

Biden Revisions to the NEPA Regulations Now in Effect

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The Biden Administration is amending the federal regulations for implementing the National Environmental Policy Act (NEPA) to reverse certain changes made by the Trump Administration. The [first set of amendments](#) took effect last Friday on May 20, 2022.

As background, the Council for Environmental Quality (CEQ) first issued the NEPA implementing regulations in 1978. They remained unchanged for more than 40 years until the Trump Administration published its [2020 rule](#) updating the regulations to facilitate “more efficient, effective, timely NEPA reviews.” Developers, construction companies, and other businesses generally supported these changes with the hope they would streamline a lengthy process that often significantly delays projects. However, environmentalists opposed the changes, fearing they would weaken important protections, including those aimed at reducing climate change impacts and protecting natural resources. Upon taking office, the Biden Administration immediately began an effort to reverse parts of the 2020 rule.

The Biden amendments will be issued in two phases. The “Phase One” rule was published on April 20, 2022, and is in effect as of May 20, 2022. The “Phase Two” rule, which is expected to include more comprehensive revisions, will be issued [“over the coming months”](#).

The Phase One rule reinstates the following three key provisions of the NEPA regulations:

1. Statement of Purpose and Need, and Scope of Reasonable Alternatives (40 CFR 1502.13)

Under NEPA, an agency’s statement of purpose and need informs the range of alternative actions analyzed in an environmental assessment (EA) or environmental impact statement (EIS). The NEPA regulations historically required agencies to consider “reasonable alternatives not within the jurisdiction of the lead agency.” The 2020 rule updates, however, instructed agencies to limit the statement of purpose and need, and therefore the range of alternatives, to only those that are consistent with the applicant’s goals and the agency’s statutory authority.

The Phase One rule removes these limitations to re-establish federal agencies’ discretion to

consider a variety of factors, including a range of reasonable alternatives that are not entirely consistent with the goals of the project applicant. Accordingly, federal agencies may again coordinate with communities and project proponents to evaluate alternatives that could minimize environmental and public health costs, but extend beyond the scope of the agency's authority or do not serve the applicant's goals.

2. Agency Implementing Regulations (40 CFR 1507.3)

The Phase One rule also removes language that could limit agencies' standards and procedures for implementing NEPA rules that extend beyond CEQ regulatory requirements. This update reestablishes CEQ regulations as the "floor" for NEPA environmental review, and restores the agency's discretion and flexibility to tailor NEPA procedures to align with specific agency and public needs. In contrast, the 2020 rule would have made the CEQ regulations a "ceiling" for NEPA requirements, effectively restricting agencies' discretion to develop and implement procedures beyond requisite CEQ regulations.

3. Scope of Effects (40 CFR 1508.1(g))

Finally, the Phase One rule restores the definition of "effects" that requires agencies to consider the historic categories of "reasonably foreseeable" direct, indirect, and cumulative effects. The 2020 rule, in contrast, limited the scope of this analysis to effects with a "reasonably close causal relationship," and included language indicating that agencies were only required to consider direct effects, had discretion to consider indirect effects, and should not consider cumulative effects in NEPA review. The Phase One rule change thus ensures that agencies' NEPA documents will evaluate all relevant environmental impacts resulting from the agency decision.

Here, the Phase One rule reversal is particularly impactful in terms of an agency's consideration of climate change, where cumulative effects tend to be substantially greater than the effects of the individual project. The Phase One update confirms CEQ's view that climate change impacts are adequately considered in evaluating direct, indirect and cumulative effects.

Except for reinstating these three key provisions, the Phase One rule does not affect other changes made by the 2020 rule. The Biden Administration plans to introduce more comprehensive changes as part of the forthcoming Phase Two rule. These changes, which are anticipated to be more controversial and draw additional public attention, are expected to address environmental justice, public participation, and streamlining provisions, including the use of plain language, deadlines, page limits, and inter-agency coordination.

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