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Curbing Abuses of a Politicized NEPA

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KEY TAKEAWAYS

NEPA reforms promise to reduce some of the regulatory burden that would otherwise inhibit job creation and economic growth in the wake of the COVID-19 crisis.

No federal action undergoing NEPA review could possibly alter the climate, so there is no rational basis for a climate-change assessment in NEPA permitting.

The NEPA could be repealed without adverse effects because there are dozens of other regulations that control every environmental byproduct of infrastructure improvement.

The Trump Administration has finalized a much-needed modernization of the implementation rules for the National Environmental Policy Act (NEPA).[1] Once the vanguard of environmental law, the 1970 act and related regulations clash with current scientific tenets and economic realities. The revised rules will reduce barriers to the nation's recovery in the wake of the COVID-19 crisis—unless thwarted by enemies of reform and activist judges. Ultimately, however, the NEPA should be scuttled.

Establishing reasonable timelines for NEPA permitting and streamlining the process of environmental assessments will expedite construction of new and safer roads, bridges, and highways, as well as cleaner energy infrastructure—without sacrificing environmental protection. Despite predictable fearmongering from the green lobby, the reforms are hardly radical: The changes largely conform to rulings by the U.S. Supreme Court.[2]

No sooner were the reforms announced than a coalition of environmental groups filed a lawsuit accusing the White House of "gutting" environmental protection.[3] In fact, the 50-year-old act could be *repealed* without any adverse effects. There are dozens of other federal and state regulations that protect water and air quality, wetlands, and endangered species, and that control run-off, hazardous waste, construction debris, demolition dust, and every other potential byproduct of infrastructure improvements.[4]

NEPA History

Congress crafted the NEPA in 1969 to inject environmental stewardship into federal agency actions.[5] The 3,200-word statute requires every executive branch department to assess the environmental effects of "major" public works projects and other budgetary and regulatory actions with potentially "significant" effects.[6] The law also established the Council on Environmental Quality (CEQ) within the Executive Office of the President to administer NEPA implementation.[7]

Five decades of NEPA experience have revealed its numerous flaws, including arbitrary standards, politicized enforcement, and protracted litigation. The act predated the Environmental Protection Agency and virtually all federal environmental statutes, and thus its architects were relatively naïve about the machinations of bureaucratic self-interest, the politicization of environmental science, and the policy distortions wrought by judicial activism—all of which have rendered the NEPA costly, time-consuming, and riddled with conflict.

The act was most recently targeted for reform shortly after President Donald Trump took office; a 2017 executive order directed the CEQ to "modernize the Federal environmental review and authorization process."[8] Among the President's goals: "[E]nsure that agencies apply NEPA in a manner that reduces unnecessary burdens and delays as much as possible, including by using CEQ's authority to interpret NEPA to simplify and accelerate the NEPA review process."

The CEQ's notice of proposed reforms and request for public comment was published in the *Federal Register* on January 10, 2020.[9] A whopping 1.1 million comments were submitted to the rulemaking docket.[10] In a related matter, the council also proposed new guidance on agencies' accounting for emissions of carbon dioxide (CO_2), methane, nitrous oxide, and other purported "greenhouse gases" (GHG) in NEPA analyses (to replace guidance issued by the Obama Administration).[11]

The CEQ's reforms promise to reduce at least some of the regulatory burden that inhibits investment, job creation, and economic growth—particularly for infrastructure and energy-related projects. It was also important to curtail agencies' improper speculation in NEPA reviews about climate effects.

Were it politically feasible, the optimum policy option is repeal of the NEPA entirely. Its primary purpose, at present, is to facilitate activists' legal challenges to development. Under current political circumstances, however, incremental reform is necessary to move the nation toward a post-COVID-19 recovery.

NEPA Basics

The NEPA statute was signed into law by President Richard Nixon on January 1, 1970, and with it creation of the CEQ to administer its implementation. As set forth by Congress, the purpose of the NEPA is to:

> [E]ncourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation.[12]

Unlike many other environmental statutes, the NEPA is not a "substantive" law; rather than mandate specific standards, it imposes *procedural* obligations on federal agencies.[13] These include, in part, requiring agencies to consider the environmental impacts of the proposed action, any unavoidable adverse effects, and alternatives to the proposed action.

