



# NEPA Rules Rewrite: Flexibility for Federal Agencies

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## NEPA Rules Rewrite: Flexibility for Federal Agencies

This is the second in a series of eAlerts on proposed revisions to regulations implementing the National Environmental Policy Act (NEPA) issued by the Council on Environmental Quality (CEQ). This Notice of Proposed Rulemaking (NPRM) initiates the narrower first phase of CEQ's two-part effort to reconsider the comprehensive modification of the NEPA regulations issued during the Trump administration (2020 NEPA Regulations). Nossaman attorneys Rebecca Hays Barho, Ed Kussy, Rob Thornton, Svend Brandt-Erichsen, Brooke Marcus and David Miller are contributors for this series.

Our first eAlert focused on changes CEQ has proposed to make with respect to the formulation of the "purpose and need" for a proposed agency action and the definition of "reasonable alternatives." Today, we focus on changes the CEQ has proposed to the regulations governing the formulation of agency-specific NEPA procedures.

### Revision of Agency Rulemaking Procedures (40 C.F.R. 1507.3)

The original NEPA regulations adopted in 1978 (1978 CEQ Regulations), which were in effect until the promulgation of the 2020 NEPA Regulations, encouraged Federal agencies to develop their own NEPA procedures to augment the CEQ regulations, so long as those procedures met or exceeded the degree of environmental review required by CEQ's NEPA rules. More than 85 federal agencies and units within agencies have developed their own NEPA procedures. Links to these agency procedures are available through the CEQ website.

The 1978 CEQ Regulations provided that agency procedures should not paraphrase the CEQ regulations and "shall confine themselves to implementing procedures." 40 CFR 1507.3(a) (1978). They required federal

agencies to consult with CEQ while developing their own NEPA procedures. *Id.* The 1978 CEQ Regulations also provided that agency procedures “shall comply with these regulations except where compliance would be inconsistent with statutory requirements.” 40 CFR 1507.3(b).

The 2020 NEPA Regulations consolidated requirements for agency NEPA procedures into section 1507.3. For example, former section 1505.1 (“Agency decision-making procedures”) became 1507.3(c) under the 2020 NEPA Regulations. But the 2020 NEPA Regulations also included provisions designed to assure that agencies promptly implemented the substantive changes to the NEPA review process envisioned by the 2020 NEPA Regulations.

Section 1507.3(a) of the 2020 NEPA Regulations provides: “Where existing agency NEPA procedures are inconsistent with the regulations in this subchapter, the regulations in this subchapter shall apply, ... unless there is a clear and fundamental conflict with the requirements of another statute.” This provision was not included when CEQ published its proposed changes to the NEPA regulations in January 2020. It apparently was added to assure that the 2020 NEPA Regulations were implemented as quickly as possible. In the preamble for the final 2020 NEPA Regulations, CEQ explained that this provision was intended to clarify that the new regulations applied to NEPA reviews begun after the effective date of the 2020 NEPA Regulations and until agencies completed updates to their own NEPA procedures to conform them to the new CEQ rules. 85 Fed. Reg. 43304, 43340 (July 16, 2020).

Section 1507.3(b) of the 2020 NEPA Regulations directed agencies to complete updates to their NEPA procedures within a year after the new CEQ rules took effect. One early action by the Biden administration extended that deadline by two years. This subsection also required that the updated agency procedures conform to the new CEQ rules in ways that went beyond the general conformity required by the 1978 CEQ Regulations. Agencies were directed to “eliminate any inconsistencies” with the new CEQ rules as they revised their procedures. The subsection added that, except “as otherwise required by law, agency NEPA procedures shall not impose additional procedures or requirements beyond those set forth in the regulations in this subchapter.” The preamble for the 2020 NEPA Regulations stated that these provisions were consistent with Executive Order 11514, as amended, directing agencies to comply with CEQ regulations except where such compliance would be inconsistent with statutory requirements. 85 Fed. Reg. at 43340.

In the Phase 1 Revisions, CEQ has proposed to:

- Revise Section 1507.3(a) and (b) to clarify that, while agency NEPA procedures must be consistent with the CEQ regulations, agencies have the discretion and flexibility to develop procedures beyond CEQ’s baseline requirements;
- Remove language from Section 1503.7(a) stating that where existing agency NEPA procedures are “inconsistent” with the CEQ regulations, the CEQ regulations apply “unless there is a clear and fundamental conflict with the requirements of another statute”;
- Remove from Section 1503.7(b) the language requiring that agencies “eliminate any inconsistencies” with the CEQ regulations; and
- Eliminate the 2020 NEPA Regulations’ prohibition on agencies’ ability to impose additional requirements or procedures beyond the CEQ regulations unless the agency-specific rules promoted efficiency or are required by law.

By removing these constraints on agency NEPA procedures, CEQ is seeking to affirm that agencies may develop NEPA procedures beyond those specified in the CEQ regulations. This revision is aimed at allowing agencies to tailor their NEPA procedures to their particular programs and the unique contexts in which they

operate. CEQ specifically notes that the proposed revisions are intended to make the CEQ regulations a floor for environmental review procedures, rather than a ceiling as they were under the 2020 NEPA Regulations.

## **Closing Thoughts**

It is unclear the extent to which this proposed change will have a practical effect on NEPA practice, though the proposed revisions reaffirm the notion that CEQ's regulations are intended to be a floor for NEPA reviews and not a ceiling. The 2020 NEPA Regulations had not been in effect long enough for the agencies to rewrite their regulations to conform to the new mandates of 1507.3(a) and (b). For example, the Department of Transportation had only issued proposed new NEPA regulations in November 2020, and they were never finalized when the Biden administration put a freeze on implementation of the 2020 NEPA Regulations pending further review. Given the timing of the change in the 2020 NEPA Regulations, agencies had not implemented final regulations that would have removed agency-specific procedures that went beyond the CEQ regulations.

However, to the extent that existing agency NEPA procedures conflict with the 2020 NEPA Regulations, the removal of 1503.7(a) would provide agencies more flexibility to carry out their NEPA requirements, including agency-specific procedures that align with their specific goals and/or authority. CEQ noted that agencies commented that the "ceiling provisions" of the 2020 NEPA Regulations created confusion as to whether they could continue to carry out agency-specific NEPA procedures or adopt new procedures to implement NEPA for their programs and authorities that were consistent with CEQ's regulations. Since CEQ reviews any changes to agency NEPA procedures prior to their adoption, CEQ's review process already promotes consistency across the various agencies without limiting an agency's flexibility.

As we noted in our prior installment, we expect significant interest in this first phase of revisions to CEQ's regulations. That interest will likely include legal challenges once the final rules are issued.

Please stay tuned for our next installment of this series, which will look at CEQ's proposed return to the prior "effects" in the longstanding 1978 NEPA Regulations.