

# “Welcome Back NEPA”: Recent Developments

Francis Chip Cameron  
CameronGray LLC  
NETWG, March 16, 2022

# OVERVIEW

- NEPA basics
- The Trump revision to CEQ regulations (2020)
- Biden actions in 2021 reverse Trump regulations
- Tribal consultation; opportunity for tribal governments – template for becoming a “cooperating agency” under NEPA
- Recent developments – EJ, NRC GEIS, conflicts between climate change goals and tribal fisheries, Supreme Court case on agency deference

# NEPA BASICS

- Substantive goals, Section 101
- “Process” requirements, Section 102; preparation of an EIS for “major Federal Actions”
- Council on Environmental Quality (CEQ)
- Analysis of environmental impacts of agency actions (licenses, permits, funding, proposed regulations, proposed legislation), including socioeconomic impacts; public disclosure
- Steps in the process – Cat Ex, EA, FONSI, Scoping, EIS, ROD

# NEPA BASICS (2)

- Alternatives – the “heart” of NEPA
- Cumulative impacts
- Environmental Justice (EJ)
- No obligation to select the least environmentally harmful alternative
- EPA review of EISs (Clean Air Act)
- Public comment

# AGENCY IMPLEMENTATION

- All agencies have NEPA implementing regulations, must be consistent with CEQ regulations
- NRC 10 CFR Part 51
- DOE 10 CFR Part 1021

# THE TRUMP CEQ REGULATIONS

- July 19, 2020, 85 FR 43304, first revision since 1978
- “outdated regulations have slowed and impeded the development of needed infrastructure across the nation”
- Heavily criticized
- Page and time limits
- Elimination of consideration of cumulative and indirect impacts

# THE TRUMP CEQ REGULATIONS (2)

- The agency need not consider impacts from alternatives it has no authority to implement
- License applicants have more authority to begin work on a project even if the EIS has not been completed and can also prepare the EIS rather than the agency
- The agency can ignore public comments that are not “specific” enough
- Agencies can exempt a project from NEPA by determining that an analysis under another statute serves the same purpose, even if not as rigorous

# BIDEN INITIATIVES

- Put Trump rule on hold and changed the agency implementation requirement to 2023, interim final rule, June 29, 2021, 86 FR 34154
- Proposed rule, October 7, 2021, 86 FR 55757; public comment period over; CEQ now evaluating comments
- EO 13990, Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis, January 20, 2021
- EO 14123, Tackling the Climate Crisis at Home and Abroad, January 27, 2021
- EJ initiatives

# CONSULTATION AND COOPERATING AGENCY

- Executive Order 13175 on consultation; must consult with tribes on any action that may have an impact on Tribes, BEFORE taking action; not satisfied by public comment
- Agency tribal policies, NRC and DOE
- Cooperating agency possibilities on preparation of an agency EIS
- Can be another Federal agency or a state or tribal government, that has jurisdiction by law or special expertise

# COOPERATING AGENCIES

- CEQ regulations permit a cooperating agency to “assume on request of the lead agency responsibility for developing information and preparing environmental analyses including portions of the EIS on which the cooperating agency has special expertise
- For example, identifying issues to be addressed; arranging for the collection of necessary resources, developing alternatives, evaluating alternatives and their impacts
- Not just commenting; but can’t control what decision the lead agency makes

# COOPERATING AGENCIES (2)

- Three key benefits to being a cooperating agency
- Transparency – being informed from the very beginning of the EIS process on the lead agency's actions and intentions
- Influence – direct input
- Leverage and coordination with the lead agency

# A TEMPLATE

- A request to be a cooperating agency should address the following:
- Special expertise, for example, effects on a tribe's cultural interests; effects on Tribal economics
- A demonstration that the Tribe has the requisite authority to enter into an agreement
- A commitment to participate
- A willingness to assist in preparing portions of the EIS

# RECENT DEVELOPMENTS

- New NRC EJ Policy
- NRC GEIS on reactor license renewal, CLI-22-02
- Projects where agency action must consider conflicts between climate change goals and tribal rights and the environment in general, e.g.; the Perpetua Resources Stibnite Gold Project mine in Idaho, for a critical mineral, antimony, used for batteries and solar panels; Forest Service Supplemental Draft EIS in the first quarter of 2022; potential harmful impacts on Nez Perce traditional fisheries
- Pending U.S. Supreme Court case, *West Virginia v. United States*, on agency ability to set generic standards