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### CEQ Regulations Replaced by Guidance for a Year of Living in Uncertainty



On February 19, 2025, the Council on Environmental Quality (CEQ) submitted to the Federal Register an interim final rule rescinding its National Environmental Policy Act (NEPA) regulations, which have been the foundation for environmental impact assessment in the United States since their promulgation in 1978.

Concurrently, CEQ posted general guidance to agencies to update their NEPA procedures within a year. Effective 45 days from publication in the Federal Register, and subject to public comment within 30 days, CEQ's action commits NEPA implementation to each agency's interpretation of NEPA and a variety of agency procedures that are based on the 1978 CEQ regulations. By swiftly rescinding its regulations, CEQ indicated that it will implement direction in President Donald Trump's Executive Order 14154 to "convene a working group to coordinate the revision of agency-level implementing regulations for consistency."

For many decades, the CEQ regulations have provided federal agencies with a consistent framework to implement NEPA, allowing for increased coordination and certainty for project applicants. By directing federal agencies to use its 2020 update to the CEQ regulations as an "initial framework for the development of revisions to their NEPA implementing procedures," CEQ has undercut the long-established interagency framework created by the NEPA regulations that applied to all federal agencies. Ironically, this is contrary to the Executive Order's prioritization of increasing "efficiency and certainty" in the NEPA process. While Congress did codify aspects of the 2020 CEQ regulations when it amended NEPA in the 2023 Fiscal Responsibility Act, the Act's codification focused on deadlines and page limits, without codification of CEQ's detailed procedures for public involvement and interagency coordination of environmental review. Those CEQ requirements, which were designed to foster efficiency and certainty based on a common set of standards, will not be replaced until the CEQ-led process completes the update of agency-level NEPA procedures that CEQ attempted in 2020 and again in 2024.

The upheaval in agencies' implementation of NEPA began with Section 5 of the order, "Unleashing Energy Dominance through Efficient Permitting," which rescinded CEQ's authority to issue regulations by revoking

Executive Order 11991, President Carter's 1978 order directing CEQ to promulgate regulations that are binding on federal agencies. The authority for CEQ regulations had been called into question, most recently by the D.C. Circuit Court of Appeals opinion in *Marin Audubon Soc'y v. Fed. Aviation Admin.*, No. 23-1067 (D.C. Cir. Nov. 12, 2024). However, until Executive Order 14154, every president had used CEQ regulations to ensure that federal agencies "use all practicable means . . . to improve and coordinate Federal plans, functions, programs, and resources . . ." 42 U.S.C. § 4331(b). The Justice Department's arguments in favor of CEQ authority were subsequently rejected by the U.S. District Court for the District of North Dakota in a ruling that vacated the 2024 Biden administration rule on the grounds that CEQ lacked rulemaking authority. Though the North Dakota ruling returns CEQ to the 2020 regulations, Executive Order 14154 directs CEQ to rescind them, issue guidance, and coordinate the revision of agency-specific NEPA regulations.

Lost in the interim final rulemaking and the concurrently issued guidance is CEQ direction on the interpretation of its governing statute, which is entitled to "substantial deference" under precedent of the Supreme Court of the United States. The CEQ guidance issued to agencies on February 19 will not be legally operative until it is implemented in the form of updated NEPA regulations adopted by various agencies, subject to CEQ coordination "for consistency." The interim rule claims that the new framework design will "expedite permitting approvals and meet deadlines established in the Fiscal Responsibility Act of 2023 (Public Law 118-5)." But aside from implementing the Fiscal Responsibility Act amendments to NEPA, the other aspects of NEPA practice will be open to agency interpretation in the absence of CEQ regulations. Important aspects of NEPA practice may no longer be codified, including the identification of "significant" environmental effects, the requirements for "scoping" the environmental impact assessment, interagency coordination, and issue resolution. Other aspects of NEPA practice, such as the consideration of the "cumulative" nature of "reasonably foreseeable" effects, are called into question by the guidance. Because Executive Orders 12898 and 14096 have been revoked, the CEQ guidance directs that "NEPA documents should *not* include an environmental justice analysis, to the extent that this approach is consistent with other applicable law."

As for the timing and process for agency updates of their NEPA procedures, the CEQ guidance indicates that CEQ will play a coordinating role as the host of monthly meetings of the regular Federal Agency NEPA Contacts and the E.O. 14154 NEPA Implementation Working Group. Under its regulations, 40 CFR 1507.3, CEQ had required public comment on proposed agency NEPA procedures and reviewed all final NEPA procedures for "conformity" with the statute. However, under the new guidance, CEQ recommends that agencies provide between 30 and 60 days for public comment on proposed NEPA regulations, "to the extent that public comment is required." In its interim final rule, CEQ argues that its action falls within the Administrative Procedure Act (APA) exception for "interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice." 5 U.S.C. 553(b)(A). CEQ guidance does not address the extent to which this APA exception applies to an agency's revision of its NEPA procedures, but indicates that public comment should not be undertaken voluntarily if public comment is not required.

While the revisions to agency NEPA procedures are ongoing, infrastructure development proponents and other users of the NEPA process will need to engage with agencies on their approach to reconciling their existing NEPA procedures with the Fiscal Responsibility Act amendments to NEPA. Given the importance of public involvement in alternatives analysis and mitigation decisions, this period of changing standards carries a high risk of environmental conflict and litigation. Project sponsors will carry the responsibility not only to help lead the NEPA process but also to "bank" as much trust, goodwill, and cooperation with stakeholders as possible to reduce the scope and duration of disagreements and associated delays. Less obvious, but possibly more impactful, will be the challenges of obtaining agency action while new standards are in development and agency personnel change. It will be even more important now than before to stand in the shoes of those with decision-making authority when framing the core analytical and public involvement requirements of NEPA.

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