

NEPA Under Attack

Outline of Major Issues in the Proposed NEPA Guidelines

Introduction

The National Environmental Policy Act has been called “the People’s Environmental Law.” Unlike other environmental laws, NEPA protects America’s “human environment”—our health and wellbeing. Since NEPA’s enactment in 1970, more than 185 other countries have passed similar laws. In addition, 16 U.S. states have written their own “Little NEPAs” for state-level projects. NEPA has been so influential that many call it the “Magna Carta of environmental law.” It applies to every major action by every federal agency. Whenever a project will significantly affect a community, an agency is required to write a detailed report about it. This “environmental impact statement” must consider potential impacts, as well as alternatives to the agency’s initial plan. If an agency fails to properly consider the impacts and alternatives, it can be challenged in court.

A. Public Participation

By giving people a voice in federal project-planning, NEPA is a key tool to advance environmental justice. But the proposed rule would cut the public comment period on major federal projects from 45 days to just 30. That’s not enough time for communities to organize and respond to long technical documents that are often only provided in English. The new rule would also limit the way agencies distribute information. Without in-person meetings, and a requirement that agencies physically distribute documents, communities are in danger of being silenced and left in the dark. There are other parts of the proposal that raise concerns that you might want to comment on:

- a. Imposing a bond to put a hold on an action: NEPA gives communities the power to challenge a federal agency when it doesn’t do its job. But the Trump administration wants to discourage public-interest lawsuits by imposing a bond requirement. In other words, anyone who asks a judge to press the pause button on an illegal project could be forced to come up with thousands, or even millions of dollars until the case has concluded.
- b. Moving documents nearly entirely online rather than circulating hard copies: Communities without access to the internet or those with slower access will be disadvantaged. Communities with lower socio-economic statuses are often the ones impacted the most by projects. By moving documents online, these

communities will not have a chance to meaningfully participate and voice their concerns.

- c. Publication of draft environmental assessment (EA) would be optional: Removing the requirement that draft EAs be published will further remove the public from participation in the NEPA process. The public can't see what the agency considered in its assessment, why it decided to issue a FONSI or not, or proactively engage in proposing better alternatives.
- d. Responding to comments collectively: The Trump Administration wants to be able to respond to similar public comments collectively. But the difference between an individual and a collective response is essentially the difference between receiving a personal letter from your congressman and a form letter from his office. NEPA comments come from the communities most affected by federal projects, and agencies should be required to address them individually.
- e. FONSI omits the findings in the EA except by reference: The public needs to see what the agency considered in its assessment of the project. This could green-light agency actions (or inaction) when it issues a FONSI because there would be nothing in the record to rebut, except by reference.
- f. Comment on how participation reduces litigation and cost to projects: By requiring agencies to consider the harm caused by their projects, as well as alternatives that would mitigate it. The public helps agencies identify any deficiencies in its plan and promotes cooperation between the two.

B. Cumulative Effects

NEPA requires federal agencies to look not just at the incremental impact of their actions, but also the "cumulative effects." For example, one more refinery in Cancer Alley might not emit much pollution by itself, but combined with the emissions of all the other factories in the area -- the cumulative effects -- it might pose an unacceptable health risk. Cumulative impacts are life-or-death impacts for already overburdened and vulnerable communities, but the new rules would prevent agencies from measuring or considering these impacts.

- a. If it was reasonable to consider cumulative impacts decades years ago, that consideration is even more reasonable today. The Trump Administration has suggested that cumulative-impact analysis is too detailed and costly, but there are more tools and data available today than ever before.
- b. Cumulative impacts hit environmental justice communities the hardest. As a consequence of decades of discriminatory decisions and policies, poor

communities and communities of color are overburdened with environmental hazards. When the government fails to consider existing hazards alongside future ones, it turns a blind eye to their deadly effects.

- c. Climate change and greenhouse gas analysis: Cumulative impacts are also important for climate justice. Historic discrimination has pushed many people to America's geographic margins: floodplains, unstable slopes, and barrier islands near toxic industrial and waste facilities. For example, think of the flooding in the Lower Ninth Ward after Hurricane Katrina. As a consequence, environmental justice communities are also the most vulnerable to the effects of climate change.

C. Categorical Exclusion

A categorical exclusion is a type of action that allegedly does not have a significant effect on the human environment and is exempt from NEPA's reporting requirements. Normally, an agency has to go through a complex rulemaking process in order to establish a categorical exclusion. Currently, each federal agency maintains its own list of categorical exclusions. But the new rules would allow the adoption of other agency's exclusions without further analysis. Furthermore, the rule would exclude all non-federal projects from the NEPA process no matter how much money the project received from the federal government. In a world where so much work is done by federal contractors, this exclusion could be disastrous.

Hundreds if not thousands of projects will fly under the radar of NEPA review if another agency has already exempted the action. Many low-income and communities of color will be affected as a result, and these communities will not be able to challenge the actions because of their exempt status. Examples of categorically excluded activities include oil and gas leases, and grazing rights on more than 155 million acres of public land—and many Native American archaeological sites. These are two parts of the proposal that you might want to comment on:

- a. Allowing agencies to adopt other agencies' exclusions if their projects are similar— many more projects and actions could be exempt from individual analysis
- b. Exempting non-federal projects from NEPA review (revenue-sharing would not meet definition of major federal action)

D. Weakened Safeguards

The new rule offers other concerning, restrictive language that would limit an agency's ability to do more under the statute. A willing agency could not do more to protect the

communities or environment its project affects if it wanted to. Under the new rule, if the proposed project would have an impact on an area outside of the agency's perview, it would not have to consider alternatives to mitigate that impact. And now, an agency would get to decide when the NEPA process would apply to its projects. These are the parts of the proposal that raise concerns that you might want to comment on:

- a. Agencies cannot interpret or set stricter standards for their NEPA procedures than what is set out in the regulation
- b. Agencies cannot consider alternatives outside their jurisdiction
- c. Allows the agency to decide when to start the NEPA process