

## NEPA Final Rule Overhauls Environmental Reviews

*Colette D. Honorable, Daniella D. Landers, Jennifer A. Smokelin,  
Keturah A. Brown, and Grace C. Hearn*  
Reed Smith LLP

On July 15, 2020, the White House Council for Environmental Quality (CEQ) issued its final rule updating, clarifying, and modernizing its governing regulations of the National Environmental Policy Act (NEPA).<sup>1</sup> The final rule, entitled “Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act,” is the first major comprehensive revision of NEPA since its promulgation in 1978.<sup>2</sup> The goals of the final rule are to create a more efficient and timely NEPA review process, improve interagency coordination, and enhance state and tribal participation.<sup>3</sup>

While the final rule is set to become effective September 14, 2020,<sup>4</sup> activities such as congressional review and impending litigation will likely delay the effective date. However, federal agencies have authority to apply the final rule to NEPA activities prior to the effective date, and must develop or revise their own NEPA regulations in accordance with the final rule by September 14, 2021, one year after the effective date.<sup>5</sup>

### I. NEPA Background

Enacted in 1970, NEPA requires federal agencies to assess environmental and related economic and social impacts of a wide variety of proposed federal actions, including permit applications, federal land management decisions, and highway and infrastructure construction.<sup>6</sup>

The CEQ is responsible for overseeing compliance with NEPA and has issued guidance documents to aid federal agencies during the NEPA review process.<sup>7</sup> Over the years, the NEPA review process has received significant criticism for being complex, complicated, and lengthy. Lengthy reviews and related litigation have often delayed significant projects.<sup>8</sup> Thus, in 2017, the Trump Administration directed the CEQ to revise NEPA regulations to implement a two-year review process completion goal for significant infrastructure projects.<sup>9</sup> In 2018, the CEQ issued an advance notice of proposed rulemaking (ANPRM) requesting recommendations for

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<sup>1</sup> *Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act*, 85 FR 43304 (July 16, 2020).

<sup>2</sup> 85 FR 43304.

<sup>3</sup> 85 FR 43358.

<sup>4</sup> 85 FR 43372.

<sup>5</sup> 85 FR 43372-73 and 85 FR 43373.

<sup>6</sup> 85 FR 43305.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> Executive Order 13807, 82 FR 40463 (Aug. 24, 2017).

modernizing its NEPA regulations.<sup>10</sup> Earlier this year, the CEQ issued a notice of proposed rulemaking (NPRM) based on the recommendations collected from the ANPRM.<sup>11</sup>

## **II. Notable Changes**

The final rule makes the following significant modifications to the NEPA review process:

### **A. New Presumptive Time Limits and Page Limits**

The final rule imposes a one-year time limit for environmental assessments and a two-year limit for environmental impact statements.<sup>12</sup> The final rule also imposes a 75 page limit on environmental assessments,<sup>13</sup> 150 page limit on standard environmental impact statements, and 300 page limit on environmental impact statements that have an “unusual scope or complexity.”<sup>14</sup> However, these time and page limits may nevertheless be exceeded with the approval of a senior agency official.<sup>15</sup>

### **B. Greater Guidance on Environmental Assessments**

While allowing federal agencies the flexibility to tailor environmental assessments to the needs of a particular, proposed action, the final rule provides increased guidance to federal agencies when drafting environmental assessments. The final rule now instructs federal agencies to apply environmental impact statement provisions regarding methodologies and scientific accuracy, incomplete or unavailable information, and environmental review and consultation requirements to environmental assessments.<sup>16</sup>

### **C. Increasing Flexibility with the Scoping Process**

Scoping is the process by which federal agencies determine the scope of issues for examination in the environmental impact statements.<sup>17</sup> Rather than requiring publication of a notice of intent (NOI) as a precondition for scoping, the final rule now permits federal agencies to begin scoping once the proposed action is ready for meaningful agency consideration.<sup>18</sup> Scoping can now include “pre-application procedures or work” conducted before NOI publication.<sup>19</sup> Federal agencies must invite relevant stakeholders to participate so that pertinent

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<sup>10</sup>*Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act*, 83 FR 28591 (June 20, 2018).

