

Quicker But Less Dirty: The Biden Administration Both Streamlines and Seeks to Expand NEPA Environmental Review

By Elaine Y. Lee and Athena G. Rutherford



Elaine Lee



Athena Rutherford

Any construction project associated with a federal agency such as the Department of Transportation or Federal Transit Administration must comply with the requirements of the National Environmental Policy Act (NEPA). With the surge of new and upcoming infrastructure projects funded by the federal government, contractors pursuing and working on projects that require NEPA compliance must understand this nuanced, complex law and its potential impact. This article provides a high-level overview of NEPA, its origins and current framework, criticisms, and

prior administrations' attempts to reform the law. It then examines two sets of changes to NEPA proposed by the Biden Administration that are arguably diametrically opposed. One set of changes recently passed as part of the Infrastructure Investment and Jobs Act (the Infrastructure Bill) streamlines the NEPA process; the second set of changes is still in the review process and seeks to expand the substantive environmental protection goals of NEPA.

Infrastructure Bill Streamlines NEPA and CEQ Proposed Rule Modifications Expand the Scope of NEPA Review

On August 10, 2021, after months of deliberation, the U.S. Senate passed the Infrastructure Bill in a bipartisan vote, and on November 15, 2021, President Biden signed the Infrastructure Bill into law. Key provisions of the \$1.2 trillion, 2,000-page¹ Infrastructure Bill include funding for upgrading domestic water supply, roads, bridges, and broadband and cybersecurity infrastructure, among others.² While the Infrastructure Bill primarily focuses \$550 billion on “hard infrastructure” spending,³ among the Bill's major plans for infrastructure are sweeping changes to NEPA.

The Infrastructure Bill has gained significant attention

for its environmental provisions, including those that are designed to streamline the review process under NEPA. The latest iteration of changes to NEPA illustrate the Biden Administration's attempt to remedy commonly argued shortcomings of the law through lasting changes that will withstand the turnover of future administrations.

At the same time, on October 6, 2021, the White House Council on Environmental Quality (CEQ) proposed modifications to its regulations for implementing NEPA. The explicit goal of these modifications is to undo changes made by the Trump Administration that narrowed the scope of environmental review under NEPA. The proposed modifications would restore emphasis on the environmental protection goals of NEPA. The CEQ has also indicated it would issue a second round of NEPA rule changes to further expand the scope of NEPA's environmental review.

Changes to NEPA impact contractors and consultants who are engaged directly to assist with preparation of NEPA documents. Trends in the construction industry toward design-build projects mean the NEPA process can delay construction and increase the cost of projects. Though the Biden Administration's changes and proposed rule changes are intended to improve the NEPA process, the effect of the changes in the Infrastructure Bill and the proposed CEQ rule changes leave a lot uncertain. Nonetheless, they should provide greater clarity for contractors working on projects that require completion of the NEPA process.

NEPA Origins and Current Framework

Under the Nixon Administration, the Environmental Protection Agency (EPA) was charged with protecting the environment, which included authority to monitor the nation's water quality, pollution, and the effects of chemicals upon fish and wildlife.⁴ This national commitment to the protection of the environment was memorialized by the passage of NEPA in 1969.⁵

NEPA, commonly referred to as the “look before you leap” law, established a nationwide environmental policy framework for planning and decision-making with respect to federal agencies. NEPA's rules apply to a broad range of federal actions, such as federally funded construction

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The level of review required by NEPA is commensurate with the estimated impact on the environment.

projects, plans to manage and develop federal lands, and federal authorizations of nonfederal activities (such as licenses and permits).⁶ NEPA's express purpose is

[t]o declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.⁷

NEPA applies to all federal agency actions that have a significant impact on the human environment.⁸ This includes direct, indirect, and cumulative impacts.⁹ Additionally, NEPA applies to private actions that require federal permits, including mining projects on federal lands, or pipelines that require federal permits.

Look Before You Leap

Touted as a foundational environmental law, NEPA is unique: it provides no substantive mandate.¹⁰ NEPA does not require the government to protect the environment, and it does not force the government to choose projects with the least impact on the environment. Rather, it is a procedural statute in which the federal government is mandated to prepare an environmental review whenever federal agencies or others propose projects on federal land that entail "major Federal actions."¹¹ The level of environmental review per project is designed to be proportional with the level of risk of environmental harm (i.e., the projects with the biggest risk of environmental harm undergo the most rigorous level of review).¹²

NEPA requires the study of potential environmental and related social and economic impacts of a proposed project, both positive and negative, as well as individual and cumulative impacts.¹³ The law also requires agencies to consider reasonable alternatives to the proposed project

before planning whether or how to proceed.¹⁴ Further, NEPA vests communities and the public at large with the right to comment on federal actions; this comment process is designed to encourage informed decision-making. The federal government must weigh environmental and socio-economic issues before decisions are made, and the right to comment supports accountability and governmental transparency by mandating that environmental reviews be made public.¹⁵

