National Environmental Policy Act: Council on Environmental Quality Issues "Phase 1" Rule

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The White House Council on Environmental Quality ("CEQ") issued an April 19th final rule that amends certain provisions of its regulations for implementing the National Environmental Policy Act ("NEPA").

CEQ describes the amendments as a "Phase 1" rule to restore provisions that were modified in 2020 by the Trump Administration that are argued to have caused:

- Implementation challenges for agencies
- Confusion among stakeholders and the general public

CEQ was established in 1970 (as part of the Executive Office of the President) with its duties including oversight of the federal agency implementation of NEPA. The regulations issued by CEQ are intended to guide the federal agencies in interpreting NEPA's procedural requirements. However, the federal agencies themselves typically have in place regulations that address NEPA requirements applicable to its activities. Nevertheless, the CEQ regulations are generally viewed by the federal agencies as guideposts for compliance.

Of course CEQ's interpretations and the federal agencies themselves, through their regulations and guidance, are sometimes superseded by judicial decisions. In other words, regardless of CEQ and the federal agencies' rules, courts have not infrequently disagreed with CEQ/federal agency regulatory interpretations.

CEQ had issued during the Trump Administration revisions that it believed were needed for modernization and clarification of the regulations. It was argued that the revisions would "facilitate more efficient, effective, and timely NEPA reviews by federal agencies in connection with proposals for agency action."

NEPA requires federal agencies to assess the environmental effects of their proposed actions prior to making decisions. The range of actions covered by NEPA has typically been broadly defined to include as examples:

- Making decisions by federal agencies on permit applications
- Federal land management actions
- Construction and/or funding highways and other publicly owned facilities

NEPA was arguably designed to force mission-oriented agencies to consider the environmental impacts of a particular decision or activity in addition to other objectives. For example, a decision by the Department of Defense to construct a base in a particular location would traditionally consider a variety of issues such

as logistics, infrastructure, etc. In the event that this proposed activity triggers a NEPA review, the environmental issues would also have to be addressed. This would include situations in which a state or local government utilizes federal funds to construct infrastructure. Therefore, the objective has been to ensure that environmental considerations are integrated into the planning of the agency actions as early as possible.

NEPA requires federal agencies to include environmental values and issues in their decision-making process. This mandate is accomplished by agency consideration of the environmental impact on proposed actions and reasonable alternatives to those actions. The statute requires federal agencies in certain instances to prepare a detailed Environmental Impact Statement ("EIS"). However, the requirement to produce this document is only triggered in the event of a "major federal action" that will "significantly affect the environment." As opposed to an EIS, which is a much more detailed document, an Environmental Assessment ("EA") provides sufficient evidence and analysis for determining whether a finding of no significant impact for an EIS should be prepared.

Note that NEPA differs from action enforcing environmental statutory programs such as the Clean Air Act or Clean Water Act. It does not impose substantive mandates. Instead, it is limited to requiring federal agencies to meet procedural requirements such as preparation of an EA or EIS in certain instances. As a result, NEPA does not require a certain alternative or meet a particular standard. Nevertheless, the failure to comply with NEPA's procedural mandates can result in an activity or project being enjoined.

CEQ's April 19th rulemaking is described as the first step (i.e., Phase 1) in a two-phase process that it states is reforming and modernizing the regulations that guide the implementation of NEPA. It will be proposing a Phase 2 NEPA rulemaking that it states will provide further improvements to the efficiency and effectiveness of environmental rule processes and reflect the Administration's commitment to achieving environmental justice and confronting climate change.

The Phase 1 rule amendments undertake the following revisions to the NEPA regulations:

- Federal agencies are required to evaluate all relevant environmental impacts of the decisions they are making:
- Mandates that agencies consider "direct," "indirect," and "cumulative" impacts of proposed action
- Fully evaluate climate change impacts and assess the consequences of releases additional pollution in communities already overburdened by polluted air or dirty water
- Provide agencies the flexibility to determine the "purpose and need" of a proposed project based on a variety of factors (arguing that the 2020 NEPA rule revisions limited federal agencies' ability to develop and consider alternative designs or approaches that did not fully align with the stated goals of the project's sponsor [often a private company])
- Establishes CEQ's NEPA regulations as a floor, as opposed to a ceiling for the environmental review standards that federal agencies should attain (arguing that the Phase 1 rule restores the ability of federal agencies to tailor their NEPA procedures to help meet specific needs of their agencies, the public, and stakeholders)

A link to a prepublication copy of the Phase 1 revisions can be found here.