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Final NEPA rule and its consequences

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On 16 July, the Council on Environmental Quality (CEQ) published its National Environmental Policy Act (NEPA) final rule, which largely shadows the proposed NEPA rule that was published in January of this year. As discussed in our previous post on the proposed rule, "CEQ's NEPA regulatory overhaul: highlights and predictions," since 1970, NEPA has required environmental review of major federal actions significantly affecting the quality of the human environment. 42 U.S.C. § 4332(2)(C). Among other things, CEQ's revisions posit a two-year limit on these reviews, a process that often takes considerably longer, and seek to minimize "excessive paperwork, litigation, and delays" (*see* Fact Sheet: Modernizing CEQ's NEP Regulations).

How is the final rule different from the draft?

For the most part, the final NEPA rule tracks the proposed rule. However, there are several noteworthy differences:

- **Categorical exclusions (*see* § 1501.4):** The final rule changes the language in the "Categorical Exclusions" section to clarify that a categorical exclusion can still apply even in the case of an extraordinary circumstance, in which a normally excluded action may still have significant effects. The phrasing in the final rule emphasizes an agency's authority to categorically exclude an action despite extraordinary circumstances, while the proposed rule emphasized an agency's responsibility to consider mitigating circumstances before applying a categorical exclusion. In practice, while this difference may not amount to a drastic change in tone or purpose, it does give an agency more concrete language on which to rely when determining to utilize a categorical exclusion.

- **Effects or impacts (*see* § 1508.1(g)(2))**: The final rule adds the term "generally" to this section, which specifies that a "but-for" relationship between an action and an environmental impact is insufficient to trigger an environmental review. The rule states that "effects should *generally* not be considered if they are remote in time, geographically remote, or the product of a lengthy causal chain" (emphasis added). While the addition of "generally" leaves some flexibility in the consideration of causal relationships and potentially expands the potential scope of review when compared to the proposed rule, it remains to be seen whether it will carry substantial weight in practice. While this phrasing, as well as other language in the text, will inevitably be the subject of litigation, courts will rely on precedent when evaluating these claims. For example, as noted in the preamble to the final rule, the Supreme Court has held that NEPA requires a reasonably close causal relationship between the environmental effect and the alleged cause (analogous to proximate cause), and that courts must consider

"underlying policies or legislative intent" when deciding whether causation exists and that but-for causation is not considered sufficient to make an agency responsible for a particular effect under NEPA. **Department of Transportation v. Public Citizen**, 541 U.S. 752 (2004).

- **Extraterritorial actions (*see* § 1508.1(q)(1)(i))**: The final rule explicitly excludes extraterritorial projects, or those that are located or have effects entirely outside the United States, from the definition of major federal action. In justifying this decision, CEQ cites caselaw that supports the presumption against extraterritorial application of Federal statutes in instances where the statute does not indicate that such application was intended by Congress (*see* **EEOC v. Arabian Am. Oil Co.**, 499 U.S. 244 (1991); **Morrison v. National Australia Bank**, 561 U.S. 247 (2010); **RJR Nabisco, Inc. v. European Cmty.**, 136 S. Ct. 2100 (2016)). After reviewing NEPA's statutory text and legislative history, CEQ determined that the default presumption against extraterritorial application was not rebutted.

- **Minimal Federal funding (*see* § 1508.1(q)(1)(vi))**: The proposed rule asked commenters to weigh in on whether there should be a monetary value for "minimal Federal funding" when determining if a non-Federal project with minimal federal funding should trigger NEPA. The final rule states that "CEQ did not receive sufficient information" regarding this issue and therefore does not place a dollar figure or give additional guidance on this phrasing. The response to comments also does not include a discussion of this definition.

Will there continue to be pushback to the NEPA revisions?

Opinions on revisions to the NEPA regulations largely reflect sectorial interests. Many industry groups along with Republican members of Congress praise the rule as an important step toward streamlining approval of federal projects and eliminating red-tape. On the other hand, many environmental groups, as well as Democratic members of Congress, are gearing up to fight the Trump Administration's overhaul of the regulations implementing this 50 year old environmental law. The outcome of the November election could stop the rule in its tracks. Under the Congressional Review Act, a new rule that was issued within 60 legislative days before Congress' adjournment prior to an election can be repealed by Congress. This NEPA rule would fall within that time frame and repeal is likely if the election results in Democrats controlling Congress or if there is a change in the White House.

At the same time, many environmental groups have already declared their intention to file lawsuits opposing the rule. For instance, complaints are likely to challenge CEQ's process in developing the final rule in only four months after the close of comments, possibly alleging a failure to comply with the Administrative Procedure Act. They may argue, for instance, that there was insufficient time to consider the 1.1 million comments to the rule, and by extension, to fully assess the rule's ramifications. The Administration will probably push back and argue that it met procedural requirements by providing a 60-day public comment period, holding two public hearings, and issuing a 600-page response to comments.