Levels of Scrutiny

As previously mentioned, the level of review required by NEPA is commensurate with the estimated impact on the environment. In determining the appropriate level of NEPA review, the federal agency for the proposed action should determine whether the proposed action:

1. normally does not have significant effects and is categorically excluded;
2. is not likely to have significant effects or the significance of the effects is unknown and is therefore appropriate for an environmental assessment; or
3. is likely to have significant effects and is therefore appropriate for an environmental impact statement.¹⁶

The first of the three levels of NEPA review listed above is a Categorical Exclusion (CE). A CE is the simplest and most common level of review required by NEPA, and it is permitted when the federal agency for the project determines that the project does not individually or cumulatively have a significant effect on the environment.¹⁷ Projects that fall into the CE category may be approved without an Environmental Impact Statement (discussed below) so long as it does not involve "extraordinary circumstances."¹⁸ Notably, Congress has created statutory CEs for select oil and natural gas development projects.¹⁹

The midlevel NEPA review (second in the list above) is an Environmental Assessment (EA). An EA is prepared when the lead federal agency determines that a project would not cause significant impacts to the environment.²⁰ If the lead agency determines that projected impacts are not significant, then it issues a Finding of No Significant Impact (FONSI). Or, alternatively, the lead agency can issue a "mitigated FONSI," which is inclusive of measures the agency plans to implement to reduce impacts of the proposed project to a level that is not significant.²¹ However, if the project is determined to *in fact* have a significant effect, then an Environmental Impact Statement will be required.²²

The third and most stringent level of review required by NEPA involves the completion of an Environmental Impact Statement (EIS). This level of review is triggered when a federal project's impacts are known to be significant in terms of their context and intensity.²³ The preparation of an EIS is not done all at once; rather, it is completed in stages.

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First, the lead agency publishes in the *Federal Register* a Notice of Intent (NOI) to prepare an EIS.²⁴ The NOI describes the project contemplated plus the rationale for the action, and it invites public comment upon environmental issues posed by the project.²⁵ Once the lead agency receives public comment, it then prepares a draft EIS analyzing the direct, indirect, and cumulative impacts of both the proposed action and one or more alternative means of achieving the desired outcomes.²⁶ A draft EIS must contrast the impacts that are likely to occur from each posed alternative versus the impacts that would occur from a course of no action (i.e., the “no action alternative”).²⁷

Next, the public is invited to comment upon and review the draft EIS.²⁸ The lead agency must review, consider, and respond to the public comment before issuing a final EIS and Record of Decision (ROD).²⁹ Should there be shortcomings identified in a draft or final EIS, the lead agency may amend the EIS or submit a supplemental EIS.³⁰ Notably, the vast majority of federal actions *do not* require an EIS, as most do not involve significant environmental impacts. Note that the EPA tracks the number of EISs prepared per annum, but it does not track numbers of EAs or CEs completed each year.³¹

NEPA Critiques and Shortcomings

NEPA is no stranger to criticism. The law has long been criticized as inefficient and blamed for causing lengthy project delays and needlessly costing taxpayer dollars.³² In recent years, the time that it takes to complete an environmental review has been scrutinized. NEPA’s most ardent opponents have called it “[a]mong the worst” of environmental regulations and have claimed that NEPA has become “a weapon for litigants to force delays.”³³ Critics have proclaimed that NEPA “has long outlived its usefulness” and that “repealing NEPA would not make a whit of difference to the environmental or public health.”³⁴

Nevertheless, there have been few attempts to systematically document and explain NEPA’s influence on environmental outcomes or environmental governance.³⁵ For instance, hundreds of thousands of proposals each year are potentially subject to NEPA review, though only approximately 200 proposals currently undergo a complete EIS review.³⁶ Instead, the vast majority of proposed actions qualify as CEs, and roughly 50,000 proposals each year are categorized as EAs, sometimes after modifications to the initial proposal.³⁷ Only in *very rare* instances do projects proceed to a full-blown EIS review.³⁸

Proponents for amending NEPA argue it must be streamlined because litigation over the adequacy of environmental review causes unnecessary delays that derail projects to the point that many, particularly large-scale projects, are abandoned. On the other hand, opponents of streamlining argue that any attempt to simplify NEPA is tantamount to lessening environmental protections and effectively cuts out public participation in the federal decision-making process. NEPA critics aver that the impact of litigation on project delays is

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dubious and offer data to support their position.³⁹

Subject to the Whims of Each Administration

Past administrations have attempted to address NEPA’s perceived shortcomings. For instance, under the Obama Administration, several bills were introduced in the 115th Congress that would have curtailed judicial review of NEPA decisions (e.g., bills that authorized the Secretary of Agriculture to require arbitration in lieu of judicial review and bills that shorten the statute of limitations for NEPA challenges).⁴⁰

