

CEQ's rescission of Trump's proposed NEPA climate guidance

By Allison B. Rumsey, Esq., Ethan G. Shenkman, Esq., and Emily Orlor, Esq., *Arnold & Porter**

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The Biden-Harris Administration's rollback of the Trump Administration's National Environmental Policy Act (NEPA) policies officially began on February 19, 2021, with the rescission¹ of the Council on Environmental Quality's (CEQ's) 2019 proposed NEPA guidance on greenhouse gas (GHG) emissions.

President Biden directed CEQ to take this action through Executive Order 13990,² issued on his first day in office. It is an important first milestone in what is expected to be a period of significant change in NEPA practice.

While the implications of this action will play out over time, we provide answers to some immediate questions:

HOW DID WE GET HERE?

Following years of deliberation and issuance of two drafts, the Obama Administration issued a Final NEPA Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in NEPA in August 2016.³

The current administration's efforts to issue a new climate guidance document will be complicated by a last-minute Trump regulation establishing new procedures for issuance of agency guidance.

The final Obama guidance required robust consideration of climate impacts, but also reflected compromise on two key issues by removing: (1) the proposed numeric threshold for quantification (25,000 metric tons/year) and (2) references to "upstream" and "downstream" emissions.

Pursuant to President Trump's Executive Order 13783,⁴ CEQ withdrew⁵ the final Obama guidance in April 2017. Two years later, the Trump Administration issued a significantly more streamlined draft GHG emissions guidance for public comment.⁶

While continuing to acknowledge that GHG emissions are an environmental impact that must be analyzed under NEPA, the draft (if finalized) would have, among other things, required

quantification only when GHG emissions are "substantial enough to warrant quantification" and when it is "practicable to quantify [GHG emissions] using available data and GHG quantification tools."

IS THE OBAMA-ERA NEPA CLIMATE GUIDANCE (2016) BACK IN EFFECT?

No. Technically, the withdrawal of the draft guidance, which was never finalized, does not bring the prior guidance back to life.

However, in the absence of any interim guidance from CEQ, agencies will naturally look to the 2016 Obama guidance for insight on how to proceed.

Indeed, CEQ's announcement of the rescission encourages agencies to consider "all available tools and resources" when analyzing GHG emissions and climate change in their NEPA reviews, including the 2016 Guidance "as appropriate and relevant."

WHAT PROCEDURAL STEPS WILL THE BIDEN-HARRIS ADMINISTRATION TAKE NEXT?

The current administration's efforts to issue a new climate guidance document will be complicated by a last minute Trump regulation⁷ establishing new procedures for issuance of agency guidance.

This rule was issued pursuant to a Trump Executive Order⁸ critical of the proliferation of agency guidance as a circumvention of notice and comment rulemaking.⁹

The rule establishes heightened procedures for issuance of "significant guidance documents."¹⁰

If the GHG emissions guidance is determined to be "significant," CEQ will have to submit the document for review to the Office of Management and Budget's (OMB's) Office of Information and Regulatory Affairs, provide responses to public comments, and comply with procedural requirements that could result in significant delays.

Of course, the Biden-Harris Administration has signaled its intent to reconsider the guidance rule, so these requirements could change.¹¹

HOW WILL THE TRUMP ADMINISTRATION'S REVISIONS TO NEPA'S IMPLEMENTING REGULATIONS AFFECT CEQ'S EFFORTS TO ISSUE NEW CLIMATE GUIDANCE?

The Trump Administration produced a comprehensive overhaul¹² of CEQ's NEPA regulations in July 2020.¹³

In its proposed rule,¹⁴ CEQ solicited comments on whether to codify its proposed GHG emissions guidance as part of its new NEPA regulations.

Ultimately, it decided not to do so, but it did make major changes to the scope of impact assessment more broadly, including repealing the requirement that agencies must evaluate the "cumulative effects" of their actions.

