

Biden-Harris Administration Proposes NEPA Regulatory Revisions

After nearly 50 years with little change, the National Environmental Policy Act (“NEPA”) regulations are facing their second substantive revisions in less than 12 months.[1] In September 2020, the Trump Administration oversaw a series of regulatory revisions that greatly altered the scope and depth of the review processes under NEPA by reducing the types of projects subject to NEPA review, reducing the scope and duration of the NEPA review, and reducing the number and types of impacts considered during a NEPA review. [2] Following the inauguration in January 2021, the Biden-Harris Administration began working to reverse some of the Trump-era NEPA modifications and restore the environmental review regulations to their pre-Trump condition. The most recent development in the multi-phased process is a “Phase 1” Notice of Proposed Rulemaking, published on October 6, 2021, seeking to restore three NEPA regulatory provisions. [3]

1. NEPA Background

NEPA is a procedural federal statute that imposes review processes for major federal actions significantly affecting the quality of the human environment. Signed in to law on January 1, 1970, NEPA provides a review framework for federal agencies and project proponents to assess the impacts of certain projects prior to project implementation. NEPA provides for the establishment of the Council for Environmental Quality (“CEQ”), to serve as the agency to promulgate NEPA regulations, ensure federal agencies meet their obligations under NEPA, and oversee federal agency implementation of the environmental impact assessment process. NEPA regulations are found at 40 CFR Parts 1500-1508, and originally went into effect in 1978.

The NEPA framework is still the same today that it was in 1978, and it applies to every agency in the executive branch of the Federal Government. A “major federal action” triggers the statute. If a project is a “major federal action” as defined under NEPA, the project proponent must prepare an Environmental Assessment (“EA”), unless that project falls into a finite set of “categorical exclusions” exempting the project from the NEPA review procedures.

Based on the EA, the agency makes a determination on whether that project could have a significant impact on the quality of the human environment. If so, the project proponent needs to prepare an Environmental Impact Statement (“EIS”). After an EIS is prepared and reviewed, a Record of Decision (“ROD”) issues.

On the other hand, if based on the EA the CEQ determines that the project poses no significant impact, it issues a formal Finding of No Significant Impact (“FONSI”) and the project can proceed without further review.

[4]



How NEPA Regulations Changed Under Trump

While the steps in the NEPA review process were largely untouched by the 2020 regulatory amendments, a series of tweaks and definition revisions changed the scope and depth of review, and minimized the types of projects subject to NEPA review at all.

The regulatory changes under the Trump-Pence administration included the following:

- Amended §1502.13 so the NEPA regulations supersede any conflicting agency NEPA procedures, and mandated a revision of all agency regulations implementing NEPA.[5] This made NEPA the strictest review process allowed.
- Changed the definition of “major federal action” to exclude actions with “minimal federal funding or minimal federal involvement,” and exclude federal projects outside of the United States.[6] This resulted in a significantly smaller pool of

projects subject to NEPA than in the 1978 regulations.

- Amended the requirements of the “purpose and need” statement in an EIS, so the purpose and need of a project is limited to the applicant’s goals.[7] The purpose and need section of an EIS sets forth the rationale for the agency’s proposed action, and sets the scope of the alternatives.[8]
- Eliminated the word “cumulative” from §1508.1(g)(3) of the regulations, which minimized the scope of a project impact analysis so it no longer considers “cumulative” impacts—only those that are “reasonably foreseeable” and “have a reasonably close causal relationship to the proposed action or alternatives.”[9] This minimized the temporal consideration of project impacts and generally excludes compounding impacts, or impacts that are remote in time or geography, such as climate change, from analysis.
- Allowed project proponents to prepare their own EISs.[10] In the 1978 regulations, proponents could prepare their own EAs, but not EISs. This potentially opens the door for bias document preparation.
- Set new deadlines and page limits for EAs and EISs: EAs cannot exceed 75 pages, and must be completed within 1 year, and EISs are capped at 300 pages and must be completed within 2 years.[11] Prior to the 2020 changes, the Trump-Pence Administration CEQ published a guidance document, finding that across all federal agencies, it took 4.5 years to complete an EIS (from Notice of Intent to ROD).[12]
- Expanded the scope of categorical exclusions. Prior to the 2020 amendments, each agency had its own categorical exclusions. The 2020 amendments pooled them, so any categorical exclusion is available for any agency. [13]

The Trump-Pence CEQ also issued a directive that other federal agencies undertake a regulatory review and amend their regulations to be consistent with the new NEPA regulations by September 14, 2021.

