



NEPA Rules Rewrite: It's "Back to the Future" With the Proposed NEPA Regulations

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This is the final *eAlert* for 2021 in our 2021 NEPA Rules Rewrite Series addressing revisions to the National Environmental Policy Act (NEPA) regulations proposed by the Biden administration. Today, we focus on the Council on Environmental Quality's (CEQ) proposal to reverse the Trump administration's definition of environmental "effects" and to eliminate the term "cumulative impacts" under NEPA. 86 Fed.Reg. 55757, 55763 (October 7, 2021). Nossaman attorneys Rebecca Hays Barho, Ed Kussy, Rob Thornton, Svend Brandt-Erichsen, Brooke Marcus and David Miller are contributors for this series.

The definitions of "effects" and the elimination of "cumulative impacts" from the NEPA regulations are key elements of the Trump administration's 2020 NEPA regulations. 85 Fed. Reg. 43304, 43375 (July 16, 2020). The Trump regulations, in turn, made major revisions to the definitions of these terms that had been in place since the Carter administration.

More than four decades ago, CEQ adopted regulations implementing NEPA and defining "effects" to include "indirect effects" and "cumulative impacts" of major federal agency actions. The 1978 NEPA regulations defined "indirect" effects to include effects "caused by an action" that are "later in time or farther removed in distance, but are still reasonably foreseeable." "Cumulative impacts" were defined as an "impact which results from the incremental effect of the action when added to other past, present, and reasonably foreseeable future actions." (40 C.F.R. § 1508.8, 1508.7 (1978).

NEPA's enactment in 1969 and the 1978 regulations spawned a blizzard of litigation over the scope of federal agencies' obligation to analyze indirect and cumulative environmental effects of a federal agency action. Fast forward to today, there is a robust body of case law in the Supreme Court and in the federal circuit courts applying the term "effects" and "cumulative impacts" in hundreds of factual settings. Before the emergence of climate change as an existential environmental issue, NEPA case law on the definition of "effects" was relatively stable. Most federal agencies and sophisticated practitioners understood how to

structure an analysis of a project's effects sufficiently enough to survive judicial scrutiny. NEPA evaluations of indirect and cumulative impacts are assisted by increasingly complex federal and state environmental laws setting substantive regulatory standards and by sophisticated analytical models of cumulative air, water and other environmental impacts.

Along comes climate change and a new round of federal litigation raising new and difficult questions regarding the reach of the NEPA obligation to evaluate indirect and cumulative impacts. The elephants (or perhaps the polar bears) in the room here are fossil fuel energy related projects (e.g., coal and natural gas power plants) with material greenhouse gas emissions.

Climate change is the quintessential example of a "cumulative impact." Virtually every human activity of the modern world involves carbon emissions. But no single activity emits carbon in an amount to individually and measurably alter the climate. The consensus of the international scientific community is that cumulative carbon emissions around the world since the dawn of the industrial revolution are having profound climate impacts and that without very large greenhouse gas emission reductions, these impacts will become increasingly severe and could be irreversible. The leaders of the world meeting this month in Scotland reiterated the urgency of achieving a net zero of carbon emissions by 2050 to avoid an irreversible tipping point.

The urgency of the climate challenge confounds the NEPA obligation that federal agencies evaluate the effects that are later in time, but still "reasonably foreseeable." How much later in time? What is "reasonably foreseeable"? Does a coal-fired power plant or a natural gas field in North Dakota have a "reasonable foreseeable" relationship to the reduction in Arctic Ocean sea ice and associated impacts on marine mammals living about and below the ice? Or does it contribute in a foreseeable way to changes in precipitation occurring in the western United States or flooding in the Mississippi River basin?

The Trump administration attempted to address these questions by requiring a "reasonably close causal relationship" between the federal action and the "effects." The regulations provided that:

A 'but for' causal relationship is insufficient to make an agency responsible for a particular effect under NEPA. Effects should generally not be considered if they are remote in time, geographically remote, or the product of a lengthy causal chain. Effects do not include those effects that the agency has no ability to prevent due to its limited statutory authority or would occur regardless of the proposed action. 85 Fed. Reg. 43304, 43375 (July 16, 2020).

The regulation also eliminated the term "cumulative impact."

Five lawsuits challenged the Trump regulations on a variety of grounds. The lawsuits zeroed in on the elimination of the term "cumulative impacts" and on the narrowing of the definition of "effects." In response to Biden administration requests, the courts have temporarily stayed the litigation.

The new regulations proposed by the Biden administration will, in large part, return the regulatory definitions of "effects" and "cumulative impacts" to the 1978 NEPA regulations. CEQ explained that the reinstatement of the 1978 definitions would insure that agencies consider the full range of reasonably foreseeable effects in the NEPA process, even if the pollution is remote in time or geographically remote from the proposed action. CEQ also stated "that even where an agency does not exercise regulatory authority over all aspects of a problem, it may be appropriate to consider and compare the air pollution and

greenhouse gas emissions effects that the proposal and the regional alternatives would have on the environment, even if the agency does not have control over all of the emissions that the alternative would produce.” 86 Fed. Reg. 55757, 66763 (October 7, 2021).

CEQ argues that reinstatement of the definition of “cumulative impacts” aligns with the courts’ longstanding interpretations of NEPA to require agencies to consider cumulative effects, noting that even before CEQ issued regulations on cumulative effects, the U.S. Supreme Court had interpreted NEPA to require consideration of cumulative effects “when several proposals . . . that will have cumulative or synergistic environmental impact upon a region are pending concurrently before an agency, their environmental consequences must be considered together.” *Kleppe v. Sierra Club*, 427 U.S. 390, 410 (1976).

If, as expected, the 1978 definition of “effects” is reinstated, it is certainly foreseeable that NEPA challenges to agency approval of fossil fuel and other major GHG-emitting projects will continue and expand.