



OVERVIEW OF SIGNIFICANT NEPA UPDATES

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Roadmap

- History of NEPA
- Biden Administration Phase I Rulemaking
- Fiscal Responsibility Act
- Biden Administration Phase II Rulemaking
- Final Thoughts and Next Steps

History Of NEPA

- Enacted in 1970
- A procedural statute that requires federal agencies to assess the environmental impacts of proposed major federal action
- CEQ issued its first set of regulations in 1978 (40 C.F.R. 1500-1508)
- Trump Administration issued the first comprehensive set of regulatory amendments
- Biden Administration issued Phase I Amendments in 2022
- Congress passed the Fiscal Responsibility Act of 2023, amending the statute
- Biden Administration issued Phase II Notice of Proposed Rulemaking on July 31, 2023

Biden Administration Phase I Rulemaking

- Final Rule Published April 20, 2022
- Targeted reversal of controversial changes made during the Trump Administration.
- Clarified that agencies may consider a variety of factors when assessing an application for an authorization and removing the requirement that the agency base the purpose and need on the goals of the applicant and the agency's statutory authority. 40 C.F.R. 1502.13.
- Removed language that could be construed as limiting agencies' flexibility in developing or revising procedures to implement NEPA specific to their programs and functions. 40 C.F.R. 1507.3
- Restored original definition of "effects" to include direct, indirect, and cumulative effects. 40 C.F.R. 1508.1(g).

Fiscal Responsibility Act

- Enacted June 3, 2023
- Bipartisan effort that raised the debt ceiling and address spending in a variety of areas
- First time since 1970 that the statutory language of NEPA was changed
- Intended to address long-standing delays in federal permitting by reducing the scope of NEPA jurisdiction

Fiscal Responsibility Act

- Limits the scope of EISs and EAs to reasonably foreseeable impacts to the environment from a proposed project
- Amends NEPA to place a 2-year limit on EISs and a 1-year limit on EAs with page limits that are enforceable by court action
- Establishes a process to determine a lead federal agency
- Allows for project proponents to contract or conduct their own EIS or EA under supervision of the lead agency
- Includes “reasonably foreseeable” effects analysis to establish guardrails and ensure a reasonably close causal relationship
- Establishes threshold determinations by the lead federal agency that would exclude projects early
- Allows tiering of environmental review with programmatic NEPA documents
- Narrows the definition of ‘major federal action’

Biden Administration Phase II Rulemaking

- Notice of Proposed Rulemaking Issued on July 31, 2023
- CEQ published a redline comparison of the proposed and current rule
- Vehicle for Biden Administration priorities including implementation of the Fiscal Responsibility Act
- First-time codification of climate change and environmental justice principles for NEPA purposes



Biden Administration Phase II Rulemaking

ENVIRONMENTAL JUSTICE

- The proposed rule would codify a definition of “environmental justice” for NEPA purposes.
- An alternatives analysis should identify and assess alternatives that address adverse health and environmental effects disproportionately affecting communities with EJ concerns
- EJ would be incorporated into the definition of “effects”

Biden Administration Phase II Rulemaking

CLIMATE CHANGE

- The proposed rule would codify agency NEPA practice with respect to studying climate change related effects
- Would define “effects” to include “climate change-related effects including the contribution of a proposed action and its alternatives to climate change, and the reasonably foreseeable effects of climate change on the proposed action and its alternatives.”
- Agencies are encouraged to use the NEPA process to identify and assess alternatives to a proposed action that will reduce climate change-related effects.

Biden Administration Phase II Rulemaking

BENEFICIAL EFFECTS

- Only actions with significant adverse effects would require an EIS
- Agencies would be allowed to determine whether the beneficial effects outweigh adverse effects
 - A renewable energy project with short-term construction related GHG emissions but overall long-term reductions in GHG emissions
 - Forest Restoration project that may have short-term adverse effects on a species by displacing it from the area while the project is carried out but also long-term beneficial effects from reduction in severe wildfire risk

Biden Administration Phase II Rulemaking

SIGNIFICANCE DETERMINATION – CONTEXT AND INTENSITY

- Proposed rule substantially revises how NEPA is applied (i.e., whether the effects of a proposed action are significant)
- Directs agency to examine the “context” and “intensity” of effects
- “Context”
 - Narrowed to potentially affected environment
 - Further defines what “context” means, such as proximity to sensitive resources
- “Intensity”
 - Returning to 1978 language (2020 Rule used “Degree”)
 - Reinstatement of a list of factors that were used to determine intensity
 - Clarifies that agencies should consider duration of effects

Biden Administration Phase II Rulemaking

CATEGORICAL EXCLUSIONS

- Proposed rule adds new forms and means of adopting CEs
- Agencies may establish joint CEs with other agencies
- Agencies may establish CEs outside of their NEPA procedures
 - Land Use Plan
 - Decision document supported by PEIS
- CEs can be tailored to specific contexts, geographies, or project types
- Will allow decision-makers to consider cumulative effects of related actions on a geographic area over a longer time frame

Biden Administration Phase II Rulemaking

INNOVATIONS

- A new regulation at 40 C.F.R. 1506.12 would allow federal agencies to pursue innovative approaches to NEPA compliance to address “extreme environmental challenges” due to climate change
- CEQ would review any agency request regarding such innovative approaches within 60 days
- Examples of potential innovative approaches include:
 - New ways to use information technology
 - Cooperative agreements with local communities/stakeholders
 - Methods to incorporate Indigenous Knowledge
 - Innovative tools to engage public and enhance public comment opportunities

Biden Administration Phase II Rulemaking

FINAL THOUGHTS

- Comment Period on Proposed Rule closed September 29, 2023

Questions?



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