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The Shifting NEPA Landscape and Implications for Project Development

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A discussion of the National Environmental Policy Act and related regulations and their implications for project development.

Under the National Environmental Policy Act (NEPA), federal agencies must determine if their proposed major federal actions (including permit authorizations for projects sponsored by private entities) will significantly affect the human environment and consider the environmental and related social and economic effects. This means that virtually any project that requires a federal permit or authorization may be required to undergo a NEPA review. Development of broadband infrastructure, roads, bridges, oil and gas pipelines, and renewable energy facilities are just a few examples of the types of activities that may trigger NEPA review.

A NEPA review can take significant agency and applicant resources, substantially delay permits, and provide a basis for a federal court challenge to the project. Indeed, NEPA is the most litigated environmental statute in the US.

In 2020, the Council on Environmental Quality (CEQ) promulgated its highly anticipated final rule to amend its NEPA regulations, the first comprehensive revision of the NEPA implementing regulations in more than 40 years. As project proponents and agencies work to understand and implement the amended NEPA regulations, the Biden administration has signaled its intent to revisit and revise those regulations.

This Note addresses:

- The CEQ's 2020 NEPA regulations.
- The changes that are expected under the Biden administration.
- Steps project proponents can take to navigate the uncertainty of the shifting NEPA landscape.

CEQ's 2020 Overhaul of the NEPA Regulations

Widely recognized as the first major federal environmental law, NEPA was enacted and signed into law a half century ago to require federal agencies to consider the environmental impacts of their proposed major federal actions before making decisions, including whether to grant a permit for a proposed project (42 U.S.C. §§4321 to 4347). It imposes primarily procedural, rather than substantive, requirements and "does not mandate particular results" (see *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).) NEPA also established the CEQ and gave it primary responsibility for implementing NEPA, predominantly by promulgating regulations to implement the procedural requirements of NEPA. While federal agencies (for example, the Bureau of Land Management, US Department of Energy, and the US Army Corps of Engineers) have their own NEPA rules, the CEQ's regulations govern NEPA compliance by all federal agencies.

In 2020, the CEQ issued new NEPA implementing regulations, which include a host of key changes to the NEPA review process (85 Fed. Reg. 43,304 (July 16, 2020)). The new regulations went into effect on September 14, 2020.

Changes Related to Applicability and Mechanics of NEPA Review

The new NEPA regulations provide several key changes related to the applicability and mechanics of NEPA review.

Clarifies When NEPA Applies

The final rule includes a "NEPA threshold" section with several factors for federal agencies to consider when

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determining whether NEPA applies to a proposed action, including whether:

- Another statute expressly exempts a proposed activity or decision from NEPA.
- Compliance with NEPA would clearly and fundamentally conflict with the requirements of another statute.
- Compliance with NEPA would be inconsistent with congressional intent expressed in another statute.
- The proposed action is a major federal action.
- The agency has discretion to consider environmental effects.
- Environmental review or analysis under another statute is functionally equivalent to relevant NEPA requirements.

(40 C.F.R. § 1501.1.)

Clarifies Definition of Major Federal Action

The new rule also clarifies that "major Federal action" does not include non-discretionary decisions and non-federal projects (including those with minimal federal funding or involvement) where the agency "does not exercise sufficient control and responsibility over the outcome of the project" (40 C.F.R. § 1508.1(q)(1)(ii)). This clarification is aimed at addressing the "small handle" problem that can arise when the federal action is only a small piece of a non-federal project.

Clarifies the Appropriate Level of NEPA Review

The new regulations clarify the basis on which an agency selects the appropriate level of NEPA review (whether categorical exclusion, environmental assessment (EA), or environmental impact statement (EIS) and modifies how agencies consider the "significance" of the effect of a proposed action on the quality of the human environment (40 C.F.R. § 1501.3(b))).

The new regulations replace the previous regulations' enumerated factors with a more flexible approach, based on the setting of the proposed action, and directs federal agencies to consider the affected area specific to the action. In a noteworthy change from the previous regulations, the new regulations exclude consideration of "controversy" from the significance determination because "the extent to which effects may be controversial is subjective and is not dispositive of effects' significance."

