

Biden Administration Walks Back Key Trump Era NEPA Regulation Changes

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On April 20, 2022, the Council on Environmental Quality (“CEQ”) published a final rule reversing strategic changes made under the Trump administration to CEQ regulations implementing the National Environmental Policy Act (“NEPA”) (“[Final Rule](#)”). The Final Rule will be effective May 20, 2022.

The Final Rule largely follows the changes outlined in CEQ’s October 7, 2021, [Proposed Rule](#), detailed in our [previous alert](#), restoring three key provisions back to the prior regulations with minor non-substantive modifications: (1) considerations relevant to the development of 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 government-wide NEPA regulations. CEQ intends that the provisions in this Final Rule have the same meaning as the corresponding provision in the regulations in effect prior to the Trump administration’s 2020 “Update to the Regulations Implementing the Procedural Provisions of NEPA” (“[2020 Rule](#)”).

This Final Rule completes the first of a two-phased process by the Biden administration to reconsider and revise the 2020 Rule to ensure that CEQ’s NEPA regulations “provide for sound and efficient environmental review of Federal actions, including those actions integral to tackling the climate crisis, in a manner that enables meaningful public participation, advances environmental justice, respects Tribal sovereignty, protects our Nation’s resources, and promotes better environmental and community outcomes.” CEQ is separately developing a Phase 2 rulemaking, which it has said will consider the 2020 Rule and the NEPA regulations comprehensively.

Background on NEPA Regulations

CEQ issued its regulations implementing NEPA in 1978, eight years after the statute was enacted. In

the years since, CEQ issued various guidance documents to help guide agencies and stakeholders in understanding and carrying out the statute, but those regulations remained largely unchanged for more than 40 years until they were extensively revised by the Trump administration in the 2020 Rule. For additional information on the 2020 Rule, please see our previous [alert](#). Expectedly, certain aspects of the 2020 Rule were highly controversial, and multiple lawsuits were filed [challenging the rule](#) following its issuance.

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. In addition, on January 27, 2021, the President signed Executive Order 14008, *Tackling the Climate Crisis at Home and Abroad*, which directed the CEQ Chair to ensure federal permitting decisions consider the effects of greenhouse gas emissions and climate change.

On June 29, 2021, CEQ issued an Interim Final Rule, which extended until September 14, 2023 a deadline imposed under the 2020 Rule for federal agencies to develop or update their NEPA implementing procedures to conform to the 2020 Rule. CEQ extended the date by two years to avoid agencies proposing agency-specific implementing procedures to conform to regulations that are currently undergoing extensive review and, according to CEQ, "will likely change in the near future." The Final Rule does not revise this deadline.

CEQ elected to pursue a two-phased approach for reviewing and making substantive revisions to the 2020 Rule. CEQ has explained that Phase 1 addresses "a discrete set of provisions that pose significant near-term interpretation or implementation challenges for Federal agencies" and that "would have the most impact to agencies' NEPA processes during the interim period before a 'Phase 2' rulemaking is complete." Phase 2 will take a more comprehensive look at the 2020 Rule and CEQ NEPA regulations, and may reverse other changes made by the 2020 Rule or propose other revisions to the regulations.

Overview of Phase 1 Changes

The Phase 1 Final Rule includes a narrow set of changes intended to reverse several of the most controversial elements of the 2020 Rule, largely following the changes outlined in the Proposed Rule. These changes include: (1) eliminating the focus on the applicant and the 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

The Final Rule implements the changes included in the Proposed Rule to (1) eliminate language added by the 2020 Rule requiring agencies to base the "purpose and need" of a proposed action on the goals of the applicant and the agency's authority, and (2) 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 considered. In reverting to the pre-2020 Rule purpose and need language, CEQ states that it is eliminating ambiguity that could be interpreted to make the

applicant's goals and the agency's statutory authority the only factors that agencies can consider when developing a purpose and need statement for environmental review of an application for an agency authorization. According to CEQ, the change ensures that agencies have flexibility to consider a variety of factors, including effectively carrying out the agency's policies and programs or the public interest. CEQ explains that "agencies should have discretion to base the purpose and need for their actions on a variety of factors, which include the goals of the applicant, but not to the exclusion of other factors." This change will potentially result in more expansive purpose and need statements, or reinvigorate litigation challenging purpose and need statements that prioritize an applicant's goals over other potentially relevant factors.

Definition of "Effects" or "Impacts"

The Final Rule generally makes the changes proposed in the Proposed Rule to the 2020 Rule's definition of "effects," restoring the concepts of direct, indirect, and cumulative impacts. CEQ explains that these changes are necessary to "help ensure the proper scope of analysis that NEPA requires, including analysis of effects on climate change, communities with environmental justice concerns, and wildlife."

