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Client Alert

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NEPA Modernization Promises Significant Change

Agency consideration of climate change curtailed in update to decades-old policy

On January 9, 2020, President Trump's Council on Environmental Quality ("CEQ") proposed to "update" the nearly forty-year-old regulations implementing the National Environmental Policy Act ("NEPA"), the statute that requires federal agencies to prepare environmental impact statements before undertaking major federal actions. 85 Fed. Reg. 1,684 (Jan. 10, 2020). The proposal follows Executive Order No. 13,807, which directed CEQ to review its regulations to modernize and accelerate the NEPA process.

NEPA applies to a broad swath of federal action that touches virtually every aspect of the economy from the building of roads, bridges, and public-transportation stations to the managing of lands, forests, and fisheries as well as the constructing of oil pipelines and power plants. But the NEPA process can be lengthy and cumbersome. It takes a federal agency four and a half years on average to prepare an environmental impact statement ("EIS"), which often balloon to over six-hundred pages. The NEPA process is subject to court challenge, and the resulting delays and litigation costs make it difficult for businesses to plan, finance, and build projects.

To address these concerns, the proposal would establish a presumptive time limit of two years for federal agencies to complete an EIS and one year to complete a less-involved (but more common) environmental assessment. The proposal also specifies a presumptive page limit of 75 pages for an environmental assessment and reinforces the existing 150-page limit for an EIS, except for "proposals of unusual scope or complexity." Other key proposed procedural reforms include enhanced cooperation and coordination among federal agencies and with states, tribes, and localities to speed up the process and reduce duplicated work.

Significantly, the proposal would change the definition of environmental "effects," limiting it to those that are "reasonably foreseeable and have a reasonably close causal relationship to the proposed action or alternatives." Currently, agencies are required to consider so-called "cumulative effects," which "requires delineating the cause-and-effect relationships between the multiple actions and the resources, ecosystems, and human communities of concern," which is done by "teas[ing] from the complex networks of possible interactions those that substantially affect the resources." Under the proposal, potential effects that are "remote in time, geographically remote, or the result of a lengthy causal chain," or that the agency "has no authority to prevent[,] or would happen even without the agency action" will no longer be part of NEPA analyses.

A major issue of dispute regarding this proposed change in the rule, therefore, is whether and to what extent it would prevent agency consideration of greenhouse-gas emissions and other climate-change impacts that are not substantially, or "proximately," caused by any singular action, but by the total sum of actions over time. Because climate change would virtually never have a "reasonably close causal relationship" to any one action, it could be the case that an agency can no longer consider climate impacts in a NEPA analysis.

The proposal could therefore significantly affect NEPA litigation. Over the past few years, environmental groups have successfully blocked or delayed several high-profile projects for climate-change reasons. For example, in 2018 a federal judge in Montana halted construction of the Keystone XL pipeline in large part because the agency had ignored the "inconvenient" cumulative effects of greenhouse gas emissions. *Indigenous Envtl. Network v. Dep't of State*, 347 F. Supp. 3d 561 (D. Mont. 2018). But if the agency can no longer consider climate-change impacts, it could very well change the outcome of cases like that one.

The proposal is open for comment until March 10, 2020. Since this is CEQ's first comprehensive revision of its NEPA regulations in forty years, petitions for judicial review of a final rule are all but certain. Interested parties will want to participate by submitting their views and experiences to build the administrative record, which will provide the basis for challenging or defending the final rule. Litigation will likely focus on whether the new policy is a permissible interpretation of NEPA, which some courts have read to require a "cumulative effects" analysis, and whether the policy change is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" under the Administrative Procedure Act.

King & Spalding and its environmental law team are well versed in NEPA regulatory and litigation matters and stand ready to assist stakeholders with preparing comments or answering questions about this major policy initiative. The firm also welcomes its new partner Marcella Burke, who served as Deputy Solicitor for Energy and Natural Resources and Senior Counselor to the Assistant Secretary for Land and Minerals Management at the Department of Interior. She worked on NEPA policy and served as the NEPA legal team lead at the agency for all major energy project NEPA approvals.

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