delay
>
> (5) Number of persons and agencies affected.
>
> (6) Availability of relevant information.
>
> (7) Other time limits imposed on the agency by law, regulations, or Executive order.

5 Proposal at 1700.

6 Proposal at 1697.

7 *See, e.g., Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983).

8 Proposal at 1694.

9 5 U.S.C. § 706(2)(A).

10 *See* Exec. Order No. 12,898, 59 Fed. Reg. 32 (Feb. 11, 1994), whose purpose was to ensure that the EPA made "achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States." 59 Fed. Reg. 32.

11 40 C.F.R. § 1508.27 Significantly. *Significantly* as used in NEPA requires considerations of both context and intensity: . . .

> (b) *Intensity.* This refers to the severity of impact. . . .
>
> (4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.
>
> For its application in connection with DAPL, *see Standing Rock Sioux Tribe*, 255 F. Supp. 3d at 127-30 (struggling with issue) & 147-48 (rejecting vacatur under *Allied Signal*).

12 40 C.F.R. § 1508.7.

13 Proposal at 1728-29.

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