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PRATT'S

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REPORT



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Editorial Office
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Overhaul of NEPA's Implementing Regulations: What You Need to Know

*By Ethan G. Shenkman, Allison B. Rumsey, Edward McTiernan, and Emily Orler**

The authors of this article identify the top 10 changes to the National Environmental Policy Act implementing regulations and describe the potential next steps and key takeaways for project proponents.

Fifty years after enactment of the National Environmental Policy Act (“NEPA”),¹ the Trump Administration has made sweeping changes to a polarizing process that, to some, has empowered communities and improved environmental outcomes, and to others, has unnecessarily delayed (and even obstructed) development of critical infrastructure projects.

The Council on Environmental Quality (“CEQ”) has finalized the overhaul of its National Environmental Policy Act implementing regulations.² These regulations are the foundation of federal agencies’ NEPA regulations, and have been the model for many NEPA-like state and local laws. Through this rulemaking, CEQ made changes to nearly every section of the regulations, which were last comprehensively updated in 1978.³

Some of the process changes will be welcome updates and improvements to the implementation of NEPA, as the desire to streamline NEPA has, to some extent, been bipartisan.⁴

Other changes that arguably narrow the scope of environmental review for many projects and will likely be more controversial.

* Partners Ethan G. Shenkman (ethan.shenkman@arnoldporter.com), Allison B. Rumsey (allison.rumsey@arnoldporter.com), and Edward McTiernan (edward.mctiernan@arnoldporter.com) and associate Emily Orler (emily.orler@arnoldporter.com) are members of Arnold & Porter Kaye Scholer LLP’s Environmental Practice Group.

¹ 42 U.S.C. § 4321 *et seq.*

² See *Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act*, 85 Fed. Reg. 43304 (July 16, 2020), available at <https://www.federalregister.gov/documents/2020/07/16/2020-15179/update-to-the-regulations-implementing-the-procedural-provisions-of-the-national-environmental>.

³ Final Rule Redline of 1978 CEQ Regulations, available at <https://www.whitehouse.gov/wp-content/uploads/2020/01/Final-Rule-Redline-of-1978-CEQ-Regulations.pdf>.

⁴ The Obama Administration also tried to simplify and “fast track” the NEPA process, for example, by improving transparency and encouraging federal agency coordination in infrastructure environmental reviews. See, e.g., Exec. Order No. 13,604, 76 Fed. Reg. 3821 (Jan. 18, 2011).

Notably, CEQ has proceeded with redefining “effects” and repealing the requirement to consider cumulative impacts, despite criticism from states and environmental groups that these revisions would limit analysis of climate change.

In the short period following publication of the final rule, environmental interest groups and 22 states brought four legal challenges in Virginia, California, and New York federal district courts, alleging violations under NEPA and the federal Administrative Procedure Act (“APA”). They claim that CEQ made procedural errors by failing, for example, to comply with its own NEPA regulations, to consider the impact of the rulemaking on environmental justice communities, and to adequately respond to public comments. They also claim that the regulations are arbitrary and capricious and contrary to the statute, improperly allow agencies to apply the rule retroactively, and invalidly amend judicial review standards.

The ultimate fate of the revised NEPA regulations is uncertain, especially if there is a new administration in 2022. However, these regulations are, at least for now, the law of the land as of this writing. Here is what you need to know.

TOP 10 LIST OF CHANGES

Establish Presumptive Time Limits for Environmental Assessments (“EAs”) and Environmental Impact Statements (“EISs”)

CEQ finalized language requiring agencies to complete EAs in one year and EISs in two years unless the time limit is modified by a senior agency official.

Revise the Definition of Major Federal Action

Consistent with the proposed rule, CEQ adopted a revised definition of “major federal action” that gives independent meaning to the terms “major” and “significant.” The definition, which triggers NEPA’s applicability through the “NEPA thresholds” section of the final rule,⁵ also includes a listing of actions that do not qualify as “major federal actions,” including decisions that are non-discretionary, do not result in final agency action, or that involve financing for which the government does not have “sufficient control and responsibility.”

CEQ also expressly excludes “extraterritorial actions” from NEPA review—a matter on which CEQ had requested comment in the proposed rule.

