NEPA: THE OLD BECOMES NEW

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The regulations that implement the National Environmental Policy Act (NEPA) are crucially important for the development of major energy and infrastructure projects in the United States. For example, the NEPA regulations will play a significant role in determining whether the federal government will successfully achieve its recently announced goal of expediting the development of 25 gigawatts of renewable energy projects on federal lands by 2025. By the same token, NEPA compliance will be critical for the private developers of those projects, as well any other private projects with a federal nexus (such as those requiring federal permits, or utilizing federal grants).

In July 2020, the Trump Administration finalized the first substantial changes to the NEPA regulations since 1978, largely in an effort to expedite the NEPA process. The 2020 Rule may prove to be short-lived. On 7 October 2021, the Biden Administration announced its intention to roll back the Trump-era changes and revert to certain aspects of the previous regulations (with another broader NEPA rulemaking on the horizon).

Given the importance of these regulations, the Biden Administration's NEPA proposals warrant close scrutiny and active participation by impacted stakeholders.

WHAT IS NEPA?

NEPA requires federal agencies to take a “hard look” at significant environmental effects before taking any major federal action. Major federal actions include federal permit decisions, rulemaking and policy actions, and funding decisions, all of which frequently implicate critical projects developed by private sector actors. These NEPA reviews typically culminate in an Environmental Assessment or Environmental Impact Statement (EIS), both of which evaluate impacts from the proposed action, the significance of those impacts, and alternatives to the proposed action. The Council on Environmental Quality (CEQ) is responsible for promulgating regulations that further define the scope of federal agencies' statutory obligations under NEPA.

2020 OVERHAUL

The Trump administration's overhaul of the prior NEPA regulations included a variety of modifications with the goal of facilitating “more efficient, effective, and timely NEPA reviews.”[1] These changes included new time limits on NEPA reviews, a narrower definition of “major federal action” that allows more projects to be categorically excluded from time-consuming NEPA reviews, and a new definition of “effects” that must be scrutinized during NEPA review. The 2020 rule eliminated the concepts of “direct,” “indirect,” and “cumulative” effects, explaining that these characterizations were an unnecessary source of confusion.[2] Instead, the 2020 definition of “effects” was changed to encompass those outcomes that are “reasonably foreseeable” results of the proposed action.

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On 29 June 2021, the Biden administration's CEQ delayed implementation of the 2020 rule,[3] extending until September 2023 the deadline for federal agencies to update their own NEPA policies to conform to the 2020 rule. Additionally, many states and environmental groups had filed lawsuits challenging the 2020 rule as inconsistent with NEPA's statutory language, but these actions have largely been dismissed or stayed as a result of the change of administration.[4] As the deadline has been extended to conform with the 2020 rule, it is likely that federal agencies will continue to use their pre-2020 regulations when conducting a NEPA review while Biden's CEQ works on a new NEPA rule. This uncertainty presents challenges for project development.

BIDEN STEPS BACK IN TIME

On 7 October 2021, the CEQ issued a Proposed Rulemaking, discussing its contemplated changes to the 2020 rule. This immediate review of the Trump rules was prompted by Biden's Executive Order 13990 and Executive Order 14008, both of which require agencies to revisit Trump-era regulations that may conflict with the Biden administration's environmental goals. In its Proposed Rulemaking, CEQ noted its view that the 2020 rule may be inconsistent with NEPA's statutory purpose.[5]

CEQ's proposal contemplates a two-phase rulemaking process. Phase 1 includes three modifications that CEQ prioritized because it concluded that they pose “significant near-term interpretation or implementation challenges for Federal agencies and would have the most impact to agencies' NEPA processes during the interim period.” The three prioritized changes involve:

1. Eliminating language requiring agencies to base the statement of purpose and need for a project on the goals of the applicant and the agency's authority when an agency has a statutory duty to review an application for a permit or other authorization (§§1502.13, 1508.1(z)).
2. Removing categorical exclusions from NEPA review and limitations on agency NEPA procedures for implementing CEQ's NEPA regulations (§ 1507.3).
3. Returning to the previous definition of “effects,” thereby requiring consideration of cumulative and indirect effects (§ 1508.1(g)).[6]

The Phase 1 rulemaking is limited, leaving many aspects of the 2020 rule in place. Phase 2 will include broader changes to the NEPA regulations in order to align with the Biden administration's environmental, climate change, and environmental justice objectives.[7] Phase 2 could also include changes to the 2020 rule's time limits on various levels of NEPA review and EIS page limits.

IMPACTS: CLIMATE AND INFRASTRUCTURE

The Biden administration's proposed changes arrive at a contentious time for environmental policy. The Biden administration's focus on environmental justice and climate change will inform how it evaluates NEPA's mandate to promote efforts that will prevent or eliminate damage to the environment and enhance public health and welfare. For example, federal agencies could require consideration of climate and environmental justice impacts when reviewing the cumulative effects of an agency action. Consistent with these goals, in February 2021, the Biden administration rescinded Trump-era draft guidance that sought to limit NEPA consideration of long-term greenhouse gas emissions, paving the way for additional climate considerations in NEPA reviews.[8]

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Additionally, the massive investments spurred by the US$1.2 trillion bipartisan Infrastructure Investment and Jobs Act will need to be navigated through these new NEPA regulations. CEQ's efforts to return to a more stringent NEPA review process may slow the deployment of many of these infrastructure investments. For all entities regulated under or otherwise impacted by NEPA, the Biden administration's proposal suggests that NEPA reviews will be marked by increasingly rigorous evaluation of environmental impacts in the coming years (and with that, potential regulatory uncertainty). The regulated community is advised to seek guidance on navigating the impending changes to the NEPA rules.

FOOTNOTES

[1] 85 Fed. Reg.43,304 (July 16, 2020).

[2] *Id*.

[3] 86 Fed. Reg. 34,154 (June 29, 2021).

[4] E.g., *Wild Va. v. CEQ*, No. 3:20-cv-00045 (W.D. Va. June 21, 2021) (dismissed as nonjusticiable for mootness or lack of standing).

[5] 86 Fed. Reg. 55,757 (Oct. 7, 2021).

[6] *Id*.

[7] *Id*. at 55,759.

[8] 86 Fed. Reg. 10,252 (Feb. 19, 2021).

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