

*NEPA Modernization: Key Elements of the Updated CEQ Regulations**A. Background*

The National Environmental Policy Act (NEPA, or the Act) sets out a process to ensure that decisions on federal projects are informed by analysis of environmental impacts, and it grants the public the right to both access this information and contribute directly to the process.¹ The Act established the Council on Environmental Quality (CEQ) to ensure federal agencies' compliance with NEPA's directives.² The CEQ regulations set forth NEPA's compliance structure. A CEQ Report released in June 2020 found that the average Environmental Impact Statement (EIS) took four-and-a-half years to complete.³ On August 17, 2017, President Trump signed Executive Order 13,807 directing the CEQ to review and revise NEPA's implementing regulations, with the goal of expediting the federal environmental review process.⁴ Pursuant to the order, the CEQ released its Final Rule after a notice-and-comment period, updating the regulations on July 15, 2020.⁵ It was the first substantial update to the regulations in more than forty years and the changes were made with the express goal of speeding up the process of environmental decisionmaking for federal projects.⁶ The updated regulations will likely face legal challenges and courts will be tasked with interpreting the new regulations within the context of the robust case law that has developed throughout the fifty years of NEPA's existence.

B. Key Updates

In keeping with the goals of the revisions, the new regulations incorporate the "One Federal Decision" policy from Executive Order 13,807.⁷ They set out time, page, and word limits for both environmental assessments and environmental impact statements. Environmental assessments must be prepared within one year and EISs must be

1. Nat'l Env't Pol'y Act, 42 U.S.C. § 4321- 4347 (1969).

2. *Id.*

3. Council on Env't Quality, *Env't Impact Statement Timelines (2010-2018)*, (2020).

4. Exec. Order No. 13,807, 82 Fed. Reg. at 40461-69 (2017).

5. CEQ Regul. for Implementing the Procedural Provisions of NEPA, 40 C.F.R. § 1500-08 (2020).

6. Council on Env't Quality, *NEPA Modernization*, <https://www.whitehouse.gov/ceq/nepa-modernization/> [<https://perma.cc/VK64-XWA3?type=image>].

7. 40 C.F.R. § 1501.7 (2020); see Exec. Order No. 13,807, 82 Fed. Reg. at 40461-69 (2017).

completed within two years, unless the lead agency's senior official agrees to an extension.⁸

NEPA applies to "major federal actions" and the new regulations narrow this definition, thereby subjecting fewer projects to the statute. The new regulations create a threshold applicability analysis and list specific actions that do not qualify under the new definition. The federal government financing a non-federal project without "sufficient control and responsibility" over the project would not qualify as a major federal action.⁹

The new regulations change the range of alternatives required to be in compliance with NEPA.¹⁰ Previously, all reasonable alternatives to a project had to be considered. Now the only alternatives that need to be considered are those that: (1) are "technically or economically feasible," (2) meet the purpose and need for the proposed action, and (3) satisfy the applicant's goals.¹¹

One of the most impactful changes in the new regulations is the elimination of the requirement to consider cumulative and indirect impacts when analyzing a project. Indirect impacts are those that are caused by the project but are removed from it in distance or time.¹² Cumulative impacts are those effects on the environment caused by incremental actions added to past, present, and reasonably foreseeable future actions, by both public and private parties, stemming from the same project.¹³ This change encourages regulators to look at a project's effects in isolation from other factors, including past and future conditions.

C. *Looking Ahead*

NEPA's aim is not to set specific environmental standards but rather to ensure that when major federal projects occur, environmental effects are considered. President Trump directed the CEQ to streamline this consideration process, which has historically been time consuming.¹⁴ The updated CEQ regulations limit the scope of that consideration through their time and page limits, narrow the scope of projects to which NEPA applies, change the regulations controlling alternatives and cumulative

8. 40 C.F.R. § 1500-08 (2020).

9. 40 C.F.R. § 1508.1 (2020).

10. 40 C.F.R. § 1502.14 (2020).

11. 40 C.F.R. § 1508.1(z) (2020).

12. 40 C.F.R. § 1508.8 (2005).

13. 40 C.F.R. § 1508.7 (2005).

14. Council on Env't Quality, *supra* note 3, at 3-4 (from 2010 to 2018 it took federal agencies an average of four-and-a-half years to complete an EIS).

impacts, and make numerous other updates not discussed here. The CEQ regulations are owed deference, but there is likely to be litigation questioning whether the regulations strayed too far from the NEPA statute itself as written by the legislature and understood through case law that has developed over the past fifty years. It is predicted that the Biden Administration will seek to undo many of the deregulatory actions taken by President Trump. With the support of a democratic senate majority, Congress could make use of the Congressional Review Act—which allows Congress to overturn rules issued by federal agencies—to reverse these NEPA rollbacks.¹⁵ There is also nothing that would stop the new administration from making changes to the regulations itself.¹⁶ In fact, the Biden Administration included the Trump Administration’s NEPA Rollbacks in its published “List of Agency Actions for Review” issued by the Trump Administration that the Biden Administration plans to re-evaluate in the coming days.¹⁷ Between the new presidential administration taking office and the litigation that will surely follow should the new CEQ regulations remain in place, the fate of the scope and power of NEPA currently remains unclear.

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15. Jennifer Adams et al., *Environmental Law Outlook Under a Biden Administration*, JDSUPRA (Nov. 11, 2020), <https://www.jdsupra.com/legalnews/environmental-law-outlook-under-a-biden-14857/>.

16. Jessica Kutz, *Trump Gutted NEPA Regulations, but a Biden Presidency Could Restore Them*, HIGH COUNTRY NEWS (Oct. 30, 2020), <https://www.hcn.org/issues/52.12/south-interview-trump-gutted-nepa-regulations-but-a-biden-presidency-could-restore-them>.

17. *Fact Sheet: List of Agency Actions for Review*, WHITE HOUSE BRIEFING ROOM (Jan. 20, 2021) <https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-list-of-agency-actions-for-review/> [<https://perma.cc/CBS2-3P7P?type=image>].

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