

Potential Impacts to Real Estate Development of Proposed Amendments to NEPA Regulations

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Proposed changes to regulations implementing the National Environmental Policy Act of 1969 (NEPA) have the potential to affect real estate development within the greater Pittsburgh region and nationwide. The proposed regulations, issued by the Council on Environmental Quality (the “CEQ”) in January 2020, would revise NEPA procedures by narrowing both the scope of actions that must be reviewed under NEPA as well as the extent of such review. With these changes, the time, cost and environmental analysis required to comply with NEPA could be significantly reduced, and development projects that previously faced delays could proceed more quickly through the review process, or potentially avoid it altogether.

Background and Purpose of NEPA

NEPA was enacted in 1970 with the goal of promoting accountability and transparency in federal decision-making by ensuring that the environmental impacts associated with federal actions were considered by the agencies undertaking those actions. Under NEPA, each federal agency is responsible for conducting a NEPA analysis on all agency actions that are deemed “major Federal actions” to determine if such actions impact the environment. “Major Federal actions” are currently defined in CEQ NEPA regulations as “actions with effects that may be major and which are potentially subject to federal control and responsibility” (emphases added). That may include both federal projects and projects undertaken by non-federal entities that receive federal funding or require federal permitting. Examples of major Federal actions include oil and natural gas pipeline construction projects, highway construction, and bridge replacement. The federal agency that takes a major Federal action (e.g., the issuance of a permit) is required to prepare an analysis of the project’s effects on the environment, which

can take three forms: (i) a categorical exclusion (CE) for an action that has been previously determined to involve no significant environmental impacts; (ii) the preparation of an environmental assessment (EA) for an action for which environmental impacts are not expected to be significant, which identifies the anticipated effects of the action and assesses their significance; or (iii) a more extensive environmental impact statement (EIS) for an action with known significant environmental impacts, involving the analysis of adverse environmental effects from, and alternatives to, the proposed action. While NEPA itself does not provide a mechanism for the public to challenge an agency’s NEPA analysis, the public has the right to conduct such a challenge through the citizen suit provisions of Administrative Procedure Act.

Proposed Changes to NEPA

The revisions to the NEPA regulations that were proposed by the CEQ in January seek to create a more efficient and timely review process by changing the application and scope of NEPA reviews, the analysis of alternatives to the proposed action, and timing requirements. The most significant change would be a revision of the term “effects.” Under the current regulations, “effects” include:

- a. Direct effects, which are caused by the action and occur at the same time and place.
- b. Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.

- c. Cumulative effects, which are effects that result from the incremental impact of the action when added to other past, present or reasonably foreseeable actions

The proposed revised definition of “effects” would be:

[E]ffects of the proposed action or alternatives that are reasonably foreseeable and have a reasonably close causal relationship to the proposed action or alternatives. Effects include reasonably foreseeable effects that occur at the same time and place and may include reasonably foreseeable effects that are later in time or farther removed in distance. (1) Effects include ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic (such as the effects on employment), social, or health effects. Effects may also include those resulting from actions that may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial. (2) A “but for” causal relationship is insufficient to make an agency responsible for a particular effect under NEPA. Effects should not be considered significant if they are remote in time, geographically remote, or the product of a lengthy causal chain. Effects do not include effects that the agency has no ability to prevent due to its limited statutory authority or would occur regardless of the proposed action. Analysis of cumulative effects is not required.

This definition would thus remove the references to direct and indirect effects, and would include only those effects that are “reasonably foreseeable and have a reasonably close causal relationship to the proposed action or alternative.” The requirement for analysis of cumulative effects would be explicitly eliminated. The proposed definition further clarifies that a “but for”

causal relationship would be insufficient to trigger an analysis of a particular effect. Rather, the phrase “reasonably close causal relationship” is intended to eliminate effects that are remote in time or in geography, an agency has no authority to prevent, or would happen regardless of the agency action.

Notably, the proposed regulation does not specifically address the extent to which an agency would be required to analyze effects from greenhouse gas emissions and potential climate change impacts, other than to note that any such analysis must be consistent with the proposed definition of “effects.”

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However, the CEQ’s proposed draft guidance on consideration of greenhouse gas emissions, released last June, would give agencies latitude in determining when quantification and analysis of greenhouse gas emissions and their effects are warranted. In the its proposal, the CEQ has requested input on whether the proposed regulation should incorporate any aspects of that draft guidance.

The proposed regulation also aims to clarify the determination process for whether or not a particular federal action triggers a requirement for NEPA review. Under its proposed rule, the CEQ seeks to modify the definition of “major Federal action” to remove the word “potentially” as well as the portion of the definition that relates to a failure to act. That would result in a narrowing of the definition of major Federal action to only affirmative actions that are clearly subject to federal control and responsibility. Additionally, the proposed definition would clarify that loans, loan guarantees or other forms of financial assistance in cases where

the agency does not have sufficient control and responsibility over the effects of the action, are not within the scope of a major Federal action and thus not subject to NEPA analysis.

With respect to EIS analysis of alternative options to the proposed major Federal action, under the current regulations, an agency must analyze all reasonable alternatives, including those that are not within the jurisdiction of the agency. The CEQ proposes to strike the term “all” from this requirement, allowing an agency to provide a reasonable number of examples that are technically and economically

feasible. In addition, the CEQ proposes to remove the requirement that an agency analyze alternatives outside of its jurisdiction.

The CEQ’s proposal contains various other revisions aimed at streamlining the NEPA process, such as clarifying the process by which an agency can create a CE and allowing agencies to establish procedures for applying CEs created by other agencies. These changes also include more practical components, such as establishing presumptive time limits for NEPA reviews – two years for an EIS and one year for an EA.

The proposed revisions, if adopted as a final regulation, would supersede all previous CEQ NEPA guidance, which would be withdrawn.

Potential Impacts to Real Estate Development

The proposed revisions to NEPA could have a significant impact on real estate developments that involve federal funding and/or permits, including

both large infrastructure and energy projects. Since the inception of NEPA, projects meeting the “major Federal action” criteria have had to undergo time-consuming review, and have been subject to legal challenges by project opponents. Developers have faced substantial costs in preparing the necessary documentation of anticipated environmental effects, the costs of delays while projects remain under extended review, and the uncertainty of ultimate approval. For example, a Montana federal district court temporarily enjoined construction of the Keystone XL pipeline in 2018 on the basis that the lead agency – the U.S. Department of State – violated NEPA by failing to evaluate the cumulative environmental impacts of the project. If the CEQ’s proposed regulatory revisions are adopted, its changes to the definition of effects can be expected to result in more flexibility for agencies performing review of environmental effects and may make it more difficult for opponents to challenge an agency’s NEPA review. Additionally, the proposed time limits for NEPA review could also significantly reduce the current average timeframes for NEPA review by more than 75 percent, which in practice could ultimately allow projects to proceed to construction more quickly.

Based on the likely impacts to a wide variety of industries and projects that require approvals, funding or other actions by federal agencies, developers of projects that are potentially subject to NEPA review and other stakeholders are encouraged to comment on the CEQ’s proposed regulation. The deadline to submit comments is March 10, 2020. There will also be two public hearings on the proposed regulations – on Feb. 11 in Denver, Colorado, and on Feb. 25 in Washington, D.C. **DP**

Babst Calland is actively monitoring this proposed rulemaking. If you have questions about how NEPA or this rulemaking could affect real estate development, or how to comment on the rulemaking, contact Matthew I. Moses or Mary H. Binker in Babst Calland’s Corporate and Commercial Group or Ben Clapp or Casey J. Snyder in the Environmental Group.