Housing and Urban Development/National Environmental Policy Act: Interim Final Rule Issued Addressing Environmental Review

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The United States Department of Housing and Urban Development ("HUD") published in the May 22nd Federal Register an interim final rule/request for comments ("IFR") addressing its environmental review regulations regarding the National Environmental Policy Act ("NEPA"). See 91 Fed. Reg. 30209.

HUD describes the IFR as removing its current requirement that Environmental Assessments ("EAs") for projects over 200 dwelling units or beds shall be sent to the Field Environmental Clearance Officer ("FECO") or Program Environmental Clearance Officer ("PECO") for review and comment.

The revision is stated to align with recent actions by the Executive Branch requesting:

- Efficiency for environmental permitting.
- Streamlining processing times.
- Meeting all other regulatory and statutory requirements for environmental review.

NEPA requires federal agencies to include values and issues in their decision-making processes. Its federal mandate is accomplished by agency consideration of environmental impacts of proposed actions and reasonable alternatives to those actions.

The statute requires federal agencies in certain circumstances to prepare a detailed Environmental Impact Statement ("EIS"). However, the requirement to prepare this document is only triggered in the event of a major federal action which will significantly affect the human environment.

As opposed to an EIS, which is a much more detailed document, an EA provides evidence and analysis for determining whether a finding of no significant impact for an EIS should be prepared.

NEPA differs from action enforcing environmental statutory programs such as the Clean Water Act and Clean Air Act. It does not impose substantive mandates. Instead, it is limited to requiring federal agencies to meet procedural requirements such as preparation of the EIS in certain defined instances. Federal agencies were required to consult with CEQ and identify and develop methods and procedures to government analysis of their proposed major federal actions. As a result, NEPA does not require a certain alternative or meet a particular standard.

Each federal agency (including HUD) has developed unique guidelines to ensure compliance with NEPA through an environmental review process. A HUD environmental review is triggered by any project activity that might impact the physical or human environment and receives HUD funding, directly or

indirectly. HUD notes that this might include new construction, rehabilitation, demolition, property acquisition, and possibly routine maintenance depending on funding sources.

The IFR published by HUD is removing the last sentence of 24 CFR 50.32 which contains the requirement that EAs for projects over 200 dwelling units or beds shall be sent to the FECO or PECO for review and comment.

HUD states in part:

… This round of review and comment is not required under the relevant environmental legal authorities, including NEPA, nor is it discussed in the preambles of HUD's 1996 rulemakings that promulgated § 50.32 in its current form. 61 FR 50914, 61 FR 15340.

HUD takes the position that the review requirement in § 50.32 represents "an extraneous step" in the environmental review process. This requirement is characterized as adding a third or fourth review to the environmental process for new construction and substantial rehabilitation projects over 200 units. It argues that they have already been certified by environmental review preparers and supervisors.

HUD further argues that the current requirement:

- Is an extra step in the review process that has the potential to add processing time to projects that often have tight closing deadlines.
- Requires duplicative technical assistance when such assistance is already available, as needed, from HUD Program Environmental Specialists and ECOs.
- Ensures that HUD's environmental review procedures are administered in accordance with Administration priorities while meeting the statutory requirements under NEPA and other related laws and authorities, including Executive Order 14154 *Unleashing American Energy*.

The IFR is being published as final (along with the request for comments) because HUD takes the position that the Administrative Procedures Act provides for exceptions where the agency finds good cause to omit advance notice of the opportunity for public comment. It cites the rationale for the IFR as fitting within this Administrative Procedures Act exception.

A copy of the Federal Register notice can be found here.