

NEPA Final Rule Unlikely To Speed Clean Energy Projects

By **Thomas Prevas** (May 23, 2024)

On May 1, the Council on Environmental Quality — a White House agency charged with implementing the National Environmental Policy Act — issued a new final rule purportedly aimed at streamlining NEPA reviews to speed up the construction of renewable energy and other electricity-related infrastructure.



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According to the White House press briefing, the new rule is intended to:

- "Accelerate the deployment of clean energy, transmission, clean water, high-speed internet, semiconductor manufacturing, and other crucial infrastructure";
- "Address climate change, protect public health, and encourage better environmental outcomes";
- "Advance environmental justice and promote meaningful public input"; and
- "Reverse provisions of the 2020 NEPA rule that were legally questionable." [1]

The primary mechanisms the rule uses to accomplish these goals are putting limits on reports, imposing timelines on agency reviews, and attempting to expand the number of projects that might qualify for a categorical exclusion from needing NEPA environmental reports without running afoul of legislative text.

But contrary to the headline claim that it speeds up the environmental review process, the new regulation further cements climate change and environmental justice as areas requiring additional study.

Despite the White House's press briefing touting its efforts to expedite renewable energy projects, the CEQ's new rule is unlikely to have a meaningful impact on expediting the permitting timeline or expense associated with critical infrastructure, energy generation and energy transmission projects.

NEPA is a federal procedural statute, but it has become a critical roadblock in federal infrastructure projects, or those using federal funds, because it requires identification and study of all necessary state and federal permits through a single environmental assessment or environmental impact statement report.

NEPA studies often take three to six years to complete, because every federal state or local authority, and every sponsor and potential interest group, participates and comments before the NEPA review process is complete.

Then, even after the process is complete, NEPA provides an easy opportunity to block or delay a project — because any party can argue that a particular review has not been done properly or procedure has not been followed. Even if the case is frivolous, the time to litigate it can be enough to block the financing for a particular project, and thereby kill it.

Accordingly, NEPA has become the primary impediment to new federal or federally funded infrastructure projects, particularly those in the energy industry involving the generation or transmission of electricity, which are necessary for the renewable energy transition.

The White House's press release touts the importance of the rule for speeding up renewable projects, and its consistency with both the Biden administration's two-phase approach to NEPA reform and the NEPA reforms called for in 2023's Fiscal Responsibility Act. But the new rule offers only marginal help, if any.[2]

NEPA has been law for more than 50 years, and its extensive process is deeply entrenched in the policies, practices, procedures and training of the government officials employed by the various federal agencies implementing the law.

Absent complete NEPA reform, those officials lack the capacity to step out of the status quo, or to implement NEPA in a different, more streamlined, more creative way, which balances the need for permit-wrapping and public comment with the practical need to build energy infrastructure projects on a timeline that is acceptable to private investors and government grant programs.

And while the CEQ claims it is simplifying NEPA and removing roadblocks, in the same breath, it expands and solidifies two new areas of NEPA review — climate change and environmental justice. Each of these areas requires looking at a geographic area well beyond the immediate project, and creates ripe opportunity for litigation, because best practices for studying these areas in the NEPA context have not yet been fully developed.

The CEQ's attempt to streamline through page limits, time limits and categorical exclusions seems unlikely to provide relief to permitting timelines on major critical infrastructure and energy projects. Federal agencies are understaffed, and already lack the capacity to process all of the NEPA and permit reviews currently assigned to them.

A two-year deadline, coupled with page limits, may only encourage or force them to cut corners or streamline public hearings. This will inevitably open projects up to greater hostility, attacks and delays, hurting developers and endangering financing.

Federal officials are damned if they do, damned if they don't. The entire process is the problem, and finalizing a rule that cements two new requirements while shortening the time for review and page limits is not a solution.

The CEQ's expansion and clarification of the categorical exclusion process, which is the process by which projects are exempt from NEPA review, could provide actual relief from the long permitting times of NEPA. But this relief is very limited.

The new rule provides only that agencies may create categorical exclusions "for categories of actions that normally do not have a significant effect on the human environment, individually or in the aggregate, and therefore do not require preparation of an [environmental impact statement] or [environmental assessment]."[3] The rule also allows agencies to adopt categorical exclusion determinations and other NEPA determinations made by other agencies.[4]

But major infrastructure projects are unlikely to qualify for a categorical exclusion — particularly those in the energy sector that are capable of moving the needle on a transition to renewables.

The Biden administration may wish to use the NEPA determination concept to speed up projects by, for example, using Federal Energy Regulatory Commission determinations to avoid lengthy reviews.[5]

But rule tinkering from administration to administration continues to fail to provide the long-term certainty of the kind of legislative reform that is necessary to expedite the construction and transmission of electric generation resources that must be planned and financed over time horizons of longer than four years.

Although NEPA began as a good, well-intentioned law, absent significant legislative overhaul and clear mandates to governmental officials, it will continue to prevent the U.S. from reforming its energy generation and associated interconnection, transmission and distribution facilities — obstructing both renewable energy, and energy security and independence.

Short of a legislative fix, the federal government may have an additional option, but it is very difficult. This option would involve undertaking an interstate programmatic environmental impact statement for the various major transmission lines and interconnection points needed to bring a renewable energy project online, and acquiring interconnection points by eminent domain.

The government could then sell the package of interconnection, permitting and land rights — including any necessary offshore rights — with a lease or other right to design, build, and operate the significant renewable energy project.

If the U.S. takes this approach, which it has the authority to do, it could take the hardest parts of permitting, land use and site risk off the table, leaving a developer with only the obligation to complete a limited environmental impact statement or environmental assessment for the construction of the project.

Doing this would align the U.S. with European countries, which provide permits with the right to build and operate a generation project — and would make renewable energy projects more developable and financeable on a shorter time horizon.

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[1] White House Press Release, available at <https://www.whitehouse.gov/ceq/news-updates/2024/04/30/biden-harris-administration-finalizes-reforms-to-modernize-environmental-reviews-accelerate-americas-clean-energy-future-simplify-the-process-to-rebuild-our-nations-infrastructure/>.

[2] The new rule's consistency with the 2023 FRA is controversial. ICYMI: Manchin Statement on Final Rule for NEPA Review Process, available at <https://www.energy.senate.gov/2024/4/manchin-statement-on-rulemaking-implementing-nepa-permitting-reforms>.

[3] 89 Fed. Reg. 35555 (May 1, 2024) (citing § 1500.5).

[4] 89 Fed. Reg. 35571 (May 1, 2024) (citing §1506.3(d)).

[5] See 89 Fed. Reg. 34074 (April 30, 2024) (adding FERC CE for energy storage systems and revising exclusions for upgrading and rebuilding powerlines and solar photovoltaic systems); FERC Order 1977 (May 13, 2024) (addressing siting authority over electric transmission lines); FERC Order 1920 (May 14, 2024).