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NEPA REVIEW REVAMP: WHAT DEVELOPERS SHOULD EXPECT FROM THE CEQ'S NEW RULE AND THE INCOMING LITIGATION STORM-FRONT

To Our Clients and Friends:

After 40 years without an update, the White House Council on Environmental Quality (CEQ) has recently revamped its National Environmental Policy Act (NEPA) implementing regulations.

The revised NEPA regulations were published in the Federal Register on July 16, 2020. They include both substantive and procedural changes with the stated goal of streamlining and accelerating the environmental review process federal agencies are required to conduct under NEPA. The final rulemaking is the culmination of a Trump Administration directive to the CEQ to modernize the NEPA review process,[1] and follows a proposed rulemaking published in January of this year.

The most significant aspects of the CEQ's final rule for project developers are that the CEQ: (1) clarified which undertakings should and should not be subject to NEPA environmental analysis; (2) created new time limits for environmental assessments (EAs) and environmental impact statements (EISs); (3) eliminated the requirement to consider whether a project is "highly controversial"; (4) revamped and streamlined the environmental "effects" analysis; and (5) revised the definition of a "reasonable alternative" to limit alternatives to those that are technically and economically feasible and consistent with the goals of the applicant.

The final rule has already been challenged and more challenges, both facial and as-applied, are expected. As such, project sponsors and private parties who are working with federal and state agencies who are relying on the new regulations must weigh the time saved under the new rule against the litigation risk that all or a portion of the regulations may not survive.

Below we discuss the most significant aspects of the new rulemaking and the threat of litigation on the horizon.

Clarifying the Scope of Projects Subject to NEPA

Several elements of the CEQ's rulemaking function to reduce the number of projects subject to NEPA review. Most notably, the CEQ attacks the long-standing "small handle" problem head-on by carving "non-Federal projects with minimal Federal funding or minimal Federal involvement" out of the definition of "major actions" subject to NEPA.[2] This revision likely excludes a broad swath of state-led infrastructure projects from NEPA review, as well as privately funded transportation projects, but the CEQ left the task of defining "minimal Federal funding" or "minimal Federal involvement" to each of the reviewing agencies.[3]

The CEQ also encourages the identification, adoption, and use of categorical NEPA exclusions for agency activities deemed to consistently have an insignificant environmental impact, in part by providing reviewing agencies the flexibility to adopt another agency's categorical exclusions.[4]

Time Limits for Environmental Reviews

Once it is determined that a project is subject to a NEPA review, the new regulations set presumptive time limits for the completion of a NEPA environmental review: one year (following the decision to prepare the review) for an environmental assessment (EA) and two years for an environmental impact statement (EIS).[5] This represents a significant time savings: According to the CEQ, the median time required for the preparation of an EIS is currently 3.5 years,[6] and so the new limits may provide relief to many developers.

However, these time limits are merely presumptive. Reviewing agencies may extend the deadlines should they deem it necessary, considering factors such as the number of the persons and agencies affected by the action under review;[7] more complex environmental reviews may therefore continue to run beyond the time limits. Still, some have expressed concern that, should agencies strictly adhere to the time goals and consequently rush through the drafting of an EA or EIS, such reviews may be more subject to legal challenge than they otherwise would be.

Eliminates Requirement to Consider Whether Project Effects Are "Highly Controversial"

The final rule removes the requirement that agencies consider "[t]he degree to which the effects on the quality of the human environment are likely to be highly controversial" when determining whether an environmental impact is "significant."[8] The "highly controversial" prong has itself been highly controversial; as the CEQ explains, whether a project is "highly controversial" is "subjective and is not dispositive of effects' significance."[9]

Revamps the Environmental Effects Analysis

NEPA requires federal agencies to consider the "adverse environmental effects" of any "major federal action" which will significantly impact the human environment.[10] For decades, NEPA implementing regulations elaborated on this statutory mandate by directing reviewing agencies to categorize and analyze a proposed federal action's adverse environmental effects as either "direct," "indirect," or "cumulative."[11]

