NEPA Rules Rewrite: The Series

Following are links to our full series of *eAlerts* analyzing revisions to the National Environmental Policy Act (NEPA) regulation, published in the Federal Register on July 16, 2020 by the Council on Environmental Quality (CEQ).

These *eAlerts* focused on changes the CEQ has made to the definitions section of the NEPA regulations, the beginning of the NEPA process for preparation of an environmental impact statement (EIS) and the required contents of an EIS. They also covered changes the CEQ has made to clarify and enhance the use of categorical exclusions (CE) and environmental assessments (EA), and examined changes made regarding public involvement, influencing judicial review, potential impacts to Federal-State Environmental Reviews and Studies and several other significant updates to the regulations.

NEPA Rules Rewrite: The Series

Vol 1. What's in a Name?

Vol 2. Initiation of the Environmental Impact Statement Process

Vol 3. Categorical Exclusions and Environmental Assessments

Vol 4. Content of NEPA Documents Under New CEQ Rules

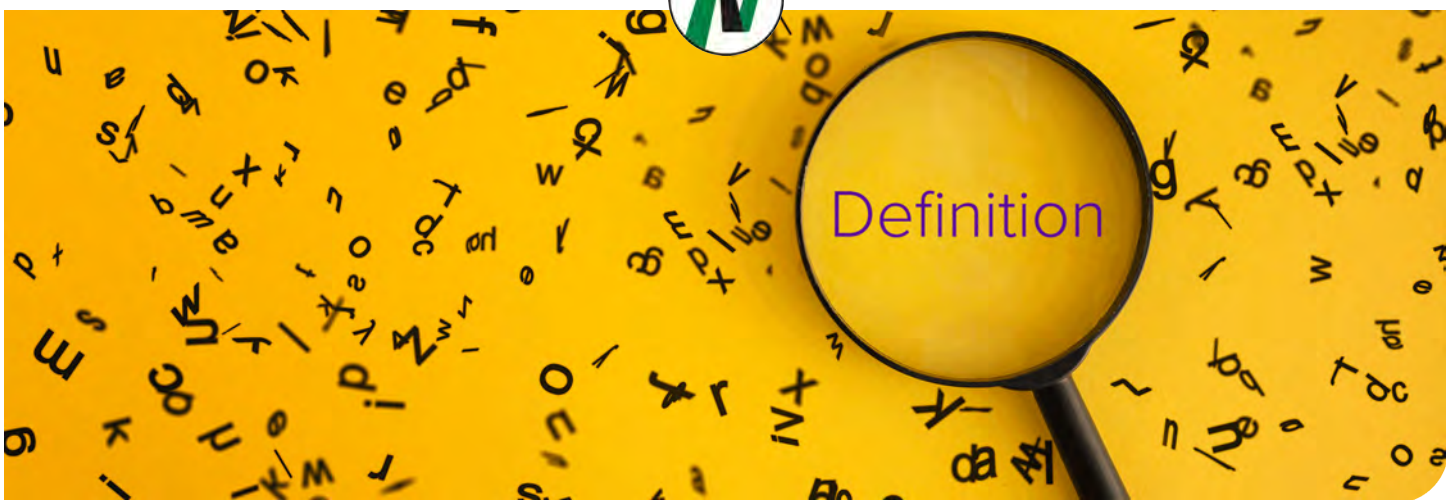
Vol 5. Public Involvement Process

Vol 6. Revised NEPA Regulations Designed to Influence Litigation

Vol 7. Potential Impacts on Federal-State Environmental Reviews & Studies

Vol 8. What Else Do You Need to Know?

Vol 9. What's Next?



NEPA Rules Rewrite: What's in a Name?

Changes in Definitions Section May Create Clarity for Agencies, Ammunition for Opponents

By Ed Kussy | 07.29.2020

This is the first in a series of eAlerts on revisions to National Environmental Policy Act (NEPA) regulations published in the Federal Register on July 16, 2020 by the Council on Environmental Quality (CEQ). CEQ's revised rules amend 40 C.F.R. Parts 1500-1508. Nossaman attorneys Ed Kussy, Rob Thornton, Svend Brandt-Erichsen, Rebecca Hays Barho, Brooke Marcus Wahlberg, David Miller, and Stephanie Clark are contributors for this series.

We begin our series on the revised NEPA regulations by describing changes CEQ has made to the backbone of the regulations: the definitions section.

For many regulations, the "definitions" section is fairly innocuous. This has never been the case for the CEQ's NEPA regulations. In defining various critical terms, CEQ attempted to set the bounds on the scope and type of analyses contemplated by various elements of the NEPA process. The new CEQ rules are no different. Thus, a good deal of the early commentary of the new regulations has focused on how the definitions changed, what has been added, and what has been left out. Our commentary will focus on those changes likely to be most significant or controversial:

"Categorical Exclusion" – The new definition of a categorical exclusion (CE) is quite narrow, simply referring to those actions listed as CEs in agency implementing procedures. This definition must be read together with 40 C.F.R. §§1501.4 and 1507.3(e)(2)(ii), which establish boundaries for CEs that are much like the prior version of the regulations. The rule continues to require agencies to list CEs in their implementing procedures. Some agency procedures, like those of the federal surface transportation agencies, contemplate that a project that is not listed, but would otherwise qualify as a CE, could be treated as a CE with some additional documentation. Not all agencies have such a provision in their implementing rules, however, and the new rule does not provide them this additional level of flexibility. Agencies are allowed to use CEs from other agencies (40 C.F.R. §1506.3(d)), but the language of this provision does not seem to allow adoption of a process to effectively define a new, project- or program-specific CE.

