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Climate Change Litigation on the Horizon with Trump Environmental Overhaul

On July 16, 2020, President Trump's Council on Environmental Quality ("CEQ") published the long-awaited final rule revising the implementing regulations for the National Environmental Policy Act ("NEPA"). 85 Fed. Reg. 43,304 (July 16, 2020). NEPA requires federal agencies to consider the environmental impact of major federal actions, which include permitting for energy projects on federal land. Pipeline projects, solar and wind farms, oil and gas development, and other infrastructure projects must go through the lengthy NEPA permitting process before construction can begin. This process takes 4.7 years on average and can exceed seven years in some cases, and critics say these lengthy delays unnecessarily stymie construction and development and diminish America's ability to compete in the global energy market.

The final rule is the culmination of a long process set in motion in the early days of the Trump administration, when the President directed CEQ to review its regulations to modernize and accelerate the NEPA process. See Executive Order No. 13,807 (Aug. 15, 2017). The final rule adopts in substantial part many of the changes proposed by CEQ earlier this year in its Notice of Proposed Rulemaking ("NPRM"), 85 Fed. Reg. 1,684 (Jan. 10, 2020), particularly about whether and how agencies must factor climate change into NEPA analyses.

Over the past few decades, NEPA litigation has turned into a proxy battle for the broader climate change debate. The new rule will bring this issue to the forefront. Specifically, litigation will focus on whether and to what extent the government must consider a particular project's impact on domestic and global climate change. The final rule makes clear that the definition of environmental "effects" or "impacts" requires the government to consider only reasonably foreseeable effects with a reasonably close causal relationship to the federal action. Given the very small contribution any individual infrastructure project may have to overall climate change, this change likely precludes an agency from considering climate change as part of its NEPA analysis in many or most instances. Litigation over

how these new regulations affect the role of climate change in NEPA analysis is all but certain. CEQ is expected to issue guidance on how agencies must account for any reasonably foreseeable greenhouse gas emissions, which should clarify some uncertainty, but many questions remain.

Analysis of Regulations

For any “major federal action significantly impacting the human environment,” NEPA requires agencies to consider, among other things, “the environmental impact of the proposed action,” and “any adverse environmental effects which cannot be avoided should the proposal be implemented.” 42 U.S.C. § 4332. Because NEPA leaves these terms undefined, CEQ has long filled the gap through regulations, previously categorizing effects as either “direct,” “indirect,” or “cumulative,” the latter of which refers to “the combination of individually minor effects of multiple actions over time.” Climate change is a quintessential cumulative effect because it results from the combined impact of many human activities.

But the new regulation does away with these categories, instead directing agencies to focus on effects or impacts more closely connected to a proposed action:

Effects or impacts means changes to the human environment from the proposed action or alternatives 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.

§ 1508.1(g)(1). The new regulation also narrows the circumstances under which a proposed action is said to “cause” an effect or impact for NEPA purposes:

A “but for” causal relationship is insufficient to make an agency responsible for a particular effect under NEPA. Effects should generally not be considered if they are remote in time, geographically remote, or the product of a lengthy causal chain. Effects do not include those effects that the agency has no ability to prevent due to its limited statutory authority or would occur regardless of the proposed action.

§ 1508.1(g)(2). The definition concludes with a newly added provision confirming that “[a]n agency’s analysis of effects shall be consistent with this paragraph,” and that “[c]umulative impact, defined in 40 CFR 1508.7 (1978), is repealed.”

§ 1508.1(g)(3). CEQ emphasizes that NEPA analyses “are bound by the definition of effects as set forth in § 1508.1(g)(1) and (2) and should not go beyond the definition of effects set forth in those two paragraphs,” which appears to leave little wiggle room for an agency to consider how a proposed project will affect climate change.

These changes were necessary, according to CEQ, because “the terms ‘indirect’ and ‘cumulative’ have been interpreted expansively resulting in excessive documentation about speculative effects and leading to frequent litigation,” and, moreover, because “NEPA practitioners often struggle with describing cumulative impacts despite a number of publications that address the topic.” CEQ also maintains that the new regulations are more faithful to the text of NEPA, which “does not subdivide” effects into categories, and to Supreme Court precedent, namely *Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752, 757 (2004), which prescribed for NEPA a causation standard akin to proximate cause in tort law.

The new regulations also include a subtle change to the provision on “Affected Environment” to include “the reasonably foreseeable environmental trends and planned actions in the area(s).” § 1502.15. Thus, according to CEQ, trends determined to be a consequence of climate change would be characterized in the baseline analysis of the affected environment rather than as an effect of the action.

Litigation Impact

In the past few years, environmental groups have used NEPA to 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. *Indigenous Env'tl Network v. Dep't of State*, 347 F. Supp. 3d 561 (D. Mont. 2018). Under the new regime, that type of deficiency—inadequate consideration of climate change—should no longer be enough to halt a project.

With NEPA litigation decidedly less-potent under the new regulations, environmental groups will likely sue to challenge the legality of these changes in an effort to revert back to cumulative-effects analysis. Expect challengers to argue that the new regulations are an impermissible interpretation of NEPA because the statute itself requires cumulative-effects analysis. Challengers will likely emphasize the import of certain phrasing in NEPA such as the “interrelations of all components of the natural environment,” “the worldwide and long-range character of environmental problems,” and the direction to “anticipat[e] and prevent[] a decline in the quality of mankind’s world environment.” 42 U.S.C. §§ 4331, 4332. Moreover, the Supreme Court has held that NEPA requires analysis of at least some cumulative effects in at least some contexts: “[W]hen 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.” *Kleppe v. Sierra Club*, 427 U.S. 390 (1976). 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.” *Id.* n. 20. Accordingly, whether and to what extent NEPA requires analysis of a cumulative effect like climate change is still largely an open question.

Challengers will also 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.” This 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.” *Motor Veh. Mfrs. Ass’n v. State Farm Ins.*, 463 U.S. 29 (1983). In addition, challengers may raise procedural challenges to how CEQ adopted these changes by arguing, for example, that CEQ was motivated by political reasons rather than empirical evidence, or that the public lacked notice of all the changes contained in the final rule.

A key threshold question is whether a court will even entertain lawsuits brought in the near future. Challenges will likely run into justiciability hurdles, for example, that plaintiffs have not been concretely injured (standing) or that the lawsuit is premature (ripeness). The government will likely argue that any legal challenge should occur only after the government has applied the new NEPA criteria in approving an individual project, at which point the operational effect of these changes will be clearer.

Finally, if the administration changes in November, the new administration will likely attempt to repeal or significantly revise the rule. Under *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009), “[an agency] 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.” But because the APA “mandate[s] that agencies use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance,” *Perez v. Mortg. Bankers Ass’n*, 575 U.S. 92, 101 (2015), changing the rule will likely require another full-blown notice-and-comment procedure. That process is cumbersome and time consuming, so litigation will remain attractive for environmental groups even if the administration changes.

The final rule goes into effect on September 14, 2020, unless otherwise altered by Congress, and will apply to any NEPA process begun after that date. It also authorizes agencies to apply the new provisions to ongoing activities and environmental documents prior to that date.

Uncertainty will linger as these litigation challenges to these new rules proceed, and the possibility of a new administration's regulatory changes to unwind the rule only increases the complexity. Given this constantly evolving landscape, it is important that regulated entities plan and create records supporting NEPA reviews that encompass these unknowns. For more information, please contact Marcella Burke at mburke@kslaw.com.

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