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How Enviros Will Challenge Trump's NEPA Update

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(February 20, 2020, 4:35 PM EST) -- Last month, President Donald Trump's Council on Environmental Quality, or CEQ, proposed updates to the nearly 40-year-old regulations implementing the National Environmental Policy Act, or NEPA, which requires government agencies to analyze the environmental effects of proposed action on federal land.

The proposal features a mix of substantive and procedural reforms intended to streamline the regulatory process, including walking back the agency's previous policy of incorporating speculative analysis of greenhouse gas emissions and other climate change impacts. Because the regulations implementing NEPA have not been updated for decades, litigation is virtually certain when, as is likely, these proposed regulations or ones substantially similar are finalized.

Among the many recommended reforms, the CEQ has proposed changing 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 "cumulative effects," which "requires delineating the cause-and-effect relationships between the multiple actions and the resources, ecosystems, and human communities of concern."

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.

Climate change is a paradigmatic cumulative effect: Because climate-change impacts are not proximately caused by any singular action and would almost never have a reasonably close causal relationship to any one action, the proposal would no longer require agencies to consider climate impacts in a NEPA analysis. Especially in light of the politically charged nature of climate change issues, it is almost certain that environmental plaintiffs will bring suit.

Litigation could take several forms. Right off the bat, environmental plaintiffs will likely assert one or more facial challenges to the regulations as soon as they are finalized. This kind of preemptive strike, before the regulations are applied or enforced, is permissible under the Declaratory Judgment Act, but challengers will run into several jurisdictional hurdles.

Federal courts can entertain a declaratory judgment action only "[i]n a case of actual controversy within its jurisdiction," that is, where the court otherwise has jurisdiction under Article III of the U.S. Constitution. And under Article III's standing requirement, a plaintiff must have been concretely harmed by the defendant's action, or face an imminent threat of such harm, in order to invoke the power of a federal court.[1]

It is unlikely that environmental plaintiffs will be able to prove that they have suffered any concrete harm until a NEPA analysis is finalized under the new regime. Moreover, federal courts lack jurisdiction over cases that are not "ripe," a doctrine requiring courts to avoid entangling themselves in abstract disagreements over administrative policies by circumscribing premature adjudication.

An early facial challenge to the new NEPA regulations would not be ripe because "withholding court consideration" would likely not work a "hardship to the parties."[2] Despite these significant challenges, lawsuits are likely to be pursued.

The Trump administration has struggled to defend its environmental policies in courts, and environmental plaintiffs will take advantage of their ability to shop for a favorable forum. Moreover, this type of high-profile litigation will likely serve as a useful fundraising tool for environmental groups, who will seek to woo donors with their cutting-edge work at the forefront of challenges to these regulations.

More serious challenges to the proposal will likely be brought after a NEPA analysis is finalized under the Administrative Procedure Act, which confers a general cause of action upon persons "adversely affected or aggrieved by an agency action." Litigation will likely focus on whether the new policy is a permissible interpretation of NEPA and whether the policy change is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" under the APA.

Expect challengers to argue that the finalized regulations are an impermissible interpretation of NEPA, because the statute requires cumulative effects analysis for things like climate change, even where causation is extremely attenuated (if it exists at all). Challengers will seize on sweeping language in NEPA emphasizing the "interrelations of all components of the natural environment," "recogniz[ing] the worldwide and long-range character of environmental problems," and directing that agencies shall "anticipat[e] and prevent[] a decline in the quality of mankind's world environment."

Moreover, the U.S. Supreme Court has held that NEPA requires analysis of at least some cumulative effects in at least some contexts, finding in Kleppe v. Sierra Club that:

when several proposals for coal-related actions that will have cumulative or synergistic environmental impact upon a region are pending concurrently before an agency, their environmental consequences must be considered together.[3]

But Kleppe also says that NEPA "does not require an agency to consider the possible environmental impacts of less imminent actions when preparing the impact statement on proposed actions."[4] Accordingly, whether and to what extent NEPA requires analysis of cumulative effects like climate change is still an open question.

Litigants will also likely argue over whether NEPA requires any particular type of causation analysis. The new proposal purports to limit agency consideration to effects that are "reasonably foreseeable" and are not "remote in time, geographically remote, or the result of a lengthy causal chain," à la proximate cause in tort law.

But challengers will argue that the proposal misunderstands tort law, and that NEPA requires consideration of effects that are more attenuated. For example, NEPA speaks of "the responsibility of each generation as a trustee of the environment for succeeding generations" and "the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity."

These arguments will be reminiscent of the opinions in the classic first-year tort case of Palsgraf v. Long Island Railroad Co.[5] To Chief Judge Benjamin Cardozo, proximate causation was present if an effect was "reasonably foreseeable," while Judge William Andrews thought liability should attach only for direct effects with a close spatial and temporal nexus to a given cause.

