

UPDATES

# U.S. Council on Environmental Quality Proposes Bipartisan Permitting Reform Implementation Rule

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*August 4, 2023*

On Monday, July 31, the White House Council on Environmental Quality (CEQ or the Council) [proposed](#) its second round of revisions to the National Environmental Policy Act (NEPA or the Act) regulations, as amended in 2020. Although lauded by the [White House](#) as modernizing and accelerating environmental reviews, building upon new permitting efficiencies directed by Congress under the [Fiscal Responsibility Act \(FRA\) and BUILDER Act of 2023](#), the proposed rule may add more complexity to NEPA reviews. The proposed rule may expand the scope of environmental review with a focus on issues of climate change, environmental justice, and even global effects. And CEQ's proposed revisions may drive substantive changes to federally approved actions, as the Council de-emphasizes the Act's procedural nature and directs agencies to focus on the Act's "action forcing" mechanisms. Some of the proposed provisions could speed up NEPA reviews, as there is expanded flexibility for use of categorical exclusions and limits on the time and length of the environmental review process.

## **Background on Biden Administration NEPA Amendments**

The Biden administration pledged to amend NEPA regulations in two separate phases. The [Phase 1 rulemaking](#), completed on April 20, 2022, restored three narrow elements of its NEPA regulations to their pre-2020 form:

1. reestablishing agencies' flexibility in considering a project application by removing the requirement that an agency base the purpose and need on the applicant's goals
2. removing language that diminished agencies' flexibility to develop or revise procedures to implement NEPA in a manner beyond CEQ's regulations
3. restore the pre-2020 definition of "effects" and "cumulative impacts" that had been in effect since 1978

In the second phase, CEQ proposes to "revise, update, and modernize" the NEPA implementing regulations. CEQ's goals in this regard are to provide for efficient and effective environmental reviews, enhance clarity and certainty for federal agencies and stakeholders, enable full and fair public participation, and promote decisions that protect and enhance the quality of the human environment.

## **Substance of Proposed Rule**

CEQ characterizes its proposal as consisting of five categories: (1) revisions to NEPA from the FRA; (2) reverting from the 2020 regulations to the 1978 regulations; (3) removing “imprudent” provisions from the 2020 regulations; (4) improving the efficiency and effectiveness of NEPA reviews; and (5) adding provisions to account for environmental justice and climate change and foster science-based decision making. We note that these amendments affect different industries differently, but if finalized without revision, they would affect every project requiring federal approval. We highlight a number of these proposed changes below.

### *Incorporating FRA/BUILDER Act Amendments*

- incorporates certain provisions from the FRA, including one-year time limit for environmental assessments (EAs) and two-year time limits for environmental impact statements (EISs), subject to potential extensions
- limits pages on an EA (75 pages) and EIS (150 pages or 300 pages for proposals of extraordinary complexity)
- defines “major federal action” that excludes certain actions lacking in federal control
- authorizes use of categorical exclusions by other agencies

### *Reinstating 1978 Regulatory Language*

- revives context/intensity factors for determining “significance”
- restores expansive alternatives analysis requirements
- adds requirements regarding unavailable information; agencies must disclose for all levels of NEPA review, not just EISs
- directs agencies to interpret their authority under NEPA as broadly as possible
- restores requirement to use all practicable means to restore and enhance the environment, consistent with the policies of NEPA
- removes reference to “complex” environmental assessments as undefined
- restores definition of “Lead Agency”

### *Removing 2020 Regulations*

- rescinds regulations governing judicial review, including those regarding the exhaustion process aimed to limit legal challenges and judicial remedies
- clarifies that “judicial review of agency compliance with the regulations ... not occur before an agency has issued the record of decision or taken other final agency action”

### *Overviewing New or Revised Elements in Proposed Rule*

- Expanded NEPA review
  - requires analysis of effects related to environmental justice

- requires analysis of climate change effects from proposed action and on the proposed action
- clarifies “major Federal action” in a manner that could expand (or narrow) NEPA scope; appropriate approach for agencies is to identify corresponding scope of analysis rather than exclude activity from NEPA review altogether (e.g., “if a Federal agency operates a loan guarantee program, the agency may have discretion in the types of activities to which it might issue a loan guarantee”)
- Increased scope of analysis
  - suggests the scoping process could be part of an EA, which would add an additional public comment process and increase the time needed to complete the NEPA review
  - references climate modeling, although no specific citation to, for example, the social cost of carbon/greenhouse gases (GHG)
  - requires consideration of effects to habitat of endangered or threatened species regardless of whether area has been designated as “critical habitat” pursuant to the Endangered Species Act
- Expanded scope of “affected environment”
  - references global, national, regional, and local environment, not just domestic effects
  - revises definition of “human environment” to remove focus on United States, implying global focus of review
  - requires agencies to consider context of an action and intensity of the effects in determining whether a proposed action’s effects are “significant”; this includes directing agencies to consider potential global, national, regional, or local contexts
- Potentially broadened scope of alternatives
  - implies that agencies have discretion to consider reasonable alternatives beyond their jurisdiction — regardless of the fact that neither NEPA nor CEQ regulations require such considerations
- Streamlined approach for long-term GHG-reducing actions
  - acknowledges that long-term benefits may offset short-term effects of proposed action
  - for example, notes that an agency should consider short-term construction-related GHG emissions from a renewable energy project in light of long-term reductions in GHG emissions when determining the overall intensity of effects (i.e., agency could reasonably determine that climate effects of the proposed action would not be significantly adverse, and therefore an EIS would not be required)
- New requirements for mitigated finding of no significant impact (FONSI)
  - authorizes agencies to prepare mitigated FONSI if action will include mitigation to avoid significant effects that would otherwise occur or minimize or compensate until insignificant

- FONSI must state the enforceable mitigation requirements or commitments
- requires a monitoring and compliance plan when the EA relies on mitigation as incorporated component of proposed action
- Increased public engagements
  - requires public comments on published draft EA and requires agency to consider such comments in final EA
  - recommends that agencies conduct early engagement and invite early participation of affected parties and agencies
  - requires agencies publish notification of proposed actions being analyzed through an EIS
- Efforts to streamline
  - expands authority to conduct programmatic review and tiering to include EAs to align to other proposed changes

## Comment Period

Comments are due **Tuesday, September 29**, and CEQ will hold four virtual public meetings in the interim: Saturday, August 26, 2023, from 1 p.m. to 4 p.m. EDT; Wednesday, August 30, 2023, from 5 p.m. to 8 p.m. EDT; Monday, September 11, 2023, from 1 p.m. to 4 p.m. EDT; and Thursday, September 21, 2023, from 2 p.m. to 5 p.m. EDT. Additional information is included on CEQ's [website](#).

## CONTACTS

If you have any questions regarding this Sidley Update, please contact the Sidley lawyer with whom you usually work, or

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