

## Council on Environmental Quality Proposes Revisions to 2020 NEPA Regulations

The Council on Environmental Quality has proposed amendments to its 2020 NEPA implementing regulations, adopted during the waning days of the Trump administration. The Proposed Rule, published in the October 7, 2021 Federal Register,<sup>[1]</sup> is the [first of two phases of rule-making](#) through which CEQ aims "to identify necessary revisions to comply with the law; meet the environmental, climate change, and environmental justice objectives of E.O.s 13990 ("Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis") and 14008 ("Tackling the Climate Crisis at Home and Abroad"); ensure full and fair public involvement in the NEPA process; provide regulatory certainty to stakeholders; and promote better decision making consistent with NEPA's statutory requirements." CEQ's proposal states that the Phase 1 rule-making proposes a ["narrow set of changes to the 2020 NEPA regulations."](#)

CEQ's proposal asserts that the 2020 NEPA regulations, adopted effective September 14, 2020,<sup>[2]</sup> [created implementation challenges on behalf of federal agencies and confused stakeholders and the general public](#). The proposed rule contends that the 2020 rule was an imperfect articulation of case law that has implications for climate change and environmental justice analysis. Therefore, CEQ states, it is restoring some of the language used in the original 1978 NEPA regulations.

### Proposed Changes

The Proposed Rule would make three key changes to the NEPA implementing regulations by:

1. **Restoring a Broad Definition of Impacts That Agencies Are Required to Evaluate.** In its own effort to address uncertainty, the 2020 NEPA regulations had called for agencies to focus on evaluating reasonably foreseeable impacts rather than categorizing them as "direct," "indirect," or "cumulative." Although CEQ said its 2020 regulations were not intended to limit the scope of analysis made necessary under U.S. Supreme Court NEPA caselaw, litigants in several cases contended that CEQ had unduly narrowed the scope of impacts. The proposed regulations again expressly require that agencies consider direct, indirect, and cumulative environmental impacts of a proposed decision or action. CEQ asserts this change reinstates agencies' ability to broadly identify the reasonably foreseeable effects of a proposed action using a context-specific analysis, particularly in the critical areas of climate change and environmental justice.<sup>[3]</sup>
2. **Restoring Provisions Regarding the Purpose and Need of a Proposed Action.** The purpose and need statement of an environmental document establishes the rationale for the agency's action, thereby setting the scope of analysis, including reasonable alternatives to the action, that an agency must consider. The 2020 NEPA Regulations added language to the purpose and need provision that required agencies tasked with reviewing an application for federal authorization to define the purpose and need of a particular project based on the goals of the project applicant and the agency's authority to review an application. The Proposed Rule would eliminate this added language, which CEQ describes as restoring agencies' flexibility to develop and analyze project alternatives beyond the stated goals of the project sponsor.
3. **Describing CEQ NEPA Regulations as a "Floor" to Allow Agencies Discretion to Develop Environmental Review Standards Beyond CEQ Regulatory Requirements.** This change would remove language added by the 2020 NEPA regulations that established the CEQ regulations as a ceiling

for agency NEPA procedures. Federal agencies would be able to tailor their NEPA procedures according to their statutory authorities, specific needs of the project, the affected community, and project stakeholders.

## **Implications**

The 1978 NEPA regulations' use of direct, indirect, and cumulative to describe those reasonably foreseeable impacts that must be evaluated has been the subject of years of NEPA litigation, especially with regard to the category of "cumulative impacts." Some courts found NEPA analyses to be deficient in part because of confusion over categories. To the extent the proposal calls for again using those categories, it may invite further litigation.

In effect, the proposed regulations would require that agencies evaluate climate change and environmental justice impacts of a proposed action. Critics of the 2020 regulations and related guidance had complained that they had inappropriately downplayed such considerations.

Federal agencies would also regain the authority to exceed the degree of environmental review required by CEQ's umbrella regulations through their own agency-specific NEPA procedures. This change has the potential to increase NEPA review timelines. It also has the potential to increase review efficiency and efficacy, as agencies may tailor their reviews to best fit their programs and needs.

## **Next Steps**

The CEQ is holding two online public meetings for the proposed rule: October 19, 2021, and October 21, 2021. Interested parties may register for those meetings [here](#).

The CEQ is also accepting public comments on the new rule through November 22, 2021.

Phase 2 of the NEPA rulemaking is anticipated to be released within the next few months.

## **Endnotes**

[1] 86 Fed. Reg. 55757 (Oct. 7, 2021).

[2] 85 Fed. Reg. 43304 (July 16, 2020).

[3] *See* 86 Fed. Reg. 55759 (Oct. 7, 2021) (stating that the 2020 NEPA regulations had the possible effect of limiting the NEPA analysis, with negative repercussions for climate change and environmental justice, and implying that undoing these changes would broaden the federal agencies' scope of analysis).

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