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Council on Environmental Quality Releases Draft Guidance to Improve Efficiency Under the National Environmental Policy Act

FACTS

On December 7, 2011, as part of the Obama Administration's effort to improve regulatory procedures, the Council on Environmental Quality (CEQ) released draft Guidance to improve efficiency under the National Environmental Policy Act (NEPA).

The draft Guidance is open for public comment until January 27, 2012. The NEPA process can be time consuming and lead to litigation challenging federal permits for private projects. This release provides an opportunity to go on record with comments on how the NEPA process could be improved, particularly as it impacts private actions.

BACKGROUND

Enacted in 1969, NEPA recognizes that many federal activities, including issuing permits, leases or other approvals to private parties, affect the environment and requires federal agencies to consider the potential environmental impacts of their action, and any reasonable alternatives, before deciding whether and in what manner to take an action. The law has implementing regulations issued by the CEQ, and over the decades, CEQ has from time to time issued Guidance on implementing NEPA.

The draft Guidance outlines the following basic principles for agencies to follow when performing NEPA environmental reviews:

- NEPA encourages simple, straightforward, and concise reviews and documentation;
- NEPA should be integrated into project planning rather than be conducted after planning is complete;
- NEPA reviews should coordinate and take appropriate advantage of existing documents and studies;
- NEPA reviews should use early and well-defined scoping to target environmental reviews to appropriate issues and avoid unnecessary work;
- Agencies should develop meaningful and expeditious timelines for environmental reviews; and
- Agencies should target their responses to comments to appropriate issues raised.

The draft Guidance clarifies that the above tools – designed to ensure the timely and efficient conduct of environmental reviews – are to be applied not only to Environmental Impact Statements, the most intensive type of NEPA environmental document, but to all types of environmental reviews, including Environmental Assessments. The draft Guidance also notes that Categorical Exclusions ("CE") may be used to streamline the NEPA process.

While this draft Guidance is part of CEQ's Plan for Retrospective Review of Existing Regulations to implement Executive Order 13563, Improving Regulation and Regulatory Review (January 21, 2011), the draft Guidance is very general, leaving vast discretion to individual agencies. Using the above tools, the draft Guidance states that agencies should strive to: create concise NEPA documents; integrate NEPA early in the planning process; utilize the scoping process to plan collaboration with other governments, assign responsibilities, and develop the planning and decisionmaking schedule; ensure inter-Governmental coordination; coordinate reviews and documents under other applicable laws; consider adopting another agency's EA when the EA or a portion thereof addresses the proposed action; incorporate materials by reference, where appropriate; provide a reasonable and proportionate response to comments received on a draft EIS; and establish clear timelines for NEPA reviews.

IMPLICATIONS

With the current push by the Obama administration to improve regulatory procedures, release of the draft Guidance provides industries with a key opportunity to comment on the NEPA process and how it affects productivity in America. Although NEPA's purpose "is not to generate paperwork – even excellent paperwork – but to foster excellent action,"¹ it is debatable whether this aspirational goal is regularly achieved. Costs imposed by the NEPA review process (both in terms of time delays and response costs) are borne by the project applicant. Given the proliferation of environmental regulations and public participation in the environmental review process since NEPA was enacted, these costs have steadily increased.

There is a 45-day public comment period on this draft Guidance, making comments due on or before January 27, 2012.

FURTHER INFORMATION

Venable has broad experience assisting clients in commenting on draft Guidance, navigating the NEPA process, and negotiating permit terms with federal, state and local authorities. If you would like further information concerning this alert, or are considering submitting comments on the draft Guidance, please contact the authors or another attorney in Venable's [Environmental Practice Group](#).