The range of federal actions to which the statute applies is broad, encompassing government financing, technical assistance, permitting, regulations, or federal policies and procedures that touch a project. Single projects often include multiple agencies. Indeed, compliance is rendered difficult by the fact that each federal agency crafts its own NEPA procedures, and thus projects often face multiple sets of rules. *The NEPA Book: A Step-by-Step Guide on How to Comply with the National Environmental Policy Act* runs 475 pages long.[14]

The NEPA's expansive reach presents virtually endless opportunities for bureaucratic wrangling and judicial interference. Green activists exploit judicial review of NEPA procedures to delay or prevent highway, pipeline, electricity transmission, water resource, and broadband upgrades, among

other projects. The mere filing of a lawsuit and the resulting delays are often as effective in crippling projects as prevailing in court. The onus is largely on project developers to prove (impossibly) that even far-fetched environmental impacts will not occur.

The likelihood of litigation prompts agencies to prepare voluminous analyses in hopes of staking a defensible position (and avoiding public embarrassment). This creates exhaustive demands for data and protracted delays—and companies trying to secure a federal permit are in no position to complain.

The CEQ implementation rules hold that the text of a final environmental impact statement "shall normally be less than 150 pages and for proposals of unusual scope or complexity shall normally be less than 300 pages."[15] However, between 2013 and 2017, the average length of a final impact statement was 669 pages and required an average of 4.5 years to complete.[16]

Reform Efforts

There has not been any comprehensive reform of the NEPA regulations since 1978.[17] Instead, more than 35 guidance documents have been issued by various administrations, which have politicized every stage of the environmental review process. Congress has enacted dozens of provisions in various authorization bills to streamline the NEPA for highway and transit projects.[18] However, 22 of 34 streamlining provisions for highway projects and 17 of 29 transit provisions were made optional for agencies.[19]

A variety of presidential directives have also been issued across the decades, while the broad, aspirational language of the statute has provoked a multitude of lawsuits, and thus an expansive body of case law.[20] The quagmire of guidance, regulations, and judicial decrees leaves government officials with virtually unconstrained regulatory discretion.

President Trump has pursued NEPA reforms since his first week in office. Executive Order (EO) 13766[21] directed agencies to designate select infrastructure projects as "high priority" for the purpose of expediting permitting reviews. Six months later, EO 13807[22] prescribed a policy of "One Federal Decision," whereby a lead agency is designated to steer the NEPA review and compile a single record of agencies' actions. The executive order also calls for reducing the processing time for reviews to "not more than an average of approximately two years." Once the review is completed, authorization to commence construction must be issued within 90 days.

Eight cabinet departments and four agencies[23] signed a memorandum of understanding (MOU) committing to implement the One Federal Decision policy for major infrastructure projects (effective April 10, 2018). The MOU calls for a joint schedule for such projects, preparing a single environmental impact statement and joint record of decision, prioritizing dispute resolution, and completing environmental reviews within two years.[24]

EO 13807 also directed the CEQ to develop a list of actions "to enhance and modernize the Federal environmental review and authorization process,"[25] including to:

- Ensure that environmental reviews and authorization decisions involving multiple agencies are conducted in a manner that is concurrent, synchronized, timely, and efficient;

- Provide for agency use of environmental studies, analyses, and decisions conducted in support of previous federal, state, tribal, or local environmental reviews; and

- Ensure that agencies apply the NEPA in a manner that reduces unnecessary burdens and delays, including use of CEQ authority to accelerate the review process.[26]

The CEQ's list of proposed actions was published as an advance notice of proposed rulemaking on June 20, 2018,[27] with a request for public comment.

The Reforms

The history of the NEPA reflects many of the vexing problems associated with the modern administrative state. The statute's overly broad aspirational language effectively delegates lawmaking authority to agencies—each of which has crafted NEPA rules of their own. The courts, in turn, have granted considerable deference to agencies' myriad statutory interpretations, which have expanded their powers. The agencies also adjudicate their own rules, thereby eroding the separation of powers doctrine and basic due-process principles.