No longer. The new rulemaking simplifies the environmental effects analysis by instructing agencies to only assess environmental impacts which are "reasonably foreseeable" and have a "reasonably close causal relationship" to the action under review.[12] This revision will enable a reviewing agency to focus its time and resources on analyzing those environmental impacts which are most likely to be significant and eliminate highly unlikely or highly attenuated potential effects.[13]

Commenters critical of this change have attacked it as a means of excluding climate change concerns from the scope of NEPA review. To address such concerns, the CEQ explains that the new effects analysis framework does not explicitly bar reviewing agencies from considering a federal action's

climate change impacts,[14] and requires agencies conducting an EIS to consider "reasonably foreseeable" environmental trends when analyzing baseline conditions at the site of a proposed project.[15] The CEQ also pulled back from its proposal that effects should not be analyzed if remote in time, geographically remote, or the result of a lengthy causal chain, adding the word "generally" before those provisions.[16]

Despite this revision, this portion of the rule is expected to be challenged, as some courts have previously invalidated agency actions for failing to take a hard look at an action's indirect impacts or cumulative impacts on climate change.[17]

Streamlines the Definition of "Reasonable Alternatives"

Under the prior rule, agencies were often required to consider alternatives to proposed actions that were not economically feasible, that the agencies had no ability to implement due to their jurisdiction, or that were unrelated to the goal of the applicant proposing the project.[18] The new definition of a "reasonable alternative" now bounds the analysis of alternatives by limiting the definition to alternatives that are technically and economically feasible and consistent with the goals of the applicant, where applicable.[19]

The NEPA Forecast: Cloudy, with a Certainty of Litigation

Litigation storm clouds are already brewing over the nascent NEPA overhaul.

The CEQ's final rule is set to take effect on September 14, 2020.[20] Federal agencies may continue adhering to the preexisting NEPA review procedures with respect to any reviews commenced prior to September 14,[21] but will be required to implement the revised regulations for reviews commenced after the new rule's effective date unless there is a clear and fundamental conflict with another applicable statute.[22] Agencies have a one-year grace period to actually revise their own implementing NEPA regulations to align with the CEQ's update.[23]

The new regulations have already been challenged in court. On July 29, 2020, two lawsuits were filed in district courts challenging the rule under the Administrative Procedures Act—one in the Western District of Virginia, brought by the Southern Environmental Law Center on behalf of seventeen wildlife groups, and another in the Northern District of California, brought by the Western Environmental Law Center and Earthjustice on a behalf of a coalition of twenty environmental justice and outdoor recreation groups.[24] The two existing lawsuits emphasize the alleged environmental harms that will be caused by the changes to the CEQ's NEPA regulations and protest the CEQ's alleged dismissal of many of the rule commenters' concerns. It is expected that these or other plaintiffs will seek preliminary injunctions to delay the effective date of the new CEQ rule, arguing that alleged defects in the rule stand to cause imminent and irreparable harm.

The existing facial suits face difficult standing and ripeness headwinds, in part because NEPA's implementing regulations are directed at federal agencies and do not take effect until at least September 14. And the flexibility agencies have to apply the preexisting environmental review procedures to pending reviews will hamper any injunction requests lodged prior to the effective date. Moreover,

NEPA's broad, open-ended statutory language, as well as the deference afforded to agencies when issuing rules interpreting an ambiguous statute, will narrow challengers' potential avenues of success on the merits.[25] Unchallenged provisions will likely be allowed to be implemented even while legal challenges to other provisions proceed, as the CEQ has specifically provided for its various revisions to be severable from one another.[26]

However, a storm-front of as-applied challenges is also on the horizon. Once the new rule becomes effective, and as agencies begin conducting their NEPA reviews in compliance with them, as-applied challenges to various revisions will proliferate.[27] Individual agencies' various decisions regarding what actions entail "minimal federal involvement" or what indirect effects require analysis, for example, are likely to spawn litigation across the nation. Challenges to CEQ rules are not automatically brought to the Circuit of the U.S. Court of Appeals for the District of Columbia, meaning both facial and as-applied lawsuits will likely be filed in district courts across the country, potentially creating a patchwork of conflicting judicial guidance.

