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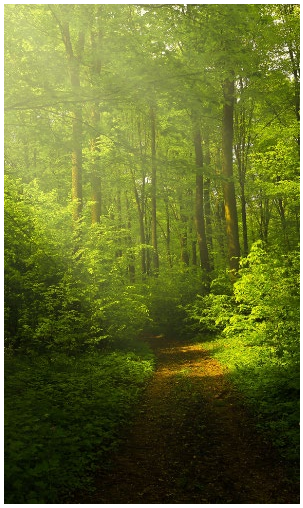

Biden Administration Announces Proposed Phase Two NEPA Regulations

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On July 28, 2023, the Council on Environmental Quality ("CEQ") announced the "Bipartisan Permitting Reform Implementation Rule," the highly anticipated Phase 2 Notice of Proposed Rulemaking reforming the implementing regulations of the National Environmental Policy Act ("NEPA"). In this second phase of the two-phased process, the Biden administration proposes extensive revisions to current version of the rule ("2020 Rule"). In particular, CEQ codified amendments recently made to NEPA by the Fiscal Responsibility Act of 2023 ("FRA"); restored many of the foundational concepts from the 1978 regulations; removed what the Biden administration deems "legally unstable" provisions introduced in the previous administration; and expressly required for the first-time consideration of environmental justice and climate change impacts.

The proposed rule, once finalized, could impact a broad range of projects needing federal permits or funding. Many of the efficiency measures reflected in the proposed rule implement changes that were recently made in the FRA. Although these changes have the potential to minimize some long-standing issues in the NEPA process around delays and litigation, ultimately, the impact of the proposed changes will be highly dependent on how the individual federal agencies *carry out* the changes through their own regulations and practices. Further, and contrary to the intent of the FRA, several of the proposed changes have the potential to hinder these efficiency measures (such as the provisions on mitigation and needed scientific studies). Additionally, the proposed rule's highly-anticipated provisions on climate change and environmental justice likely lack the needed specificity to address issues of agency consistency across reviews and litigation.

CEQ is accepting comments regarding the proposed rule through September 29, 2023. The timing for the finalization of this rule is not known but will likely occur several months in advance of the 2024 presidential election (before the Congressional Review Act time limit).

Overview of Phase 2 Changes

CEQ provides five justifications for the Phase 2 revision. First, the proposed rule implements the amendments to NEPA made by the FRA in June. Second, it reverts provisions revised by the 2020 Rule to the language from the 1978 regulations while making minor clarifying changes. Third, it removes 2020 Rule provisions that CEQ considers "imprudent or legally unsettled." Fourth, it makes changes aimed at "enhanc[ing] consistency and provid[ing] clarity to improve the efficiency and effectiveness of the environmental review process." Fifth, it proposes revisions that would "implement decades of CEQ and agency experience implementing and complying with NEPA, foster science-based decision making—including decisions that account for climate change and environmental justice—improve the efficiency and effectiveness of the environmental review process, and better effectuate NEPA's statutory purposes."

The number of proposed revisions is extensive, and the extent to which the changes present a new approach to NEPA review varies on a case-by-case basis. An overview of some of the most critical changes in the proposed rule is below.

- ***Climate Change and Environmental Justice.*** The proposed rule aims to advance the Biden administration's policy commitment to addressing climate change and environmental justice concerns. Among other things, it would add environmental justice and climate change to the list of environmental consequences that must be considered in a NEPA review. Under the proposed rule, environmental documents must analyze "[a]ny reasonably foreseeable climate change-related effects, including the effects of climate change on the proposed action and alternatives," as well as "[t]he potential for disproportionate and adverse human health and environmental effects on communities with environmental justice concerns." Consistent with existing CEQ and other agency guidance, many agencies have already been undertaking an

analysis of climate change and environmental justice impacts in their NEPA analyses—but this change establishes an explicit requirement to do so.

With respect to climate change, CEQ invites comment on whether it should codify its 2023 GHG Guidance, and if so, which parts. (Please see our prior alert for an overview of the GHG Guidance). This would be done as a separate rulemaking.

Regarding environmental justice, the proposed rule provides a definition of "environmental justice" that aligns with the definition in Executive Order 14096 and encourages agencies to incorporate mitigation measures to address disproportionate burdens on communities with environmental justice concerns.

- ***Revised Definition of "Major Federal Action."*** CEQ proposes to revise the definition of "major Federal action"—the trigger for environmental review under NEPA—to align with the FRA's statutory changes, including exclusions codified in the FRA. Several of these exclusions relate to projects receiving federal funding. CEQ attempts to minimize some uncertainty regarding the exclusions codified in the FRA by providing that "generally . . . Federal financial assistance, other than minimal Federal funding, is a major Federal action where the Federal agency has authority and discretion over the financial assistance in a manner that could address environmental effects from the activities receiving the financial assistance." CEQ notes that "[i]n such circumstances, the agency has sufficient control and responsibility over the use of the funds or the effects of the action for the decision to provide financial assistance to constitute a major Federal action." CEQ requests input on whether additional procedures, such as thresholds for the amount or proportion of federal funding necessary for an agency action to constitute major federal action, could increase predictability in when funding will be considered a major federal action.

