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Sea Change? Proposed Updates to NEPA Regulations Seek to Streamline Review Process, but Also Spur Controversy

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On January 10, 2020, the Trump Administration announced a proposed rulemaking that will be the first comprehensive overhaul to the White House Council on Environmental Quality's ("CEQ") National Environmental Policy Act ("NEPA") implementing regulations[1] in over forty years.[2] Proponents of the proposed changes laud the expected streamlining of the environmental review process and the reduction of time and costs expended by federal agencies in advancing projects and permits. Opponents of the proposal, on the other hand, contend that it will weaken environmental protections. The most contentious proposed change is the elimination of the requirement for agencies to evaluate cumulative impacts.[3] This change is seen by environmental groups as a way for federal agencies to avoid considering the impact of government actions on greenhouse gas ("GHG") emissions and climate change.

The proposal would address many needed changes that could over time make the NEPA process more efficient and reduce litigation over long-settled issues. The proposed changes can be divided into three groups: substantive changes, practical changes and legal clarifications. While the primary substantive change — eliminating the requirement to evaluate cumulative impacts — likely will be delayed by litigation, the less controversial practical changes and legal clarifications could be finalized and in force in mid– to late 2020.

"Effects" — Eliminating the Requirement to Disclose Cumulative Impacts

The NEPA statute requires federal agencies to evaluate the "adverse environmental effects"[4] of proposed actions, but the implementing regulations have long divided effects into three categories — direct, indirect and cumulative. The proposal eliminates those definitions and strikes all references to direct, indirect and cumulative, in favor of "effects or impacts." The new definition captures the current concepts of direct and indirect effects, but eliminates the concept of cumulative impacts — the incremental impacts of the proposed project when considered along with past, present and reasonably foreseeable future projects.[5]

It is unclear, however, whether the proposed changes would ultimately allow agencies to avoid considering climate change in their NEPA reviews as many commenters have opined. In recent years, some courts have struck down agency actions for failing to adequately consider climate change. Any such decisions that overturned agency action based on the cumulative impacts analysis could carry less weight in future litigation applying the new regulations that exclude cumulative impacts.[6] However, the proposed changes likely will not render obsolete the full body of NEPA caselaw concerning climate change impacts, because not all of those cases turned on the cumulative impacts analysis.

Several courts have required federal agencies to bolster their analysis of GHGs and climate change based on NEPA's requirement that agencies take a "hard look" at the direct and indirect effects of proposed projects.[7] The holdings from those cases could remain relevant to an agency's obligation to evaluate "adverse environmental effects," which encompasses the current concepts of direct and indirect effects. Indeed, the proposed changes acknowledge that some level of analysis of climate change impacts will typically be required in NEPA reviews, which indicates that existing caselaw on such analyses could remain relevant.[8]

Although the proposed change to eliminate cumulative impacts is a significant textual change from the current regulations, the ultimate impact on agencies' analysis of GHG emissions and climate change impacts remains uncertain. We expect this proposed change to be heavily litigated, and it likely will take years to assess whether, when and how an agency must consider climate change impacts in NEPA documents going forward.

Improving the Process — Proposed Changes to Agency Coordination Procedures, Timelines for Completion, and Presumptive Page Limits

Project proponents have long complained that the NEPA review process is far too lengthy and costly. The proposal includes a number of changes aimed at streamlining the process and minimizing the time agencies spend preparing their NEPA documents. While the proposed changes do not mark the first effort to implement streamlining initiatives, it is the first time these measures will be baked into the regulations. Below are three noteworthy process improvements.