• Key Takeaways From Pending Proposal

The pending Phase 1 rulemaking is narrow, and addresses only a fraction of the changes that the Trump-Pence Administration CEQ promulgated. The pending proposal will essentially reverse three changes that the Trump-Era CEQ put into place:

- **Re-Direct Purpose and Need.** CEQ proposes to revert to the language of the 1978 NEPA Regulations in §1502.13 for the “purpose and need” section, so the “purpose and need” of a project is no longer limited to the Applicant’s goals.[14] This means

reviewing agencies will again have the flexibility to determine the “purpose and need” of a project based on a variety of factors, and will be able to consider a broader scope of alternatives—not just those that fulfill the Applicant’s narrow goal.

- **Restore Cumulative Impact Analysis.** CEQ proposes to revise §1508.1(g)(3) by restoring, with minor modifications, the definition of “cumulative impacts” from the 1978 NEPA Regulations.^[15] This will again require that reviewing agencies must consider the “direct,” “indirect,” and “cumulative” impacts of a proposed project.
- **Reinstate NEPA as a Floor, Not a Ceiling.** Amend §1507.3 to allow Federal agencies to revise their NEPA regulations according to their needs, and impose more-strict processes than provided in NEPA.^[16] This flips the bounds of NEPA review requirements from being the maximum review allowed, to the minimum.

As a preliminary step in re-establishing NEPA as the minimum (not maximum) regulatory review requirement, CEQ issued an interim final rule on June 29, 2021, directly addressing the 2020 directive that agencies amend their regulations to be subordinate to NEPA by September 14, 2021.^[17] Instead, CEQ extended that date to September 14, 2023, noting that pending revisions to the NEPA regulations may change agencies’ directives.

After Phase 1, CEQ anticipates a “Phase 2” to “more broadly revisit the 2020 NEPA Regulations and propose further revisions to ensure that the NEPA process provides for efficient and effective environmental reviews that are consistent with the statutes text and purpose; provides regulatory certainty to Federal agencies; promotes better decision making consistent with NEPA’s statutory requirements; and meets environmental, climate change, and environmental justice objectives.”^[18]

[1] Until 2020, NEPA regulations were largely untouched since their enactment in 1978.

[2] Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43304, July 13, 2020. Available at <https://www.govinfo.gov/content/pkg/FR-2020-07-16/pdf/2020-15179.pdf>.

[3] <https://www.whitehouse.gov/ceq/news-updates/2021/10/06/ceq-proposes-to-restore-basic-community-safeguards-during-federal-environmental-reviews/>; National Environmental Policy Act Implementing Regulations Revisions, 86 Fed. Reg. 55757, October 7, 2021. Available at <https://www.govinfo.gov/content/pkg/FR-2021-10-07/pdf/2021-21867.pdf>; The public comment period of the proposed rule closed on November 22, 2021. A final rule has not been published as of December 22, 2021.

[4] <https://www.epa.gov/sites/default/files/2021-04/documents/rtoc-presentation-nepa-2021-04.pdf> at 6.

[5] Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43304, July 13, 2020. Available at <https://www.govinfo.gov/content/pkg/FR-2020-07-16/pdf/2020-15179.pdf> ; 40 CFR §1502.13

[6] Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43304, July 13, 2020. Available at <https://www.govinfo.gov/content/pkg/FR-2020-07-16/pdf/2020-15179.pdf> ; 40 CFR § 1508.1(q)(1).

[7] Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43304, July 13, 2020. Available at <https://www.govinfo.gov/content/pkg/FR-2020-07-16/pdf/2020-15179.pdf> ; 40 CFR §1502.13.

[8] 40 CFR §1502.14(f).

[9] Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43304, July 13, 2020. Available at <https://www.govinfo.gov/content/pkg/FR-2020-07-16/pdf/2020-15179.pdf> ; 40 C.F.R. §1508.1(g)(3).

[10] Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43304, July 13, 2020. Available at <https://www.govinfo.gov/content/pkg/FR-2020-07-16/pdf/2020-15179.pdf> ; 40 CFR § 1506.5(b).

[11] 40 CFR §§ 1501 and 1502.

[12] https://ceq.doe.gov/docs/nepa-practice/CEQ_EIS_Timelines_Fact_Sheet_2018-12-14.pdf.

[13] Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43304, July 13, 2020. Available at <https://www.govinfo.gov/content/pkg/FR-2020-07-16/pdf/2020-15179.pdf> ; 40 CFR § 1501.4; <https://ceq.doe.gov/nepa-practice/categorical-exclusions.html>.

[14] National Environmental Policy Act Implementing Regulations Revisions, 86 Fed. Reg. 55757, October 7, 2021. Available at

<https://www.govinfo.gov/content/pkg/FR-2021-10-07/pdf/2021-21867.pdf>.

[15] *Id.*

[16] *Id.*

[17] Deadline for Agencies to Propose Updates to National Environmental Policy Act Procedures, 86 Fed. Reg. 34154, June 29, 2021, available at <https://www.govinfo.gov/content/pkg/FR-2021-06-29/pdf/2021-13770.pdf>

[18] *Id.*