Additionally, in August 2017 the Trump Administration issued Executive Order 13807, which attempted to streamline NEPA’s administrative processes.⁴¹ The Executive Order’s intended to

- 1) focus on issues that truly matter rather than amassing unnecessary detail [and mandating completion of an EIS review within 365 days];
- 2) reduce paperwork, including by setting appropriate page limits [EIS statements were limited to 150 pages, with an allowance for up to 300 pages for “complex projects”];⁴²
- 3) discuss briefly issues that are not significant; and
- 4) prepare analytic (rather than encyclopedic) documents, among other measures.⁴³

The Executive Order aimed to reduce the average time for environmental review and approval, and it directed executive agencies to streamline completion of all environmental reviews of infrastructure projects, with all EISs being completed within two years from the publication of an NOI.⁴⁴ This contrasts with the results of studies performed by the CEQ—the division of the Executive Office charged with issuing guidance and interpreting regulations that implement NEPA’s procedural requirements⁴⁵—which determined the average time for federal agencies to complete an EIS is 4.5 years.⁴⁶

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QUICKER BUT LESS DIRTY: STREAMLING AND EXPANDING NEPA ENVIRONMENTAL REVIEW

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Though the past two administrations sought to alter NEPA's requirements via different means, both were interested in addressing critiques of the law. Since its inception in 1969, however, the CEQ has not significantly revised NEPA's regulations aside from the July 2020 passage of a final rule, "Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act," which was designed to facilitate "efficient, effective, and timely NEPA reviews . . . by simplifying regulatory requirements, codifying certain guidance and case law relevant to these regulations, revising the regulations to reflect current technologies and agency practices, eliminating obsolete provisions, and improving the format and readability of the regulations." Not until the current administration—nearly 40 years later—has the CEQ revised the NEPA in a more meaningful way.⁴⁷ Considering how the landscape of construction and the environment have changed in the past 50 years⁴⁸ and the fact that it has been decades since the CEQ has provided any significant revisions to NEPA regulations, the urgency in addressing NEPA's shortcomings—whether accurate or merely perceived—is clear.⁴⁹

Biden Administration's Changes to NEPA

Biden Infrastructure Bill Alters NEPA Requirements

The Infrastructure Bill includes spending primarily for "hard infrastructure" but also contains several provisions that will significantly alter NEPA review requirements. The Infrastructure Bill's key NEPA provisions include the following,⁵⁰ all of which are intended to streamline the environmental review process by:

1. mandating the Secretary of Transportation to identify categorical exclusions that, if applicable to other federal agencies, would facilitate infrastructure development relevant to transportation projects and accelerate project delivery if available to other federal agencies;
2. allowing the establishment of a new categorical exclusion for oil and gas pipeline gathering lines⁵¹ on federal and Indian lands and expanding the scope of the existing categorical exclusion for projects of limited federal assistance to include those that receive \$6 million or less in federal funding and have overall implementation costs of \$35 million or less;
3. authorizing project sponsors and federal land management agencies to avail themselves of the applicable categorical exclusions established by the Federal Highway Administration;
4. reducing the time that a lead agency has to invite other agencies to participate in the environmental review from 45 calendar days to 21 calendar days;
5. requiring the use of joint NEPA documents by the Federal Highway Administration and other federal land

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- management agencies for projects involving multiple federal agency approvals;
6. establishing a presumptive 200-page limit for the alternatives analysis portion of an EIS;
7. requiring that the NEPA review process be completed within two years from the publication of the NOI, pursuant to a schedule developed by the lead agency;⁵² and
8. requiring issuance of a Record of Decision for a project within 90 days of the final EIS.

Additional Biden Rollbacks to Trump NEPA Changes

In addition to the NEPA changes finalized in the Infrastructure Bill, the Biden Administration implemented additional adjustments designed to scale back Trump reforms that could impact the pace of future infrastructure projects. The CEQ recently proposed restoring three procedural NEPA provisions to provide communities and decision-makers more complete information about proposed projects, the environmental and public health impacts of said projects, and alternatives to proposed projects.⁵³

Additional NEPA rule changes proposed by the Biden Administration include the following.

1. **Restore the requirement that federal agencies evaluate all the relevant environmental impacts of the decisions they are making.** This proposed change would make clear that agencies must consider the "direct," "indirect," and "cumulative" impacts of a proposed decision, including by evaluating a full range of climate change impacts and assessing the consequences of releasing additional pollution in communities that are already overburdened by polluted air or dirty water.

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CEQ Chair Brenda Mallory says the proposed revisions will help ensure NEPA's efficient application and mitigate past shortcomings, but many suggest that the Biden Administration is shooting itself in the proverbial foot.