- **Implementing One Federal Decision.** In August 2017, President Trump issued Executive Order 13807,[9] requiring enhancements to the NEPA process primarily to reduce unnecessary burdens and delays through interagency cooperation. For major infrastructure projects, the Executive Order directed agencies to produce a single review schedule, environmental impact statement ("EIS"), and record of decision in a process known as "One Federal Decision." The proposed change to the implementing regulations will codify aspects of the policy for all projects.[10] For example, the agencies will be required to meet a schedule set by the lead agency and issue a joint record of decision.[11]
- **Presumptive Time and Page Limits.** To address the most frequent complaint — the NEPA process takes too long — the proposal sets presumptive time limits for completion of as two years for an EIS and one year for an environmental assessment ("EA").[12] In addition, the presumptive page limit for an EIS is "150 or fewer" for typical projects and "300 or fewer" for "proposals of unusual scope or complexity."[13] The page limits are intended to force agencies to focus on the most significant issues and not extensively document issues not likely to affect the environment.
- **Framework for NEPA Applicability.** The proposal includes a new tool for agencies to work through threshold questions of whether NEPA is applicable and, if so, what level of NEPA review is appropriate, i.e., EIS, EA, or Categorical Exclusion ("CE"). This framework will assist agencies in making a determination that certain projects can be exempted from review altogether, or utilize the less rigorous CE or EA instead of preparing a full blown EIS.[14]

Codifying Well-Settled Caselaw

Since NEPA's enactment, a vast body of caselaw has developed and shaped the agencies' current review process. Yet a number of legal arguments that have long been settled by the courts continue to appear in NEPA litigation, detracting from the truly contested issues. In many respects, the proposed changes read like a NEPA lawyer's wish list for ways to streamline litigation and eliminate arguments that frequently are

presented to agencies, but rarely prevail.[15] Below are brief summaries of seven key points where the proposed changes seek to codify NEPA case law.

- **NEPA is a Procedural (Not Substantive) Statute.** Mirroring the often cited premise from the Supreme Court in *Robertson v. Methow Valley Citizens Council*,[16] the proposed language in 40 C.F.R. § 1500.1 states that "NEPA does not mandate particular results or substantive outcomes." This change codifies the well-heeled principle that NEPA is a procedural statute that does not mandate the agencies to choose a less environmentally damaging course of action.
- **NEPA Does Not Apply to Every Agency Decision.** The proposed changes in 40 C.F.R. § 1501.1(a)(2), codify a "threshold applicability analysis" framework that directs agencies to consider whether NEPA applies in the first instance.[17] Agencies are directed to evaluate, among other things, whether there is a major federal action and if that action is non-discretionary.[18]
- **Projects That Do Not Rise to Major Federal Actions Categorized as Non-Major.** NEPA requires agencies to study major federal actions, which should not include projects in which the federal permit or funding is a small component of a largely state or private undertaking — known as the small handle problem. The proposed changes permit agencies to identify "non-major" projects that are not subject to NEPA review.[19] This change could exempt, among other things, certain infrastructure projects from review such as pipelines, bridges and roads.[20]
- **Commenters Must Provide Clarity on Their Issues and Exhaust the Administrative Process.** Agencies are often in the position of having to decipher vague comment letters submitted by the public despite early Supreme Court caselaw requiring the public to "structure their participation so that it is meaningful, so that it alerts the agency" to their position.[21] In addition, the public is required to exhaust the administrative process and remedies available prior to seeking relief in the courts. These concepts would be codified in the proposed rule.[22]
- **Agencies Can Take Some Action Before the NEPA Process Concludes.** Often, agencies need to take initial steps to implement the project before the NEPA process concludes. Most frequently this arises when agencies need to preserve land. For example, the Department of Transportation often funds the purchase of properties in the planned right-of-way for potential highway or rail corridors to limit the need to later acquire properties that have developed during the lengthy NEPA process. The proposal clarifies that the agencies are authorized to take these important pre-decisional steps, potentially minimizing emergency litigation by project opponents to prevent agencies from moving forward before the final plan is selected.[23]
- **Economic and Social Impacts Without Environmental Impacts are Not Included.** The proposed changes clarify that economic or social impacts — absent an environmental impact — do not require study in a NEPA document. When

economic or social impacts are interrelated with potential impacts to the natural or physical environment, then the agencies would be required to consider the effects on the human environment.[24]

