Environmental
Alert

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New NEPA Rule and Guidance Provide Some Direction and Add Uncertainty to Energy and Infrastructure Project Development

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On February 19, 2025, the White House Council on Environmental Quality (CEQ) took two actions likely to impact environmental permitting and litigation associated with project development. First, CEQ issued an Interim Final Rule that rescinded its existing regulations associated with the National Environmental Policy Act (NEPA).[i] Second, CEQ posted a Guidance Memorandum that addresses how hundreds of individual federal government agencies should establish or revise their own NEPA regulations, and provides instructions on how agencies should manage NEPA reviews in the short-term. CEQ's rule and guidance are the latest developments in the shifting landscape around NEPA implementation, which is likely to continue to impact energy and infrastructure project development, along with other sectors.

While questions remain regarding how NEPA will be implemented, project proponents and lenders may still gain insight into how agencies will assess project proposals based on what was included in the rule and guidance. Overall, NEPA's implementation may now be more open to agency and judicial interpretation.

Background on NEPA

NEPA plays a central role in energy, infrastructure and other projects because NEPA requires the federal government to consider likely environmental impacts of agency actions. NEPA's reach has historically been extensive, and applied when an agency was involved in a "major" action subject to substantial federal control and responsibility. This includes projects that are federally funded, federally permitted, or carried out by a federal agency. For private entities who interface with these federal agency actions, *e.g.*, market participants in the infrastructure and energy sectors, successfully navigating the NEPA regulatory landscape has been crucial for a project's life cycle, from initial project approvals and financing to eventual decommissioning.

In the past, NEPA reviews could take years to complete, and because parts of the review process were open to public comment, opponents of a particular project often used NEPA as a tool to slow or even prevent a project from moving forward. A project subject to NEPA review generally must undergo an initial analysis, or an Environmental Assessment (EA) prior to permitting or construction. An EA typically examines the need for the proposed project, potential alternatives to the proposal, and associated environmental, social, and economic impacts. Based on the results of the EA, the agency may need to prepare a more rigorous review, named an Environmental Impact Statement (EIS), which is open to public review and comment and requires the agency to respond to substantive public comments.

Due to the significant amount of time generally needed to comply with NEPA, it has long been targeted for reform, and CEQ's recent rule and guidance are the latest developments in a series of attempts to reform NEPA. CEQ first published NEPA regulations that established the framework for NEPA compliance in the 1970s.[ii] Following decades of expansion of NEPA's reach through court decisions and agency action, efforts to modernize the law kicked off a series of events that are continuing to unfold. Notably, the 2023 Fiscal Responsibility Act (FRA) included provisions designed to streamline the NEPA review process by, for example, requiring that EISs be completed within two years and EAs be completed within one year.[iii] That same year, CEQ published a proposed rule with updated NEPA regulations that incorporated FRA revisions to the regulations and added new requirements for agencies to include climate and environmental justice analyses as part of their environmental reviews. States challenged that rule on a variety of grounds, including allegations that CEQ lacked rulemaking authority. Two federal courts have since agreed that CEQ lacked rulemaking authority.[iv]

How Agencies Will Implement NEPA Going Forward

On January 20, 2025, President Trump rescinded the original 1978 Executive Order that had authorized CEQ to issue binding NEPA regulations, and directed CEQ to rescind existing NEPA regulations and issue guidance that expedites and simplifies the permitting process, which CEQ completed on February 19, 2025. Overall, the guidance on how agencies should manage NEPA reviews and NEPA regulations shifts responsibility from CEQ, a body for which the Trump administration has not yet appointed a leader, to the hundreds of individual federal government agencies that may undertake NEPA reviews. While the guidance may allow for CEQ and federal agencies to more narrowly interpret NEPA and fast track NEPA reviews, some uncertainty remains.

The guidance broadly states that agencies must revise (or establish) NEPA implementing procedures to expedite permitting approvals consistent with the deadlines imposed by the FRA. While agencies work on these revisions, the guidance indicates that agencies should continue following existing practices and consider voluntarily relying on the now-rescinded CEQ NEPA regulations. The guidance indicates that public comment periods should last no less than 30 days and no more than 60 days, but does not specify when public comment is appropriate.

