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Managing Conflict: Department of the Interior Implementation of 2020 NEPA Regulations

The secretary of the interior issued two Secretarial Orders on April 16, 2021, that provide early indications of the Biden administration's approach to the environmental review process for infrastructure projects under the National Environmental Policy Act. Both orders were adopted pursuant to President Biden's [Executive Order 13990](#), *Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis* (Jan. 20, 2021), which he issued on his first day in office. From the start, the Biden administration has made clear its intention to review and revise the [new NEPA regulations adopted by the Council on Environmental Quality](#) in July 2020. The two Secretarial Orders now reveal the administration's initial approach on NEPA reform. Given the importance of a well-managed NEPA process to the planning and authorization of many infrastructure projects, it appears the Biden administration will take an incremental and deliberate approach to addressing concerns about the 2020 NEPA regulations.

Secretarial Orders

First, in [Secretarial Order 3398](#), titled *Revocation of Secretary's Orders Inconsistent with Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis*, Secretary Haaland revoked various Secretarial Orders adopted during the prior administration. One of the revoked orders (Secretarial Order 3355, issued on August 31, 2017) had established a set of requirements for implementing NEPA for covered infrastructure projects, including timelines of one year for preparation of an Environmental Impact Statement and six months for an Environmental Assessment, in contrast with the longer general timelines set out in the 2020 NEPA regulations (two years for an EIS and one year for an EA). The previous Secretarial Order 3355 also had created a management structure for major infrastructure projects that coordinated NEPA decisions within the deputy secretary's office. Under this structure, priority projects had moved through their environmental reviews to a consolidated Record of Decision while other projects were delayed at the start of the NEPA process. With the revocation of this prior Secretarial Order, the more general provisions of the NEPA regulations will apply to govern decision-making coordinated by the lead agency, with resolution of specific issues by senior agency officials.

Second, in [Secretarial Order 3399](#), entitled *Department-Wide Approach to the Climate Crisis and Restoring Transparency and Integrity to the Decision-Making Process*, Secretary Haaland instructs the bureaus and offices of her department to implement the 2020 NEPA regulations, but only insofar as that implementation does not "change the application or level of NEPA" compliance that would have occurred under the prior version of the NEPA regulations, and is consistent with department's own NEPA regulations, the departmental manual, and guidance from the department's Office of Environmental Policy and Compliance. If any of the department's regulations are found to "irreconcilably conflict" with the 2020 NEPA regulations, the relevant bureau or office must elevate the issue for resolution by the department and CEQ. This is significant because CEQ asserted that its 2020 regulations apply "unless there is a clear and fundamental conflict with the requirements of another statute." See 40 C.F.R. § 1507.3(a).

An example of such a conflict may be found in the department's NEPA regulation for consideration of past actions in the analysis of cumulative effects. See 43 C.F.R. § 46.115. In this regulation, the responsible official is directed to analyze the effects in accordance with 1978 CEQ definition of "cumulative impact" and relevant guidance issued by CEQ, such as *The Council on Environmental Quality Guidance Memorandum on Consideration of Past Actions in Cumulative Effects Analysis* (June 24, 2005). The 2020 NEPA regulations replaced the former definition of cumulative impacts impact with a general definition of "effects or impacts,"

requires that an agency's analysis of effects be consistent with this new definition, and affirmatively states that the prior definition of "cumulative impact" is repealed. See 40 C.F.R. § 1508.1(g). However, agencies have adopted the prior CEQ definition of "cumulative impact," and courts have found that the CEQ guidance on that definition is entitled to deference. See *League of Wilderness Defenders-Blue Mountains Biodiversity Project v. U.S. Forest Service*, 549 F.3d 1211, 1218 (9th Cir. 2008).

Secretarial Order 3399 indicates an incremental approach to managing changes in the NEPA process. The order preserves current NEPA practice under the 2020 regulations, but implements the new regulations to the point of conflict with the department's older NEPA rules. This is consistent with President Biden's Executive Order 13990, which rescinded a prior Executive Order (EO 13807, *Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects*), aspects of which the 2020 NEPA regulations codified.

Regarding the NEPA analysis of greenhouse gas emissions from a proposed action, Secretarial Order 3399 advises its bureaus to use "appropriate tools, methodologies, and resources available to quantify GHG emissions and compare GHG quantities across alternatives." When such a quantification of GHG emissions is not possible "because tools, methodologies, or data inputs are not reasonably available," Secretarial Order 3399 requires a "qualitative analysis and the rationale for determining that a quantitative analysis is not warranted." This direction paraphrases the 2016 final CEQ guidance on consideration of GHG emissions and the effects of climate change in NEPA reviews,^[1] which CEQ withdrew in 2017^[2] and then replaced with new draft guidance in 2019, although the 2019 guidance was withdrawn in February 2021, as CEQ indicated that agencies should consider all available tools and resources in assessing GHG emissions and climate change effects of their proposed actions, "including, as appropriate and relevant, the 2016 GHG Guidance."^[3]

Finally, Secretarial Order 3399 requires the department's bureaus and offices to proactively begin consultation with potentially impacted tribes and to engage potentially impacted environmental justice communities early in the project planning process. "Early in the project planning process" is defined to include when the agency has "enough information on a proposed action to determine that an environmental assessment or an environmental impact statement will be prepared." This provision is consistent with longstanding regulations for applying NEPA early in the planning process and the expansion of the scoping process in CEQ's 2020 regulations. The 2020 NEPA regulations added requirements to involve tribal agencies in the preparation of environmental assessments to invite tribal agencies to participate in the scoping process. See 40 CFR 1501.5(e), 1501.9(b). However, the 2020 NEPA regulations do not specifically provide for involvement by environmental justice communities, noting in the preamble to the regulations that "agencies can consider, as needed, environmental justice issues." See 85 Fed. Reg. at 43356.

Takeaways

The Biden administration's approach towards NEPA implementation, and CEQ's request that the 2020 NEPA regulations rule be remanded but not vacated, will be subject to judicial review in a summary judgment hearing on April 21, 2021.^[4] Whether CEQ is given the time and latitude to undertake a comprehensive revision of its NEPA regulations will depend on the success of that defense.

Endnotes

^[1] [CEQ Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in NEPA Reviews \(doe.gov\)](#) (August 1, 2016).

[\[2\]](#) CEQ Notice, pursuant to Executive Order 13783 of March 28, 2017, *Promoting Energy Independence and Economic Growth*, 82 FR 16576 (Apr. 5, 2017).

[\[3\]](#) CEQ Notice of rescission of draft guidance, 86 FR 10252 (February 19, 2021).

[\[4\]](#) CEQ has noted "substantial concerns about the effects of the 2020 Rule on public health, the nation's land, water, and air quality, communities that have been historically marginalized and overburdened by pollution, the ability of citizens to have their voices heard in federal decision-making processes, and other issues, including the process by which the 2020 Rule was promulgated and the lawfulness of aspects of the 2020 Rule." CEQ Motion for Remand Without Vacatur, Ex. A ¶ 5, *Wild Virginia v. CEQ*, Civ. No. 3:20-cv-45-JPJ (W.D. Va.).

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