THREE STEPS FORWARD, TWO STEPS BACK: THE BIDEN ADMINISTRATION'S REVISED NEPA RULES

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On Wednesday, 20 April, the Council on Environmental Quality (CEQ) finalized its first of two phases of rulemaking updates to the National Environmental Policy Act (NEPA) regulations (the 2022 Rule). The 2022 Rule unwinds a number of changes in the NEPA overhaul regulations finalized by the Trump Administration in 2020 (the 2020 Rule), and furthers President Biden's Executive Order to CEQ to ensure that federal permitting decisions consider the effects of greenhouse gas emissions and climate change.[1]

The 2022 Rule will affect all federal agencies and projects triggering NEPA environmental review. In particular, the 2022 Rule will be critically important to federal agencies seeking to implement the Biden Administration's policies to develop renewable energy. For instance, the Biden Administration has set goals for the development of 25 gigawatts (GW) of renewable energy on federal land by 2025[2] and 30 GW of offshore wind energy by 2030.[3] These land-based and offshore projects, along with their supporting infrastructure, will be subject to NEPA review.

THE 2022 RULE IN CONTEXT

The NEPA regulations, originally issued in 1978, remained unchanged until the Trump administration overhauled the regulations in 2020. Through the 2020 Rule, the Trump Administration sought to facilitate “more efficient, effective, and timely NEPA reviews.”[4]

Upon taking office, the Biden Administration immediately sought to change the 2020 Rule. In January, CEQ announced a proposed a “phase 1” rulemaking targeting three changes to the 2020 Rule, and on 20 April 2022, CEQ announced the 2022 Rule implementing these changes:[5]

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)). This change does away with a portion of the 2020 rule that constrained the federal agencies' discretion and flexibility to consider alternative project designs or approaches that are not entirely consistent with the goals of the project sponsor.
2. Re-establishing CEQ NEPA regulations as the baseline for federal agencies' NEPA standards and procedures for implementing NEPA (§ 1507.3). This change makes CEQ's NEPA regulations the “floor” rather than the “ceiling” for NEPA environmental reviews, providing federal agencies with flexibility to tailor NEPA procedures to the specific needs of the each agency and its stakeholders.

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3. Returning to the previous definitions of "effects," thereby requiring consideration of cumulative impacts and indirect effects (§ 1508.1(g)). This change ensures that federal agencies' NEPA documents evaluate all relevant environmental impacts resulting from the federal action, including climate change impacts.

The only significant change from the proposed to the 2022 Rule is the addition of a "reasonably foreseeable" clause in the definition of "effects," retaining the definition of "effects" and "impacts" as "changes to the human environment from the proposed action or alternatives *that are reasonably foreseeable*." As explained in the preamble to the 2022 Rule, the proposed rule had removed the "reasonably foreseeable" clause that was added in the 2020 Rule because CEQ assumed that reasonable foreseeability was always central to the definition of effects.[6] However, after considering submitted comments, CEQ explained that "this clause enhances clarity in line with longstanding agency practice and NEPA case law."[7]

According to a White House press release, the 2022 Rule establishes CEQ's NEPA regulations as a "floor, rather than a ceiling," for the environmental review standards that federal agencies should be meeting, noting that "[t]he proposal restores the abilities 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."[8]

UNCERTAINTY REMAINS

CEQ Chair Brenda Mallory envisions the 2022 Rule as restoring the basic NEPA safeguards that "will provide regulatory certainty, reduce conflict, and help ensure that projects get built right the first time." However, the back-and-forth between the 2020 Rule and the 2022 Rule injects some uncertainty into NEPA review processes at a time when the Federal government seeks to ramp up infrastructure projects.

For example, despite CEQ's efforts to return to some core elements of the 1978 rule, judicial and agency interpretations of the NEPA regulations that were developed between 1978 and 2020 may have limited applicability. There is also ongoing litigation brought by environmental groups challenging the 2020 Rule, creating additional uncertainty, though the Department of Justice may move to stay or dismiss the litigation in light of the 2022 Rule. Furthermore, the Biden Administration and federal agencies have yet to announce clear policies with defined processes to implement NEPA in an efficient and coordinated manner. Without explaining how to manage these challenges to NEPA implementation, Mallory states that "[p]atching these holes in the environmental review process will help projects get built faster, be more resilient, and provide greater benefits to people who live nearby."[9]

Apart from the targeted changes to the 2020 Rule, the 2022 Rule leaves in place a number of changes from the 2020 Rule. These include, for example: requiring environmental impact statements to be completed within two years and environmental assessments within one year; aggregating categorical exclusions for use across multiple agencies; considering comments only if they are "exhaustive"; and excluding smaller projects from NEPA review.

Additionally, CEQ intends to issue a "phase 2" rulemaking which will "more broadly revisit the 2020 NEPA regulations and propose further revisions" to the NEPA regulations.[10] This two-phase approach suggests that broader revisions may be coming from CEQ, but specifics on this second phase remain elusive.

The upshot is that uncertainty will remain. Despite an effort to take a few steps forward in streamlining the NEPA process, it is unclear if the 2022 Rule will have the desired effect. The thrust of the 2022 Rule is to reinsert longstanding definitions and practices to ensure comprehensive environmental review, consistent with

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Congressional policy. Given its narrow scope, the 2022 Rule may have limited practical impact on NEPA timelines. There is little in the 2022 Rule to guide agencies and project proponents in performing rigorous NEPA assessments efficiently. Given the broad changes implemented in the Trump-era 2020 Rule, the patchwork revisions in the 2022 Rule, and the broader revisions still to come, the regulated community should seek guidance for navigating this new era of NEPA processes. K&L Gates Environment, Land and Natural Resources practice group can assist clients in assessing the application of the new NEPA 2022 Rule to a particular project, and assessing the risk of that review.

FOOTNOTES

[1] https://www.federalregister.gov/executive-order/14008

[2] https://www.doi.gov/sites/doi.gov/files/mou-esb46-04208-pub-land-renewable-energy-proj-permit-coord-doi-usda-dod-epa-doe-2022-01-06.pdf

[3] https://www.energy.gov/articles/energy-secretary-granholm-announces-ambitious-new-30gw-offshore-wind-deployment-target

[4] https://www.federalregister.gov/documents/2020/07/16/2020-15179/update-to-the-regulations-implementing-the-procedural-provisions-of-the-national-environmental

[5] https://www.federalregister.gov/documents/2022/04/20/2022-08288/national-environmental-policy-act-implementing-regulations-revisions

[6] *Id*.

[7] *Id*.

[8] https://www.whitehouse.gov/ceq/news-updates/2022/04/19/ceq-restores-three-key-community-safeguards-during-federal-environmental-reviews/

[9] https://www.whitehouse.gov/ceq/news-updates/2022/04/19/ceq-restores-three-key-community-safeguards-during-federal-environmental-reviews/

[10] https://www.federalregister.gov/d/2021-21867/p-49

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