

OCTOBER 2021

Biden Administration Seeks To Restore and Expand National Environmental Policy Act (“NEPA”) Regulations and Signals Forthcoming Second Rule Promulgation Concerning NEPA Review

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On October 6, 2021, the White House Council on Environmental Quality (“CEQ”) proposed modifications of its regulations for implementing the provisions of the National Environmental Policy Act (“NEPA”). The proposed rule can be found [here](#). Following the call of President Biden’s Executive Order 13990, *Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis*, available [here](#), the CEQ proposed rule would undo most of the regulatory modifications CEQ made in the Trump Administration’s 2020 Rule. As explained in the proposed rule itself, it is CEQ’s view that the 2020 Rule was too focused on the interests of project applicants, and thereby misinterpreted NEPA by limiting the scope of federal agency environmental impact analysis, especially as related to project purpose and need and cumulative impacts in “critical areas such as climate change and environmental justice.” CEQ further explained its current view that the 2020 Rule is inconsistent with NEPA’s purpose of “encouraging productive and enjoyable harmony” between humans and the environment or promoting science based decision making. The below outlines the major changes announced by the proposed rule and what can be expected by our clients moving forward.

What You Need to Know:

- **Restoration to pre-Trump NEPA rules may help the development community by removing uncertainty** –The pre-Trump rules provided greater certainty (particularly for larger infrastructure projects that expected NEPA review), because NEPA had been implemented in the same form for years, so the time to permit, although longer than anyone desires, could at least be estimated based on past experience.
- **CEQ’s Phase 2 NEPA Rule changes will be important to monitor** –The Biden administration desires to add regulatory requirements to the NEPA review process in a second proposed rulemaking, which could be expected to include additional requirements around studying climate change and environmental justice. This could slow or obstruct the development of future projects, including necessary infrastructure and energy projects.

Undoing the 2020 Rule

For the first time since the 1970s, CEQ under the Trump Administration modified its NEPA regulations in 2020. Generally the 2020 Rule narrowed the scope of what federal agencies could consider in project reviews pursuant to NEPA. This was accomplished, in large part, by a three discreet changes, which the CEQ under the Biden Administration is proposing to reverse by returning to the regulations promulgated in 1978 with further embellishment.

First, the 2020 rule added language to the description of purpose and need statements for proposed actions (40 CFR 1502.13), requiring agencies to base the purpose and need on the goals of an applicant and the limits of an agency’s statutory duty authority. CEQ proposes to eliminate this new language from the 2020 Rule, explaining that it prioritized an applicant’s goals over the public interest and NEPA’s central purpose of promoting environmentally sound decision making. Instead CEQ proposes to revert the language back to that from the 1978 NEPA Regulations requiring the purpose and need statement to “briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action.” As before, the applicant’s goals will not be part of the NEPA analysis.

Second, the 2020 rule inserted that where an agency’s NEPA procedures are “inconsistent” with the CEQ regulations, the CEQ regulations apply “unless there is a clear and fundamental conflict with the requirements of another statute.” (40 CFR 1507.3). The

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proposed rule removes this requirement once again to allow for agency-specific NEPA procedures, explaining that agencies need flexibility based on their unique functions, and the CEQ regulations only were intended to provide a minimum standard.

Finally, the new rule changes the meaning of the key term *effects*. NEPA requires federal agencies to examine the environmental *effects* of their proposed actions and alternatives and any adverse environmental effects that cannot be avoided if the proposed action is implemented. 42 U.S.C. 4332(2)(C). The 2020 Rule (40 CFR 1508.1(g)) changed the definition of “effects” to those “that are reasonably foreseeable and have a reasonably close causal relationship,” and limited a causal relationship to a “but for” relationship between development and effect. The proposed CEQ amendment restores the pre-2020 definition of “effect” to include “direct,” “indirect,” and “cumulative effects,” as well as the range of reasonably foreseeable effects, as had long been the scope of environmental consideration under NEPA. When discussing the scope of environmental effects, the CEQ called attention to climate change and environmental justice, which are key pillars in President Biden’s overall environmental platform.

Moving Forward

While the proposed NEPA regulations announced today will primarily undo the 2020 Rule, CEQ has suggested that a second phase of rule changes could be coming that would expand the scope of NEPA review, as well as address timing issues. If the more than 1.1 million comments filed concerning the 2020 proposed rule serve as any indication, the time involved to undertake a NEPA review must be addressed, and failure to do so is also inconsistent with President Biden’s environmental initiative because efforts to combat climate change, including the use of renewable portfolio standards, depend on interconnecting substantial renewable energy generation facilities to the grid in the very near future.

Comments to the proposed rule are due by November 21, 2021. CEQ will conduct two online public meetings for the proposed rule on Tuesday, October 19, 2021, from 1 to 4 p.m. EDT, and Thursday, October 21, 2021 from 5 to 8 p.m. EDT. The link to register for either is found [here](#).

Saul Ewing Arnstein & Lehr will continue to monitor and report on the proposed rule’s development.

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