The "controversy" factor has been increasingly relied on by courts in finding that a federal agency should have completed an EIS for a given project (see, for example, *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 440 F. Supp. 3d 1, 28 (D.D.C. 2020) (finding Corps should have completed an EIS for authorizations associated with the Dakota Access Pipeline). For more information on the Dakota Access project, see Legal Update, Standing Rock Sioux Tribe v. US Army Corps of Eng'rs: District Court Orders Full Environmental Review of Dakota Access Pipeline).

Under the new regulations, a showing that there is controversy is not sufficient to demonstrate that an EIS is necessary.

Expands Use of Categorical Exclusions

The new regulations facilitate increased use of categorical exclusions by allowing agencies to adopt other agencies' categorical exclusions. They also clarify that extraordinary circumstances do not automatically preclude categorical exclusion (40 C.F.R. § 1501.4).

Refines the Scope of Alternative Analysis

The final regulations clarify that reasonable alternatives requiring consideration are only those that are technically and economically feasible, meet the purpose and need of the proposed action, and are within the jurisdiction of the agency (40 C.F.R. § 1508.1(z)). They also clarify that agencies must limit their consideration to a reasonable number of alternatives (40 C.F.R. § 1502.14(f)).

Streamlines the Review Process

The new regulations include various modifications and improvements to streamline the NEPA review process. These include:

- **Presumptive page and time limits:** The new regulations presumptively limit EAs to 75 pages and EISs to either 150 or 300 pages, depending on scope and complexity and subject to extension by a senior agency official. To promote timely reviews, the new regulations also establish presumptive time limits of one year for EAs and two years for EISs.
- **One Federal Decision (OFD) policy**: The new regulations adopt elements of the OFD policy to improve interagency coordination of NEPA reviews. The regulations direct the lead agency in a multi-agency review to:
  - prepare a joint schedule;
  - develop procedures to address delays or disputes; and
  - when practicable, prepare a single EIS or EA.

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- **Reliance on existing studies, analyses, and information**: The new regulations encourage agencies to "tier" from existing federal, state, tribal, and local environmental analyses, studies, and decisions when doing so would facilitate the NEPA review. The new regulations also direct federal agencies to coordinate with state, tribal, and local agencies to minimize duplication of review requirements.
- **Increased applicant and contractor participation:** The new regulations give applicants and contractors more flexibility to prepare NEPA documents, including EAs, subject to a disclosure statement specifying any financial interest in the action. As with the previous regulations, the new regulations still require that agencies provide guidance, participate in document preparation, independently evaluate document contents, and take responsibility for assessment scope and accuracy.

Provides Flexibility for Public Involvement

In response to concerns from commenters that the proposal's comment time limits and provisions encouraging electronic communications may impede public access and input, the new regulations allow agencies to tailor public involvement to more effectively reach interested parties and meet the specific circumstances of the proposed action. The new regulations also put an emphasis on utilizing modern technology to enhance public involvement.

Substantive Changes to NEPA Effects Analysis

The new regulations also make important substantive changes to the NEPA effects analysis. They provide a new definition of "effects" of the proposed action that eliminates the references to separate categories of direct, indirect, and cumulative effects, and instead requires consideration of all effects caused by an agency action (40 C.F.R. § 1508.1(g)).

Under the regulations, federal agencies are only to analyze effects that are "reasonably foreseeable" and have "a close causal relationship" with the proposed action, which do not include effects that are:

- Remote in time.
- Geographically remote.
- The product of a lengthy causal chain.
- The agency has no ability to prevent.

(40 C.F.R. § 1508.1(g).)

The new regulations also revise the provision requiring agencies to address the "affected environment" to clarify that the NEPA review should "describe the environment of the area(s) to be affected … including the reasonably foreseeable environmental trends and planned actions in the area(s)" (40 C.F.R. § 1502.15).

During the rulemaking process, some commenters expressed concern that eliminating the requirement for a separate cumulative effects analysis may hinder federal agencies' analysis of climate change and environmental justice impacts. The CEQ clarified in the final rule preamble that the new regulations "do[] not preclude consideration" of "cumulative impacts" or "impacts of a proposed action on any particular aspect of the human environment" (85 Fed. Reg. 43,344). The CEQ instead stated that the new regulations are designed to require consideration of all effects caused by the action (which arguably include climate change, environmental justice, and other effects caused by the action that previously were likely to have been considered in a cumulative effects analysis).