Of course, any legal wrangling will be for naught if Democrats sweep November's election and invoke the Congressional Review Act (CRA) to rescind the CEQ's rule. The CRA allows Congress, with Presidential approval, to rescind a rulemaking by simple majority within 60 legislative days of the rule's finalization, and the Biden campaign has already indicated a desire to wield this weapon against vulnerable Trump Administration environmental rules.[28]

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[1] *See* Executive Order No. 13,807 (Aug. 15, 2017).

[2] 40 C.F.R. § 1508.1(q)(vi).

[3] 85 Fed. Reg. at 43347.

[4] 40 C.F.R. § 1507.3(d)(2).

[5] 85 Fed. Reg. 43304, 43326 (July 16, 2020); 40 C.F.R. § 1501.10.

[6] 85 Fed. Reg. at 43305.

[7] 40 C.F.R. § 1501.10.

[8] 85 Fed. Reg. at 43322.

[9] *Id.*

[10] 42 U.S.C. § 4332.

[11] 85 Fed. Reg. at 43343.

[12] *Id.;* 40 C.F.R. § 1508.1(g). Furthermore, the CEQ states that a "but for" causal relationship is insufficient to make an agency responsible for reviewing a particular effect under NEPA. 40 C.F.R. § 1508.1(g)(2).

[13] 85 Fed. Reg. at 43343, 43344.

[14] 85 Fed. Reg. at 43344.

[15] 40 C.F.R. § 1502.15.

[16] 85 Fed. Reg. at 43343, 43344.

[17] *See, e.g., WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41 (D.D.C. 2019) (holding that the U.S. Bureau of Land Management was required to quantify downstream greenhouse gas emissions and reasonably foreseeable cumulative climate impacts of oil and gas development when authorizing leases on federal land); *see also* Juan Carlos Rodriquez, *WH Tweak To Enviro Review Rule May Bring New Headaches*, Law360 (July 26, 2020), https://www.law360.com/transportation/articles/1292130/wh-tweak-to-enviro-review-rule-may-bring-new-headaches.

[18] *See, e.g., Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 194 (D.C. Cir. 1991) ("[T]he rule of reason does not give agencies license to fulfill their own prophecies, whatever the parochial impulses that drive them. . . . [A]n agency may not define the objectives of its actions in terms so unreasonably narrow that only one alternative from among the environmentally benign ones in the agency's power would accomplish the goals of the agency's action.").

[19] 85 Fed. Reg. at 43343, 43376.

[20] 40 C.F.R. § 1506.13.

[21] *Id.*

[22] 40 C.F.R. § 1507.3.

[23] *Id.*

[24] Niina H. Farah, *Enviros to court: Trump "cut every corner" on NEPA overhaul*, E&E News (July 29, 2020), here.

[25] *See National Cable & Telecommunications Assn. v. Brand X Internet Services*, 545 U.S. 967 (2005) (giving deference an agency when issuing a rule that overturns a previous judicial precedent interpreting an ambiguous statute that the agency is tasked with executing).

[26] 40 C.F.R. § 1500.3.

[27] Dawn Reeves, *Critics Blast CEQ Rule Overhaul As Cutting 'Heart' Out Of NEPA's Purpose*, Inside EPA (July 16, 2020), https://insideepa.com/daily-news/critics-blast-ceq-rule-overhaul-cutting-'heart'-out-nepa's-purpose.

[28] Coral Davenport, *Democrats Eye Trump's Game Plan to Reverse Late Rule Changes*, N. Y. Times (July 17, 2020), https://www.nytimes.com/2020/07/17/climate/trump-regulations-election.html.

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