

The Future of NEPA [PODCAST]

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On this episode of the Bracewell Environmental Law Monitor, host [Daniel Pope](#) talks with Chad Whiteman, Andrew Varcoe and [Ann Navaro](#) about current rule-making from the Council on Environmental Quality, the agency that oversees the implementation of the National Environmental Policy Act, or NEPA.

Chad is vice president for environment and regulatory affairs at the US Chamber of Commerce. Andrew is deputy chief counsel at the US Chamber Litigation Center. Ann is a partner in our DC office, advising on and litigates under the federal laws and policies governing natural resources and the environment.

Given that NEPA applies really just to federal agencies, why do private companies and non-government entities care so much about NEPA?

It's really surprising how many things NEPA actually touches and for businesses across all these different sectors. NEPA folks get involved with NEPA. So, if you have to get a federal authorization from an agency to proceed through NEPA, then making sure that NEPA is an efficient and clear process is a real priority for you. Recently, for a number of years, NEPA hasn't been that. It's been costly and burdensome. So, the business community has a strong desire to work with agencies to ensure that they're considering the environmental impacts when they're significant, but also making sure that the federal agency's process is efficient and transparent and is least burdensome as possible.

The previous administration tried to incorporate many principles or to distill lots of those principles into a regulatory facelift of those regulations. What can you tell us about what happened in 2020? What has the Council on Environmental Quality (CEQ) proposed and what's pending?

The 1978 regulations were the only time there was a really comprehensive set of regulations put out. There were some, up to eight, that were done in that interim period, but not comprehensively. NEPA is one of the most litigated statutes out there. That means that there's been a lot of case law that has directed how a lot of what the agencies do to respond and comply with NEPA.

What transpired over the last 40 years was incorporated into the 2020 updates. Some of those things were aimed at setting boundaries and clarifying things that were ambiguous. So, the 2020 regulations were a comprehensive update. They walked through so many different parts of the 1978 regulations and really try to make them more efficient and more predictable.

What are your thoughts on the current administration's proposed rule to allow agencies to have a little bit more latitude in making their own version of NEPA?

One of the three primary things that were proposed in this administration's phase one rule says in the regulatory text that those inconsistencies that other agencies may have should make them consistent with the CEQ. So, it really did guide agencies to stick to CEQ's model. The challenge is if you have different agencies doing different things, you may have different litigation outcomes that may make different requirements. Probably the most difficult part is in many of these complicated projects, the bigger projects have more than one agency involved.

The classic NEPA regulations talked about direct effects, indirect effects and cumulative impacts. The 2020 rule focused that inquiry just on effects that could be reasonably attributed to a project and over which the agency had some jurisdiction. What was the change in the 2020 rule? Why does this administration want to change it?

The specific language in the 2020 rule has to do with effects that are reasonably foreseeable and have a reasonably close causal relationship to the proposed action or alternatives. That was based in significant part on Supreme Court precedent over the past 30 years. Another important change that the 2020 rule made had to do with essentially telling agencies they didn't need to think about the distinction between direct effects, indirect effects and cumulative effects. Sometimes agencies got themselves tied up in knots, trying to figure out how to categorize the effects. The approach the 2020 rule took was you don't really need to worry about what category the effects fall into. You just analyze those that are reasonably foreseeable, regardless of the box you might think they've fallen into.

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