- **Final Agency Action Required for Judicial Review.** The proposal codifies the requirement that judicial review cannot occur before the agency has taken a final agency action (as required by the Administrative Procedure Act). The agencies can designate the EIS, EA/Finding of No Significant Impact, or CE as the final agency action, but those documents are not necessarily the final agency action.[25] In addition, the proposed changes permit agencies to develop a framework for staying decisions pending judicial review — potentially limiting the amount of emergency briefing.[26] And the proposal would codify provisions of Federal Rule of Civil Procedure 62 permitting agencies to seek "imposition of an appropriate bond requirement or other security requirements as a condition for a stay."[27]

Looking Forward

The proposal has received significant attention from both industry and environmental groups and it is near certain that any final rule will be heavily litigated. In addition, some Democratic lawmakers have stated that they will consider using the Congressional Review Act — which gives Congress 60 legislative days to overturn rulemakings with a simple majority vote — to reverse the proposed changes if they become final.[28] The CEQ intends the various changes to be severable from one another, potentially allowing unchallenged provisions to be implemented as legal challenges to other provisions proceed.[29]

Comments on the proposed rule are due **March 10, 2020,** and can be submitted here. Interested and affected parties should monitor these developments with their environmental counsel.

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1. 40 C.F.R. §§ 1500.1-1507.4.↩

2. First promulgated in 1978, CEQ's implementing regulations, have only been substantively amended once. In 1987, the regulations were revised to eliminate the requirement that agencies prepare a "worst case scenario" analysis. See Final Regulations, 43 Fed. Reg. 55978-56007 (Nov. 29, 1978); Final Rule, 51 Fed. Reg. 15618-26 (Apr. 25, 1986).↩

3. See Notice of proposed rulemaking, 85 Fed. Reg. 1684, 1728 (Jan. 10, 2020) (proposing definition of "[e]ffects or impacts" to be codified at 40 C.F.R. § 1508.1(g), stating that "[a]nalysis of cumulative effects is not required."); see also 40 C.F.R. § 1508.7 (2019) (defining "[c]umulative impact"); id. § 1508.27(7) (explaining that "[s]ignificance exists if it is reasonable to anticipate a cumulatively significant impact on the environment.").↩

4. 42 U.S.C. § 4332(2)(C)(ii).↩

5. 85 Fed. Reg. at 1728 (proposing definition of "[e]ffects or impacts" to be codified at 40 C.F.R. § 1508.1(g)).↩

6. *See, e.g., Indigenous Envtl. Network v. U.S. Dep't of State*, 347 F. Supp. 3d 561, 578 (D. Mont.), order amended and supplemented, 369 F. Supp. 3d 1045 (D. Mont. 2018) (requiring the Department of State to supplement its NEPA analysis for the Keystone XL Pipeline project to address cumulative impacts relating to greenhouse gas emissions).↩

7. *See, e.g., WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 67 (D.D.C. 2019) (holding that the U.S. Bureau of Land Management's (BLM) failure to quantify greenhouse gas emissions that were "reasonably foreseeable" effects of oil and gas development in authorizing leases on federal land in Wyoming, Utah, and Colorado violated NEPA); *W. Org. of Res. Councils v. BLM*, 2018 WL 1475470 (D. Mont. Mar. 26, 2018) (finding that NEPA required BLM to consider foreseeable climate change concerns in issuing coal leases in Montana); *Sierra Club v. FERC*, 867 F.3d 1357, 1374 (D.C. Cir. 2017) (holding FERC failed to adequately consider the indirect effects of greenhouse gas emissions that would result from burning natural gas carried by the Southeast Market Pipelines Project).↩

