

National Environmental Policy Act: Council of Environmental Quality Proposal to Withdraw Trump Era Rules



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The Council on Environmental Quality published in the October 7th Federal Register at Notice of Proposed Rulemaking (“NPR”) to withdraw certain Trump Administration revisions to its National Environmental Policy Act (“NEPA”) rules. See 86 Fed. Reg. 55757.

The NPR would generally restore regulatory provisions that were in effect for several decades before being modified by the Trump Administration’s Council on Environmental Quality (“CEQ”) in 2020.

CEQ was established in 1970 (as part of the Executive Office of the President) with its duties including oversight of federal implementation of NEPA. Regulations issued by CEQ are intended to guide the federal agencies in interpreting NEPA’s procedural requirements.

The federal agencies themselves typically have in place regulations that address NEPA requirements applicable to its activities. Nevertheless, the CEQ regulations are generally viewed by the federal agencies as the guidepost for compliance.

Of course, CEQ’s interpretations and the federal agencies themselves, through their regulation and guidance, are sometimes superseded by judicial decisions. In other words, regardless of CEQ and the federal agencies’ rules, courts have not infrequently disagreed with CEQ/federal agency regulatory interpretation

NEPA requires federal agencies to assess the environmental effects of their proposed actions prior to making decisions. The range of actions covered by NEPA has typically been broadly defined to include as examples:

- Making decisions by federal agencies on permit applications
- Federal land management actions
- Constructing and/or funding highways and other publicly owned facilities

The federal agencies are required to evaluate the environmental related social and economic effects of their proposed actions. Agencies are also required to provide opportunities for public review and a comment on those evaluations.

NEPA requires federal agencies in certain instances to prepare a detailed Environmental Impact Statement (“EIS”). However, the requirement to produce this document is only triggered in the event of a “major federal action” that will “significantly affect the environment.” As opposed to an EIS, which is a much more detailed document, an Environmental Assessment provides evidence and analysis for determining whether a finding of no significant impact for an EIS should be prepared.

Of critical importance, NEPA differs from action enforcing environmental statutory programs such as the Clean Water Act and Clean Air Act. It does not impose substantive mandates. Instead it is limited to requiring federal agencies to meet procedural requirements such as preparation of the EIS in certain defined instances. As a result, NEPA does not require a certain alternative or meet a particular standard.

The Biden Administration CEQ argues in support of the NPR that the 2020 revisions:

- Caused implementation challenges for agencies
- Sowed confusion among stakeholders and the general public

By way of summary, the October 7th NPR is described as making the following three changes to the 2020 NEPA rules:

- Restore the requirement that federal agencies evaluate all the relevant environmental impacts of the decisions they are making.
- Agencies must consider the “direct,” “indirect,” and “cumulative” impacts of a proposed decision
- Include evaluation of a full range of climate change impacts
- Assess the consequences of releasing additional pollution in communities overburdened by polluted air or dirty water
- Restore the full authority of agencies to work with communities to develop and analyze alternative approaches that could minimize environmental and public health costs.
- Described as providing agencies the flexibility to determine the “purpose and need” of a proposed project based on a variety of factors
- Provide agencies the ability to work with project proponents and communities to mitigate or avoid environmental harms by analyzing common sense alternatives
- Establish CEQ’s NEPA regulations as a floor, rather than a ceiling, for the environmental review standards that federal agencies should be meeting.
- Described as restoring the ability of Federal agencies to tailor their NEPA procedures, consistent with the CEQ NEPA regulations
- Meet specific needs of their agencies, the public, and stakeholders

The CEQ NPR describes these as “Phase 1” provisions to the NEPA regulations. What is described as a broader “Phase II” revisions to the regulations is expected to be proposed in the future.

A copy of the NPR can be downloaded [here](#).