- 2. Restore the full authority of agencies to work with communities to develop and analyze alternative approaches that could minimize environmental and public health costs.** This proposed change would give agencies the flexibility to determine the “purpose and need” of a proposed project based on a variety of factors, and to work with project proponents and communities to mitigate or avoid environmental harms by analyzing common sense alternatives. The 2020 NEPA rule limited federal agencies’ ability to develop and consider alternative designs or approaches that do not fully align with the stated goals of the project’s sponsor, often a private company.
- 3. Establish CEQ’s NEPA regulations as a floor, rather than a ceiling, for the environmental review standards that federal agencies should be meeting.** This proposal would restore the ability of federal agencies to tailor their NEPA procedures, consistent with the CEQ NEPA regulations, to help meet the specific needs of their agencies, the public, and stakeholders.⁵⁴

While CEQ Chair Brenda Mallory says these revisions will be instrumental in ensuring NEPA’s efficient application and mitigating past shortcomings,⁵⁵ many suggest that the Biden Administration is shooting itself in the proverbial foot as these revisions are counterproductive to the Administration’s infrastructure priorities.

What Do NEPA Changes Mean for Contractors?

While NEPA imposes obligations on federal agencies to prepare environmental reviews of federal actions, it also has direct impacts on contractors, designers, consultants, and other private entities working to build a federally funded project. Changes to NEPA will, of course, affect contractors who directly assist in the preparation of NEPA documents. But even when a contractor is not

directly involved in the NEPA process, compliance with NEPA may be on the critical path for federally funded projects.

With more federally funded projects trending towards the design-build model,⁵⁶ contractors are being engaged early in the design process before the environmental permitting process (including NEPA) has been completed and construction has begun. Delays to the NEPA process can therefore delay the completion of design and the start of construction, and changes to the project as a result of the NEPA process can increase risks and costs to a design-build contractor who bid on and contracted to build a particular project.

The impact of NEPA on contractors in the design-build context is illustrated by 23 C.F.R. § 636.109, which specifically discusses the interplay between the NEPA process and bidding and award of Department of Transportation (DOT) design-build contracts. Section 636.109—helpfully called “How does the NEPA process relate to the design-build procurement process?”—sets out requirements for when a design-build contract may be procured by the DOT in relation to completion of the NEPA process. Its opening sentence recognizes the impact of the NEPA process from the perspective of various players: first, NEPA itself (“to ensure that there is an objective NEPA process”); second, public owners of the projects vis-à-vis the environmental goals of NEPA (“that public officials and citizens have the necessary environmental impact information for federally funded actions before actions are taken”); third, the contractors bidding on projects still subject to completion of the NEPA process (“that design-build proposers do not assume an unnecessary amount of risk in the event the NEPA process results in significant change in the proposal”); and finally, the public owners of the project vis-à-vis the cost of the project (“that the amount payable by the contracting agency to the design-builder does not include significant contingency as a result of risk placed on the design-builder associated with significant change in the project definition arising out of the NEPA process”).

Considering these potential impacts, section 636.109 allows the DOT to issue Requests for Quotes (RFQs) and Requests for Proposals (RFPs) prior to the completion of the NEPA process if they “inform proposers of the general status of the NEPA process” and if “no commitment will be made as to any alternative under evaluation in the NEPA process, including the no-build alternative.”⁵⁷ The DOT may even award a design-build contract prior to the conclusion of the NEPA process, but the design-builder may only proceed with preliminary design. It may not proceed with final design or physical construction until completion of the NEPA process, and the DOT is authorized to use contract hold points or other methods of issuing multistep approvals to ensure this.⁵⁸ Further, the design-build contract must state that no commitments are being made to any alternative evaluated in the NEPA process, all environmental and mitigation measures identified in the NEPA document will be implemented,

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and the design-build contract will be terminated if the no-build alternative is selected at the end of the NEPA process.⁵⁹

These provisions presumably mitigate the risk that design-build proposers face when bidding and entering into contracts for projects that have yet to complete the NEPA process while balancing the interests of other players. Certainly, making it clear that final design and construction may not proceed until completion of NEPA, requiring the agency to be explicit about the status of the NEPA process in the RFQ and RFP, and authorizing the agency to build hold points and/or approvals into the contract itself should reduce the uncertainty contractors face when the NEPA process is ongoing. Contractors bidding and contracting for these DOT design-build contracts know they need not spend time and money on a final design or construction until the NEPA process is concluded.

