ALLEN & OVERY

# Back to the '70s:
# The CEQ's Proposed Rule Addressing the Procedural Provisions of NEPA

In anticipation of a potentially significant increase in federal infrastructure spending from the Infrastructure Investment and Jobs Act now coursing through Congress, the Council on Environmental Quality ("**CEQ**") recently introduced a Proposed Rule addressing the procedural provisions of the National Environmental Policy Act ("**NEPA**"). The Proposed Rule would effectively undo several regulatory changes the CEQ enacted during the Trump Administration, potentially altering the NEPA landscape for the second time in just two years.

## NEPA Regulations during the Trump Administration

The Trump Administration introduced Executive Order 13807 (August 15, 2017) ("**EO 13807**") with the stated purpose of "[ensuring] the Federal environmental review and permitting process for infrastructure projects is coordinated, predictable, and transparent." As part of that effort, EO 13807 directed the CEQ to compile a list of proposed actions that would "enhance and modernize the Federal environmental and review process." President Trump tasked the CEQ with "simplifying and accelerating NEPA reviews" to eliminate unnecessary burdens and delays.

Particularly in light of a 2020 CEQ EIS Timeline Report that showed that Environmental Impact Statements ("**EIS**") across all federal agencies require an average of 4.5 years to complete, the goal of increasing efficiency in the NEPA process has long sat on regulators', companies', and environmentalists' priority lists. However, the Trump Administration's action generated a range of reactions from industry commentators. Some, such as the U.S. Chamber of Commerce, lauded EO 13807 as a step toward "moderniz[ing] and rationaliz[ing] the NEPA permitting process;" others, including the National Resources Defense Council, worried that the move served as a mere pretext for reducing environmental scrutiny of potentially polluting projects.

Pursuant to EO 13807, the CEQ promulgated an Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act ("**2020 NEPA Regulations**") in July 2020, which represented the first comprehensive update to the NEPA implementing regulations since a series of amendments in 1978 ("**1978 NEPA Regulations**"). A string of lawsuits challenging the rulemaking process for the regulations soon commenced. Courts have since dismissed at least one of those suits on grounds of ripeness and standing; because the CEQ extended the original deadline for federal agencies to conform to the new regulations to September 14, 2023, the court determined the regulations' anticipated effects are too "speculative" at this point to warrant adjudication on the merits.

# CEQ Reverses Course

The Biden Administration wasted no time in attempting to undo the procedural changes that the CEQ imposed under President Trump. Shortly after his inauguration ceremony, President Biden issued Executive Order 13990 (January 20, 2021) ("**EO 13990**"), which expressly revoked EO 13807 and required the Chair of the CEQ to determine whether existing circumstances justified a replacement order. On that same day, the White House published a fact sheet that called upon agency heads to review certain previous agency actions and scrutinize those actions' alignment with EO 13990's stated objective to "protect public health and the environment." Specifically, the fact sheet requested that the CEQ analyze the 2020 NEPA Regulations.

The CEQ's evaluation concluded that the 2020 NEPA Regulations contravened EO 13990 and would "have negative repercussions for environmental protection and environmental quality, including in critical areas such as climate change and environmental justice." This conclusion formed the basis for the Proposed Rule now under consideration.

The Proposed Rule aims to rewind the implementing regulations to their pre-2020 state. Among other modifications, the Proposed Rule would:

### Eliminate the requirement that federal agencies center the purpose and need statement of an EIS on an applicant's goals

The 1978 NEPA Regulations required that each EIS include a statement on the purpose and need motivating an agency's range of proposed alternatives, including the proposed action. Though the 2020 NEPA Regulations do not eliminate this obligation, they require those agencies reviewing an application to center the purpose and need statement on the goals of the applicant and the agency's statutory authority, potentially prioritizing the applicant's goals over other considerations, such as the public interest. According to the CEQ, the 2020 NEPA Regulations therefore preclude agencies from studying alternatives that contribute more to NEPA's priorities, so the Proposed Rule would strike the reference to the applicant's goals from this procedural provision.

Similarly, the Proposed Rule would remove the reference to applicant's goals from the meaning of "reasonable alternatives," which the 2020 NEPA Regulations currently define as "a reasonable range of alternatives that are technically and economically feasible, meet the purpose and need for the proposed action, and, where applicable, meet the goals of the applicant."

### Establish the CEQ regulatory requirements as a floor, not a ceiling

The 2020 NEPA Regulations include several ceiling provisions that bar agencies from imposing requirements that extend beyond those enumerated in the regulations, except when those additions "promote agency efficiency." Where agencies' established NEPA procedures are "inconsistent" with the 2020 NEPA Regulations, the 2020 NEPA Regulations would apply "unless there is a clear and fundamental conflict with…another statute." Moreover, the 2020 NEPA Regulations force agencies to revise any policies that conflict with the statute, bringing them in line with the CEQ's prescribed processes.

In order to offer agencies the flexibility to develop NEPA procedures beyond those specified in CEQ regulations, the Proposed Rule would abolish these ceiling provisions. The CEQ aims to promote NEPA procedures tailored to each agency's unique contexts, which necessarily requires a level of autonomy that, based on the CEQ's review, the 2020 NEPA Regulations foreclose.

### Restore elements of the definition of "effects" to allow agencies to consider a full range of environmental impacts

The 2020 NEPA Regulations generally authorize agencies to ignore effects that are "remote in time, geographically remote, or the product of a lengthy causal chain," as well as those effects that "the agency has no ability to prevent due to its limited statutory authority." The 2020 NEPA Regulations also repealed the definition of "cumulative impacts," which refers to "effects resulting from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions, regardless of who undertakes the other actions."

Concerns that these amendments would limit the environmental effects agencies consider in their NEPA analyses underlie a key provision in the Proposed Rule. The Proposed Rule restores the terms "direct" and "indirect" to the definition of effects and reinstates the definition of "cumulative impacts," with a view toward guaranteeing that NEPA studies examine an "appropriate universe of effects," including those that raise environmental justice concerns.

The CEQ confirmed in the Proposed Rule that it "will continue to evaluate the NEPA process for opportunities to improve [Review: timeliness/timelines] consistent with NEPA's purposes." Subsequent phases may address outstanding [Review: timeline] concerns and further the Biden Administration's commitments to sustainability and environmental justice. Project finance sponsors, developers, and lenders should track these developments closely since they will directly impact strategies, tactics, and timing for developing and implementing the broad range of infrastructure projects that are subject to NEPA.



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