Consistent with the new regulations, instead of addressing climate change or environmental justice impacts in a separate cumulative effects analysis, federal agencies:

- May address climate trends or planned actions that are relevant to environmental justice communities in the "affected environment" discussion.
- Where they are reasonably foreseeable and have a close causal relationship to the proposed action, may evaluate potential climate change and environmental justice impacts as part of the "effects of the action" analysis.

These changes may result in a different approach for some federal agencies.

Implementation of the New Regulations

Although the CEQ's new regulations are mandatory for NEPA reviews beginning on September 14, 2020, the regulations afford agencies discretion to decide whether to apply the new rules to projects that were already underway by the time the new regulations went into effect (85 Fed. Reg. 43,304 and 85 Fed. Reg. 43,339).

The new regulations also direct each federal agency to revise their NEPA procedures, as necessary, to implement the new CEQ regulations by September 14, 2021. Several agencies have also issued these regulations (see, for example, Legal Update, DOE Issues Final Rule Limiting its Environmental Review of LNG Projects).

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Agencies are directed not to impose additional procedures or requirements beyond those set out in the CEQ regulations. During this transition period while agencies work to update their regulations, where existing agency NEPA procedures are inconsistent with the new CEQ regulations, the CEQ regulations apply.

Pending Challenges to New NEPA Regulations

The new NEPA rules have generated much controversy and spurred numerous lawsuits. There are currently four pending challenges to the CEQ's new NEPA regulations in three different federal district courts:

- *Alaska Cmty. Action on Toxics v. Council on Envtl. Quality* (N.D. Cal. No. 20-5199).
- *California v. Council on Envtl. Quality* (N.D. Cal. No. 20-6057). This suit was filed on behalf of 21 states and several territories, counties, and cities, including California, Colorado, Connecticut, Delaware, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, Wisconsin, Guam, District of Columbia, New York City, and Harris County, Texas.
- *Envtl. Justice Health Alliance v. Council on Envtl. Quality* (S.D.N.Y. No. 20-6143).
- *Wild Virginia v. Council on Envtl. Quality* (W.D. Va. No. 20-45).

In each of these cases, the plaintiffs are seeking to invalidate the new NEPA regulations. They allege that the new NEPA regulations are unlawful for several reasons, including that the CEQ failed to adequately consider how the changes are likely to harm environmental quality and to consider environmental justice in revising the regulations, rendering the revisions arbitrary and capricious under the Administrative Procedure Act (APA) (5 U.S.C. § 553). The plaintiffs also have asserted that the new regulations are inconsistent with NEPA several reasons, including that the regulations improperly remove the requirement that agencies consider cumulative and indirect impacts to the environment.

In response, the government under the Trump administration argued that plaintiffs' arguments fail for lack of ripeness and standing. In particular, the government argues that the plaintiffs cannot establish irreparable injury without later agency action actually implementing the new NEPA regulations. They also argued that the CEQ's interpretations of NEPA are entitled to deference and that the regulations' revised definitions are examples of the reasonable construction of ambiguous terms. The government also argued that the rulemaking process was proper under the APA because the CEQ:

- Properly assessed the environmental impacts of the new regulations.
- Provided reasonable explanations for the revisions.
- Properly considered the plaintiffs' comments.

Plaintiffs in the Wild Virginia case filed a motion for a preliminary injunction, seeking to have the rule blocked nationwide. On September 11, 2020, the Virginia district court issued an order declining to issue a preliminary injunction or stay, finding that plaintiffs had not made a clear showing that they are likely to succeed on the merits of their challenge to the rule (see *Wild Virginia v. Council on Envtl. Quality*, 2020 WL 5494519 (W.D. Va. 2020)).

Accordingly, while litigation is ongoing, the new NEPA regulations are in effect across the country.

Outlook for NEPA Regulations Under the Biden Administration

The Biden administration has already indicated that it intends to revisit the new NEPA regulations. On President Biden's first day in office, he issued an executive order (EO) on "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis" (Health and Environment EO), which directs the heads of the relevant agencies to "immediately review and, as appropriate and consistent with applicable law, take action to address the promulgation of Federal regulations and other actions during the last 4 years" that conflict with enumerated objectives, including:

- Protecting the environment.
- Listening to science.
- Holding polluters accountable.
- Reducing greenhouse gas emissions.
- Prioritizing environmental justice.

