

# Biden Administration Proposes Phase One Rule Revamping Environmental Permitting

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October 13, 2021

On October 7, 2021, the White House Council on Environmental Quality (CEQ) issued a [proposed rule to amend regulations implementing the National Environmental Policy Act \(NEPA\)](#). This rule marked the first of a two-phased rulemaking effort to unwind the 2020 NEPA Reform Rule that CEQ promulgated under the Trump administration and revise NEPA regulations to reflect the Biden administration's environmental policies. Companies in the energy sector, including renewables, manufacturing, transportation, aviation, telecom, and more should evaluate potential impacts of proposal on future projects and consider participating in the rulemaking process.

CEQ's proposed rule follows directions from President Joe Biden as well as the agency's response to litigation over the 2020 NEPA Reform Rule. Executive Order 13990, issued on Inauguration Day, directed CEQ to review the 2020 rule and Executive Order 14008. In recent months, CEQ had announced its review and identified key areas of focus in numerous court filings regarding the 2020 rule. In its phase one proposal, CEQ stated that its review found the 2020 rule had limited NEPA reviews regarding climate change and environmental justice, failed to "encourage productive and enjoyable harmony" of humans and the environment and support science-based decision making, and involved unspecified "implementation challenges for Federal agencies."

The phase one proposal addresses a small set of provisions that CEQ intends to revert to the text of the 1978 NEPA regulations — provisions that are not likely to change during the second phase. The second phase rulemaking, which CEQ expects to propose next year, will involve additional substantive revisions of the regulations and likely will include additional provisions to incorporate the Biden environmental, climate change, and environmental justice objectives. CEQ will conduct online public meetings on October 19 and October 21, with public comments due by November 22, 2021. Companies with pending or planned projects — across every sector of the economy — should evaluate the substantive and timing considerations of the proposal on their projects.

## *Major Changes*

The proposal focuses on three areas: 1) the purpose and need of a proposed action, 2) agency NEPA procedures for implementing CEQ's NEPA regulations, and 3) the definition of "effects."

**1. Purpose and Need:** CEQ said there is "a lack of evidence" that the 2020 rule's approach to the "purpose and need" statement would lead to more efficient NEPA reviews. The proposed rule unwinds

the current ability of an agency to narrow the scope of the “purpose and need” statement for actions proposed by a private actor. This means that the “public interest” and other factors will dictate the purpose and need and not solely the “applicant’s goals.” Agencies must consider other issues such as “other environmental outcomes, and local economic needs” so it may include alternatives “that could minimize environmental and public health costs.”

**2. Agency NEPA Procedures:** According to the proposal, agencies had complained about unspecified confusion with the 2020 rule regarding agency-specific procedures. The proposed rule rescinds a 2020 rule provision that limits an agency’s ability to impose more stringent environmental review requirements than those contained within CEQ’s procedures. CEQ explains that its NEPA regulations are a “floor,” not a “ceiling,” and other federal agencies are free to impose more stringent NEPA implementing regulations. This means that agencies are free to include more specific requirements for developing multiple alternatives, the use of public hearings, or other measures they deem appropriate.

CEQ had already issued an interim final rule on June 29, 2021, that extended the 2020 rule deadline for federal agencies to propose changes to their NEPA procedures by two years, to September 14, 2023.

**3. Definition of “Effects”:** In assessing whether the impacts of a proposed action are “significant,” agencies must assess the “effects” of the proposed action or alternatives. The 2020 rule modified the definition of “effects” by removing references to “direct” and “indirect” effects, clarifying that agencies need not analyze effects of actions beyond their control, and eliminating the requirement that agencies consider cumulative impacts from the proposed action and related actions. In addition, the 2020 rule limited the review to reasonably foreseeable impacts with a close causal relationship to the proposed action.

The proposed rule restores the definition of “effects” from the 1978 NEPA regulations and removes the close causal relationship standard for consideration of effects. In the proposal, CEQ notes that these changes would ensure that agencies consider effects that advance the administration’s focus on climate change and environmental justice. For instance, when evaluating a fossil fuel project, CEQ notes in the preamble that it would be appropriate to consider and compare greenhouse gas emission effects even if the agency lacks authority to prevent such emissions. When assessing greenhouse gas emissions and climate change effects of a proposed action, CEQ advises agencies to consider the 2016 NEPA Greenhouse Gas Guidance as well as the February 2021 governmentwide interim values for the Social Cost of Greenhouse Gases.

The rule revives the requirement for agencies to consider “cumulative effects” of proposed actions. Indeed, cumulative effects include those of “other past, present, and reasonably foreseeable actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions.”

While these proposed changes appear modest compared with the significant revisions expected in the phase two rulemaking, the revisions to “effects” could have implications for projects pending review or planned projects on the brink of initiating the NEPA process. Project applicants under these circumstances should ask their lead agency for technical assistance and a better understanding of how the proposed revisions may affect their project. The 2020 rule went into effect in September 2020 and remains in effect despite several legal pending challenges. Accordingly, a broad swath of projects over the past year should closely account for the proposed revisions. In addition, stakeholders across sectors should evaluate the rule and consider participating in the rulemaking process.

## CONTACTS

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