NEPA requires agencies, in undertaking environmental reviews of covered actions, to assess the environmental effects of the proposed action, alternatives, and any adverse environmental effects that cannot be avoided if the proposed action is implemented. The 2020 Rule eliminated long-used concepts of direct, indirect, and cumulative effects, instead focusing the analysis on those effects that are reasonably foreseeable and that have a reasonably close causal relationship to the proposed action or alternatives. The 2020 Rule further provided that a "but for" causal relationship is not sufficient, and that effects generally should not be considered "if they are remote in time, geographically remote, or the product of a lengthy causal chain." These changes have been particularly controversial and a key focus of litigation challenging the 2020 Rule.

The Final Rule undoes the 2020 Rule changes to the definition of "effects or impacts" by restoring direct, indirect, and cumulative effects as part of the definition of "effects." However, the Final Rule recognizes that nothing in the CEQ regulations requires agencies to categorize effects separately as direct, indirect, or cumulative. Rather, CEQ provides that agencies can holistically discuss "all reasonably foreseeable direct, indirect, and cumulative effects, rather than delineating the categories in separate sections of a NEPA document."

CEQ's changes also remove the potential limitations in the 2020 Rule on consideration of temporally or geographically removed environmental effects, effects that are the product of a lengthy causal chain, and effects that the agency has no ability to prevent due to its limited statutory authority or that would occur regardless of the proposed action.

Despite the removal of the 2020 Rule's limitation on the scope of the effects, CEQ contends that the Final Rule "will not result in consideration of a limitless universe of effects," but will instead continue to be "bounded by a reasonableness standard." Consistent with this intention, between the Draft and Final Rule, CEQ added language to the definition of effects, which limits effects to "changes to the human environment from the proposed action or alternatives *that are reasonably foreseeable.*"

In the preamble to the Final Rule, CEQ explains that the revised definition of effects ensures that NEPA reviews consider adverse and beneficial effects, including greenhouse gas emissions, over various timeframes. Thus, according to CEQ, air pollution like greenhouse gas emissions released by fossil fuel combustion is often a reasonably foreseeable indirect effect of proposed fossil fuel

extraction that agencies should evaluate in the NEPA process, even if the pollution is remote in time or geographically remote from a proposed action. The consideration of beneficial effects is of particular relevance to renewable energy project development and carbon capture and storage projects. Using the example of a utility-scale solar facility, CEQ notes that a solar facility could have short-term direct effects (such as adverse construction and land impacts), as well as long-term indirect beneficial effects (such as reductions in air pollution from the renewable energy generated at the facility that displaces more greenhouse gas-intensive energy sources like coal or natural gas).

Agency NEPA Procedures

The Final Rule implements the changes proposed in the Proposed Rule to remove limitations imposed by the 2020 Rule on the scope of agency-specific NEPA procedures and to clarify 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 Final Rule removes 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 generally bars agencies from imposing additional procedures or requirements beyond the CEQ regulations.

The revision will allow agencies to adopt procedures that may go beyond the CEQ regulations as appropriate to address their individual authorities, programs, and circumstances. CEQ explains that this added flexibility could help foster more efficient and effective reviews by allowing agencies to identify process improvements and better integrate NEPA with other statutory requirements.

Potential Impacts

The changes to CEQ’s NEPA regulations in Phase 1 will likely come as no surprise to those following CEQ’s review and reconsideration of the 2020 Rule. The Phase 1 revisions return the regulations to the pre-Trump Administration status quo in the three areas addressed by the rule. The short time period in which the 2020 Rule will have been in effect means that few NEPA analyses were conducted under that rule.

The Biden administration has placed climate change and environmental justice front and center in its agenda. The Final Rule’s focus on restoring consideration of indirect and cumulative impacts could result in agencies giving greater consideration to climate change and environmental justice-related impacts. Critically, although the changes in the Phase 1 Final Rule and the attendant explanation in the preamble to the Final Rule make clear that climate change and environmental justice impacts should be considered in NEPA analyses, project proponents and agencies continue to operate with little guidance on the appropriate scope of those analyses. Statements in the preamble to the Final Rule suggest that CEQ may use Phase 2 of the rulemaking or additional guidance documents, such as guidance on assessment of greenhouse gas emissions and climate change in environmental reviews, to provide greater clarity on analyses of greenhouse gas emissions, climate change and environmental justice.

With the Phase 1 Final Rule now complete, CEQ will continue to work on Phase 2 and intends to issue a Phase 2 proposed rule, likely in 2022. In Phase 2, CEQ will consider the NEPA regulations comprehensively and will assess whether to revise additional provisions to reverse the language of the pre-2020 Rule or to propose other revisions. Those subject to environmental review under NEPA will want to pay close attention as CEQ moves ahead with Phase 2 of its NEPA rulemaking effort, as

that effort is likely to have broader implications for NEPA analyses and may include changes beyond merely restoring the pre-2020 Rule.

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