Some of the CEQ's reforms are intended to cut through the NEPA's hyper-politicized regime and to "modernize and clarify" the NEPA regulations to "facilitate more efficient, effective, and timely NEPA reviews"[28] including:

- Allowing agencies to use documents required by other statutes or prepared by state, tribal, and local agencies to comply with NEPA;

- Clarifying that agencies should use reliable existing information and resources—and are not required to undertake new scientific and technical research to inform their analyses;

- Stating explicitly that harm from the failure to comply with the NEPA can be remedied by compliance with the NEPA's procedural requirements, and a violation of the procedural rules does not create a per se cause of action;

- Requiring a demonstration of an immediacy of harm (unrelated to a mere violation of statutory procedures) for injunctive relief; and

- Excluding outside parties from raising claims based on issues they did not raise during the public comment period.

Other reforms codify policies previously implemented by executive order, including designating a lead agency in cases involving multiple agencies, preparing a single environmental impact statement and a joint record of decision in such cases, and imposing a one-year limit for initial assessments and two years for more comprehensive environmental impact statements.

Going forward, the NEPA debate will focus on two of the Trump Administration's most important reforms—both of which relate, not surprisingly, to vague statutory language that has provoked a rash of costly litigation. They are (1) the extent of the "alternatives" to a proposed action that agencies must consider in a NEPA review, and (2) the range of "effects" that must be assessed in NEPA analyses. As explained below, both bear directly on whether and/or how carbon dioxide, methane, and emissions of other purported greenhouse gases should be incorporated into the NEPA process—perhaps the most contrived means of controlling permitting decisions.

Alternatives

The NEPA directs agencies in preparing environmental impact statements to "study, develop, and describe appropriate alternatives to recommended courses of action," but does not specify the type or number of alternatives that are adequate for the task.[29] The CEQ's original implementation rules directed agencies to "[r]igorously explore and objectively

evaluate *all* reasonable alternatives and, for alternatives that were eliminated from detailed study, briefly discuss the reasons for their having been eliminated."[30]

Agencies were required to identify a "preferred alternative" as well as to assess a "no action alternative." Beyond those requirements, there was ambiguity, which both agencies and activists leveraged to manipulate the outcome of the NEPA process. Thus, there was a need for the CEQ to clarify what constitutes a sufficient assessment of reasonable alternatives.

In the new implementation rules, the CEQ deleted "all" before "reasonable alternatives," in keeping with the actual text of the NEPA.[31] As the council noted, there is no necessity for consideration of alternatives to be exhaustive "where the consideration of a spectrum of alternatives allows for the selection of any alternative within that spectrum."[32] These changes are sensible checks on unnecessarily costly and time-consuming assessments. And while activists will undoubtedly continue to challenge the sufficiency of agencies' alternatives analyses, the new rules should restrict the scope of their claims.

The CEQ also eliminated the requirement for agencies to consider alternatives over which they have no jurisdiction. After all, the purpose of an analysis is to reveal the optimal course of action—which would be thwarted if the "best" option falls outside the agency's jurisdiction and cannot be adopted.

Perhaps most important, the council has redefined "reasonable alternatives" in the implementing regulations to mean "a reasonable range of alternatives that are technically and economically feasible, meet the purpose and need for the proposed action, and, where applicable, meet the goals of the applicant."[33] Indeed, to consider infeasible alternatives would waste the resources of both agencies and applicants while delaying public health and safety benefits that accrue from new development and infrastructure improvements.

The rulemaking also includes new requirements for soliciting public comment on potential alternatives and impacts to be considered in an environmental impact statement. The solicitation is intended to both ensure informed decision-making and to address policy conflicts before agencies conclude the NEPA process. Therefore, the CEQ is also prohibiting outside parties from raising claims based on issues they did not raise during the public comment period. Allowing agencies to address claims at the front end of the permitting process should help to reduce protracted litigation.

Effects

The NEPA requires agencies to evaluate the environmental impacts and effects of a proposed action, but the statute does not address the scope of such analyses. The original CEQ regulations, on the other hand, distinguished between direct, indirect and cumulative effects. Such a broad scope of effects resulted in unnecessarily expansive and speculative analyses and excessive litigation.[34]

The new implementation rules replace "direct," "indirect," and "cumulative" with the definition "reasonably foreseeable and hav[ing] a reasonably close causal relationship to the proposed action or alternatives." Indeed, it is reasonable that agencies refrain from considering effects that are remote in time, geographically remote, the product of a lengthy causal chain, or those that would occur regardless of the proposed action.[35] According to the council, a close causal relationship is analogous to "proximate cause" in tort law.

