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Council on Environmental Quality Pushes Forward on NEPA Reform

On June 20, 2018, the Council on Environmental Quality (“CEQ”) announced that it is considering updates to its implementing regulations under the National Environmental Policy Act (“NEPA”).¹ CEQ is responsible for issuing guidelines that other federal agencies must follow when evaluating the environmental impacts of federal actions. The June 20th Advance Notice of Proposed Rulemaking (“ANPR”), which was issued in response to President Trump’s Executive Order No. 13807, “Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects,”² presents the first major opportunity for the public to participate in reshaping the NEPA process since CEQ first published its regulations in 1978. The rulemaking will be of particular interest to developers of, and investors in, large infrastructure projects ranging from energy pipelines, energy import/export facilities, and electric transmission lines to water, road and mass transit infrastructure projects.

EXECUTIVE ORDER 13807

The main premise of Executive Order No. 13807 is that slow environmental review processes have prevented investment in U.S. infrastructure, imposing extra costs on Americans and hindering economic growth. As a result, the Order states, the federal government needs to “change the way it processes environmental reviews and authorization decisions.”³ The Order aims to streamline the environmental review process by establishing a “One Federal Decision” policy, under which the federal agencies involved in environmental reviews and permitting for a major infrastructure project must develop a single permitting timetable, prepare a single environmental impact statement (“EIS”), sign a single Record of Decision (“ROD”), and issue all project approvals within 90 days of the ROD.⁴

Under Executive Order No. 13807, CEQ is required to perform two primary tasks: (1) develop a framework for implementing the One Federal Decision policy; and (2) modernize the environmental review and authorization process.⁵ In response to the first directive, CEQ has issued joint guidance with the Office of Management and Budget indicating that federal agencies



should enter into, and from time to time revise and improve, a Memorandum of Understanding for Implementation of One Federal Decision (“MOU”).⁶ The heads of twelve federal agencies accordingly executed an MOU on April 9, 2018.⁷ The June 20 ANPR is CEQ’s first action in response to the Order’s second directive. It requests public comment on twenty enumerated issues related to the NEPA process, the scope of NEPA review, and other general topics.

NEPA PROCESS

The ANPR seeks public comment on whether CEQ’s NEPA regulations should be revised to ensure better interagency cooperation and concurrent, more efficient multi-agency reviews.⁸ CEQ’s existing regulations have long required that a “lead agency” manage the NEPA process,⁹ and the CEQ/OMB guidance and MOU executed earlier this year expanded on that requirement by delineating more specific coordinating responsibilities for the lead agency, requiring active inter-agency communication, and providing for concurrent review of EISs. Importantly, the MOU signatories committed to effectuating Executive Order 13807’s policy goal of completing all environmental reviews and authorization decisions within a two-year period.¹⁰

Historically, CEQ has declined to impose universal time limits for the NEPA process, and has instead left timing decisions to the agencies conducting environmental reviews.¹¹ If CEQ uses its forthcoming rulemaking to codify the MOU’s two-year timeframe, or otherwise updates its regulations to include more prescriptive process requirements, that could help ensure that process changes voluntarily entered into under the MOU will persist beyond the current administration. Such changes to CEQ’s regulations could also give project developers a legal avenue to challenge slow or poorly coordinated reviews, though in practice an effective remedy is rarely available for agency delays.¹²

SCOPE OF NEPA REVIEW

NEPA requires federal agencies to prepare an EIS for all “major Federal actions significantly affecting the quality of the human environment.”¹³ The ANPR seeks public comment on whether CEQ should update the regulatory definitions of key NEPA terms, including “major federal action,” “significantly,” and “cumulative impact.”¹⁴ This request indicates that CEQ may be open to considering changes that would affect NEPA’s threshold applicability. Such changes could be especially significant for projects that have a small federal “handle”—for example, because they use minimal federal funding or because a federal permit is required for only a small portion of the project—or that take place in multiple stages over time.

In addition to considering changes regarding identification of projects as subject to NEPA requirements, CEQ is seeking comment on the types of issues that should be covered in NEPA documents. Although this particular request is vague, it appears that CEQ may be considering clarifications about the types of environmental impacts that should be considered “significant” for the purpose of NEPA reviews. For example, CEQ could potentially update its regulations to be consistent with a recent Federal Energy Regulatory Commission (“FERC”) order limiting its consideration of upstream and downstream greenhouse gas emissions in reviewing natural gas infrastructure projects.¹⁵

While it is possible that CEQ could update its regulations to narrow the universe of projects that are subject to NEPA’s environmental review process, it will need to be careful to craft definitions that remain consistent with the statute, as any such rulemaking will almost certainly be subject to challenge. Indeed, given that a significant portion of current NEPA interpretation has resulted from legal challenges and not agency regulations or guidance, effective input to CEQ will need to reflect on and respond to those potential constraints.

OTHER GENERAL TOPICS OF NOTE

The ANPR also requests comment on a diverse set of issues, including, among others, whether any provisions in CEQ’s regulations are obsolete; whether any regulations could be updated to reflect new technologies that could streamline the



review process; and whether CEQ should clarify the role of tribal governments. These requests reflect an interest on the part of CEQ in receiving broad, creative responses about how to modernize NEPA.

CONCLUSION

CEQ’s request for public comment represents an important opportunity for project developers and investors. In responding to the ANPR, it will be important for commenters to think carefully about how CEQ can streamline the NEPA process in a manner that is consistent with other legal requirements. A thoughtful approach is necessary to ensure that CEQ carries out the directives of Executive Order No. 13807 without setting individual implementing agencies up for legal challenges. For example, any changes to CEQ’s regulations that include more prescriptive timing or interagency coordination requirements will need to address how to incorporate meaningful tribal consultation into the review and permitting process.¹⁶ Regulatory changes should also leave developers and investors with enough flexibility to manage project risks in ways that make sense for individual projects—for example, by working with communities to achieve public buy-in. To be successful, the rulemaking must streamline the process up front while also putting implementing agencies in a strong position to avoid multi-stage NEPA reviews.

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¹ Update to the Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act, 83 Fed. Reg. 28,591, 28,591 (June 20, 2018).

² 82 Fed. Reg. 40,463 (Aug. 24, 2017).

³ E.O. 13807, at § 1.

⁴ *Id.* § 5(b).

⁵ *Id.* § 5(b)(4), (e).

⁶ CEQ/OMB Memorandum M-18-13 (Mar. 20, 2018).

⁷ MOU Implementing One Federal Decision Under Executive Order 13807 (Apr. 9, 2018).

⁸ 83 Fed. Reg. at 28,591.

⁹ See 40 C.F.R. § 1501.5.

¹⁰ CEQ/OMB Memorandum M-18-13, Subparts V.A & VI.A.1.

¹¹ See 40 C.F.R. § 1501.8.

¹² See *The Steamboaters v. FERC*, 759 F.2d 1382, 1393 (9th Cir. 1985) (“The regulations CEQ promulgates for implementing the procedural provisions of NEPA are mandatory and binding on federal agencies.”).



¹³ 42 U.S.C. § 4332(2)(C).

¹⁴ 83 Fed. Reg. at 28,591.

¹⁵ See Dominion Transmission Inc., Order Denying Rehearing, 163 FERC ¶ 61,128, Docket No. CP14-497-001 (2018).

¹⁶ Cf. National Historic Preservation Act § 101(d)(6), 16 U.S.C. § 470a(d)(6) (“In carrying out its responsibilities under section 106 of this Act, a Federal agency shall consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to [properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization].”).