

The National Environmental Policy Act (NEPA) was passed over fifty years. It created a new tool for environmental protection, the environmental impact statements, It also created the White House Council on Environmental Quality (CEQ), which issued guidelines of implementing NEPA in 1978. Lawyers will need to retool quickly because of recent changes. Here's a roadmap to recent developments.

The original version of NEPA and the 1978 version of CEQ guidelines provided a stable framework for agencies and courts for nearly fifty years. The Trump Administration made significant changes in the CEQ guidelines. The Biden Administration rolled back some of those changes and was planning to further amendments, which were presumed likely to undo many others.

In June of 2023, the stable statutory foundation for NEPA abruptly shifted. As part of a legislative package to suspend the debt ceiling and avoid a default on U.S. debt, the Builder Act (Title III of Division C of the 2023 Fiscal Responsibility Act) amended and dramatically expanded the provisions in NEPA dealing with environmental impact statements.

Many of the changes appear to have codified CEQ provisions or current caselaw in a non-controversial way. Other provisions were modified in the interest of streamlining permitting for new projects. Notably, the Builder Act creates deadlines for completion of environmental documents and limits their length.

Courts as well as CEQ will take time to work through all of the changes and determine the extent to which they change existing law. The short-term effects may be to complicate the agency's task in complying with NEPA and increase litigation, neither of which is likely to be conducive to the goal of making permitting more efficient.

The core mandate to prepare an impact statement now requires agencies to:

(C) consistent with the provisions of this Act and except where compliance would be inconsistent with other statutory requirements, include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the head of the lead agency on —

- (i) reasonably foreseeable environmental effects of the proposed agency action;
- (ii) any reasonably foreseeable adverse environmental effects which cannot be avoided should the proposal be implemented;

- (iii) a reasonable range of alternatives to the proposed agency action, including an analysis of any negative environmental impacts of not implementing the proposed agency action in the case of a no action alternative, that are technically and economically feasible, and meet the purpose and need of the proposal;
- (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity; and
- (v) any irreversible and irretrievable commitments of Federal resources which would be involved in the proposed agency action should it be implemented.

The Builder Act then inserts three new subsections to section 102(2). Those sections direct agencies to :

- (D) ensure the professional integrity, including scientific integrity, of the discussion and analysis in an environmental document;
- (E) make use of reliable data and resources in carrying out this Act;
- (F) consistent with the provisions of this Act, study, develop, and describe technically and economically feasible alternatives.

The Builder Act goes on to add a series of new sections to NEPA. Briefly, they operate as follows:

Section 106 codifies the two track process for environmental reviews developed by courts and embedded in the CEQ regulations. If the agency determines that an action will have a "reasonably foreseeable significant effect" on the environment, it prepared an environmental impact statement (EIS). Otherwise, it prepares an environmental assessment (EA), a more abbreviated statement about environmental effects, along with a Finding of No Significant Environmental Impact (FONSI). .

Section 107 deals with the preparation of impact statements, including appointment of a lead agency if more than one agency is involved, page limits, deadlines, and so forth.

Section 108 deals with an existing practice under NEPA. When an agency is considering a large number of projects that have common features, it may prepare a programmatic impact statement. This statement deals with issues that all the projects have in common. For five years after the programmatic impact statement is adopted, the agency may rely on it, allowing it limit project evaluations to issues specific to each project.

Section 109 deals with another existing agency practice, the use of categorical exclusions. These are rules determining that certain categories of agency actions generally do not have significant environmental impacts and therefore do not require an individualized assessment. Prior to the Builder Act, there was an exception if a particular project presented exceptional circumstances. It is not clear whether this exception remains in effect.

Section 110 seeks to increase the use of information technology in NEPA.

Section 111 then defines much of the relevant terminology. These definitions can have important consequences. I've already [written](#), for instance, about the mess created by an ill-considered effort to redefine the term "major federal action."

It remains to be seen whether major changes in NEPA practice will result from the Builder Act or whether the effect will only be incremental. CEQ will be in a position to frame implementation of the "New NEPA", since courts and agencies will be looking to it for early guidance.