

CEQ Proposes Phase 1 Rulemaking to Revise the NEPA Implementing Regulations

The White House Council on Environmental Quality (CEQ) announced through a Notice of Public Rulemaking (NPRM) published in the Federal Register on October 7, 2021, their intention to make a limited set of revisions to the CEQ NEPA Implementing Regulations.

By way of background, in July 2020 CEQ published a final rule with major revisions to the CEQ NEPA Implementing Regulations originally issued in 1978. The revised 2020 regulations were promulgated under the Trump Administration and went into effect on September 14, 2020.

The new rule proposed under the Biden Administration rolls back several key changes made in the 2020 rule, focusing on three areas CEQ describes in their notice as, “key regulatory provisions”:

1. Restoring the requirement that federal agencies evaluate all relevant environmental impacts related to the decisions they are making (i.e., would restore definitions of direct, indirect, and cumulative impacts from the 1978 Regulations).
2. Restoring the full authority of agencies to work with communities to develop and analyze alternative approaches that could minimize environmental and public health costs (i.e., would remove language from the 2020 revisions that agencies had to frame purpose and need relying on the goals of the applicant, and revises language related to the definition of “reasonable alternatives” to be consistent with this proposed change).
3. Establishing CEQ’s NEPA regulations as a floor, rather than a ceiling, for the environmental review standards federal agencies should be meeting (i.e., would remove language from the 2020 revisions that limited agencies from “adding” requirements in their own agency-specific regulations).

According to CEQ, the 2020 revisions to the regulations caused implementation challenges for agencies and created confusion among stakeholders and the general public regarding the application of NEPA. They also state, the proposed changes in the new rulemaking would better align the NEPA regulations with CEQ and agency expertise, as well as NEPA’s statutory goals to promote sound decisions informed by science. In addition, the CEQ stated in a press release announcing the proposed rulemaking that these reforms would, “restore durability and regulatory certainty, cut down on conflict, deliver sounder results on the ground, and aim to get more American workers on the job building our next generation of infrastructure.”

CEQ is referring to the recent proposed rulemaking as “Phase 1,” which is implementing limited changes to the 2020 revised version of the regulations. The Administration indicated earlier this year Phase 2 will include a much more comprehensive set of revisions and changes to the regulations and will be issued later this year. CEQ has stated future rulemaking will focus on helping to ensure full and fair public involvement in the environmental review process; meeting the nation’s environmental, climate change, and environmental justice challenges; providing regulatory certainty to stakeholders; and promoting better decision-making consistent with NEPA’s goals and requirements.

CEQ's notice of proposed rulemaking for the "Phase 1" revisions to its NEPA procedures can be found at: <https://www.federalregister.gov/documents/2021/10/07/2021-21867/national-environmental-policy-act-implementing-regulations-revisions>.

CEQ's press release for the proposed rule can be accessed here:

<https://www.whitehouse.gov/ceq/news-updates/2021/10/06/ceq-proposes-to-restore-basic-community-safeguards-during-federal-environmental-reviews/>.

CEQ is inviting public comment on these proposed revisions during a 45-day comment period that began on October 7, 2021. Two public meetings on the proposed rule will be held online on October 19, 2021, from 1:00-4:00 pm EDT and October 21 from 5:00-8:00 pm EDT. To learn more about the public comment process or register for the Registration for the public meetings and additional information can be found at: <https://ceq.doe.gov/laws-regulations/regulations.html>

While it is hard to know how long Phase 1 rulemaking will take CEQ to finalize, it will likely be 6-12 months. Phase 2 rulemaking will definitely take longer, given the later start for that process.

The 2020 revisions to the CEQ NEPA Implementing Regulations represented the first major overhaul of the regulations in over 40 years, and some of the changes made were controversial. To that point, five major lawsuits were filed last summer shortly after the rulemaking was finalized by coalitions of environmental and environmental justice NGOs. They argued that many of the changes made in the revised rule violated both the Administration Procedures Act (APA) and the NEPA Statute. One of the lawsuits remains in play under consideration of the Fourth Circuit Court of Appeals, so it is possible the Court could invalidate all or part of the 2020 revised rule.

Phase 1's proposed rulemaking, and the subsequent, broader Phase 2 rulemaking indicate the Biden Administration's intentions to make their own substantive changes to the regulations, including rolling back some of the key revisions made by the previous administration. NEPA practitioners will need to keep a close eye on these two phases of rulemakings and how their eventual finalization will affect NEPA practice. In addition, any ruling by the Fourth Circuit Court of Appeals must also be considered.

In response to these upcoming changes, as well as the uncertainty caused by the pending litigation, adaptability and flexibility will be key to maintaining effective NEPA compliance practices. One excellent way to keep track of these changes and developments is Shipley's one-day workshop that provides a comprehensive overview of the 2020 revised CEQ NEPA Regulations, current developments with litigation over the rulemaking for those revised regulations, and updates on these new rulemakings and revisions that CEQ has begun. For more details on this workshop, navigate to:

[**Understanding Recent and Upcoming Revisions to the CEQ NEPA Implementing Regulations - December 14, 2021**](#)