Other aspects of section 636.109, however, still demonstrate how much risk and uncertainty contractors face when the NEPA process may indefinitely hold up final design and the start of construction, and obligate contractors to keep open the possibility of moving forward with an alternative design—or even that NEPA may conclude that it is better not to build the project at all. For instance, a contract awarded prior to the final environmental approval may include a lump-sum price subject to modification if requirements change, or it may provide for negotiation of pricing once environmental documents are completed.⁶⁰ A design-build contract awarded prior to the final environmental approval must limit the type of work performed prior to issuance of the final environmental decision to preliminary design and other efforts appropriate to assist the agency in the environmental decision-making process.⁶¹ Built-in holds and multistage approval processes in the contract set out a path, but that path is one with many enforced stops and check points, which inevitably create more paperwork and potential for conflict and delay.

Given the impact the NEPA process can have on contractors—both those engaged to work on NEPA documents themselves and those in the design-build context—changes to NEPA implemented by the Biden Administration may be significant for contractors. The changes to NEPA set forth in the Infrastructure Bill and recently announced by the CEQ attempt to address some of the criticisms of NEPA by streamlining the process while also restoring and potentially strengthening the environmental goals of the law. The two sets of changes arguably have diametrically opposed impacts on contractors: The streamlining of the process leads to more certainty around cost and timing for contractors, as well the restoration/strengthening of the environmental protections leads to a more intensive and costly approval process with possibly greater range of alternatives being considered.

A More “Streamlined” Process

As critics of NEPA have long pointed out, the broad scope and inherent ambiguity of NEPA has meant uncertainty in the requirements and process of NEPA, which in

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turn can mean uncertainty for contractors facing potential changes to the timing and cost of projects going through the NEPA process. The Biden Administration’s changes to NEPA included in the Infrastructure Bill carry forward some of the Trump Administration’s changes that attempt to “streamline” the NEPA process and provide some certainty to contractors being impacted by the law.

First, the Infrastructure Bill’s alterations will provide clarity as to which projects do not require completion of the NEPA process at all.⁶² In anticipation of the many transportation projects that will come from the passing of the Infrastructure Bill, the Bill orders the Secretary of Transportation—working with the Departments of Interior, Army, Commerce, Agriculture, Energy, and Defense, and any other federal agency as needed—to identify “categorical exclusions” to NEPA in order to “accelerate delivery of a project.” CEs are defined in 23 C.F.R. § 771.117 as actions that, “based on [] past experience with similar actions, do not involve significant environmental impacts.”⁶³ The Infrastructure Bill also allows for the establishment of new CEs for oil and gas pipeline gathering lines. Contractors bidding on projects falling under one of the newly identified and established CEs will be able to avoid the complication and delay of the NEPA process entirely.

Second, to address one of the biggest challenges NEPA poses for construction projects—the delay to start of construction caused by the NEPA process—the Infrastructure Bill includes several changes to shorten or set time periods throughout the process. Time for the lead agency to invite other agencies to participate in the environmental review was cut from 45 days to 21 days.⁶⁴ The NEPA review process itself will need to be completed within two years from the publication of the NOI and the lead agency must develop a schedule for the review process. Further, the ROD must be issued within 90 days of the final EIS. The limited review time, requirement for a schedule to be developed, and deadline for issuance of a

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ROD will give contractors certainty in planning around the NEPA process and facilitate better anticipating the start of construction.

Third, the Infrastructure Bill's requirement that federal agencies use joint NEPA documents in projects requiring multiple federal agency approvals, as well as the establishment of the 200-page limit on the alternatives analysis portion of an EIS, will undoubtedly streamline the process and hopefully result in quicker completion of the NEPA process.

The Return of A Broader Environmental Review

While the Infrastructure Bill's changes to NEPA would mostly streamline the process, the additional rule changes proposed by the CEQ under the Biden Administration arguably work in the opposite direction. The CEQ's recently announced rule changes seek to reverse the Trump Administration's weakening of the environmental protections of NEPA by restoring agencies' obligation to conduct a broader environmental review.⁶⁵ The Trump Administration removed certain requirements of NEPA in an effort to speed up approval of projects and eliminate some "bureaucratic" aspects of the process.⁶⁶ Reversing those changes may once again slow things down for contractors on projects subject to NEPA.

The CEQ's proposed rules would once again require agencies to evaluate the direct, indirect, and "cumulative effects" of federal projects; allow agencies to impose additional NEPA regulations; and expand the range of "reasonable alternatives" that could be considered.⁶⁷ The proposed rules have been praised for restoring the environmental protections of NEPA, and supporters argue that the rules clear up confusion caused by the Trump Administration's changes.⁶⁸ "Patching these holes in the environmental review process will help reduce conflict and litigation and help clear up some of the uncertainty that the previous administration's rule caused," said Brenda Mallory, the chair of the CEQ under the Biden Administration.⁶⁹ "The basic community safeguards we

are proposing to restore would help ensure that American infrastructure gets built right the first time, and delivers real benefits, not harms, to people who live nearby."⁷⁰ Supporters point to the possibility of costly remediation if a project is built without adequately evaluating the environmental impact, so a more fulsome NEPA review at the outset could ultimately reduce the overall cost of projects.⁷¹

Certainly, setting aside the environmental and social impacts, the proposed rules could aid contractors involved in projects subject to NEPA by setting forth more defined standards for the NEPA process. In the near term, they also likely would resolve some of the litigation filed in response to the Trump Administration's changes, which would clear the way for any projects held in limbo.

