



Biden Administration Proposes to Walk Back Key Trump Era NEPA Regulation Changes

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On October 7, 2021, the Council on Environmental Quality (“CEQ”) published a notice of [proposed rulemaking](#) (“Proposed Rule”) to reverse several key changes made under the Trump administration to CEQ’s National Environmental Policy Act (“NEPA”) implementing regulations. The proposed rulemaking—the first phase of a two phase process to reconsider and revise the July 2020 “Update to the Regulations Implementing the Procedural Provisions of NEPA” (“[2020 Rule](#)”)—announces a narrow, but important, set of proposed changes, which the [CEQ states](#) “would better align the NEPA regulations with CEQ and agency expertise, as well as NEPA’s statutory goals and purpose to promote sound decisions informed by science.” It proposes to revert three aspects of the 2020 Rule back to the prior regulations with minor modifications: (1) the “purpose and need” of a proposed action; (2) the definition of “effects,” restoring the prior definitions of direct, indirect, and cumulative effects; and (3) agency flexibility to develop NEPA implementation procedures that go beyond the governmentwide NEPA regulations. CEQ intends to undertake a broader revisitation of the 2020 Rule, and to propose further revisions in the second phase to ensure efficient and effective environmental reviews, provide regulatory certainty, promote better decision-making, and address climate change and [environmental justice](#) objectives. Comments on the Proposed Rule are due by November 22, 2021. The timing of the second phase is not yet clear.

Background on NEPA Regulations

In the 2020 Rule, under the Trump administration, CEQ made extensive revisions to its NEPA regulations for the first time in over 40 years. For additional information on the 2020 Rule, please see our previous [alert](#). Following the issuance of the 2020 Rule, multiple lawsuits were filed [challenging the 2020 Rule](#), contending that the 2020 Rule exceeded CEQ’s authority and that the rulemaking process was procedurally and substantively defective.

On his first day in office, President Biden issued Executive Order 13990, *Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis* (Jan. 20, 2021), which directed the review of regulations issued by the Trump administration for consistency with the new administration’s environmental priorities. An accompanying White House fact sheet specifically identified the 2020 Rule for CEQ review. On June 29, 2021, CEQ issued an Interim Final Rule extending the deadline for federal agencies to develop or update their NEPA implementing procedures to conform to the CEQ regulations until September 14, 2023; the Proposed Rule does not propose to revise this deadline.

Overview of Proposed Changes in the Phase 1 Notice of Proposed Rulemaking

The Proposed Rule proposes a narrow set of changes intended to reverse several of the most controversial elements of the 2020 Rule, including: (1) eliminating the focus on the applicant and limited scope of the agency’s authority in defining the “purpose and need” of a proposed action; (2) restoring the 1978 definition of “effects,” including direct, indirect and cumulative impacts; and (3) reversing the limitations on the ability of agencies to develop their own NEPA implementing procedures that go beyond the CEQ regulations.

Purpose and Need of Proposed Action

The Proposed Rule would eliminate language added by the 2020 Rule that requires an agency to base the “purpose and need” of a proposed action “on the goals of the applicant and the agency’s authority” in the context of environmental reviews of applications for authorization, as well as make a conforming change to the definition of “reasonable alternatives.” The purpose and need section of an environmental impact statement (“EIS”) explains why a proposed action is being pursued and provides the boundaries for the range of reasonable alternatives to be considered.

In the Proposed Rule, CEQ reasons that the language added by the 2020 Rule “could be construed to require agencies to prioritize the applicant’s goals over other relevant factors, including the public interest.” While CEQ acknowledges that the goals of the applicant are a relevant factor for defining the purpose and need of a proposed action, it explains that the consideration of these goals should not be to the exclusion of other relevant factors, such as regulatory requirements, desired environmental outcomes, and local economic needs. The proposed change is intended to clarify that agencies have the discretion to base the purpose and need on a variety of factors, as well as to confirm that agencies “should consider a range of alternatives that are technically and economically feasible and meet the purpose and need for the proposed action but that are not unreasonably constrained by an applicant’s stated goals.”

Direct, Indirect, and Cumulative Impacts

NEPA requires agencies, in undertaking environmental reviews of covered actions, to assess the environmental impacts or effects of the proposed action and reasonable alternatives, as well as any adverse effects that are unavoidable if the proposed action is implemented. Perhaps the 2020 Rule’s most controversial changes were doing away with the long-used concepts of direct, indirect, and cumulative effects, and its decision to instead focus the analysis on those effects that are reasonably foreseeable and that have a reasonably close causal relationship to the proposed action. The 2020 Rule also provided that a “but for” causal relationship is not sufficient, and that the standard is analogous to proximate cause in tort law. These changes are a key target of the litigation challenging the 2020 Rule.