Consequently, the CEQ is effectively eliminating the consideration of "cumulative effects," correctly concluding that they are, by their nature, highly speculative and many of which, such as potential climate change, are well beyond the control of both agencies and permit applicants. Indeed, determining the geographic and temporal scope of such effects has proven to be, in many cases, more political science than sound science.

As noted by the council, "Excessively lengthy documentation that does not focus on the most meaningful issues for the decision maker's consideration can lead to encyclopedic documents that include information that is irrelevant or inconsequential to the decision-making process. Instead, agencies should focus their efforts on analyzing effects that are most likely to be potentially significant and be effects that would occur as a result of the agency's decision."

The elimination of cumulative effects from consideration under the NEPA is entirely in keeping with the 1983 unanimous U.S. Supreme Court decision in *Metropolitan Edison*,[36] which stated:

> The terms "environmental effects" and "environmental impact" in §102(C) [of NEPA] should be read to include a requirement of a reasonably close causal relationship between a change in the physical environment and the effect at issue.

The CEQ has also clarified that the required analyses of "effects" do not include those over which the agency has no authority or those that would

occur even without agency action.[37] According to the council, "With this proposed change and the proposed elimination of the definition of cumulative impacts, it is CEQ's intent to focus agencies on analysis of effects that are reasonably foreseeable and have a reasonably close causal relationship to the proposed action."

This, too, reflects a U.S. Supreme Court ruling, the 2004 case, *Public Citizen*,[38] which stated:

> We hold that where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant "cause" of the effect. Hence, under NEPA and the implementing [Council on Environmental Quality] regulations, the agency need not consider these effects in its [Environmental Assessment] when determining whether its action is a "major federal action."

Climate Change

The CEQ's elimination of "cumulative" references in NEPA analyses bears directly on the issue of climate change. After all, climate change is purported to result from the buildup of carbon dioxide and other gases in the atmosphere, which is a process of accumulation (i.e., cumulative impact).

As noted in the previous section, the CEQ is precluding consideration in NEPA analyses of effects that are "remote in time, geographically remote, or the product of a lengthy causal chain."[39] Nor should the analyses include effects that the agency has no ability to prevent due to its limited statutory authority or those that would occur regardless of the proposed action.

That should rightfully end consideration of so-called greenhouse gas emissions in the NEPA process.[40] Indeed, no single federal action undergoing a NEPA review could possibly alter the climate, so there is no rational basis for incorporating a climate change assessment in permitting.[41] As noted by Heritage Foundation scholars, "[E]ven if the U.S. were to cut its CO_2 emissions 100 percent, it would have a negligible impact on global warming."[42]

Alas, neither science nor common sense prevented previous administrations from requiring consideration of so-called greenhouse gas emissions in NEPA analyses. For example, the CEQ in 2010 proposed draft guidance for assessing the effects of "greenhouse gas" emissions when a proposed action "would be reasonably anticipated to cause direct emissions of 25,000 metric tons or more of CO_2-equivalent GHG emissions on an annual basis."[43]

However, there is no relationship between that volume of emissions and changes in climate; it was selected solely because it is the minimum standard for reporting other types of emissions under the Clean Air Act.

A revised draft of the Obama Administration guidance was released in 2014 that maintained the same reference point for NEPA analyses.[44] But the final guidance,[45] issued by the Obama Administration four months before the 2016 presidential election, no longer contained a volume reference. Instead, agencies were granted broad discretion to treat *any* level of projected "GHG" emissions as a proxy for climate change—a decidedly irrational approach. The final guidance also directed agencies to conduct "qualitative" analyses when actual emissions data "are not reasonably available to support calculations for quantitative analyses."[46]

Two months after taking office, President Trump, pursuant to Executive Order 13783,[47] directed the Council on Environmental Quality to rescind the Obama Administration guidance, which occurred on April 5, 2017.[48] The CEQ proposed replacement guidance on June 26, 2019.[49]

The NEPA reforms appear to eclipse, at least in part, the 2019 proposed guidance for "greenhouse gas" emissions. The elimination of "cumulative" and "indirect" effects should virtually eliminate consideration of carbon-dioxide emissions (and others) in NEPA analyses, as does limiting the consideration of effects to those that are "reasonably foreseeable and have a reasonably close causal relationship to the proposed action or alternatives."

