September 26, 2023

Comment Period on Significant NEPA Revisions Ends on September 29

On July 31, the White House Council on Environmental Quality (CEQ) published a proposed rule, the Bipartisan Permitting Reform Implementation Rule, which seeks to "revise, update and modernize" the existing regulations under the National Environmental Policy Act (NEPA) and includes significant environmental justice and climate change provisions. This is the second phase of NEPA regulatory amendments to be proposed by the Biden administration since taking office in 2020. The first phase of CEQ's revisions was issued as a final rule on April 20, 2022, reversing changes to the NEPA regulations promulgated under the Trump administration that targeted regulatory provisions that had been in effect for decades (the 2022 Phase I Rule).

NEPA was signed into law on January 1, 1970, and it requires federal agencies to assess the environmental impacts of proposed agency actions. NEPA covers a broad range of government actions, including permit application decisions, federal land management decisions and the construction of major public infrastructure projects such as highways. Specifically, NEPA requires federal agencies to prepare environmental impact statements for "major federal actions significantly affecting the quality of the human environment." NEPA also established CEQ to oversee implementation of the law. In 1978, an executive order from President Jimmy Carter authorized CEQ to adopt formal regulations, which are codified at 40 C.F.R. Parts 1500-1508.

In 2020, under the Trump administration, CEQ finalized regulations which, among other provisions, prevented consideration of cumulative environmental impacts, including those related to climate change. The 2022 Phase I Rule reversed this approach, again requiring federal agencies to consider the "direct," "indirect" and "cumulative" effects of a proposed project.

The 2023 proposed rule (the 2023 Phase II Proposed Rule) seeks to revise existing NEPA regulations in a number of meaningful and significant ways. For instance, while environmental justice is considered a part of any NEPA analysis through federal guidance and executive orders, the 2023 Phase II Proposed Rule would codify a definition of "environmental justice" to include the "disproportionate and adverse effects on communities with environmental justice concerns, whether direct, indirect, or cumulative." As significant, how federal agencies consider climate change under NEPA would also be codified; for example, "in addition to considering climate change effects at the relevant global and national levels, agencies should identify and use information on future projected GHG [greenhouse gas] emissions scenarios to evaluate future impacts (such as flooding, high winds, extreme heat, and other climate change-related impacts)."

It is anticipated that the focus on environmental justice and climate change effects will result in a broad range of comments during the public comment period, which is open now and closes on September 29. Those in the regulated community contemplating projects subject to NEPA review should be aware of the proposed regulations. The proposed regulations can be found and commented on here.

If you or your organization would like to learn more about CEQ's proposed NEPA regulations, please reach out to one of the attorneys in the sidebar.

Authors



Harold M. Blinderman
Partner

Hartford, CT | (860) 275-0357

hmblinderman@daypitney.com



Todd W. Terhune
Partner

Parsippany, NJ | (973) 966-8040

tterhune@daypitney.com



Drew A. Levinson
Senior Associate

Parsippany, NJ | (973) 966-8051

dlevinson@daypitney.com



Elizabeth C. Barton
Of Counsel

Hartford, CT | (860) 275-0371

ecbarton@daypitney.com