However, critics of the CEQ's proposed rules argue that the rules return NEPA to "the decades-long status quo of perpetual delays and red tape."⁷² The American Road and Transportation Builders Association's Vice President of Regulatory and Legal Issues, Nick Goldstein, remarked that the proposals are "ill-timed and wholly inconsistent with the administration's own stated goals of modernizing the nation's transportation infrastructure," noting that currently, completion of the environmental process under NEPA can take as long as seven years for new transportation projects.⁷³ By requiring more comprehensive environmental evaluation, the CEQ's proposed rules could theoretically make the NEPA process more complicated and costly, requiring more intensive and comprehensive analysis. This analysis would still need to occur within the procedural rules of NEPA, as updated by the Infrastructure Bill.

Now that the Infrastructure Bill has passed, the overall NEPA process, even with more comprehensive review, is confined by clearer parameters (i.e., clear deadlines for completion of review, shortened time periods, page limits, consistency in forms across agencies, etc.). So, for contractors who are not engaged to work on NEPA documents directly but rather are impacted by the need to wait for completion of the NEPA process before they can proceed with the final design and construction of a project, the cumulative effect of the Biden Administration's recent changes to NEPA should be to provide greater certainty and clarity, allowing those contractors to better plan to incorporate the NEPA process into the construction schedule and budget.

Conclusion

Contractors set to bid on or construct federal projects subject to NEPA should pay special attention to how the Infrastructure Bill and the Biden Administration's rule changes to NEPA unfold. NEPA's process-driven design was set to encourage rational and well-informed decision-making, but effectiveness and efficiency concerns continue to plague it. Though efforts to improve the efficacy and speed of NEPA's process are seemingly political in nature or at least subject to the whims of each administration, the fact that every administration agrees that change is necessary reflects a common goal of improving NEPA.

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Elaine Y. Lee is an attorney in the Los Angeles office of Pillsbury Winthrop Shaw Pittman LLP, where she advises and advocates for clients in connection with major construction projects, including public infrastructure, commercial buildings, and cultural venues. Athena G. Rutherford is an attorney in the San Francisco office of Pillsbury Winthrop Shaw Pittman LLP, where she represents clients in general and complex litigation, including litigation related to construction and real property.

Endnotes

1. Katie Lopbosco & Tami Luhby, *Here's What's in the Bipartisan Infrastructure Package*, CNN (updated Nov. 15, 2021), <https://www.cnn.com/2021/07/28/politics/infrastructure-bill-explained/index.html>.

2. H.R. 3684, 117th Cong. (2021).

3. For instance, the bill provides for \$110 billion for roads, bridges, and other transportation-related programs; \$66 billion for rail and Amtrak maintenance and upgrades; \$65 billion to modernize the electric grid, including improvements to the nation's clean energy infrastructure; \$65 billion to expand high-speed internet access; \$55 billion to upgrade water infrastructure, including lead pipe replacement; \$47 billion for infrastructure "resilience," to guard against cyberattacks and severe weather; \$39 billion for public transit; \$25 billion for airport upgrades; \$21 billion for environmental remediation; and \$7.5 billion to install electric vehicle charging stations across the country. *Id.*; News Release, White House, UPDATED FACT SHEET: Bipartisan Infrastructure Investment and Jobs Act (Aug. 2, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/08/02/updated-fact-sheet-bipartisan-infrastructure-investment-and-jobs-act/>.

4. *The Origins of EPA*, U.S. ENV'T PROT. AGENCY, <https://www.epa.gov/history/origins-epa> (last visited Oct. 21, 2021).

5. 42 U.S.C.A. § 4321 et seq. (1970); *Welcome*, NEPA.GOV: NAT'L ENV'T POL'Y ACT, <https://ceq.doe.gov/> (last visited Oct. 25, 2021).

6. NEPA encompasses a variety of projects and activities, including construction of roads, bridges, highways, public transit, and airports; conventional and renewable energy production and distribution; electricity transmission; water infrastructure; and broadband deployment, as well as management of public lands, forests, and waters. Such management activities include leases and authorizations for energy production, mining, grazing, and other activities; management of national parks, forests, and fisheries; and environmental restoration projects. Where the federal government delegates to states, NEPA requirements trickle down and are applicable, too. *CEQ Releases Final Rule That Seeks to Modernize NEPA Regulations*, AM PUB. POWER ASS'N (July 16, 2020), <https://www.publicpower.org/periodical/article/ceq-releases-final-rule-seeks-modernize-nepa-regulations>.

