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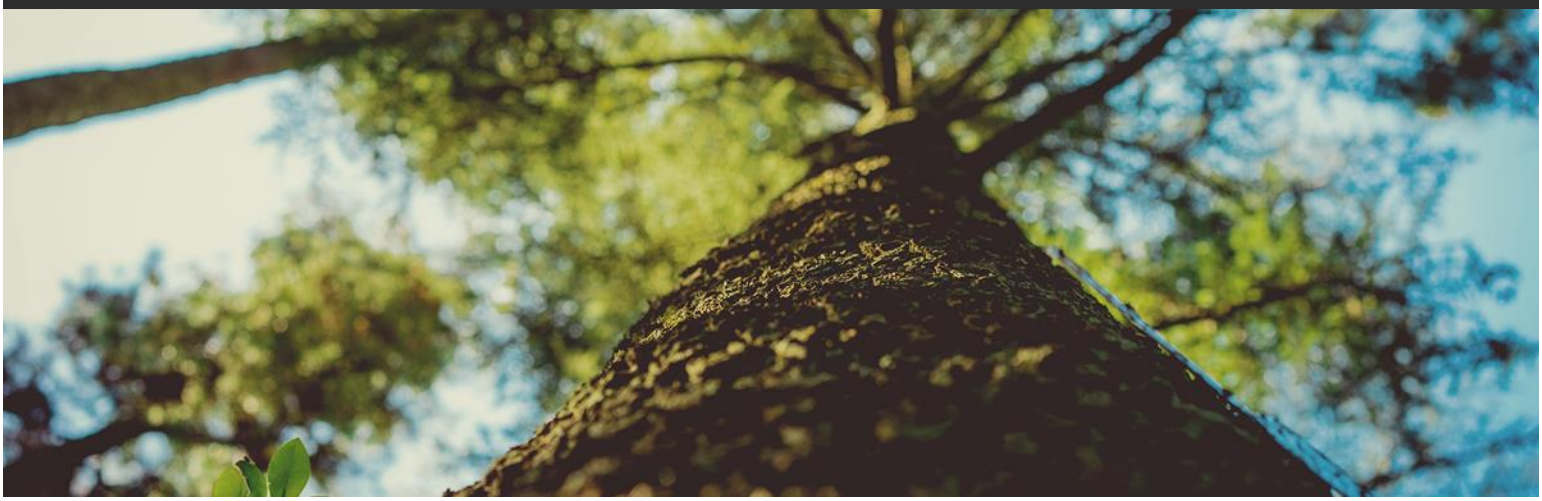

January 2020

Trump Administration Proposes Significant Streamlining of National Environmental Policy Act

On Jan. 9, 2020, the Trump administration's Council on Environmental Quality (CEQ) proposed rules that would update comprehensively the regulations promulgated under the National Environmental Policy Act (NEPA) for the first time in 40 years. After 40 years there is little question that the regulations could use updating and that environmental reviews can be streamlined. However, these proposed revisions go beyond seeking efficiencies and better coordination. Rather, they seek to narrow federal agencies' NEPA obligations with a goal of expediting projects and reducing the number of actions subject to NEPA review. Whether one considers NEPA an important tool for factoring environmental considerations into decision-making, or an unnecessary and bureaucratic roadblock for critical projects, the proposed changes, if adopted in their present form, raise significant questions that will likely lead to litigation, and could add uncertainty and delay to the federal environmental review process, the opposite of the stated goal of the measures.

President Richard M. Nixon signed NEPA into law in 1970, amid a growing national concern over rapid industrialization. NEPA's purpose, set forth in its preamble, is to "declare national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation… ." NEPA establishes such a national policy by requiring federal agencies to weigh

environmental impacts equally with other factors as part of the agencies' decision-making process on federal actions. Federal agencies implement NEPA through the preparation of Environmental Impact Statements (EIS) and Environmental Assessments (EA) for their agencies' actions.

Pointing to an environmental review process that has become too long and burdensome, the CEQ's proposed modifications fall into four categories:

- **Modernize, simplify, and accelerate the NEPA review process** by imposing time limits of two years for the completion of an environmental impact statement (EIS) and one year for an environmental assessment (EA), setting EIS page limits, mandating a single EIS and Record of Decision (ROD) for multi-agency actions, establishing a stronger role for lead agencies, and promoting the use of modern technology for information sharing and public outreach;
- **Clarify terms, application, and scope of review** by providing direction on whether NEPA applies to a particular action, incorporating public participation earlier in the process, requiring comments to be timely and specific to be considered, modifying the definition of environmental "effects" and requiring that effects must be reasonably foreseeable and have a reasonably close causal relationship to the proposed action, stating that an analysis of cumulative effects is not required under NEPA, excluding non-discretionary actions and non-federal projects with only minimal federal funding from "major Federal action," and requiring that "reasonable alternatives" be technically and economically feasible;
- **Enhance coordination with states, tribes, and local governments** by reducing duplicate reviews and ensuring appropriate consultation with tribal and local governments; and
- **Reduce unnecessary burdens and delays** by facilitating federal agencies' adoption of categorical exclusions and allowing one agency to use another's categorical exclusions, and allowing applicants and contractors to assume a greater role in EIS preparation.

