CLIENT ALERTS & INSIGHTS

Proposed Elimination of Cumulative Effects Analysis under NEPA Leaves Climate Change Considerations in Jeopardy

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On January 9th, President Donald Trump in conjunction with the Council on Environmental Quality ("CEQ") proposed sweeping regulatory revisions to rules that govern how the CEQ implements the National Environmental Policy Act[1] ("NEPA").

These Proposed Revisions scale back the reach of NEPA's environmental review process in an effort to speed approval of major infrastructure projects, including oil and gas pipelines. The most significant of the Administration's Proposed Revisions center on whether and to what extent agencies must consider the environmental "effects or impacts" of a project.

Background

NEPA, which marked its 50th anniversary on January 1, requires comprehensive studies into the potential environmental "effects or impacts" of major federal actions or projects, including an analysis of alternatives.[2]

The CEQ regulations currently define "effects" to include: (a) Direct effects, which are caused by the action and occur at the same time and place; and (b) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. *See* 40 CFR § 1508.8.

"Cumulative impact" is currently defined as "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time." *See* 40 CFR § 1508.7.

Narrower Definition of "Effects"

The CEQ proposes to simplify the definition of what "effects or impacts" must be considered in conjunction with a project application by excluding the terms "direct", "indirect", and "cumulative". Under the Proposed Revisions to the NEPA implementing regulations, federal agencies would only need to consider effects that are "reasonably foreseeable" and have a "close causal relationship to the proposed action or alternatives". *See* Proposed Section 1508.1(g)

Elimination of Cumulative Effects Analysis

The Proposed Revisions state that effects "should not be considered significant if they are remote in time, geographically remote, or the product of a lengthy causal chain." *See* Proposed Section 1508.1(g)(2). Most significantly, the Proposed Revisions state that "[a]nalysis of cumulative impacts is not required under NEPA." *See Id.*

Eliminating "cumulative effects" analysis from the NEPA review process is a major deregulatory step. Climate change is a cumulative problem. Requiring that agencies analyze "cumulative effects" has been a means for executing climate change analyses.

Consideration of Greenhouse Gas Emissions

The Proposed Revisions state that potential climate change impacts and greenhouse gas ("GHG") emission analyses should follow the proposed guidance issued by the CEQ entitled "Draft National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions" ("GHG Draft Guidance"). *See* 84 FR 30097 (June 26, 2019).

The GHG Draft Guidance provides a streamlined approach to analyzing the impacts of GHGs under NEPA. It gives deference to federal agencies undertaking NEPA review and encourages agencies to follow the "rule of reason" and use their "expertise and experience" to decide whether and to what degree the agency will analyze particular effects of GHG emissions. Notably, the GHG Draft Guidance provides:

- "NEPA analyses need not give greater consideration to potential effects from GHG emissions than to other potential effects on the human environment."
- Impacts of a proposed action should be discussed "in proportion to their significance, and there should only be brief discussion of issues that are not significant."
- Agencies should quantify a project's direct and reasonably foreseeable indirect GHG emissions when those emissions are "substantial enough to warrant quantification," and when it is "practical" to do so using available data and GHG quantification tools.
- Agencies should consider whether quantification of GHG emissions "would be overly speculative" or where necessary information is "not of high quality."
- "A separate cumulative effects analysis is not required."
- "Agencies need not undertake new research or analysis of potential climate effects."
- Agencies "need not weigh the effects of the various alternatives in NEPA in a monetary cost-benefit analysis using any monetized Social Cost of Carbon (SCC) estimates."

84 FR 30097 § II.

Thus, under the Proposed Revisions, together with the GHG Draft Guidance, federal agencies could still consider GHG emissions from a project when undertaking NEPA review, but any climate change analysis would be significantly curtailed and would not be required.

Conclusion

If the Proposed Revisions are implemented, it will significantly narrow the scope of NEPA reviews and make it easier for pipeline and other energy infrastructure projects to proceed. The Trump Administration explained the Proposed Revisions by stating that federal agencies have "struggled with preparing cumulative effect analyses" and "continue to find themselves in costly and time-consuming administrative proceedings and litigation over the proper scope of the analysis."[3] Litigation regarding the proper scope of a cumulative effects analysis has historically been used as a tool by climate change activists to challenge and impede projects. The Proposed Revisions will make it easier for federal agencies to comply with NEPA, thereby making such legal challenges less apt to succeed.

For more information on this topic, contact a member of Benesch's Energy Practice Group.

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[1] 42 USC § 4321 *et seq.*

[2] 40 CFR § 1502.16

[3] https://ceq.doe.gov/docs/ceq-publications/ccenepa/sec1.pdf