Although the guidance states that agencies should not delay pending or ongoing NEPA analyses, it is possible that, in the absence of clear CEQ direction, NEPA reviews may be delayed as agencies spend time interpreting NEPA's requirements and new avenues for project opponents to challenge projects emerge. It will likely take agencies years to complete the process of revising or developing their own NEPA regulations, and each revision or new rule could be subject to legal challenge. Nevertheless, the guidance encourages agencies to rely on rules that the first Trump administration issued in 2020 when agencies revise or issue NEPA regulations. Project proponents and lenders may wish to look to those 2020 rules for insight into how agencies may proceed in the interim period before new or revised regulations are issued.

Notably, the guidance suggests that the cumulative climate change impacts and environmental justice assessments that the Biden administration sought in NEPA reviews will not be required going forward. This is because the guidance states that a NEPA analysis should "not employ the term 'cumulative effects'" and that "NEPA documents should not include an environmental justice analysis, to the extent this approach is consistent with other applicable law."

Many agencies already have their own NEPA regulations. However, the fact that many of these regulations are based on the now rescinded CEQ regulations or incorporate those regulations by reference raises the possibility that agency action taken pursuant to these regulations can be challenged. Similarly, it is possible that CEQ's rescission of the regulations without notice and comment is itself likely to be litigated.

Furthermore, in the absence of CEQ regulations, project developers may face varied and inconsistent agency approaches to NEPA. This may require project proponents and lenders to spend more time assessing different agency regulations or interpretations, and it may also create more vulnerability to litigation from project opponents concerning how agencies made decisions. Additionally, Congress continues to work on its own environmental permitting reform, including holding hearings on the issue as recently as last week.

Risk Mitigation as NEPA Evolves

As NEPA continues to evolve, project proponents could try to mitigate compliance risk and speed agency review by scoping projects in a way that limits federal government involvement in projects to non-meaningful ministerial tasks, or advocating more forcefully for categorical exclusions.[v] These actions could exempt projects from more rigorous NEPA assessments. If this is not possible, project proponents may try to work with agencies to continue following the more rigorous assessment and mitigation methods associated with the historic NEPA guidance and regulations. This may involve analyzing impacts of a project that may not be reasonably foreseeable, along with possible alternatives, if those impacts could still be raised by project opponents. This type of analysis may create a legal record that can help defend future project challenges because it can help preserve a position that an impact does not require assessment under NEPA and show why an outcome is justified even if the assessment is undertaken.

Project proponents may also look to engage directly with local communities to minimize areas of disagreement before they can give rise to allegations that could support NEPA litigation targeting a project. This may involve proactively involving local communities in the planning of energy and infrastructure projects, and modifying a project's proposed location or distribution of economic benefits to address objections or concerns. Finally, we note that project proponents should keep in mind the existence of 'little NEPAs' (for example, New York's State Environmental Quality Review Act and the California Environmental Quality Act), along with local land use regulations, which have the ability to complicate project development regardless of what happens with the ongoing developments surrounding NEPA.

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[i] 42 U.S.C. §§ 4321 et. seq. The rescission of NEPA implementing regulations is pursuant to Executive Order (E.O.) 14154, *Unleashing American Energy*.

[ii] E.O. 11514 (1970); E.O. 11991 (1977).

[iii] Fiscal Responsibility Act of 2023, Pub. L. No. 118-5 (2023), https://www.govinfo.gov/app/details/PLAW-118publ5.

[iv] This position was first validated in *Marin Audubon v. Federal Aviation Administration*, where the U.S. Court of Appeals for the District of Columbia held that Congress had not granted rulemaking authority to CEQ. In *Iowa v. Council on Envtl. Quality*, the District Court for the District of North Dakota reached the same conclusion.

[v] A categorical exclusion can apply to an action that an agency has determined does not have a significant effect on the environment and for which, therefore, neither an environmental assessment nor an environmental impact statement is normally required.

If you have questions concerning the contents of this alert, or would like more information, please speak to your regular contact at Weil or to the authors:

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