Both sides will stake claim to Cardozo's position, which carried the day and won out over time. But there is no easy way to resolve the dispute, because whether climate change is caused by any particular action is a judgment call to which there is no obvious answer.

The success of these statutory arguments will likely come down to whether the regulations are entitled to deference under Chevron USA Inc. v. Natural Resources Defense Council Inc.,[6] under which courts must defer to an agency's reasonable interpretations of an ambiguous statute. If Chevron applies, the new proposal will likely stand: Whatever else might be said about NEPA's language, it does not unambiguously require cumulative effects analysis or a particular causation standard, and courts rarely hold that an agency's interpretation is unreasonable.

But challengers will likely argue that the regulations are not entitled to Chevron deference under United States v. Mead Corp.,[7] which held that Chevron only applies where "Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."

Although NEPA does not expressly give the CEQ authority to issue regulations, the CEQ was formed in 1969 to oversee the implementation of NEPA, and is charged with, among other things, "develop[ing] and recommend[ing] to the President national policies to foster and promote the improvement of environmental quality."

And in Department of Transportation v. Public Citizen,[8] the Supreme Court in a unanimous opinion analyzed whether the agency there had complied with the CEQ's implementing regulations without suggesting that those regulations might be invalid. History and practice thus both indicate that the CEQ does have the authority to issue these regulations and is entitled to Chevron deference.

Finally, challengers will likely argue that the regulations are invalid under the Administrative Procedure Act because they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," which can occur when:

the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[9]

But this is a "narrow" standard of review, and "a court is not to substitute its judgment for that of the agency."[10] When, as here, an agency changes policy, it:

need not demonstrate to a court's satisfaction that the reasons for the new policy are better than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better.[11]

In light of this relatively undemanding standard, this challenge is unlikely to succeed.

In truth, NEPA is an odd vehicle for this type of litigation. After all, it is a procedural statute, and its procedural mandate is primarily informational. According to the Supreme Court:

[i]f the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs.[12]

Under the current regime, even when an environmental impact statement concludes that a federal action will significantly contribute to climate change, NEPA does not require the agency to select a more environmentally friendly outcome. Still, over the past few years, environmental groups have used NEPA to successfully block or delay 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.[13] Even though NEPA is supposed to be a procedural statute to make sure that environmental issues are not overlooked, rather than a mechanism for resolving broader substantive policy debates, NEPA litigation has turned into a proxy battle for the broader climate change debate.

And that raises the ultimate issue, which is the inherently speculative nature of some climate science, whether and to what extent climate change is an impending crisis, and whether that means that any one project should be shuttered.

The supposed experts at the CEQ declined to directly address greenhouse gas emissions and potential climate change impacts, despite receiving comments requesting that it do so, maintaining that the agency "does not consider it appropriate to address a single category of impacts in the regulations." But this just kicks the can further down the road:

The upshot is that, instead of giving this important debate the attention it deserves, parties are left to argue, and courts are required to resolve, this delicate issue in the context of a procedural statute whose requirements can be avoided by an agency's reasoned say so. But such a momentous decision ought to be made in the open by politically accountable policymakers, not through litigation over a NEPA process that shuts down projects mostly through interminable delay.

The CEQ's proposed regulations appear to rest on a firm legal foundation, but given their significance if finalized, challengers will be undeterred. Stronger wording concerning greenhouse gas emissions and climate change impacts could help insulate the regulations from challenge.

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information purposes and is not intended to be and should not be taken as legal advice.

[1] Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).

[2] Abbott Laboratories v. Gardner, 387 U.S. 136 (1967).

[3] Kleppe v. Sierra Club, 427 U.S. 390 (1976).

[4] Id. n. 20.

[5] Palsgraf v. Long Island Railroad Co., 162 N.E. 99 (N.Y. 1928).

[6] Chevron USA Inc. v. Natural Resources Defense Council Inc., 467 U.S. 837 (1984).

[7] United States v. Mead Corp., 533 U.S. 218 (2001).

[8] Department of Transportation v. Public Citizen, 541 U.S. 752 (2004).

[9] Motor Veh. Mfrs. Ass'n v. State Farm Ins., 463 U.S. 29 (1983).

[10] Bowman Transp. Inc. v. Arkansas-Best Freight System Inc. , 419 U. S. 281 (1974).

[11] Federal Communications Commission v. Fox Television Stations Inc. , 556 U.S. 502 (2009).

[12] Robertson v. Methow Valley Citizens Council , 490 U.S. 332, 350 (1989).

[13] Indigenous Envtl. Network v. Dep't of State , 347 F. Supp. 3d 561 (D. Mont. 2018).