In contrast, the proposed "GHG" emissions guidance leaves room for the inclusion of climate change as a potential decision factor in the NEPA process, stating, "A projection of a proposed action's direct and reasonably foreseeable indirect GHG emissions may be used as a proxy for assessing potential climate effects."

That is nonsense, of course. The potential effects of so-called greenhouse gas emissions are inherently speculative; the science is far from settled about the volume of carbon-dioxide emissions (and others)—if any—which would provoke changes in climate. But if such a causal relationship exists, the volume of emissions necessary to provoke it would be global in scale and not attributable to any single agency action—under any circumstance.

The proposed guidance attempts to limit the proxy approach by advising agencies that "GHG" emissions should be considered when "a sufficiently close causal relationship exists between the proposed action and the effect." But there is no such scenario, so to suggest one exists is irrational.

The CEQ's proposed criteria for quantifying direct and indirect "GHG" emissions is also irresponsibly vague and thus would grant agencies far too much discretion, that is: "when the amount of those emissions is substantial

enough to warrant quantification, and when it is practicable to quantify them using available data and GHG quantification tools."

In other words, the proposed guidance would effectively leave the decision to agencies whether to include "GHG" emissions in NEPA analyses. In light of the NEPA reforms, the council ought to scrap the "GHG" emissions guidance and leave it to Congress to decide whether to address purported greenhouse gas emissions in NEPA permitting.

Conclusion

Since its passage in 1969, the NEPA has persisted despite dramatic changes in America's economic, social, political, and environmental landscapes—and despite the enactment of countless other federal, state, and local regulations. Consequently, the NEPA is an anachronism that unduly complicates federal projects, encourages judicial activism, politicizes rulemaking, and blurs distinctions between environmental risks. The 50-year-old act is redundant and should be repealed. Absent congressional leadership to do so, the Trump Administration's reforms address several of the most problematic elements of the NEPA process.

