



Back to the Past: NEPA Rule Changes Restore Provisions

On April 20, 2022, in the first leg of a two-phase process, the Council on Environmental Quality (CEQ) issued its [final rule](#) amending its regulations for implementing the National Environmental Policy Act (NEPA). To be effective May 20, 2022, the amendments restore provisions that were in effect for forty-two years before being modified in 2020 by the Trump administration. These “Phase 1” changes focus on the (a) purpose and need of a proposed action, (b) an agency’s NEPA procedures for implementing the rules, and (c) the definition of “impacts” and “effects.”

The 2020 Changes

Less than two years ago, on July 16, 2020, the CEQ finalized the [Trump Administration’s overhaul of the NEPA regulations](#). The changes were the first significant amendments to CEQ’s rules since 1978. The 2020 changes were extolled by the industry as having the potential to reduce NEPA costs and delays for all energy, mineral development, and infrastructure projects that constitute a “major federal action significantly affecting the quality of the human environment” and which, thus, require some form of federal permitting or licensing.

In its attempt to “reduce paperwork and delays, and promote better decisions consistent with the national environmental policy set forth” in NEPA, the CEQ explained in the preamble to the 2020 rules that:

This final rule comprehensively updates, modernizes, and clarifies the regulations to facilitate more efficient, effective, and timely NEPA review by Federal agencies in connection with proposals for agency action. The rule will improve interagency coordination in the environmental review process, promote earlier public

involvement, increase transparency, and enhance the participation of States, Tribes, and localities.

85 Fed. Reg. 43304.

One of the most controversial changes focused on the scope of environmental impacts that federal agencies were required to assess. The 2020 changes removed the decades-long references in the rules to “direct,” “indirect,” and “cumulative” impacts. Instead, the 2020 rules required that, in relation to the proposed action, the effects agencies were required to assess should not be considered if they are “remote in time, geographically remote, or the product of a lengthy causal chain.”

Back to the Past

The new rules are the first step in a two-phase approach that CEQ is taking to modernize the regulations. As explained by the CEQ, this Phase 1 rule makes the following three significant changes to the 2020 NEPA regulations.

1. The rule requires that federal agencies will consider the “direct,” “indirect,” and “cumulative” impacts of a proposed action, including by fully evaluating climate change impacts and assessing the consequences of releasing additional pollution in communities that are already overburdened by polluted air or dirty water.

The preamble to the final rule explains the change:

CEQ is including direct, indirect, and cumulative effects as a part of the definition of “effects” or “impacts” to avoid disruption and uncertainty caused by the 2020 rule and clarify that agencies should continue to engage in the context-specific inquiry they have undertaken for more than 40 years to identify *reasonably foreseeable* effects of a proposed action and its alternatives, providing for sound decision making. The restoration of “cumulative impacts” from the 1978 regulations specifically provided that the terms “impacts” and “effects” are synonymous. *Agencies should treat cumulative effects under the final rule in the same fashion as they treated cumulative impacts under the 1978 regulations.*

87 Fed. Reg. 23466 (*Emphasis added.*)

2. The rule restores the full authority of agencies to work with communities to develop and analyze alternative approaches that could minimize environmental and public health costs. The change will give agencies the flexibility to determine the “purpose and need” of a proposed project based on a variety of factors and to work with project proponents and communities to mitigate or avoid environmental harms by analyzing common sense alternatives.

3. The rule establishes CEQ’s NEPA regulations as a floor, rather than a ceiling, for the environmental review standards that federal agencies should be meeting. This proposal restores the ability of Federal agencies to tailor their NEPA procedures, consistent with the CEQ NEPA regulations, to help meet the specific needs of their agencies, the public, and stakeholders.

Stay Tuned. Phase 2 Up and Coming.

CEQ will be proposing a ‘broader set’ of Phase 2 changes that the agency says will further address the efficiency and effectiveness of federal environmental review processes and which will reflect the Biden Administration’s commitment to achieving environmental justice and confronting climate change.

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