Additionally, opponents may argue that the "issue exhaustion" limitations on challenges, as well as the rule itself, disproportionally affect communities of color. According to the rule, if a public commenter fails to raise an issue in its comments to an environmental assessment (EA) or draft Environmental Impact Statement (EIS), that issue is forfeited in subsequent claims. People in under-served communities may not have the resources immediately available during the EA or EIS phase to develop expert comments or fully consider the breadth of impacts that may result from a project. The Administration will likely argue that addition of the exhaustion provision finds support in Supreme Court precedent. In **Department of Transportation v. Public**

Citizen, the Court held that litigants challenging an EA, who had failed to identify additional alternatives to a proposed action in their comments, were precluded from later arguing that the alternatives listed in the EA were inadequate. 541 U.S. 752 (2004). The Court reasoned that failing to identify additional alternatives denied the agency the opportunity to evaluate additional alternatives. However, the Court left open the possibility that "an EA's or an EIS' flaws might be so obvious that there is no need for a commentator to point them out specifically in order to preserve its ability to challenge a proposed action."

Moreover, the Administration may argue that agencies are free to consider environmental justice issues when conducting environmental reviews and that the revisions actually encourage minority participation. For example, the amendments grant tribes greater opportunity for involvement by explicitly including the term "tribal" when discussing engagement during the NEPA process. The final rule adds "tribal" anywhere that "state and local" entities are prompted for participation, to "ensure consultation with tribal entities." The rule also makes it so that tribes can participate in the NEPA process even if a proposed project's effects fall outside the tribe's reservation.

Finally, challengers to the rule may argue that the revisions to the definition of "effects" narrow the scope of what effects must be considered and will likely use climate change to demonstrate that the changes are inconsistent with the purpose of NEPA. The NEPA rule revisions eliminate the terms "direct effects," "indirect effects," and "cumulative impact" from the definition and redefine "effects" as those that are "reasonably foreseeable and have a reasonably close causal relationship to the proposed action or alternatives, including those effects that occur at the same time and place as the proposed action or alternatives and *may* include effects that are later in time or farther removed in distance from the proposed action or alternatives" (emphasis added). Thus, while agencies still "may" consider indirect effects, this change narrows the scope of required environmental review by giving agencies discretion not to consider indirect effects and will likely reduce emphasis on the consideration of such effects.

The deletion of the cumulative impact requirements in the rule is also intended to reduce the extent of effects that must be considered. Greenhouse gas emissions are generally considered to have cumulative impacts and therefore may not be evaluated when reviewing projects like new pipelines. While the final rule states that climate change considerations are not precluded and that impacts on climate change can be assessed case-by-case, depending on the proposed project, challengers to the rule will likely argue that the effect of the proposed revisions is to drastically reduce the extent to which agencies consider climate change impacts. Just this month Native American and environmental groups filed a lawsuit against the Bureau of Land Management for failing to consider environmental impacts of 30 oil and gas leases sold near the Navajo Nation. Under the new revisions, lawsuits like this that claim cumulative effects of greenhouse gasses and health impacts may need to cite other, more immediate impacts, in order to trigger a NEPA review. In the meantime, those looking for greater clarity on evaluation of greenhouse gas emissions under NEPA can look to CEQ's Draft NEPA Guidance on Consideration of Greenhouse Gas Emissions (84 Fed. Reg. 30,097), for which the comment period ended in August 2019.

What can we expect next?

Unless the new regulations are repealed under the Congressional Review Act or by a new administration in the White House, we can probably expect a significant number of lawsuits challenging the new rule and its application. The success of these and other challenges will depend on a variety of factors, including the court in which the complaints are filed, as well as the degree of deference courts grant to CEQ and other agencies in the exercise of their administrative discretion. Note that the Supreme Court has held that CEQ's regulations interpreting NEPA are

entitled to substantial deference. **Andrus v. Sierra Club**, 442 U.S. 347, 358 (1979); **Robertson v. Methow Valley Citizens Council**, 490 U.S. 332 (1989).

The NEPA regulatory revisions also may affect pending litigation over projects such as the Dakota Access pipeline. For some time, environmental groups have been challenging the adequacy of the NEPA environmental analysis conducted for these pipelines. The revisions allow for agency discretion in determining whether to apply the final rule to ongoing environmental reviews. If agencies choose to apply the final rule to pending projects, their actions will likely be subject to challenge, though courts are likely to defer to agencies as to the application of the NEPA regulatory revisions.

Finally, these NEPA regulations should be viewed in the context of the broad de-regulatory thrust of the current Administration, now even more justified in its eyes by the exigencies of current health and economic crises. When President Trump signed Executive Order 13927 in June, he cited NEPA as but one of several environmental statutes that contemplate relaxed compliance to meet national emergencies. This Executive Order is another target for litigation; most recently the Center for Biological Diversity filed a complaint under the Freedom of Information Act against CEQ, the U.S. Fish and Wildlife Service, and the Bureau of Land Management, after the agencies did not answer its FOIA request seeking a list of projects identified for emergency treatment under the Executive Order.

Thus, the ultimate effect of this NEPA reform will be governed by a multitude of factors, including the outcome of the upcoming election, legal challenges, and exercise of discretion by affected agencies.

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