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Endnotes

1. *Federal Register*, Vol. 85, No. 137 (July 16, 2020), pp. 43304–43376.
2. Eli Dourado and Josh T. Smith, "Improving the Magna Carta of Environmental Law," Utah State University Center for Growth and Opportunity, April 22, 2020, https://medium.com/cgo-benchmark/improving-the-magna-carta-of-environmental-law-e50ddd702198 (accessed August 6, 2020).
3. "Environmental Organizations Sue Over NEPA Changes," *Smoky Mountain News*, July 22, 2020, https://www.smokymountainnews.com/archives/item/29515-environmental-organizations-sue-over-nepa-changes (accessed August 6, 2020).
4. Including the Clean Air Act, 1970; Clean Water Act, 1972; Coastal Zone Management Act, 1972; Endangered Species Act, 1973; Resource Conservation and Recovery Act, 1976; Federal Land Policy and Management Act, 1976; and Surface Mining Control and Reclamation Act, 1977, among others. At least 16 states have enacted NEPA-type laws to evaluate the effects of potential state agency actions. See Ballotpedia, "State Environmental Policy Acts," https://ballotpedia.org/State_environmental_policy_acts (accessed August 6, 2020).
5. The text of the NEPA establishes as national policy "to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans." See National Environmental Policy Act of 1969, Public Law No. 91–190, § 4331 (1970).
6. Ibid., §§ 4321–4347. These include construction of roads, bridges, highways, and airports; conventional and renewable energy production and distribution; electricity transmission; water infrastructure; broadband deployment; and management of public lands.
7. The CEQ does not wield rulemaking authority per se, but the U.S. Supreme Court has recognized that the council was created by the NEPA to interpret the act. See Mario Loyola, "Modernizing the National Environmental Policy Act," Federalist Society teleforum, February 24, 2020, https://fedsoc.org/events/modernizing-the-national-environmental-policy-act-nepa (accessed August 6, 2020).
8. Donald Trump, "Presidential Executive Order on Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure," Executive Order No. 13807, August 15, 2017, https://www.whitehouse.gov/presidential-actions/presidential-executive-order-establishing-discipline-accountability-environmental-review-permitting-process-infrastructure/ (accessed August 6, 2020).
9. *Federal Register*, Vol. 85, No. 7 (January 10, 2020), pp. 1684–1730.
10. "'Rulemaking Docket' for Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act," Council on Environmental Quality, https://www.regulations.gov/docket?D=CEQ-2019-0003 (accessed August 13, 2020).
11. *Federal Register*, Vol. 84, No. 123 (June 26, 2019), pp. 30097–30099.
12. National Environmental Policy Act of 1969.
13. For an explanation of the various steps agencies must take, see Diane Katz, "Time to Repeal the Obsolete National Environmental Policy Act (NEPA)," Heritage Foundation *Backgrounder* No. 3293, March 14, 2018, https://www.heritage.org/sites/default/files/2018-03/BG3293_0.pdf.
14. Ronald E. Bass, Albert I. Herson, and Kenneth M. Bogdan, *The NEPA Book: A Step-by-Step Guide on How to Comply with the National Environmental Policy Act* (Point Arena, CA: Solano Press, 2001).
15. *Federal Register*, Vol. 85, No. 7, § 1502.7.
16. Council on Environmental Quality, "Length of Environmental Impact Statements (2013–2017)," July 22, 2019, https://ceq.doe.gov/docs/nepa-practice/CEQ_EIS_Length_Report_2019-7-22.pdf (accessed August 6, 2020), and Council on Environmental Quality, "Environmental Impact Statement Timelines (2010–2017)," December 14, 2018, https://ceq.doe.gov/docs/nepa-practice/CEQ_EIS_Timelines_Report_2018-12-14.pdf (accessed August 6, 2020).
17. President Richard Nixon signed the NEPA into law on January 1, 1970. The CEQ issued initial guidelines for implementation that same year, revised those guidelines in 1973, and finalized the actual NEPA regulations in 1978. See Council on Environmental Quality, "Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act," *Federal Register*, January 10, 2020, https://www.govinfo.gov/content/pkg/FR-2020-01-10/pdf/2019-28106.pdf (accessed August 13, 2020). See *Federal Register*, Vol. 85, No. 7, *supra* note 10.
18. Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Public Law No. 109–59; Moving Ahead for Progress in the 21st Century, Public Law No. 112–141; and Fixing America's Surface Transportation Act, Public Law No. 114–94.
19. For a list, see Katz, "Time to Repeal the Obsolete National Environmental Policy Act (NEPA)."
20. See *Federal Register*, Vol. 85, No. 7, *supra* note 10.
21. Donald Trump, "Executive Order Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects," Executive Order No. 13766, January 24, 2017, https://www.govinfo.gov/content/pkg/FR-2017-01-30/pdf/2017-02029.pdf (accessed August 6, 2020).
22. Trump, "Executive Order on Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure."
23. Included are the Departments of Interior, Agriculture, Commerce, Housing and Urban Development, Transportation, Energy, Homeland Security, and the Environmental Protection Agency. In addition, the memorandum was also signed by the U.S. Army Corps of Engineers, the Federal Energy Regulatory Commission, the Advisory Council on Historic Preservation, and the Federal Permitting Improvement Steering Council.

