



ENVIRONMENTAL RULEMAKING UPDATE

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Edward (Ted) Boling | Partner

Perkins Coie



- Served as the country's top NEPA attorney as an associate director at the CEQ in the Executive Office of the President
- Served at U.S. Department of the Interior (DOI) and U.S. Department of Justice (DOJ) in Democratic and Republican administrations
- Deep involvement in federal infrastructure permitting issues and the first comprehensive revision of CEQ's NEPA regulations in over 40 years
- Advises leaders on transportation and energy development projects, agencies that must hire outside counsel, and the environmental professionals that support them on the development of renewable energy, resource development, transportation, and infrastructure.
- Development of the National Ocean Policy, CEQ's climate change guidance, and the regulatory response to the Deepwater Horizon disaster.
- Drafted NEPA guidance on mitigation and monitoring, cumulative impacts analysis, and the development of categorical exclusions from detailed NEPA documentation
- Advised White House on the establishment of national monuments, including the first marine national monuments in the United States

Michael Drummond

DOT, OGC



- Federal Attorney for the Department of Transportation
- Practice includes NEPA and environmental law
- Served as Director, Environmental Process and Policy Practice with WSP USA
- Nine years at the Council on Environmental Quality (CEQ)
- Helped draft the first comprehensive update to CEQ's NEPA implementing regulations in over forty years
- Led the development of the first government-wide reports on EIS timelines and page counts
- B.A. from the Evergreen State College and J.D. from the University of Washington School of Law.
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Jayni Hein

CEQ



- **Senior Director for NEPA & Counsel, CEQ**
- Background in environmental law, climate change, energy, and public lands, including NEPA.
- Previously, Natural Resources Director, Institute for Policy Integrity at NYU Law; Executive Director, Center for Law, Energy & the Environment, UC Berkeley School of Law.
- Prior experience as an attorney at Latham & Watkins LLP focused on environmental law and regulatory policy.
- Teach Natural Resources Law & Policy at NYU School of Law; author of numerous law review articles, an environmental law textbook, and op-eds on environmental topics.
- B.A. from University of Virginia and J.D. from UC Berkeley School of Law.

Executive Order 13990: Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis

Sec. 2. Immediate Review of Agency Actions Taken Between January 20, 2017, and January 20, 2021

- Agency actions subject to review are those “regulations, orders, guidance documents, policies, and any other similar agency actions promulgated, issued, or adopted between January 20, 2017, and January 20, 2021, that are or may be inconsistent with, or present obstacles to, the policy set forth in section 1 of this order.”
- Agencies are directed to “consider suspending, revising, or rescinding the agency actions.”
- Directs DOJ to notify courts with pending litigation on any action being reviewed to consider a stay

DOI Secretarial Orders 3398 & 3399

- S.O. 3398 rescinded S.O. 3355, which implemented E.O. 13807 with tighter Interior timelines for EIS (1 year) and EA (6 months)
- S.O. 3399 instructs Interior bureaus/offices to implement 2020 CEQ NEPA regulations only:
 - Without changing the “application or level of NEPA” compliance that would have occurred under the prior CEQ regulations and,
 - consistent with Department’s own NEPA regulations, the Departmental Manual, and guidance from the Department’s Office of Environmental Policy and Compliance.
 - Departmental regulations found to “irreconcilably conflict” with the 2020 CEQ regulations must be referred for resolution by the Department and CEQ.

NEPA Regulatory Actions

Trump Administration

- CEQ's final rule updated NEPA regulations on July 16, 2020, and the regulations took effect on September 14, 2020. All federal agencies were directed to issue proposed procedures for implementing the regulations by September 14, 2021.

Biden Administration

- On June 29, 2021, CEQ issued a two-year extension of the deadline for agencies to issue proposed procedures. CEQ "will assess how to amend its NEPA regulations to deliver an efficient environmental review process that ensures robust public participation and environmental protection."

CEQ Regulatory Agenda to revise the 2020 NEPA regulations.

- Notice of proposed rulemaking for a narrow set of changes (October 7, 2021).
- Notice of proposed rulemaking for a broader set of changes in November 2021.

Phase One Rulemaking

- Purpose and Need. CEQ proposes to revert 1978 regulations requiring agencies to briefly state the underlying purpose and need to which the agency is responding with conforming change to the definition of “reasonable alternatives.” 2020 regulations require agencies to base the purpose and need on an applicant’s goals and agency authority in reviewing a proposed application.
- Agency NEPA Procedures. CEQ proposes to restore the status of CEQ rules as a “floor” rather than a “ceiling” for agency NEPA procedures. 2020 NEPA rule asserts that agency NEPA procedures that are “inconsistent” with the CEQ rules are superseded “unless there is a clear and fundamental conflict with the requirements of another statute.”
- Indirect and Cumulative Effects. 2020 definition of “effects” eliminated the consideration of indirect and cumulative effects and limited scope. 40 CFR 1508.1(g). CEQ proposes to restore direct, indirect, and cumulative effects and eliminate limitations on effects analysis.

Phase Two Rulemaking Issues?

- “One Federal Decision” 40 CFR 1501.7(g), Lead Agencies, and timing and synchronous review aspects in the criteria for scope in § 1501.9(e)
- Official oversight and responsibility for agency NEPA processes. Senior Agency Official to ensure that the agency staff have the resources and competencies necessary to produce timely, concise, and effective environmental documents. 40 CFR 1507.2.
- Major Federal Action. 2020 NEPA rule changes to the definition of “major Federal action” have reopened a debate over whether the word “major” limits the scope of NEPA’s applicability. 40 CFR 1508.1(q).
- “Significantly” Redefined. The ten-factor analysis of the intensity of environmental effects replaced with four general considerations regarding the degree of effects.
- Transparency regarding agency progress in meeting milestones, 40 CFR 1507.4 “Agency NEPA program information” & Permitting Dashboard

NEPA-RELATED PROVISIONS

- **SEC. 11301. CODIFICATION OF ONE FEDERAL DECISION**
- **SEC. 11309. EVALUATION OF PROJECTS WITHIN AN OPERATIONAL RIGHT-OF-WAY.**
- **SEC. 11311. EFFICIENT IMPLEMENTATION OF NEPA FOR FEDERAL LAND MANAGEMENT PROJECTS.**
- **SEC. 11312. NATIONAL ENVIRONMENTAL POLICY ACT OF 1969 REPORTING PROGRAM.**
- **SEC. 11313 & 11314. EXTENDING DURATION OF NEPA ASSIGNMENT AGREEMENTS**

Infrastructure Investment and Jobs Act continued

NEPA-RELATED PROVISIONS

- **SEC. 11315. EARLY UTILITY RELOCATION PRIOR TO TRANSPORTATION PROJECT ENVIRONMENTAL REVIEW.**
- **SEC. 11316. STREAMLINING OF SECTION 4(F) REVIEWS.**
- **SEC. 11317. CATEGORICAL EXCLUSION FOR PROJECTS OF LIMITED FEDERAL ASSISTANCE.**
- **SEC. 11318. CERTAIN GATHERING LINES LOCATED ON FEDERAL LAND AND INDIAN LAND.**
- **SEC. 14002. ENVIRONMENTAL REVIEWS FOR CERTAIN TRIBAL TRANSPORTATION FACILITIES.**
- **SEC. 14003. PROGRAMMATIC AGREEMENTS FOR TRIBAL CATEGORICAL EXCLUSIONS.**