



Insight

CEQ Proposes to Reverse Parts of Trump's NEPA Reforms

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EXECUTIVE SUMMARY

- The Council on Environmental Quality proposed the first of two planned rules aimed at reversing most of the Trump Administration's National Environmental Policy Act reforms.
- The proposed rule will scrap provisions from the Trump Administration aimed at reducing environmental review times for infrastructure and other projects needing federal approval.
- While the proposed rule will revert to policy that led to review times doubling since the 1970s, a second proposed rule will likely go even further.

INTRODUCTION

The Biden Administration's Council on Environmental Quality (CEQ) [proposed](#) the first of two planned rules that are expected to largely reverse a 2020 final [rule](#) issued by the Trump Administration regarding implementation of the National Environmental Policy Act (NEPA). While the 2020 rule limited the scope of review and established deadlines to advance infrastructure projects in a timelier manner, the proposed rule would expand what agencies need to consider in ways that will have the effect of increasing review times and project uncertainty.

This analysis reviews the provisions of the proposed rule (Phase I) and their implications for infrastructure permitting and considers what may lie ahead in a forthcoming second rule (Phase II).

PROVISIONS OF THE PROPOSED RULE

The CEQ is responsible for establishing regulations implementing NEPA. Each agency is then tasked with ensuring that their own NEPA regulations adhere to the requirements of CEQ's provisions. In effect, CEQ's rule acts as the standard from which all projects that need federal approval must consider environmental effects.

The 2020 final rule issued by the Trump Administration's CEQ took [steps](#) to address lengthy delays in the federal permitting process due to NEPA. According to a 2018 CEQ [study](#), review times have more than doubled since the 1970s and 25 percent of reviews took more than six years.

The Biden Administration's proposal takes aim at three provisions of the 2020 rule that were intended to lessen review times. The first is to revert to the language of the previous regulations (from 1978) regarding the statement of "purpose and need" of a proposed action. The 2020 rule required agencies to base this statement on the goal of the project of the permit seeker – in essence requiring agencies to review proposed projects with the goal of getting it achieved. The new proposal would not prioritize the goal of the project, but instead weigh the goal against other factors, including the public interest.

The second change is to reverse language from the 2020 rule that required agencies to ensure their own NEPA regulations removed inconsistencies with CEQ's regulations and prohibited agencies from additional review procedures that went beyond CEQ's. While the Trump Administration's goal with these mandates was to ensure consistency and predictability with NEPA rules across the federal government, the Biden Administration contends that they acted as "ceiling requirements" rather than the "prior understanding and practice" that CEQ's rules set a minimum level of requirements.

The third change would broaden the definition of "effects" that agencies use to evaluate environmental impacts and restore the consideration of cumulative impacts, such as future emissions that may exacerbate climate change, in reviewing proposed actions. The 2020 rule limited consideration to only immediate, foreseeable impacts.

IMPLICATIONS OF THE PROPOSED RULE

The likely effect of the proposed changes is that they will restore three components of the pre-2020 regulations that have contributed to review times doubling since the 1970s. While the proposed rule panned the Trump Administration's focusing of the "purpose and need" statement on the applicant's goal as possibly having negative environmental consequences, viewing projects from the applicant's standpoint would have helped direct review. Instead, the proposed changes will ensure that those opposing projects – whether on viable environmental reasons or specious ones – have additional chances to seek to delay a final decision.

Similarly, allowing agencies to add layers of review beyond CEQ's regulations – while somewhat prescient in recognizing different agencies may have different review needs – deals a substantial blow to the predictability and certainty that would greatly improve the environmental review process and prevent needless delays of infrastructure projects.

The expanded definition of effects and the inclusion of cumulative impacts would likewise enable project opponents to raise countless issues during review that would add to the number of assessments applicants would need to complete – an expensive increase in the amount of time and paperwork that would need to be spent on an application.

While the Biden Administration's CEQ views these proposed revisions as necessary to ensure the NEPA process is duly completed, the result will be additional obstacles for many of the infrastructure projects on which the administration has staked much of its success.

POSSIBLE PHASE II CHANGES

The proposed changes in the Phase I rule are what the CEQ termed in the Spring 2021 Unified [Agenda](#) as a "narrow set of changes" despite their likely effects on review times. Yet those changes are indeed narrow compared to what the Phase II rule, [scheduled](#) to appear as a proposed rule by the end of the year, will likely require.

The Phase II rule will include revisions on public involvement in reviews, likely with an eye toward expanding opportunities to raise objections to proposed projects. It will also likely go further than Phase I in requiring climate change considerations to be factored into permitting decisions.

A big unknown about the Phase II rule is whether it will propose to remove the two-year deadline for an agency

to finalize an environmental impact statement from the time it informs the public it is considering a project. This component of the 2020 rule directly addresses the long delays in the NEPA review process identified in the 2018 study but is viewed by many environmental interests as arbitrary and may be a target for CEQ.

CONCLUSION

The CEQ's proposed Phase I NEPA rule is the first of two planned rules that would undo reforms finalized in 2020. The proposed revisions are likely to increase permitting times and uncertainty for applicants and decrease the number of projects ultimately approved. A forthcoming Phase II proposed rule will likely reverse the 2020 rule to a greater degree.

What remains to be seen is how the Biden Administration reconciles its proposed NEPA changes with how they will slow many of the infrastructure projects it touts as critical to the United States' economic future.