Updating aging regulations to promote clarity and efficiency is a laudable goal. The NEPA process should be used to promote commonsense consideration of environmental effects in conjunction with federal decision-making, not to endlessly delay projects in an avalanche of data, studies and red tape. Recognizing changes in technology and promoting inter-agency coordination of NEPA reviews for major projects is simple good management and consistent with the goal of environmental protection. However, the proposed changes, especially those that relate to the analysis of an action's cumulative effects, climate change and greenhouse gas emissions, and those imposing artificial deadlines and page limits for complex analyses of large projects, could backfire, leading to adverse court decisions and project setbacks unintended by the proposed rulemaking.

One of the most notable changes is the proposed revision to the definition of "effect." Mirroring proximate cause in tort law, CEQ seeks to define effects as those that are reasonably foreseeable and have a reasonably close causal relationship to the proposed action. According to CEQ, an effect for which the agency action has *only* a "but for" causal relationship would not be enough to meet the new definition. In a similar vein, CEQ proposes that "effects should not be considered significant if they are remote in time, geographically remote, or the result of a lengthy causal chain." While CEQ's stated purpose of the new definition is to focus federal agencies' attention on only the most significant effects of an action, some have asserted that the change could reduce the analysis of the potential impact an action may have on, for example, increased CO_2 emissions and global warming, depending on the nexus between the action and these impacts. Along with revising the effects for which federal agencies must give a hard look, CEQ proposes eliminating altogether the longstanding requirement of evaluating cumulative effects. Although federal courts give substantial deference to agencies' regulations, courts may find that eliminating the

cumulative effects analysis altogether may be overreaching. Some courts have found that the requisite analysis is part of the statute itself, *see, e.g., Te-Moak Tribe of Western Shoshone of Nev. v. United States DOI*, 608 F.3d 592 (9th Cir. 2010) (failure to conduct a cumulative effect analysis is a violation of NEPA); *Ohio Valley Envtl. Coalition v. Hurst*, 604 F. Supp. 2d 860, 867 (S.D.W.V. 2009) ("The Army Corps of Engineers' obligation to consider the ongoing effects of past actions is part of its statutory obligation to consider cumulative impacts under [NEPA]"). Other courts have suggested that the cumulative effect requirement arises out of both the statute and the CEQ's interpretation of it. *See Nat'l Audubon Soc'y v. Dep't of the Navy*, 422 F.3d 174, 184-85 (4th Cir. 2005). Yet others have found that it stems entirely from CEQ's guidance and regulations. *See Dubois v. United States Dep't of Agric.*, 102 F.3d 1273 (1st Cir. 1996), *cert. denied*, 521 U.S. 1119 (1997). Regardless of whether courts view the cumulative effects analysis as part of NEPA itself, part of CEQ's interpretation of the statute, or a combination of both, such a drastic departure from decades of established agency interpretation would make a change of this scope ripe for judicial challenge.

Another seemingly harmless change – imposing time and page limits on the review process – could also prove inadvertently counterproductive. The size and complexity of NEPA environmental reviews stems from the statute itself and a substantial body of caselaw interpreting it for the past 50 years of NEPA's existence. If that caselaw has taught us anything, it is that the greatest risk for having a federal approval overturned comes from the failure of the environmental review properly to identify and to weigh the environmental effects of the action against other non-environmental effects, not the substance of the decision. Federal agencies straining to meet deadlines and to stay within page limits could produce NEPA reviews that fail to withstand judicial scrutiny, leading to even greater delays in getting projects built. Rather than using the rulemaking process to constrain agency staff, the federal government might consider allocating additional budgetary resources to ensure there is adequate staff necessary to complete EAs and EISs in a timely manner.

NEPA provided a legislative response to a growing national concern that rapid industrialization would lead to unknown environmental impacts. Over the past 50 years, environmental law has developed well-settled precedent and procedures to address that concern for projects at both the federal and state level. Attempts to roll back years of precedent to limit the scope of NEPA's cumulative review and consideration of potential climate impacts from greenhouse gas emissions will likely be hotly contested, and could result in years of litigation focusing on the issue of whether that limitation is consistent with the language of NEPA and the case law interpreting it. Some seeking to simplify and to shorten reviews will applaud these proposed changes, and, while there is certainly justification for wanting to meaningfully reduce a federal bureaucracy that sometimes hinders project development, it nevertheless remains a question whether such changes would ultimately result in shorter reviews and faster project construction, or whether the uncertainty, controversy, and likely judicial intervention into what has heretofore been a relatively well-established area of environmental law could slow or stop some project development and construction. Public comments on the proposed rulemaking are due by March 10, 2020.

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