

Council on Environmental Quality Publishes Phase 2 NEPA Rule

Alert

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By Aimee Guzman Davenport, Betsy Smith & Sarah Lintecum Struby

On May 1, 2024, the White House Council on Environmental Quality (CEQ) published its [Bipartisan Permitting Reform Implementation Rule](#) (Rule), which is also known as the Phase 2 National Environmental Policy Act (NEPA) rule. The Rule is the second part of a CEQ rulemaking process to revise NEPA implementation. Keeping in line with other recent rules from the U.S. Environmental Protection Agency (EPA) and the agency's 2023-2027 National Enforcement and Compliance Initiatives, the Biden Administration revised the NEPA regulations to strengthen climate change and Environmental Justice (EJ) considerations, and emphasize public engagement in the NEPA process in the Rule. The White House touts the Rule as following through on the Biden Administration's "all-of-government effort" to speed up environmental reviews and federal permitting processes so that clean energy projects can move forward. The Rule will apply to projects beginning environmental review on or after July 1, 2024, and will not affect environmental review processes currently underway.

NOTABLE UPDATES TO THE NEPA REGULATIONS

Environmental Impact Statements and Environmental Assessments

The Rule imposes time limits on agencies to complete Environmental Impact Statements (EIS) and Environmental Assessments (EA). An agency must complete an EIS in two years and an EA in one year, but an agency may extend these deadlines by doing so in writing and after consulting with the applicant.¹ The Rule also imposes page limits² for EISs and EAs. CEQ mandates that an EIS cannot exceed 150 pages, except proposals of "extraordinary complexity" may be up to 300 pages. An EA cannot exceed 75 pages. Finally, if an agency chooses to publish a draft EA, the agency now must invite public comment on the draft EA. Agencies were already required to request public comment on a draft EIS under the previous

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regulations.

Climate Change and Environmental Justice

Many of the Rule's changes were intended to modernize the NEPA review process to improve environmental and climate change outcomes. For example, the NEPA policy regulation instructs agencies to consider reasonable alternatives that will reduce climate change-related effects or that address environmental effects disproportionately affecting EJ communities. The Rule also instructs agencies to meaningfully engage with EJ communities, again emphasizing the Rule's underlying meaningful public engagement push. In the Rule's definition of "communities with environmental justice concerns," it is noted that agencies may use the EJScreen Tool and the Climate and Economic Justice Screening Tool to identify EJ communities.

CEQ chose to not adopt all but one of the recommendations from its [2023 greenhouse gas guidance](#). The only codified recommendation requires agencies assessing environmental consequences to quantify greenhouse gas emissions where feasible. CEQ noted that it may consider codifying the 2023 guidance in a future rulemaking.

Categorical Exclusions

In efforts to streamline lower impact projects, the Rule approves additional mechanisms agencies may use to establish Categorical Exclusions (CEs). To avoid duplication, agencies may establish joint CEs through shared analysis and programmatic documents, such as through wide-reaching land use plans and other decisions supported by comprehensive environmental reviews. CEQ suggests agencies will more quickly develop CEs for specific contexts, geographies or project types. In addition to promoting the use of shared analyses, the Rule enables lower levels of environmental reviews when a project sponsor or agency opts to mitigate the effects of the project.

Procedural Changes

The Rule revised many of the 2020 regulation's procedural provisions. CEQ removed the exhaustion provisions in this Rule, noting that the 2020 regulation's exhaustion provisions were "inappropriately stringent," and that exhaustion was an administrative law question best left to the courts. The Rule also expressly expands the judicial review provision to allow a sponsor's claim that an agency failed to meet a NEPA § 107(g)(3) deadline to be brought before an agency has issued the record of decision or before an agency has taken other final agency action. Finally, the Rule removes the remedies provision of the 2020 regulation, as CEQ said it was "questionable" whether it had authority to direct courts on Administrative Procedure Act remedies.

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OVERVIEW OF NEPA AND RECENT REGULATORY CHANGES

Fluctuating NEPA changes have been confusing review standards for larger projects in recent years. Since 2020, we have seen (1) the enactment of former President Trump's "NEPA Modernization" rules, (2) the rollback of those rules by President Biden to restore pre-2020 standards, (3) the issuance of several guidance documents, and now, (4) new rules adding more climate impact and community engagement considerations. Projects that will end up being reviewed under three sets of rules in three years, threatening viability entirely, have been caught in the middle of this NEPA seesaw.

NEPA requires federal agencies to analyze the potential effects of agency actions on the environment. Examples of agency actions subject to NEPA review include construction of highways, funding projects conducted by non-governmental entities, managing federal lands and approving permits for private projects. The level of NEPA review depends on the size and scope of the project. Major federal actions require the development of an EIS. Agencies may conduct EAs and CE determinations for activities with smaller impacts. In all events, a NEPA analysis must evaluate the effects that a proposed federal action will have on the environment, assess the significance of those effects and consider alternatives to the proposed action as well as appropriate mitigation measures.

Prior to the Trump and Biden Administrations, CEQ last comprehensively revised the NEPA regulations in 1978. In 2020, the Trump Administration overhauled the regulations to accelerate the environmental review and decision-making process in order to promote infrastructure development. Significant changes included revising the definition of "major federal action" to allow more projects to be categorically excluded from NEPA review and narrowing the definition of "effects" to remove the express requirement that agencies consider cumulative and indirect effects of proposed actions. The changes also included presumptive time limits for completing EISs and EAs as well as various litigation reforms.

On his first day in office, President Biden issued an [Executive Order](#) announcing his administration's priorities, including protecting the environment and advancing EJ, and directing federal agencies to review regulations issued during the Trump Administration for consistency with Biden Administration priorities. On October 7, 2021, CEQ announced that it would [reconsider and revise](#) the 2020 NEPA regulations using a phased approach. In May 2022, Phase 1 went into effect. Those regulations restored the express requirement to assess both indirect and cumulative impacts, revised the requirement for a purpose-and-need statement in an EIS and clarified that federal agencies can develop their own programs that go beyond the review required by the CEQ NEPA regulations. As noted above, this final rulemaking is Phase 2.

WHAT DOES THIS RULE MEAN FOR BUSINESSES?

Lower impact projects, such as solar storage and electric vehicle charging infrastructure, transmission improvements, broadband deployment, battery storage and offshore wind projects, should become more streamlined from CEQ's proposed changes. The Rule will decrease the potential that renewable energy

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projects need to develop EISs, generally allowing such projects to use a different NEPA process. On the other hand, federal agencies will need to perform additional environmental analysis and perform additional public stakeholder engagement to vet fossil fuel projects. Parties can expect increased scrutiny and legal uncertainty around these projects.

For new projects, it's important to seek clarity from the lead agency regarding which standards apply. Stinson's attorneys continue to track developments in NEPA regulations, guidance and case law.

For more information on the NEPA regulations, please contact [Aimee Guzman Davenport](#), [Andrew Davis](#), [Kyle Foote](#), [Sarah Lintecum Struby](#), [Betsy Smith](#) or the Stinson LLP contact with whom you regularly work.

1. If there is no applicant, the agency may extend the deadline and set a new deadline in writing.
2. The page limits do not include any citations or appendices.

CONTACTS

Aimee Guzman Davenport

Betsy C. Smith

Sarah Lintecum Struby

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