

## Parsing a Pair of Two-track Regulatory Actions: Part II — NEPA Compliance at CEQ

### In brief...

EPA is simultaneously pursuing two related initiatives: a revision of its longstanding Guidelines for Economic Analysis, and an NPRM on the use of such analyses in rulemakings under the Clean Air Act. Meanwhile, CEQ has been making major revisions to its regulations governing NEPA for all federal agencies, but the president just signed an Executive Order telling agencies to try to work around NEPA. What's going on? Part II of this two-part commentary looks at NEPA.

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[Part I](#) of this commentary examined two ongoing EPA actions regarding the use of economic analysis: one in the form of a rule, the other in the form of guidance. This second part will look at two actions affecting compliance with the National Environmental Policy Act (NEPA): the Council on Environmental Quality's (CEQ) ongoing effort to revise the NEPA procedural regulations, and President Trump's June 4 Executive Order instructing CEQ, in view of the economic emergency, to work with agencies on alternative means of NEPA compliance.

### CEQ revises its NEPA rules, but agencies are urged to find workarounds

In response to the last recession, Congress passed the American Recovery and Reinvestment Act of 2009, which included substantial funding for infrastructure construction. This prompted a search for “shovel-ready projects,” which turned out to be a rare species indeed. The Obama administration discovered an obstacle that has bedeviled many administrations: federal funding, e.g. for a state highway project, brings with it an obligation to comply with the NEPA, which turned 50 this year. The required Environmental Impact Statements [typically](#) take years to complete.

#### CEQ Rulemaking

The passage of NEPA in 1970 unleashed a torrent of private litigation against federal projects – sometimes by national environmental groups for broad policy reasons, but often just by local opponents to a particular development. One complication was that agency compliance procedures varied substantially. In response, President Carter issued an [Executive Order](#) directing CEQ – despite the absence of any statutory rulemaking authority – to develop [uniform regulations](#) for NEPA compliance. The courts have enforced these rules ever since.

In an attempt to streamline NEPA procedures, President Trump signed his own [Executive Order](#) directing CEQ to update its regulations. In 2018 the agency issued an [ANPRM](#), and in January of this year issued an [NPRM](#). They are now working on a final rule, and no doubt will make every effort to get it done before the end of the year. That will not, however, be fast enough to affect the federal response to the pandemic and the economic recovery – a response that includes a wide range of agency actions that will need to comply with NEPA.

### The President's June 2020 Executive Order

On June 4, President Trump signed another Executive Order on NEPA: [Accelerating the Nation's Economic Recovery from the COVID-19 Emergency by Expediting Infrastructure Investments and Other Activities](#). It directs agencies to use existing emergency authorities to accelerate decisions on federal actions. It includes provisions on compliance with the Endangered Species Act, and the permitting provisions of the Clean Water Act, and has specific provisions for DOT and Army Corps of Engineers projects, as well as for federal land management agencies. The EO directs CEQ to use its existing emergency authority to facilitate faster actions:

The Council on Environmental Quality has provided appropriate flexibility to agencies for complying with [NEPA], . . . in emergency situations. Such flexibility is expressly authorized in CEQ's regulations, . . . which were first issued in 1978. These regulations provide that when emergency circumstances make it necessary to take actions with significant environmental impacts without observing the regulations, agencies may consult with CEQ to make alternative arrangements to take such actions.

It is not clear how much latitude CEQ has under this authority, nor how much the courts will allow. While it's true that, in the [1978 regulations](#), CEQ "expressly authorized" itself to provide flexibility, those regulations do not themselves have any statutory basis. Federal agencies, and federally funded state agencies, have spent decades trying to find faster ways to get through the NEPA process, and litigants (including all manner of project opponents) have spent decades figuring out how to stop them; the resulting body of case law does not leave much in the way of wiggle room. On the other hand, the pandemic emergency is real, and neither the Congress, the executive, nor the courts would have allowed a rigid procedural overburden to have developed under NEPA unless it were possible to waive it under exigent circumstances. As specific actions are challenged, it is likely that agency demonstrations of good faith will go a long way towards convincing judges to accommodate expedited NEPA compliance.

There remains a problem though, in that government-by-exception tends to bestow its blessings on politically favored projects, and to leave insurmountable barriers in place for everyone else. The projects that get fast-tracked will often be those that have political support from the right member of Congress or the right governor. Private applicants for federal permits may find themselves at a disadvantage compared to publicly funded projects. We should pray that the current emergency will be quickly behind us, and that CEQ's longer term effort to update the rules and construct a workable and predictable system of NEPA compliance procedures will be successful.