The Proposed Rule explains that undoing these changes is necessary both to eliminate confusion and to ensure that the NEPA process “considers the full range of reasonably foreseeable impacts in the NEPA process,” such as “air and water pollution, greenhouse gas emissions that contribute to climate change, and effects on communities with environmental justice concerns.” While CEQ explains that removing these changes is necessary to address adverse effects such as greenhouse gas (“GHG”) emissions released by burning fossil fuel as a reasonably foreseeable indirect effect of proposed fossil fuel extraction, CEQ explains it is also necessary to ensure consideration of *beneficial* effects, such as considering long-term reductions in GHG emissions as an indirect effect in the context of the environmental review of a proposed utility-scale solar facility. Further, while the 2020 Rule did not specifically bar an agency from considering reasonably foreseeable impacts that could be categorized as “cumulative impacts” under the earlier definition, CEQ has determined that the elimination of the definition has created unnecessary confusion and proposes to restore the definition to provide clarity with regard to addressing such impacts.

Finally, CEQ believes that the 2020 Rule’s language that limits effects to impacts with a “reasonably close causal relationship to the proposed action or alternatives” and states that a “but for” causal relationship is insufficient, could result in agencies inappropriately omitting important categories of effects, such as GHG emissions, from their analyses. Similarly, CEQ maintains that the 2020 Rule’s exclusion of “effects that the agency has no ability to prevent due to its limited statutory authority or would occur regardless of the proposed action” inappropriately limits agency discretion to consider effects that may “not fall neatly within discrete agency jurisdictional or regulatory confines.”

Agency NEPA Procedures

The Proposed Rule would remove limitations imposed by the 2020 Rule on the scope of agency-specific NEPA procedures, clarifying that while agency NEPA procedures must be consistent with the CEQ regulations, agencies also have the discretion and flexibility to develop procedures that go beyond the CEQ regulatory requirements. Specifically, the Proposed Rule would remove what CEQ refers to as “ceiling provisions” in the 2020 Rule, which include: (1) language that specifies that where agency procedures are inconsistent with CEQ regulations, the CEQ regulations apply “unless there is a clear and fundamental conflict with the requirements of another statute”; and (2) language that bars agencies from imposing additional procedures or requirements beyond the CEQ regulations except for “agency efficiency” or “as otherwise required by law.” The revision is meant to clarify that CEQ regulations are a “floor” rather than a “ceiling” for NEPA procedures, allowing agencies the flexibility to adopt procedures that may go beyond the CEQ regulations as appropriate to address their individual authorities, programs, and circumstances. As CEQ points out in the Proposed Rule, any proposed changes to an agency’s NEPA procedures already are subject to review by CEQ to ensure the procedures are consistent with NEPA and CEQ’s regulations.

Potential Impacts

It has been clear since the earliest days of the Biden administration that there would be an effort to revisit and undo many of the Trump era changes to CEQ's NEPA implementation rules. The Phase 1 Proposed Rule, following from the earlier extension of the date for agencies to revise their agency-specific NEPA procedures, is the first major step in this effort. The publication of the Proposed Rule kicks off a 45-day comment period, expiring on November 22, 2021. CEQ also has announced two online public meetings on the proposal, to be held on October [19](#) and [21, 2021](#).

Compared to the breadth of the 2020 Rule, the Proposed Rule proposes a relatively narrow set of revisions to reinstate the prior regulations with respect to some of the 2020 Rule's most significant and controversial changes. A broader revisitation of other portions of the 2020 Rule will be undertaken as part of a second phase, through which CEQ also intends to propose further revisions. CEQ has indicated that the second phase will aim to ensure efficient and effective environmental reviews, provide regulatory certainty, promote better decision-making, and address climate change and environmental justice objectives. It is reasonable to expect that some of these additional changes will be aimed at enhancing public participation, transparency, and informed science-based decision-making that could expand the requirements associated with NEPA reviews. However, it is also important to recognize that a streamlined NEPA process may be critical to realizing the Biden administration's infrastructure and renewable energy priorities, and some of the forthcoming changes therefore could aim to reduce certain burdens associated with NEPA compliance.

In the interim, though it is not clear that the 2020 Rule has had much in the way of practical effect, the focus on restoring consideration of indirect and cumulative impacts in the Proposed Rule could result in agencies giving greater consideration to climate change and environmental justice-related impacts (as environmental justice communities can suffer from compounded impacts from multiple pollution and emission sources). Those subject to environmental review under NEPA will want to pay close attention as CEQ moves ahead with the Proposed Rule and potentially more expansive changes in the second phase of its NEPA rulemaking effort.

For More Information

Van Ness Feldman closely monitors and counsels clients on NEPA-related issues. If you would like more information on how these updates may impact your business, please contact [Jonathan Simon](#), [Joe Nelson](#), [Molly Lawrence](#), [Tyson Kade](#), [Jenna Mandell-Rice](#), or any member of the firm's Land, Water, and Natural Resources practice in Washington, D.C. at (202) 298-1800 or in Seattle, WA at (206) 623-9372.

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