24. The White House, "Memorandum of Understanding Implementing One Federal Decision under Executive Order 13807," 2018, https://www.whitehouse.gov/wp-content/uploads/2018/04/MOU-One-Federal-Decision-m-18-13-Part-2-1.pdf (accessed August 6, 2020).
25. Trump, "Executive Order on Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure."
26. The CEQ does not have rulemaking authority per se. But the U.S. Supreme Court has recognized that the CEQ was created by the NEPA Act to interpret the law. See Loyola, "Modernizing the National Environmental Policy Act."
27. *Federal Register*, Vol. 83, No. 119 (June 20, 2018), pp. 28591–28592. President Donald Trump's infrastructure plan features 15 pages of recommendations to streamline permitting. See White House, *Legislative Outline for Rebuilding Infrastructure in America*, February 12, 2018, https://www.whitehouse.gov/wp-content/uploads/2018/02/INFRASTRUCTURE-211.pdf (accessed August 6, 2020).
28. See *Federal Register*, Vol. 85, No. 7, *supra* note 10.
29. At a minimum, an agency must carry forward one action alternative and the no-action alternative. See Melanie Hernandez, "NEPA Nerd Dive: How Many Alternatives Have to Be Discussed?" Scout Environmental, August 12, 2019, https://scoutenv.com/2019/08/12/how_many_nepa_alternatives/ (accessed August 6, 2020). The range of alternatives for some actions may be dictated by statute.
30. *Federal Register*, Vol. 43, No. 230 (November 29, 1978), pp. 559987–56007 (emphasis added).
31. Section 102(2)(C) of the act directs agencies to address "alternatives to the proposed action," while § 102(2)(E) requires only that agencies "study, develop, and describe appropriate alternatives to recommended courses of action."
32. See *Federal Register*, Vol. 85, No. 7, *supra* note 10.
33. Congress did not include a set of definitions in the NEPA.
34. 40 Code of Federal Regulations § 1508.8, (1977), https://www.law.cornell.edu/cfr/text/40/1508.8 (accessed August 13, 2020).
35. Council on Environmental Quality, "Regulatory Impact Analysis for the Final Rule, Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act," RIN 0331–AA03, June 30, 2020, https://www.whitehouse.gov/wp-content/uploads/2020/01/CEQ-NEPA-Regulations-RIA_Final.pdf (accessed August 6, 2020).
36. *Metropolitan Edison Co. v. PANE*, 460 U.S. 766 (1983).
37. According to Mario Loyola, the redefinition is "in keeping with the key U.S. Supreme Court case over the last couple of decades on NEPA, which is *Department of Transportation v. Public Citizen*." See Loyola, "Modernizing the National Environmental Policy Act."
38. *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004).
39. See *Federal Register*, Vol. 85, No. 7, *supra* note 10.
40. Under the final rule, trends determined to be a consequence of climate change will be characterized in the baseline analysis of the affected environment, rather than as an effect of the action.
41. Nothing in the NEPA refers to climate change, nor has Congress authorized the CEQ to consider "GHG" emissions or climate change in NEPA analyses. On the contrary, Congress has rejected controls for emissions of carbon dioxide (and others) such as "cap-and-trade" and carbon taxes, as well as the Green New Deal resolution. No President sought Senate ratification of the United Nations' 1997 Kyoto Protocol or any other climate-related agreement.
42. Kevin D. Dayaratna and Nicolas D. Loris, "Assessing the Costs and Benefits of the Green New Deal's Energy Policies," Heritage Foundation *Backgrounder* No. 3427, July 24, 2019, https://www.heritage.org/sites/default/files/2019-07/BG3427.pdf (accessed August 6, 2020).
43. Council on Environmental Quality, "Draft NEPA Guidance on Consideration of the Effects of Climate Change and Greenhouse Gas Emissions," February 18, 2010, https://ceq.doe.gov/docs/ceq-regulations-and-guidance/20100218-nepa-consideration-effects-ghg-draft-guidance.pdf (accessed August 6, 2020).
44. Council on Environmental Quality, Revised Draft Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in NEPA Reviews, *Federal Register*, December 24, 2014, https://www.energy.gov/sites/prod/files/2014/12/f19/CEQ%20Guidance%20on%20Greenhouse%20Gas%20Emissions%20-%20Revised%20Draft%20for%20Public%20Comment2014-30035.pdf (accessed August 14, 2020).
45. *Federal Register*, Vol. 79, No. 247 (December 24, 2014), pp. 77802–77831.
46. Council on Environmental Quality, "Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews," August 1, 2016, https://ceq.doe.gov/docs/ceq-regulations-and-guidance/nepa_final_ghg_guidance.pdf (accessed August 6, 2020).
47. Donald Trump, "Executive Order Promoting Energy Independence and Economic Growth," Executive Order No. 13783, March 28, 2017, https://www.govinfo.gov/content/pkg/FR-2017-03-31/pdf/2017-06576.pdf (accessed August 6, 2020).
48. *Federal Register*, Vol. 82, No. 64 (April 5, 2017), pp. 16576–16577.
49. *Federal Register*, Vol. 84, No. 123, *supra* note 12.