Critics have argued that the changes to impact assessment will curtail — if not entirely eliminate — meaningful GHG emissions and climate impacts analysis.¹⁵

There are currently five cases pending in four federal district courts challenging the Trump Administration's NEPA rules.¹⁶

In its motion for summary judgment in the Western District of Virginia, the Trump Department of Justice argued that changes to the scope of impacts analysis are mere changes in terminology and not necessarily major substantive changes.¹⁷

Ironically, if the Biden-Harris Administration adopts this interpretation of its predecessor's NEPA rules as largely non-substantive, this could pave the way for issuing new climate guidance sooner rather than later.

More likely, the current administration will wait to issue new climate guidance until after it decides whether to reconsider or rescind the Trump-era NEPA regulations.

DOES THE ANNOUNCEMENT OF THE RESCISSION GIVE ANY HINTS ABOUT THE BIDEN-HARRIS ADMINISTRATION'S POTENTIAL POLICY DIRECTION?

Unsurprisingly, the rescission announcement emphasizes that agencies must consider climate impacts in their NEPA reviews.

In addition, the announcement makes clear that agencies must analyze both a project's (or program's) potential effects on climate change and the effects of the climate change on the project (or program).¹⁸

This description of the "affected environment" was an area in which the 2019 Trump proposal scaled back the previous guidance document.

The announcement does not provide any clue as to the timing of next steps.

However, given the Biden-Harris Administration's prioritization of climate policy and the importance of NEPA analysis to the administration's sustainable infrastructure plan, we expect new climate guidance to be at the top of CEQ's agenda.¹⁹

Notes

¹ <https://bit.ly/3m36n5o>

² <https://bit.ly/2PnpVWb>

³ See Council on Environmental Quality, *Guidance on Consideration of Greenhouse Gases*, <https://bit.ly/2O5w3Sc>

⁴ <https://bit.ly/3ue3W2R>

⁵ <https://bit.ly/3dnVA1s>

⁶ See Draft National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions, <https://bit.ly/3wgdtd4>, 84 Fed. Reg. 30,097 (June 26, 2019); see also Ethan Sherkman, *CEQ's Proposed Guidance on NEPA Climate Reviews Replaces Obama's*, <https://bit.ly/3w7f9UB>, Env't F. (Nov./Dec. 2019).

⁷ <https://bit.ly/39tJeUC>

⁸ <https://bit.ly/3rwWZrT>

⁹ See also Ethan Sherkman, *Guidance on the Administration's Two Executive Orders on Guidance*, <https://bit.ly/3sE1YYX>, Env't F. (Jan./Feb. 2020).

¹⁰ 40 C.F.R. § 1519.4.

¹¹ See The White House, *Fact Sheet: List of Agency Actions for Review*, <https://bit.ly/3cBfMxZ>, (Jan. 20, 2021). The guidance will not be available for repeal through the Congressional Review Act if it is considered a "rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties." See 5 U.S.C. § 804(3).

¹² <https://bit.ly/3u49MDN>

¹³ See also CEQ Finalizes Comprehensive Changes to NEPA Regulations, <https://bit.ly/2PDoaUy>, Arnold & Porter (July 30, 2020).

¹⁴ <https://bit.ly/3rwXaU5>

¹⁵ See, e.g., 40 C.F.R. § 1508.1(g)(3) ("An agency's analysis of effects shall be consistent with this paragraph (g). Cumulative impact, defined in 40 CFR 1508.7 (1978), is repealed.")

¹⁶ Federal defendants obtained 60-day stays in four of the cases, but Judge Jones of the Western District of Virginia recently declined to stay proceedings in his court. Federal defendants and defendant-intervenor's reply briefs are due on March 17, 2021. See *Wild Va. v. CEQ*, No. 3:20-cv-00045-JPJ-PMS (W.D. Va.); *Alaska Cmty. Action on Toxics v. CEQ*, No. 3:20-cv-05199-RS (N.D. Cal.); *California v. CEQ*, No. 3:20-cv-06057-RS (N.D. Cal.); *Env't Just. Health All. v. CEQ*, No. 1:20-cv-06143-CM (S.D.N.Y.); *Iowa Citizens for Cmty. Improvement v. CEQ*, No. 1:20-cv-02715-TJK (D.D.C.).

