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Biden Administration Announces First Round of Revisions to CEQ's NEPA Rules

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On October 7th, the Council on Environmental Quality (CEQ) announced the Biden Administration's first round of proposed revisions to the National Environmental Policy Act (NEPA) regulations.¹ Each of the “Phase 1” changes will undo regulatory revisions made just over a year ago by the Trump Administration and reinstate definitions and requirements that were part of CEQ's NEPA regulations since the late 1970s. CEQ noted that it is contemplating additional changes (“Phase 2 revisions”) that could be released to the public in 2022.

The 2020 NEPA Rule Changes

As part of the first significant update of the NEPA regulations in 42 years, CEQ made a number of changes to the scope of environmental analyses required by federal agencies in 2020. See “Council on Environmental Quality Issues Final NEPA Rule,” Holland & Hart News Update, 07/17/2020 and “Answers to Key Questions about the Revised CEQ NEPA Regulations,” Holland & Hart News Update, 08/19/2020. Among its key changes, the 2020 Rule:

- Required agencies to frame the “purpose and need” of their environmental reviews to correspond to an applicant's goals when a review comes in response to an applicant's requested federal approval.
- Refined the “reasonable alternatives” to a proposed action to include only those that were “technically and economically feasible” and would “meet the goals of the applicant.”
- Required that if a federal agency's specific NEPA regulations were inconsistent with the 2020 Rule, the 2020 Rule would control “unless there is a clear and fundamental conflict with the requirements of another statute.”
- Revised the definition of “effects” or “impacts” to remove the terms “direct effects” and “indirect effects” and required instead an analysis of only those effects “that are reasonably foreseeable and have a reasonably close causal relationship” to the proposed action.
- Removed an agency's obligation to analyze “cumulative impacts” as part of its consideration of effects.

In the months that followed the issuance of the 2020 NEPA Regulations, five lawsuits were filed by environmental organizations and affiliated

groups challenging the 2020 Rule.² These cases challenge the 2020 NEPA Regulations on a variety of grounds including under NEPA, the Administrative Procedure Act, and the Endangered Species Act — contending that the rule exceeded CEQ's authority and that the related rulemaking process was procedurally and substantively defective. At CEQ's request, four district courts issued temporary stays pending CEQ's rulemaking efforts. The district court in *Wild Virginia v. Council on Environmental Quality* dismissed the case without prejudice as unripe for judicial review. The dismissal is currently on appeal to the U.S. Court of Appeals for the Fourth Circuit.

Proposed “Phase 1” Revisions

In its “Phase 1” revisions to the 2020 Rule, CEQ now proposes to reverse each of the changes noted above and return to the 1978 requirements and definitions. The most immediate effect of these changes would be to require agencies to return to their pre-2020 requirements regarding the scope and detail of their NEPA analyses, including a potentially broader “purpose and need” statement for proposed actions, a range of alternatives that may go beyond those that advance a project applicant's goals, and provide an analysis of a more expansive range of effects.

CEQ has suggested that the scope of analysis and definitions from the 1978 rules were understood by agencies, NEPA practitioners, and the courts. Perhaps a more significant motivation for the changes is the Biden Administration's intent to require agencies to analyze the impacts of proposed federal actions on global climate change: a category of impacts that were expected to receive more limited consideration under the 2020 Rule. As an example, CEQ suggests in its “Phase 1” proposal that greenhouse gas emissions impacts would justify an agency's rejection of proposed oil and gas leasing on federal lands.

CEQ's proposed “Phase 1” changes come at a time of skyrocketing energy prices and escalating supply chain disruptions for American consumers and businesses. Similarly, the Biden Administration continues to push for expansive new federal funding for infrastructure projects, most of which are likely to require the preparation of a NEPA analysis prior to final approval. CEQ's “Phase 1” regulatory changes are likely to delay the approvals of domestic energy projects on federal lands (including the development and transportation of oil and gas and other federal minerals) and may well complicate federal agencies' efforts to advance the president's “Build Back Better” initiative.

Public comments on CEQ's proposed “Phase 1” regulations are due November 22, 2021.

¹<https://www.govinfo.gov/content/pkg/FR-2021-10-07/pdf/2021-21867.pdf>

² *Wild Va. v. Council on Env't Quality*, No. 3:20cv45 (W.D. Va. 2020); *Env'tl. Justice Health All. v. Council on Env't Quality*, No. 1:20cv06143 (S.D.N.Y. 2020); *Alaska Cmty. Action on Toxics v. Council on Env't Quality*, No. 3:20cv5199 (N.D. Cal. 2020); *California v. Council on Env't Quality*, No. 3:20cv06057 (N.D. Cal. 2020); *Iowa Citizens for Cmty.*

Improvement v. Council on Env't Quality, No. 1:20cv02715 (D.D.C. 2020).

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