- ***Limiting EIS Requirement.*** The proposed rule clarifies that while projects may have both beneficial and adverse effects, "only actions with significant adverse effects require an environmental impact statement." It also notes that a significant adverse effect may exist even if the agency considers that on balance the effects of the action will be beneficial.

- ***Permitting Preparation by the Project Sponsor.*** The proposed rule integrates requirements from the FRA, slightly modifying the 2020 Rule, that allow project sponsors to prepare EISs. Agencies are required to establish procedures for project sponsors to prepare environmental documents, and the lead agency remains ultimately responsible for the final content of environmental documents.

- ***Categorical Exclusions.*** The proposed rule would make a number of changes to the use of categorical exclusions. These changes include, but are not limited to:
    - implementing an amendment in the FRA providing that an agency can apply or adopt another agency's categorical exclusion;
    - clarifying that categorical exclusions are limited to categories of actions that normally do not have a significant effect on the human environment, individually "or in the aggregate," similar to the pre-2020 regulations;
    - allowing agencies to establish categorical exclusions "individually or jointly with other agencies" by using a shared substantiation document;
    - allowing agencies to establish categorical exclusions through land use plans, decision documents supported by a programmatic EIS or environmental assessment ("EA"), or other equivalent planning or programmatic decisions;
    - defining "extraordinary circumstances" and including as examples "potential substantial effects on sensitive environmental resources, potential disproportionate and adverse effects on communities with environmental justice concerns, potential substantial effects associated with climate change, and potential adverse effects on historic properties or cultural resources;" and
    - clarifying that, even if "extraordinary circumstances" exist, an agency may still apply a categorical exclusion if it either determines that the proposed action does not have the potential to result in significant effects or modifies the proposed action to address the extraordinary circumstance.

- ***Environmental Consequences and Significance Determinations***. The proposed rule addresses factors agencies must consider in determining significance of effects and restores the concepts from the 1978 rule that require the consideration of context and intensity. The proposed rule indicates that in evaluating context, the appropriate environment may include not just the project area, but the global, national, regional, and local environment. Furthermore, it indicates that proximity to unique or sensitive resources or vulnerable communities should be evaluated as part of the context. Carrying forward the requirement that impacts to environmental justice communities must be evaluated in the environmental document, the proposed rule identifies environmental justice as a factor to evaluate when determining the intensity of the impacts.

  Additionally, the proposed rule removes consideration of public controversy from the factors considered in determining whether a proposal has significant impacts and replaces it with "the degree to which the potential effects on the human environment are highly uncertain." CEQ clarified in the preamble that the uncertainty of an effect is an appropriate consideration, but that public controversy over an activity or an effect is *not* a factor for determining significance.

- ***Alternatives.*** The proposed rule adds a requirement that the environmental document identify the environmentally preferable alternative(s). While identification of the environmentally preferable alternative was previously required in the Record of Decision, it had not been required in the environmental document. CEQ's stated purpose in adding this requirement is to "maximiz[e] environmental benefits, such as addressing climate change-related effects or disproportionate and adverse effects on communities with environmental justice concerns; protecting, preserving, or enhancing historic, cultural, Tribal, and natural resources, including rights of Tribal Nations that have been reserved through treaties, statutes, or Executive Orders."

  The proposed rule clarifies that an agency is not obligated to consider "every conceivable alternative to a proposed action" but rather is to consider "a reasonable range of alternatives that will foster informed decision making."

  Additionally, the proposed rule indicates that agencies *may* include reasonable alternatives not with the jurisdiction of the lead agency, although CEQ anticipates that this will happen infrequently and notes that such alternatives still must be technically and economically feasible and meet the proposed action's purpose and need. CEQ's prior guidance had stated that an alternative outside the legal jurisdiction of the lead agency must be analyzed in the EIS if it is reasonable.

- ***Mitigation***. Although NEPA is not an action-forcing statute (i.e., NEPA does not *require* implementation of mitigation), the proposed rule encourages federal agencies to mitigate the impacts of their actions in a number of different ways and imposes requirements on agencies that rely on mitigation in making their environmental determination. With respect to environmental justice impacts, the proposed rule provides that agencies "should, where relevant and appropriate, incorporate mitigation measures that address or ameliorate significant adverse human health and environmental effects of proposed federal actions that disproportionately and adversely affect communities with environmental justice concerns." Further, when the agency relies on and commits to mitigation for any impact in a record of decision, finding of no significant impact, or separate document, the proposed rule would require that the agency prepare a monitoring and compliance plan.

- ***Scientific Information.*** The proposed rule aligns with the FRA amendments by recognizing that "new scientific or technical research" is generally not required when determining the appropriate level of NEPA analysis. CEQ expressly invites comments on this approach—and one potential comment could be whether this should apply beyond the NEPA level of review determination phase to NEPA reviews generally.

