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Locke Lord QuickStudy: Trust the Process? CEQ's NEPA Phase II ?Regulations a Mixed Bag and a Missed ?Opportunity

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Introduction

On May 1, the White House Council on Environmental Quality ("CEQ") published its Final Rule implementing revisions to the National Environmental Policy Act ("NEPA")—better known as Phase 2 (the "Final Rule").[1] This rule, which takes effect on July 1, 2024, partially rolls back changes to the NEPA regulations made in 2020 by the Trump Administration[2], and implements statutory amendments enacted as part of the Fiscal Responsibility Act of 2023 ("FRA") (last year's deal to raise the federal debt ceiling). It also makes other changes consistent with the policy priorities of the Biden Administration—including climate change and environmental justice.[3]

NEPA is a procedural statute that governs the environmental review process for all major federal actions, and its requirements are often blamed for the length of time it takes for infrastructure projects to receive federal approvals. A 2020 CEQ study found that, on average, it takes 4.5 years for a potential project to progress from a Notice of Intent ("NOI") to conduct a NEPA analysis to a Record of Decision for a Final Environmental Impact Statement ("EIS").[4] For electrical transmission projects, the average project review timeline can extend even further, with most taking 6.5 years for completion.[5] NEPA's various requirements also turn it into a magnet for litigation and attendant delays.

So how successful is the Final Rule in making NEPA more efficient, versus adding more process and uncertainty? The answer is a mixed bag, with the Final Rule accomplishing the bare minimum in capturing the efficiencies of the FRA amendments, codifying climate and environmental justice analyses that could help some projects (e.g., clean energy and transit) but create new hurdles for others (e.g., fossil fuel and highway infrastructure), and in some areas reverting back to the approach taken in the original 1978 NEPA regulations.

The following is an overview of some key changes contained in the Final Rule, with a focus on the effects they could have on the efficiency of the federal permitting process.

Key Changes that Could Increase Permitting Efficiency

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Time and Page Limits

The Final Rule incorporates into the regulations the presumptive time limits for NEPA reviews established in the FRA. Federal agencies must complete an Environmental Assessment ("EA") within one year of issuance of an NOI or an EIS within two years of an NOI, though these timelines can be extended.[6] These limitations on the duration of NEPA reviews should greatly accelerate the permitting process and provide much-needed certainty for many projects. However, CEQ declined to adopt time limits for the period between an applicant's submittal of a project application and the agency's issuance of the NOI, or the final EA or EIS and project approvals. This provides overworked, under-resourced, or simply reluctant agencies with significant leeway to manipulate permitting timelines, something we already saw in response to the timelines imposed in the 2020 CEQ regulations and the since-repealed "One Federal Decision" executive order issued under the Trump Administration.[7]

In addition to the time limits for EAs and EISs, the Final Rule also imposes page limits on those documents. EAs will be limited to 75 pages and EISs to 150 pages, or 300 pages for projects with "extraordinary complexity."[8] However, the Final Rule places no limits on the number of appendices and attachments that agencies may add to their NEPA documents. Given how often NEPA is invoked in legal challenges to project approvals, it is perhaps understandable that agencies would take liberal advantage of this loophole to leave no stone unturned in their administrative records.

Applicant-Prepared NEPA Documents

The Final Rule now explicitly authorizes a practice that many agencies have already adopted in order to manage their workload, in which project sponsors prepare the necessary EA or EIS themselves so as to increase the speed and accuracy of the required submittals.[9] Agencies remain obligated to review and independently verify the submitted information, analysis, reasonable alternatives, and conclusions reached within the submittals. Nonetheless, the ability of project sponsors to privately contract with (and fund) a consultant to prepare the NEPA documents for their project should provide relief to understaffed agencies and further shorten permitting timelines.[10]

Revision of "Major Federal Action"

The Final Rule adopts an expanded definition of "Major Federal Action" that exempts several categories of action from NEPA review, including federal funding "solely in the form of general revenue sharing funds that do not provide Federal agency compliance or enforcement responsibility over the subsequent use of such funds," and "[l]oans, loan guarantees, or other forms of financial assistance where a Federal agency does not exercise sufficient control and responsibility over the subsequent use of such financial assistance or the effects of the action."[11] This provision could streamline a wide range of federal funding and loan activities.

Increased Use of Categorical Exclusions ("CEs")

CEs provide an avenue for agencies to designate certain categories of activities or actions that do not require an EA or EIS because their effects on the environment will be minor or negligible. Pursuant to the FRA, the Final Rule provides increased flexibility for agencies to establish CEs through the NEPA process and outside of it—such as through a programmatic EIS, a land management plan, or a decision document.[12] Additionally, agencies can

establish joint CEs with or "borrow" CEs from other agencies if the proposed action and the covered action are "substantially the same."[13] The Final Rule also adds a definition of "extraordinary circumstances" when an applicable CE is inappropriate: when the "normally categorically excluded action may have a significant effect."[14]

Key Changes that Could Decrease Permitting Efficiency

Consideration of Environmental Justice, Climate Change, and Alternatives

Among the most important changes is CEQ's first-ever codification of a definition of environmental justice in relation to NEPA, now defined as

[t]he just the treatment and meaningful involvement of all people, regardless of income, race, color, national origin, Tribal affiliation, or disability, in agency decision-making and other Federal activities that affect human health and the environment[.][15]

Additionally, the Final Rule further incorporates Environmental Justice into the definition of "effects" including "disproportionate and adverse effects on communities with Environmental Justice concerns[.]"[16] The downstream impacts of this inclusion will likely result in additional overall considerations and costs for EAs and EISs.

