

White House Council on Environmental Quality Revises NEPA Regulations for First Time in 40 Years

July 20, 2020

On July 16, 2020, the White House Council on Environmental Quality (CEQ) released long-awaited revisions to its regulations under the National Environmental Policy Act (NEPA). CEQ's revisions come over 40 years after it first promulgated the regulations. In the interim decades, the NEPA process has become infamous for its long delays for project development, intensive paperwork requirements, long litigation timelines, and guarantees of uncertainty for all stakeholders. In the revised regulations, CEQ seeks to reduce these hurdles to allow for more informed decision-making by agencies and a better-informed public, while also creating more reasonable timelines for project proponents. CEQ has undertaken a comprehensive cleaning-of-house, covering everything from words per page to addressing substantive issues such as how an agency should consider effects in its NEPA analysis. In this alert, we highlight the background and key provisions of the rule and consider what comes next for project proponents.

The final rule was several years in the making. In June 2018, CEQ issued an Advanced Notice of Proposed Rulemaking to gather insight on how to update its NEPA regulations and in January 2020 published its proposed rule.¹ CEQ received over one million comments on the proposal and finalized its rule with some changes to address those comments.

CEQ's final revisions seek to provide greater clarity to decision makers and the public on the environmental impacts of proposed projects. The major changes fall into three general and overlapping categories: (1) reducing timing and paperwork burden; (2) reducing litigation burden; (3) clarifying substantive considerations.

1. *Reducing timing and paperwork burden.* CEQ has inserted bounds around what has become for many projects an unpredictable adventure in bureaucracy. In the final rule, CEQ addresses the fact that Environmental Impact Statements (EIS) often now range from 450 to 800 pages, contrasted with the original 1978 prediction of 150 pages. The new regulations limit EISs to 300 pages, though longer ones are possible where approved. Similarly, Environmental Assessments (EA) are capped at 75 pages.

CEQ likewise sets time limits for the NEPA process in reaction to data showing that most EISs take two to six years to complete, as opposed to the original prediction of one year. Under the

new regulations, the presumptive time limit for EAs is one year, with the clock starting the date the agency decides to prepare an EA and ending the date it publishes the EA or a Finding of No Significant Impact (FONSI). For EISs, the time limit is two years, starting from the date of the issuance of a notice of intent (NOI) to the date a record of decision (ROD) is signed.

2. *Reducing litigation burden.* The revised regulations contain several provisions aimed at addressing the significant amount of litigation surrounding NEPA decisions that has been a constant across administrations from both parties for the past 40 years. These provisions include requiring specific comments on draft EISs to be timely submitted to meet exhaustion requirements; codifying judicial decisions that a showing of a NEPA violation alone is insufficient to be considered irreparable harm or to warrant injunctive relief; and working to replace the vast body of guidance documents with a uniform approach in the revised regulations and the preamble of the final rule.
3. *Clarifying substantive considerations.* The revised regulations also tackle substantive provisions of NEPA. For example, various provisions address which actions would qualify for a NEPA analysis: An agency must consider whether another statute exempts a proposed activity from the NEPA process under a new NEPA thresholds section, and CEQ provides that “major Federal action” is determined by the role of the federal agency and the control it has over environmental effects, as opposed to the effects stemming from the action.

Further, the regulations explain that the “Purpose and Need” statement should focus on the proposed action and the agency’s goals and that agencies should consider a “reasonable number of alternatives” instead of “all” alternatives. Agencies must also consider connected actions when considering the effects of a proposed action. The term “effects” means those that are reasonably foreseeable and have a close causal relationship to the proposed action; CEQ explained this new definition wraps in the familiar tort standard and tightens the overbroad “but for” approach.

The rule is set to go into effect on September 14, 2020. It will apply to all NEPA processes that commence after the effective date, and agencies have discretion on whether to apply to the new regulations to ongoing NEPA analyses.

CEQ’s rule will undoubtedly spur more NEPA regulatory activity. Other agencies will likely undertake rulemakings to conform their NEPA implementing regulations to CEQ’s updated approach. These rulemakings thus would involve their own grappling with agency guidance documents, proposals and solicitation of comments, and potential effects on relevant regulated entities.

Meanwhile, the current political climate also shapes what comes next for CEQ’s final rule. The revised regulations will almost certainly be subject to litigation. The political calculus may be further complicated after the elections. Changes in Congress could render the rule vulnerable to revocation under the Congressional Review Act, and a change in the White House could produce further rulemaking that would change CEQ’s current approach. Any related rulemakings undertaken by other agencies could follow a similar fate.

CEQ’s revised regulations aim at least in part to give project proponents some certainty with respect to the notoriously unmanageable NEPA process. Whether these regulations can withstand the charged

political climate is an issue stakeholders will be watching closely in the coming months.

¹ See Sidley Environmental Update, [The Council on Environmental Quality Proposes National Environmental Policy Act Regulation Changes to Streamline Review Process](#) (Jan. 14, 2020).

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