<sup>11</sup>*Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act*, 85 FR 1684 (Jan. 10, 2020).

<sup>12</sup> 85 FR 43362-63.

<sup>13</sup> 85 FR 43360.

<sup>14</sup> 85 FR 43364.

<sup>15</sup> 85 FR 43360; 85 FR 43364.

<sup>16</sup> 85 FR 43360.

<sup>17</sup> 85 FR 43362.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

data and information can be collected.<sup>20</sup> The increased flexibility places a greater emphasis on early information collection that was not present in the previous regulations.

#### **D. Clarifying Categorical Exclusions**

The final rule adds a categorical exclusions section to provide greater guidance to the processes that agencies employ in determining whether a proposed action can be classified as a categorical exclusion under NEPA. Categorical exclusions are types of proposed actions that generally do not have significant environmental effects and therefore do not require a comprehensive environmental review.<sup>21</sup> Federal agencies must determine whether the proposed action for which a categorical exclusion would normally apply may have a significant impact.<sup>22</sup> The final rule clarifies that the mere existence of extraordinary circumstances does not automatically preclude the application of a categorical exclusion.<sup>23</sup>

#### **E. Codifying the One Federal Decision Policy**

The final rule codifies provisions of the One Federal Decision Policy (OFD), which was established by Executive Order 13807 in order to improve interagency coordination and promote timely reviews.<sup>24</sup> Where multiple federal agencies have authority over a proposed action, the agencies must develop either one environmental impact statement and a joint record of decision, or one environmental assessment and a joint finding of no significant impact (FONSI).<sup>25</sup>

#### **F. Narrowing the Scope of Environmental “Effects” of a Major Federal Action**

The final rule also narrows the scope of effects that agencies are required to consider during the approval process of infrastructure projects.<sup>26</sup> The final rule eliminates “cumulative impacts” as well as the “direct,” “indirect,” and “cumulative” effects.<sup>27</sup> Federal agencies must now consider changes to the human environment effects that are “reasonably foreseeable” and have a “reasonably close causal relationship to the proposed action.”<sup>28</sup> Further, a “but for” causal relationship is an insufficient trigger for federal agency obligations under NEPA.<sup>29</sup> The definition of “effects” also provides that the close causal relationship concept is “analogous to proximate cause in tort law.”<sup>30</sup> Effects are not significant if they are “remote in time, geographically remote, or the result of a lengthy causal chain.”<sup>31</sup> Federal agencies can still

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<sup>20</sup> *Id.*

<sup>21</sup> 85 FR 43360.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> Executive Order 13807, 82 FR 40463 (Aug. 24, 2017).

<sup>25</sup> 85 FR 43361.

<sup>26</sup> 85 FR 43343.

<sup>27</sup> *Id.*

<sup>28</sup> 85 FR 43375.

<sup>29</sup> *Id.*

<sup>30</sup> 85 FR 43343.

<sup>31</sup> 85 FR 43375.

consider the impact of the proposed action on a specific aspect of the human environment, and should consider predictable trends.<sup>32</sup>

### **III. An Uncertain Future**

The final rule has garnered attention and evoked responses from several NEPA review process stakeholders. Proponents applaud the final rule for its streamlined review process and reduction in costs. But opponents of the final rule criticize the shortened review process as insufficient and claim that it fails to adequately account for the effects of climate change, which many argue will result in disproportionate impacts on minority communities. Legal challenges to the final rule, congressional review of the final rule, and the upcoming November elections exacerbate the inherent uncertainties of the NEPA review process and may cause even more confusion and delay the final rule from going into effect.

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<sup>32</sup> *Id.*