  CEQ removed the statement, first added by the 2020 Rule,"[a]gencies are not required to undertake new scientific and technical research to inform their analyses" from the provision governing information to be included in the environmental analysis. Although CEQ indicated that it removed this language to make clear that agencies are not limited to use of existing

materials and may undertake site surveys, conduct investigations, and perform other forms of data collection, this language appears to invite agencies to require new, additional information. This appears to be at odds with the intent of the 2020 Rule and FRA to limit the degree to which applicants could be required to prepare new information to support an environmental review.

The proposed rule also addresses how scientific information should be used in the context of climate change analysis. CEQ proposes to require agencies to use projections when evaluating reasonably foreseeable effects, including climate change-related effects. Under the proposed rule, agencies can use models that analyze a range of possible future outcomes, but agencies must disclose the underlying relevant assumptions or limitations of those models.

- ***Programmatic Environmental Reviews and Tiering.*** CEQ notes that it continues to encourage agencies to engage in programmatic environmental reviews for broad federal actions—and that this continues to be "a best practice for addressing broad actions." The proposed rule provides examples of types of agency actions that may be appropriate for programmatic environmental review, including programs, policies, or plans; regulations; national or regional actions; or action with multiple stages that are part of an overall plan or program. For tiered documents, the proposed rule would clarify that agencies need to discuss the relationship between the tiered analysis and the previous review. CEQ also invites comments on additional changes that would further promote the effective use of programmatic reviews.

- ***Provisions for Concise and Timely Reviews.*** The proposed rule also continues efforts from the 2020 Rule and FRA to improve the efficiency of environmental reviews. The proposed rule retains the page limits introduced in the 2020 Rule that were codified by the FRA and removes the 2020 Rule's provision that allowed a senior agency official of the lead agency to approve longer documents that exceed the page limits (75 pages for EAs, 150 pages for EISs, and 300 pages for EISs of extraordinary complexity).

  The proposed rule would also align the regulatory text with the statutory amendments in the FRA for the presumptive timelines for EAs and EISs, including by clarifying when to begin the clock in measuring the timelines. Additionally, the proposed rule adds a new process whereby federal agencies – but not project sponsors – may engage CEQ to assist informally in resolving disputes between agencies regarding the potential effects of a proposal. The purpose of this provision seems to be to resolve disputes early in the process and thereby avoid delays later in the process.

- ***Legal Review Exhaustion Requirements.*** The proposed rule removes what CEQ characterizes as "legally vulnerable provisions" introduced by the 2020 Rule, including requirements on the contents of public comments, and provisions limiting judicial review. Specifically, the proposed rule would remove:
  - the "exhaustion" requirement introduced by the 2020 Rule;
  - a provision regarding monetary bonds and other security requirements; and
  - a provision that limited a court's ability to provide injunctive relief where it found NEPA violations, regardless of whether the proposed action could threaten public health or safety.

  Ultimately, these changes will make it easier for plaintiffs to obtain judicial review of NEPA documents than under the 2020 Rule.

Potential Implications

The changes in the proposed rule are numerous and wide-ranging in subject matter. First, many of the proposed changes can generally be characterized as a reversion from the 2020 Rule to the 1978 Rule, with some minor clarifying language. Given the short timeframe that the 2020 Rule was effective, the controversy surrounding those regulatory changes, and the robust case law on NEPA that came before the 2020 Rule, it is questionable whether many agencies used the 2020 Rule to guide the substance of their NEPA analyses.

Many of the efficiency measures reflected in the proposed rule implement changes that were recently made in the FRA. While the changes that implement the FRA have the potential to minimize some long-

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standing issues in the NEPA process around delays and litigation, ultimately, the impact of the proposed changes will be highly dependent on how the individual federal agencies *carry out* the changes through their own regulations and practices. For example, even after the 2020 Rule adopted streamlining measures, many agencies found ways to circumvent timelines and page limits.

Although the proposed rule for the first time imposes an explicit regulatory requirement to evaluate climate change and environmental justice impacts, many agencies were already analyzing those impacts in their NEPA documents because case law has generally required at least some level of analysis of those impacts. The proposed rule fails to provide sufficient detailed direction on some of the more nuanced issues regarding how those analyses should be conducted and what level of analysis is required. It seems likely that agencies will continue to rely on existing guidance documents that provide more detail on how to conduct environmental justice and climate change analyses. Furthermore, undoubtedly litigation will continue that focuses on the adequacy of environmental justice and climate change analyses.

CEQ is accepting public comment on its proposed rule through September 29, 2023. After CEQ issues a final rule, individual federal agencies are likely to undertake rulemakings to update their NEPA implementing regulations to align with CEQ's changes. In addition, federal agencies may issue guidance on their respective NEPA implementation. No doubt politics, namely which party controls the Executive Branch, will affect the scope of agency-specific NEPA regulations, and the vigor with which agencies implement CEQ's proposed changes.

For More Information

Van Ness Feldman closely monitors and counsels clients on NEPA-related issues. If you would like more information on how these updates may impact your business, please contact Molly Lawrence, Jenna Mandell-Rice, Rachael Lipinski, April Knight, Jonathan Simon, Joe Nelson, or any member of the firm's Land, Water, and Natural Resources practice in Washington, D.C. at (202) 298-1800 or in Seattle, WA at (206) 623-9372.

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