⁵ The “NEPA thresholds” section establishes a number of considerations to determine whether “NEPA applies or is otherwise fulfilled,” including, for example, whether compliance with NEPA would conflict with another statute and whether another statute’s requirements “serve the function of agency compliance” with NEPA.

Refine the Range of Reasonable Alternatives

Consistent with the proposal, CEQ included a new definition of “reasonable alternative” clarifying that agencies need only consider alternatives that are “technically or economically feasible,” meet the purpose and need for the proposed action, and meet the applicant’s goals (if applicable). CEQ had invited comment on establishing a presumptive maximum number of alternatives, but elected instead to direct agencies to “limit their consideration to a reasonable number of alternatives.”

Restrict the Scope of Effects

CEQ finalized a revised definition of “effects” largely as proposed that will narrow the scope of “effects” analyzed in the NEPA process. Indeed, CEQ included new language specifying that agencies “are bound” and “should not go beyond” the definition of “effects” in the final rule—curtailing federal agencies’ discretion to evaluate a broader scope of effects.

In the final rule, CEQ abandons the terminology “direct” and “indirect,” though these concepts remain in substance. CEQ has defined effects as those that are “reasonably foreseeable and have a reasonably close causal relationship to the proposed action or alternatives,” and those that “occur at the same time and place” (i.e., “direct effects,” as defined in the 1978 regulations) and “are later in time or farther removed in distance” (i.e., “indirect effects,” as defined in the 1978 regulations). The final rule also rejects a “but for” test and clarifies that agencies need not consider effects they have no jurisdiction to prevent or would occur regardless of the proposed action.

CEQ had proposed that agencies need not consider effects that are “remote in time, geographically remote, or the product of a lengthy causal change.” The final rule softened that language slightly by inserting the term “generally.” CEQ explains that this qualification was intended “to reflect the fact that there may occasionally be a circumstance where consideration of those effects is appropriate.”

CEQ, however, did not walk back or soften its proposal to repeal the requirement to consider cumulative impacts.⁶ Environmental justice advocates and other critics claimed that the deletion of cumulative impacts was intended to scale back consideration of climate change impacted under NEPA. In response to these concerns, CEQ included language emphasizing the potential impacts of climate change on the environment and proposed actions,⁷ but said

⁶ Notably, CEQ had originally inserted this requirement in response to the U.S. Supreme Court’s decision in *Kleppe v. Sierra Club*, 427 U.S. 390 (1976).

⁷ Specifically, the final rule requires agencies to discuss “reasonably foreseeable environmental trends and planned actions in the area(s)” in the discussion of the affected environment. Notably,

little to allay concerns that the new rule would curtail consideration of a proposed action's impacts on climate change. Relatedly, CEQ refrained from finalizing, codifying or repealing any of CEQ's outstanding Draft NEPA Guidance on Consideration of Greenhouse Gas Emissions⁸—an issue left for another day—so there remains significant uncertainty about how climate change will be considered under the new regulation.

Encourage Joint Documents

CEQ finalized language requiring, to the “extent practicable,” federal agencies to prepare a “single” EISs and EAs, and “joint” decision documents. The final rule also encourages elimination of duplication with state, tribal and local procedures through joint preparation of environmental documents—which could prove difficult in states that modeled their NEPA-like requirements on the former CEQ rules.

Expand the Use of Categorical Exclusions

CEQ finalized language that would provide agencies greater flexibility to apply categorical exclusions, a mechanism that allows pre-defined categories of routine activities to proceed without additional environmental review. Consistent with the proposed rule, CEQ's regulations now allow agencies to apply a categorical exclusion established from another agency's NEPA procedures and to adopt other agencies' categorical exclusion determinations.

Increase Flexibility for Applicants

Consistent with the proposed rule, CEQ will allow applicants to take certain actions while the NEPA process is still underway (e.g., acquiring interest in land). CEQ has also finalized language allowing applicants to prepare EISs under the direction of agencies. Likely in response to comments that delegating this responsibility to applicants “hands over to the fox the keys to the henhouse,”⁹ CEQ retained language in the current rules (which it had proposed to delete) that requires preparers to submit a disclosure statement identifying conflicts of interest. However, CEQ acknowledges that “most applicants will have such financial interest.”