The EO was accompanied by a fact sheet, which provides a non-exhaustive list of agency actions that federal agencies are directed to review and "consider suspending, revising, or rescinding." The new NEPA regulations are included on the list.

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The Health and Environment EO also directs the CEQ to:

- Rescind its 2019 draft guidance, "Draft NEPA Guidance on Consideration of Greenhouse Gas Emissions" (84 Fed. Reg. 30097 (June 26, 2019)).
- Review, revise, and update is previous 2016 guidance, "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" which provided a framework for agencies to address greenhouse gas (GHGs) emissions from federal actions and the effects of climate change on their proposed actions within the existing NEPA regulatory framework (81 Fed. Reg. 51866 (August 5, 2016)).

Approach to Pending Litigation

The Health and Environment EO also gives some indication as to how the Department of Justice (DOJ) under the Biden administration may address the pending challenges to the new NEPA regulations. The EO states that the Attorney General may provide notice of the order to any court with jurisdiction over pending challenges to relevant regulations and request that the court stay or otherwise dispose of litigation until the completion of the review processes described in the EO. This language is likely to be used by DOJ to seek stays, voluntary remands, or other relief in the ongoing litigation involving the NEPA regulations.

Accordingly, unless the new NEPA regulations are remanded or vacated by litigation, the CEQ is likely to undertake rulemaking to rescind or revise the NEPA regulations. Development of new or amended regulations, however, requires a lengthy process and is not likely to happen quickly. For example, it took the Trump administration almost four years to complete its NEPA rulemaking.

Scope of Biden Administration Review

As part of its review of the new NEPA regulations, the Biden administration is likely to revisit the "effects" definition and evaluate re-imposing a requirement for a separate cumulative effects analysis. Consistent with the Health and Environment EO and President Biden's January 27, 2021 EO on Tackling the Climate Crisis at Home and Abroad, which emphasizes a "whole-of-government" approach to climate change and environmental justice, it is expected that amendments to the NEPA regulations are likely to emphasize consideration of climate change and environmental justice impacts in NEPA reviews. For more information on this executive order, see Legal Update, President Biden Issues Executive Order Addressing the Climate Crisis.

The Biden administration has also clarified that it does not intend to be constrained by some of the procedural restrictions the Trump administration imposed on environmental reviews. To that end it revoked:

EO 13807, "Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects," which imposed page restrictions.

EO 13771, "Reducing Regulation and Controlling Regulatory Costs," which had directed all agencies to repeal at least two existing regulations for each new regulation issued.

(See the Health and Environment EO and the Executive Order on Revocation of Certain Executive Orders Concerning Federal Regulation.)

It is possible that the CEQ may also revisit the procedural provisions of the new regulations. However, given the Biden administration's ambitious goals for renewable energy development and infrastructure, it may be beneficial for the CEQ to maintain certain requirements like time and page limits for NEPA reviews.

Implications for Project Development

Developing a major infrastructure project requires significant coordination, numerous approvals, and, if a federal permit is required, a NEPA review. NEPA reviews can take a long time to complete. This is typically years if an EIS is required, often adding substantial time to a project's schedule. This review and the permits are also often a target of litigation. In light of the pending challenges to the new NEPA regulations and the probability that the Biden administration will revise or rescind those regulations, there may be substantial uncertainty related to how agencies can conduct a NEPA review for an upcoming project.

In the immediate term, the CEQ's new NEPA regulations and procedures apply for new projects. As federal agencies' approaches to NEPA reviews continue to evolve based on the shifting regulatory landscape, however, project proponents can take proactive steps to ensure a thorough NEPA analysis that is likely to withstand legal scrutiny. For example, as the national spotlight shines on climate change and environmental justice issues, project proponents can:

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- Identify and address climate change and environmental justice issues from the outset of a project, which may involve project redesign and/or studies related to the climate effects of their projects.
- Engage in helping to identify and address environmental justice issues in the NEPA process and work with permitting authorities to ensure a thorough environmental justice analysis with adequate opportunities for public participation.

Project proponents should also prepare for the likelihood that new regulations or guidance may include more prescriptive requirements for consideration of climate change effects in NEPA reviews.

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