Further, the Final Rule further revises the definition of "effects" to include, for the first time, "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."[17] In addition, the Final Rule requires, where feasible, the "quantification of greenhouse gas emissions" as part of the effects analysis.[18]

These considerations must also be factored into the identification of alternatives that will (1) reduce reasonably foreseeable climate change-related effects and (2) address adverse health and environmental effects disproportionately affecting communities with environmental justice concerns. These additional considerations will add time and expense to quantify potential impacts for all projects. In the long run, these provisions could advantage certain projects such as clean energy and transit infrastructure that may have short-term construction impacts but long-term climate benefits (including reductions in or offsetting of greenhouse gas emissions).[19] But they will likely result in increased costs and additional litigation risks for more carbon-intensive proposals.

Increased Public Engagement and Participation Requirements

The Final Rule creates a new section on "Public and Governmental Engagement," and with it a host of additional requirements and regulations.[20] The lead agency is now formally obligated to publish NEPA documents and supporting materials on their websites, actively and meaningfully engage potentially affected communities (including public meetings, hearings, and consideration of comments), and ensure that a major emphasis is placed on engaging the public early and often.[21] These additional public engagement requirements, while helpful in ensuring more transparency to the NEPA process, could also increase the demand on agency and project applicant resources, and potentially open up new avenues for litigation if an agency's outreach is deemed insufficient under this heightened standard.

Updated Factors for Determining the Significance of Effects

The Final Rule reverts to the original 1978 regulations in directing agencies to once again examine the context and intensity of effects as part of a determination of whether the effects of a proposed action are significant.[22]

Additionally, the Final Rule restores and revises the ten-factor "intensity" test, which was removed in 2020, with explicit consideration requirements added for Tribal sacred sites, environmental justice community concerns, and any species/habitat that are determined to be "critical" under the Endangered Species Act.[23] As the number of considerations increases, so do the odds that the level of NEPA review will increase. Thus, these additional considerations can generally be expected to increase the likelihood that a federal action will be subject to an EIS rather than just an EA or CE.

Obligation to Undertake New Research In A NEPA Analysis

The Final Rule mirrors the FRA's rather vague language allowing agencies to use "any reliable data source" in their NEPA review and "not [being] required to undertake new scientific or technical research unless it is essential to a reasoned choice among alternatives, and the overall costs and timeframe of obtaining it are not unreasonable."[24] CEQ declined to provide clarity regarding how these new standards should be applied, instead deeming them to raise "detailed or fact-specific issues that may be better suited to address in guidance or by agencies in considering specific NEPA reviews."[25] Absent further specificity from CEQ, a provision that was supposed to relieve agencies of obligations to generate new data in their NEPA analyses (rather than simply using best available science) could end up spinning off a whole new avenue of litigation.

As a tool to improve permitting efficiency, the Final Rule is, as the kids say, "mid." Several important and welcome improvements to the NEPA process are offset by missed opportunities to ensure that the intended efficiencies are in fact realized. For more information on how the new NEPA rules might affect your project, please contact the authors.

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[1] National Environmental Policy Act Implementing Regulations Revisions Phase 2, 89 Fed. Reg. 35442 (May 1, 2024) (to be codified at 40 CFR Parts 1500—1508).

[2] The White House, *CEQ Restores Three Key Community Safeguards during Federal Environmental Reviews*, April 19, 2022

[3] *See* 89 Fed. Reg. at 35442–43.

[4] CEQ, *Environmental Impact Statements Timelines (2010-2018)*, p. 1, June 12, 2020

[5] *See id.*

[6] 40 CFR § 1501.10(b).

[7] Executive Order 13807

[8] 40 CFR §§ 1501.5(g) and 1502.7.

[9] 40 CFR § 1506.5.

[10] *See* 40 CFR § 1507.3(12).

[11] 40 CFR § 1508(w)(2).

[12] 40 CFR § 1501.4.

[13] 40 CFR § 1506.3.

[14] 40 CFR § 1501.4.

[15] 40 CFR § 1508.1(m).

[16] 40 CFR § 1508.1(i)(4).

[17] *Id.*

[18] 40 CFR § 1502.16(a)(6).

[19] *See* 40 CFR § 1501.3(d).

[20] 40 CFR § 1501.9.

[21] *Id.*

[22] 40 CFR § 1501.3.

[23] 40 CFR § 1501.3(d)(2).

[24] 40 CFR § 1501.3(c).

[25] 89 Fed. Reg. at 35463.

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