CEQ has deleted the requirement to consider “cumulative actions” and “similar actions” in the scope of an EIS, so it is unclear what “planned actions” will be included in this analysis.

⁸ See Draft National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions, 84 Fed. Reg. 30,097, 30,098 (June 26, 2019), <https://www.govinfo.gov/content/pkg/FR-2019-06-26/pdf/2019-13576.pdf>.

⁹ See e.g., *Carper Testifies in Front of CEQ on Trump Administration's NEPA Proposal*, U.S. Senate Committee on Environment and Public Works Minority Press Releases (Feb. 25, 2020), <https://www.epw.senate.gov/public/index.cfm/2020/2/carper-testifies-in-front-of-ceq-on-trump-administration-s-nepa-proposal>.

Narrow Commenting

CEQ retained from the proposed rule the requirement that public comments be submitted within the comment period. If not “timely” submitted, the arguments “shall be considered unexhausted and forfeited”—meaning they cannot later be raised in court. Importantly, the final rule removes the requirement in the proposed rule that agencies limit the comment periods to only 30-days.

Establish Regulatory Presumption

CEQ retained from the proposed rule a number of changes intended to address litigation-related delays. Among other things, the final rule requires a certification statement to be included in the Record of Decision, which establishes a “presumption”—rather than a “conclusive presumption,” as proposed—that the agency has considered all submitted alternatives, information and analyses in the final EIS.

Require Revision of Agency NEPA Procedures

CEQ finalized proposed language requiring agencies to update their agency NEPA regulations within a year of publication of the CEQ rules, and generally prohibiting agencies from imposing “additional procedures or requirements” beyond the CEQ regulations.

CEQ also included new language in the final rule establishing that CEQ regulations apply in the event of a conflict with agency-specific NEPA procedures unless there is a “clear and fundamental conflict” with the requirements of another statute.

Notably, CEQ deleted the “functional equivalent” test, and arguably gave agencies broad discretion to determine when they can “substitute” other procedures or documents for a NEPA document based on whether those procedures or documents “satisfy” the requirements in the final rule.

NEXT STEPS AND KEY TAKEAWAYS

Whether this rulemaking remains in effect well beyond September 2020 will depend on whether the rule survives potential judicial challenges and review under the Congressional Review Act (“CRA”).

- There are several potential hurdles to any attempts to bring a facial (rather than as-applied) challenge the rule, including standing and ripeness. As of the date of publication of this article, these arguments are being briefed in a Virginia federal district court. On the merits, opponents of the rule will have to grapple with NEPA’s broad and open-ended language, which arguably leaves agencies with considerable discretion in implementation. On the other hand, several of the

changes arguably run counter to judicial interpretations of the statute.

- Regarding the CRA, Congress will have an opportunity to review and issue a joint resolution of disapproval that would make the rule of “no force and effect” and would ban CEQ from issuing another rule in “substantially the same form” unless specifically authorized by statute. Though this is highly unlikely to occur in the current legislative session, the CRA provides that the 60 session-day period for review resets if Congress adjourns before the full review period elapses. Meaning, if Democrats win both houses of Congress and the Presidency in the upcoming elections, the NEPA rule—along with other controversial rulemakings that have been finalized this summer—could be subject to repeal under the Congressional Review Act. Of course, a potential new administration could also use ordinary rulemaking procedures to rollback the rollback.

If this rulemaking survives judicial challenge and a potential new administration, the impacts on the NEPA process will be seen in its application.

- Will the changes encourage agencies to prioritize the NEPA process and invest in staffing necessary to produce defensible documents in shorter timeframes? Or, will agencies be forced to cut corners in public engagement and document drafting that provides for even greater public opposition and litigation risk for projects?
- Will the changes ultimately lead to faster project implementation? Or, will agencies find it necessary to front-load analyses before the Notice of Intent starts the clock?
- Will the changes provide clarity on the scope and application of NEPA? Or will litigation continue based upon new ambiguity under these far-reaching regulations?
- Will the changes assuage the concerns of critics about the inefficiency of the NEPA process? Or will NEPA continue to be a polarizing issue?
- Most importantly, despite these changes, will this bedrock federal environmental statute continue to perform its fundamental role of integrating environmental considerations into federal agency decision-making and forcing these considerations into the public light?