7. 42 U.S.C.A. § 4321.

8. Kirk Emerson & Elizabeth Baldwin, *Effectiveness in NEPA Decision Making: In Search of Evidence and Theory*, 21 J. ENV'T POL'Y & PLANNING 427, 443 (2019).

9. *Id.*

10. See *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349–54 (1989) (explaining that "NEPA itself does not mandate particular results, but simply prescribes the necessary

process," and that the NEPA process ensures that agencies "will carefully consider . . . detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decision-making process and the implementation of that decision").

11. 42 U.S.C. § 4321(a)(1); Julia S. Thrower, *Is the National Environmental Policy Act in Need of Change?*, 62 *ADVOCATE* 35 (2019).

12. Thrower, *supra* note 11.

13. NEPA applies to all major federal actions, including policies, regulations, permits, and grant-making. This paper focuses on transportation infrastructure. According to the U.S. Environmental Protection Agency, under NEPA, "all federal agencies are to prepare detailed statements assessing the environmental impact of and alternatives to major federal actions significantly affecting the environment." U.S. ENV'T PROT. AGENCY, *What Is the National Environmental Policy Act?*, <https://www.epa.gov/nepa/what-national-environmental-policy-act> (last visited Oct. 22, 2021).

14. *Id.*

15. Thrower, *supra* note 11.

16. 40 C.F.R. § 1501.3(a).

17. *Id.* §§ 1508.4, 1507.3(b)(1)–(2)(ii); see also John C. Ruple & Kayla Race, *Measuring the NEPA Litigation Burden: A Review of 1,499 Federal Court Cases*, 50 *ENV'T L.* 479, 484–85 (2019).

18. Ruple & Race, *supra* note 17, at 484–85; see also 40 C.F.R. § 1508.4.

19. 42 U.S.C. § 15942(a).

20. 40 C.F.R. § 1508.9.

21. *Id.* § 1501.4; Final Guidance for Federal Departments and Agencies on the Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact, 76 *Fed. Reg.* 3843, 3847 (Jan. 21, 2011).

22. 40 C.F.R. § 1501.4.

23. Ruple & Race, *supra* note 17, at 484.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*; see also 40 C.F.R. § 1502.14(d) ("Identify the agency's preferred alternative or alternatives, if one or more exists, in the draft statement and identify such alternative in the final statement unless another law prohibits the expression of such a preference.").

28. Ruple & Race, *supra* note 17, at 485; see also 40 C.F.R. §§ 1503.1, 1503.4.

29. Ruple & Race, *supra* note 17, at 484; see also 40 C.F.R. §§ 1503.1, 1503.4.

30. 40 C.F.R. § 1502.9(a), (c).

31. The U.S. Government Accountability Office (GAO) estimates that 95% of NEPA documents are CEs, nearly 5% are EAs, and less than 1% are EISs. See U.S. GOV'T ACCOUNTABILITY OFF., GAO-14-370, NATIONAL ENVIRONMENTAL POLICY ACT: LITTLE INFORMATION EXISTS ON NEPA ANALYSES 8 (Apr. 2014); see also Ruple & Race, *supra* note 17, at 486.