¹⁷ Defendants' Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment and In Support of Defendants' Cross-Motion for Summary Judgment, *Wild Va. v. CEQ*, No. 3:20-cv-00045-JPJ-PMS (W.D. Va. Dec. 21, 2020), ECF No. 129-1 ("{ A } s CEQ explained, the elimination of the separate categories of direct, indirect, and cumulative effects does not necessarily mean that impacts previously categorized as indirect or cumulative will no longer be considered under the 2020 Rule's single definition of environmental effects."); see also Business Association's Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment and In Support of Their Cross-Motion for Summary Judgment, *Wild Va. v. CEQ*, No. 3:20-cv-00045-JPJ-PMS (W.D. Va. Dec. 21, 2020), ECF 128-1 ("Plaintiffs insist that CEQ failed to consider the possibility that the NEPA Rule will lead to adverse environmental impacts by 'eliminat[ing]' analysis of indirect and cumulative effects. SJ Mem. 15. But Plaintiffs simply ignore the key aspects of CEQ's explanation. Their assertion, for example, that the rule 'tells agencies not to evaluate' indirect or cumulative effects (SJ Mem. 35) is not correct. Although the Rule states that effects that are geographically, temporally, or causally remote from an action 'should generally not be considered' under NEPA

(85 Fed. Reg. at 43,375 (new 40 C.F.R. § 1508.1(g)(2))), CEQ explained that all effects will continue to be considered to the extent that they are required to be considered under the proximate cause framework mandated by Public Citizen.”).

¹⁸ See *National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions*, <https://bit.ly/3cyum9s>, 86 Fed. Reg. 10,252 (Feb. 19, 2021) (“Many projects and programs proposed, funded, or approved by Federal agencies have the potential to emit or sequester greenhouse gases (GHGs), and may be affected by climate change.”).

¹⁹ See *Executive Order 14008, Tackling the Climate Crisis at Home and Abroad*, <https://bit.ly/39rBcM3>, (Jan. 27, 2021) (directing the CEQ and OMB “to ensure that Federal infrastructure investment reduces climate pollution, and to require that Federal permitting decisions consider the effects of greenhouse gas emissions and climate change”); see also *President Biden Sets Broad Climate and Environmental Policies*, <https://bit.ly/2O5wqfy>, Arnold & Porter (Jan. 28, 2021).

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ABOUT THE AUTHORS



Arnold & Porter environmental partner **Allison B. Rumsey** (L) focuses her practice on environmental litigation and enforcement matters. Rumsey represents clients in state and federal regulatory enforcement actions, class-action and citizen suit lawsuits, and business disputes. She also has an active practice assisting clients in NEPA and federal regulatory process and related litigation. She can be reached at allison.rumsey@arnoldporter.com. Environmental partner **Ethan G. Shenkman** (C) represents a diverse array of clients in trial court and appellate matters, and in matters before federal and state agencies. He represents clients in rulemakings and litigation concerning biofuels regulation, the Renewable Fuels Standard, phaseout of HFCs, the Clean Power Plan, NEPA and other climate-related litigation. He can be reached at ethan.shenkman@arnoldporter.com. Environmental associate **Emily Orler** (R) focuses her practice on environmental regulatory and compliance counseling, and environmental litigation. She has particular experience advising clients on infrastructure, natural resource development and environmental remediation projects. She can be reached at emily.orer@arnoldporter.com. All of the authors are based in the firm’s Washington, D.C., office. This article was originally published Feb. 23, 2021 on the Arnold & Porter website. Republished with permission.

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