

CLIENT ALERT

White House Updates Rules for Environmental Reviews of Federal Actions

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On July 16, 2020, the Trump administration's Council on Environmental Quality (CEQ) published a [final rule](#) revising the regulations implementing the National Environmental Policy Act (NEPA) – the first substantial rewrite to the regulations guiding how the Executive Branch is to consider the environmental impacts of federal actions since the rules were first issued more than four decades ago.

Under NEPA, federal agencies must prepare “a detailed statement” – known as an environmental impact statement – to accompany proposals for federal legislation and other major federal actions that significantly affect the quality of the human environment. The statement must describe the environmental impact of the proposed action, any adverse environmental effects which cannot be avoided, and alternatives to the proposed action, among other information, and must be prepared after consulting with any other federal agencies with relevant expertise. 42 U.S.C. § 4332(2)(C).

The process for evaluating the environmental impacts of proposed federal actions and the elements of the associated written review, especially for large infrastructure projects and resource development on public lands, have been the source of considerable controversy and litigation since NEPA's enactment.

With the revision, CEQ has delivered on a priority of the Trump administration, consistent with its other efforts to revise federal regulations perceived as unnecessarily cumbersome. In the preamble to the final rule, CEQ states the changes were needed to improve efficiency of the environmental review process across the federal government, to improve clarity and consistency in the written work product, to increase public participation and transparency, and to more closely align the environmental review process with the statutory language and recent case law. The new rule becomes effective on September 14, 2020.

The new rule also codifies the “One Federal Decision” construct for coordinating environmental reviews and permitting decisions across multiple agencies that was established in [Executive Order 13807](#) and incorporates many of the project delivery improvements that were in Title 41 of the Fixing America's Surface Transportation Act of 2015.

Among the more significant changes in the final rule are:

- Narrowing the categories of federal actions that require the more detailed environmental impact statement – as opposed to the less detailed environmental assessment – by redefining the term “major federal action” to exclude nondiscretionary decisions made in accordance with an agency's statutory authority, non-federal projects where the federal involvement is minimal, agency actions with effects located entirely outside of the jurisdiction of the United States, or actions that are not “final agency actions” within the meaning of the Administrative Procedure Act. The final rule also clarifies agencies may utilize categorical exclusions, which exempt from NEPA review those actions an agency has determined in advance do not normally have significant effects on the human environment, that are issued by other agencies when the underlying federal action is similar.

- Redefining the term “effects” to mean only those changes to the human environment from the proposed action that are reasonably foreseeable and have a reasonably close causal relation to the proposed action. Indirect effects or cumulative effects – such as those effects that are remote in time, geographically remote, or the product of a lengthy causal chain – are excluded from the new definition, which states that a “but for” causal relationship is not sufficient to make an agency responsible for a particular effect under NEPA. For example, although when applying the previous regulations numerous courts have required agencies to evaluate the impacts of proposed federal actions on climate change during NEPA reviews, the preamble to the new rule states: “The rule does not preclude consideration of the impacts of a proposed action on any particular aspect of the human environment. The analysis of the impacts on climate change will depend on the specific circumstances of the proposed action.”
- Adding a definition for the term “reasonable alternatives” which means “a reasonable range of alternatives that are technically and economically feasible, meet the purpose and need for the proposed action, and, where applicable, meet the goals of the applicant.” Alternatives that are not feasible would not need to be included in an environmental impact statement.
- Including a new section on compliance to clarify that NEPA is a procedural statute, that judicial review should not occur before an agency has issued a record of decision, and that failure to raise a comment or objection during the development of an environmental impact statement will result in waiver of the issue. The final rule also includes other provisions intended to guide judicial review of actions that have undergone NEPA analysis, including language that the appropriate remedy for a NEPA violation is compliance with NEPA, not an injunction of the underlying action, and a requirement that the decisionmaker include a certification in the record of decision that alternatives, information, and analysis was considered in order to establish a presumption of compliance. The final rule also states that individual agencies may establish bond or security requirements when a party seeks to enjoin an action based on non-compliance with NEPA.
- Establishing presumptive deadlines and page limits for environmental review documents and a preference for coordinated reviews to streamline the review process across the federal government. The rule also clarifies that other environmental reviews conducted pursuant to other statutory requirements may satisfy NEPA if they are functionally equivalent and allows agencies to utilize categorical exclusions issued by another agency for actions that are similar.

Environmental groups and several states have already signaled their intent to file legal challenges arguing that the new rule is contrary to the purpose of NEPA, disregards decades of caselaw and guidance documents interpreting NEPA, and violates the separation-of-powers doctrine.

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