32. Thrower, *supra* note 11, at 36.

33. *Id.*
34. *Id.*
35. Emerson & Baldwin, *supra* note 8, at 427–28.
36. Compare to the 1980s when the number of annual EISs exceeded 1,000, but later procedural guidance has streamlined the process. *Id.* at 428.
37. Emerson & Baldwin, *supra* note 8, at 428–29.
38. *Id.* at 429.
39. From 2001 through 2013, Council on Environmental Quality (CEQ) conducted an annual survey on litigation involving a NEPA-based cause of action. The survey tallied the lead defendant federal agency and type of plaintiff. For NEPA-based case dispositions during the year, the survey tallied outcome types and basis for dispositions. Council on Env't Quality, *2013 NEPA Litigation Survey*, <https://ceq.doe.gov/docs/ceq-reports/2013-NEPA-Litigation-Survey.pdf> (last accessed Oct. 25, 2021).
40. S. 2068, 115th Cong. § 314 (2017); S. 879, 115th Cong. § 106 (2017); H.R. 2936, 115th Cong. § 311 (2017); H.R. 875, 115th Cong. § 4 (2017) (all bills authorizing the Secretary of Agriculture to require arbitration in lieu of judicial review of NEPA Actions); H.R. 4423, 115th Cong. § 2 (2017); S. 3202, 115th Cong. § 2 (2017); H.R. 4419, 115th Cong. § 4–5 (2017) (all bills shortening the statute of limitations for challenging NEPA claims).
41. Exec. Order No. 13,807, 82 Fed. Reg. 40,463 (Aug. 24, 2017) (Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects).
42. Meghan E. Smith & Alex Prochaska, *The Fate of Executive Orders After 2020 Election*, NAT'L L. REV. (Oct. 6, 2020), <https://www.natlawreview.com/article/fate-executive-orders-after-2020-election>.
43. Sec'y of Interior, Order No. 3355 (Aug. 31, 2017), https://legacy-assets.eenews.net/open_files/assets/2017/11/17/document_ew_05.pdf.
44. Smith & Prochaska, *supra* note 42.
45. *Welcome*, *supra* note 5.
46. Smith & Prochaska, *supra* note 42.
47. Rachel Lipinski et al., *Updated: CEQ Issues Final Rule to Modernize NEPA Regulations*, NAT'L L. REV. (Aug. 7, 2020), <https://www.natlawreview.com/article/updated-ceq-issues-final-rule-to-modernize-nepa-regulations>.
48. *See* National Environmental Policy Act Regulations; Incomplete or Unavailable Information, 51 Fed. Reg. 15,618 (Apr. 25, 1986) (amending 40 C.F.R. § 1502.22).
49. Ruple & Race, *supra* note 17, at 488; *see also* Lipinski et al., *supra* note 47.
50. Shelby Dyl et al., *Biden's Infrastructure Bill and the Promise of NEPA Reform*, JD SUPRA (Aug. 24, 2021), <https://www.jdsupra.com/legalnews/biden-s-infrastructure-bill-and-the-9782709/>.
51. Gathering pipelines transport gases and liquids from the commodity's source—like rock formations located far below the drilling site—to a processing facility, refinery, or a transmission line.
52. For projects with an environmental impact statement, this time is measured from publication of a notice of intent to the record of decision; for projects with an environmental assessment, it is measured from the date on which the lead agency determines that an environmental assessment is required to publication of the finding of no significant impact.
53. Press Release, White House, CEQ Proposes to Restore Basic Community Safeguards During Federal Environmental Reviews (Oct. 6, 2021), <https://www.whitehouse.gov/ceq/news-updates/2021/10/06/ceq-proposes-to-restore-basic-community-safeguards-during-federal-environmental-reviews/>.
54. *Id.*
55. *Id.*
56. John R. Heisse, Barbara R. Gadbois & Joseph C. Kovars, *Turning a Battleship: Design-Build on Federal Construction Projects*, 31 CONSTR. LAW., no. 4, Winter 2011, at 6.
57. 23 C.F.R. § 636.109(a)(1)–(3).
58. *Id.* § 636.109(b)(1)–(3).
59. *Id.* § 636.109(b)(4), (5), (9).
60. MICHAEL T. CALLAHAN, ROBERT F. CUSHMAN, MICHAEL C. LOULAKIS, EDMUND CAPLICKI, ANDRÉE BLAIS, JILL JAFFE, & NANCY SMITH, § 13.04 PARTICULAR CONSIDERATIONS AFFECTING TRANSPORTATION DESIGN-BUILD PROJECTS, DESIGN BUILD CONTRACTING HANDBOOK § 13.04 (3rd ed. 2022).
61. *Id.*
62. *See generally* H.R. 3684, 117th Cong. (2021).
63. As previously highlighted, a project that falls under a CE does not normally require an environmental assessment or environmental impact statement.
64. H.R. 3684, 117th Cong. (2021).
65. White House Press Release, *supra* note 53.
66. Exec. Order No. 13,807, 82 Fed. Reg. 40,463 (Aug. 24, 2017) (Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects).
67. Council on Environmental Quality, National Environmental Policy Act Implementing Regulations Revisions, 86 Fed. Reg. 55,757 (Oct. 7, 2021) (to be codified at 40 C.F.R. pts. 1502, 1507, 1508).
68. Lisa Friedman, *Biden Administration to Restore Climate Criteria to Landmark Environmental Law*, N.Y. TIMES (Oct. 6, 2021, updated Oct. 8, 2021), <https://www.nytimes.com/2021/10/06/climate/biden-nepa-environmental-law.html>.
69. *Id.*
70. *Id.*
71. Kevin DeGood, *The Importance of NEPA Review for Infrastructure Projects*, CAP (Aug. 16, 2018), <https://www.americanprogress.org/issues/economy/reports/2018/08/16/454416/importance-nepa-review-infrastructure-projects/>.
72. AJOT, *ARTBA: Proposed Rollback of NEPA Reforms Conflicts with Biden's Own Infrastructure Goals*, AJOT: AM. J. TRANSP. (Oct. 20, 2021), <https://ajot.com/news/article/artba-proposed-rollback-of-nepa-reforms-conflicts-with-bidens-own-infrastructure-goals>.
73. *Id.*