8. The Trump Administration's Draft National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions explains that "Agencies should attempt to quantify a proposed action's projected direct and reasonably foreseeable indirect GHG emissions when the amount of those emissions is substantial enough to warrant quantification, and when it is practicable to quantify them using available data and GHG quantification tools." 84 Fed. Reg. 30097, 30098 (June 26, 2019). The Obama Administration made the same type of acknowledgment, by noting that analysis of the direct and indirect effects of GHG emissions will capture the cumulative impacts of climate change on the proposed action. CEQ, Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews, dated August 1, 2016 (withdrawn April 5, 2017) at 17, ¶ 5, online: https://ceq.doe.gov/docs/ceq-regulations-and-guidance/nepa_final_ghg_guidance.pdf.↩

9. Executive Order 13807 — Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects (Aug. 27, 2017), online: https://www.federalregister.gov/documents/2017/08/24/2017-18134/establishing-discipline-and-accountability-in-the-environmental-review-and-permitting-process-for; *see also* One Federal Decision Framework for the Environmental Review and Authorization Process for Major Infrastructure Projects under Executive Order 13807 (M-18-13) (March 20, 2018), online: https://www.whitehouse.gov/wp-content/uploads/2018/04/M-18-13.pdf.↩

10. 85 Fed. Reg. at 1691.↩

11. *Id.* at 1715-16 (proposing changes to 40 C.F.R. §§ 1501.8(b)(6)-(7), 1501.7(g)).↩

12. *Id.* at 1717 (proposing changes to 40 C.F.R. § 1501.10).↩

13. *Id.* at 1719 (proposing changes to 40 C.F.R. § 1502.7).↩

14. *Id.* at 1714-15 (proposing changes to 40 C.F.R. § 1501.3).↩

15. *See id.* at 1688 ("[T]he proposed regulations would codify longstanding [case law] in some instances, and, in other instances, clarify the meaning of the regulations where there is a lack of uniformity in judicial interpretation of NEPA and the CEQ regulations.").↩

16. 490 U.S. 332, 350 (1989) ("[I]t is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process.''); see also 85 Fed. Reg. at 1693.↩

17. *See also* 85 Fed. Reg. at 1729 (proposing changes to 40 C.F.R. § 1508.1(q) and (defining "major federal action" to exclude projects "where the agency cannot control the outcome").↩

18. In *Department of Transportation v. Public Citizen*, the Supreme Court made clear that NEPA does not apply "where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions." 541 U.S. 752, 770 (2004).↩

19. 85 Fed. Reg. at 1728 (proposing changes to 40 C.F.R. § 1507.3(c)(1)).↩

20. "For example, this might include a very small percentage of Federal funding provided only to help design an infrastructure project that is otherwise funded through private or local funds." *Id.* at 1709.↩

21. *Dep't. of Transp. v. Pub. Citizen*, 541 U.S. at 764-65 ("Because respondents did not raise these particular objections to the EA, [the agency] was not given the opportunity to examine any proposed alternatives to determine if they were reasonably available. Respondents have therefore forfeited any objection to the EA on the ground that it failed adequately to discuss potential alternatives to the proposed action.").↩

22. 85 Fed. Reg. at 1713, 1722 (proposing changes to 40 C.F.R. §§ 1503.3, 1500.3(b)).↩

23. *Id.* at 1724 (proposing changes to 40 C.F.R. § 1506.1(b)).↩

24. *Id.* at 1720 (proposing changes to 40 C.F.R. § 1502.16(b)); *see, e.g., Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766 (1983).↩

25. 85 Fed. Reg. at 1693-94; id. at 1713 (proposing changes to § 1500.3(c)).↩

26. *Id.* at 1713 (proposing changes to 40 C.F.R. § 1500.3(c)).↩

27. *Id.* at 1713 (proposing changes to 40 C.F.R. § 1500.3(c))↩

28. *See* E&E News, *Democrats promise action against Trump NEPA overhaul* (Jan. 10, 2020), online: https://www.eenews.net/stories/1062039825.↩

29. 85 Fed. Reg. at 1694 (proposing changes to 40 C.F.R. § 1500.3(e)).↩

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