“Effects” – The change to the definition of “effects” in the new rules may end up as a primary flashpoint in the litigation that is sure to come. Likely to receive the greatest attention are the things removed from the old regulation. For example, as described in greater detail below, CEQ has eliminated explicit references to “indirect” and “cumulative” effects. Although the new definition of “effects” contains language that seems quite broad, other provisions seem to constrain the scope of analysis. This creates internal ambiguities. Simply changing critical, well-established concepts could well lead to more litigation until the precise scope of the changes is defined by future court decisions.

The new definition first states that effects or impacts of the action are those that are: (1) reasonably foreseeable; and (2) have a reasonably close causal relationship to the proposed action or alternatives. While the new rule drops an explicit reference to “indirect effects,” it explicitly includes the idea that effects could occur either at the same time and place as the proposed action or its alternatives or could occur later in time and be further removed in distance from the proposed action. While the definition and preamble may imply that an agency could still consider what used to be called indirect and even cumulative effects, opponents of the new rules will certainly argue otherwise.

The new rule expressly rejects a simple “but for” causal relationship in determining the scope of effects to be considered. Actions too far removed in time or distance, or at the end of lengthy causal chain need not be considered. The definition specifically excludes actions that the agency has no ability to prevent or that would occur regardless of the proposed action. This considerably narrows the effects that any agency must consider in preparing a NEPA document and may assist project proponents in limiting the breadth of NEPA reviews.

On the other hand, the causation standard may also set up an internal contradiction in the definition itself, as the scope of “effects” seems at once to be fairly broad and then is narrowed in a way that rejects the initial precept. This is exacerbated by 40 C.F.R. §1501.3(b), which instructs agencies on how to determine if an effect is significant. That section does not limit the analysis to those effects the agency has power to control. These and other internal inconsistencies may rear their heads in future litigation.

Of particular interest to those who closely watch NEPA practice is the elimination of CEQ’s clear requirement that agencies examine “cumulative impacts.” Cumulative impacts were designed in CEQ’s original regulations to measure the impacts of the proposed action in context with other past, present, and future actions irrespective of who undertook them, thus measuring the incremental effect of the proposed action on the environment. Not only has the analysis of cumulative impacts been dropped, the new “effects” definition includes the further limitation that agencies need not consider impacts beyond their control. It must be said that the treatment of cumulative impacts in a NEPA document has often presented problems, as it was difficult to draw boundaries around the scope of this analysis. In many EISs, the cumulative impacts analysis was little more than a report of what else was going on or planned in the area, with only cursory analyses of any synergistic impacts with the proposed action. Thus, while there has been much handwringing and writing about ending the requirement to specifically address cumulative impacts, the real impact of this change is uncertain. Nevertheless, and as noted above, both the removal of cumulative effects and the ambiguity of the internal inconsistencies in the new rule are sure to be the subject of litigation.

Finally, we would be remiss not to mention CEQ’s elimination of the term “significantly” from the definitions section. The preamble to the final rule states that the definition of “significantly” has been replaced by new section 40 C.F.R. § 1501.3(b), which describes the factors agencies should consider in determining whether effects are significant. While that provision does address when an impact should be considered “significant,” it is far narrower

than the old definition. Further complicating matters, the terms “significantly” and “significant” have many meanings in federal environmental law (for example, in some programs, it simply means “capable of being measured,” essentially a scientific concept). That is clearly not the case in the NEPA context. A clear description as to what “significant” meant for NEPA purposes was useful. The old definition was closely allied to the types of impacts that might give rise to an EIS, which was at least informative to the public and courts reviewing NEPA documents. Like other aspects of the new “effects” definition, we fear that the lack of clarity of this central NEPA concept could create problems and litigation.

“Legislation” – The new definition of “legislation” is much shorter than its predecessor. Some provisions have been moved to other places in the new rule. The exclusion of actions proposed by the President fails to recognize how federal legislation is developed or how treaties are dealt with administratively. It is true that the Supreme Court has held that actions reserved to the President are beyond the scope of

NEPA. But, in a sense, virtually all proposals for legislation come from the President. Thus, when legislation is developed by a department of the executive branch, it must be reviewed by the Office of Management and Budget (technically a part of the White House) for consistency with the President’s policies and other government actions. Does this make the legislative proposal an action by the President? Similarly, requests for the ratification of treaties are no longer included in the definition. While treaties and other international agreements are approved by the President, they are often negotiated by the various federal departments and then sent to the White House, and, perhaps the State Department, for approval. Only a few treaties directly involve the President. How is this different from the way legislation is handled? The new rule provides no guidance with respect to these issues.

“Major Federal Action” – There are several important changes in the new definition. The old rule plainly stated that the term “major” does not have a meaning independent from the term “significantly.” Thus, any action with significant environmental effects was a major action. The new rule rejects this premise. Actions which are not “major” federal actions, such as actions with minimal federal involvement or investment, are not subject to NEPA, whether or not they have a significant environmental impact. Thus, for example, where a state uses only a small amount of federal funds on a large project, NEPA may not apply. For transportation projects, this provision parallels a CE added pursuant to MAP-21 (the 2012 transportation reauthorization statute) for small projects or projects with limited federal assistance. See 23 C.F.R. §§771.117(c)(23) and 771.118(c)(18). This provision may similarly narrow the degree to which NEPA applies for non-federal projects requiring some level of federal permitting or other authorization, although it remains to be seen whether agencies will limit NEPA review in practice.

The style of the new provision is somewhat strange and departs from the previous provision. Rather than defining what constitutes a major federal action, the definition focuses on what is not a federal action, mirroring, in many ways, exclusions that have evolved over time in various court decisions. The actual definition appears almost as an afterthought.

Of particular interest are two exclusions from what will be viewed as “major federal action”: activities that are non-discretionary and non-federal projects with minimal federal funding where an agency does not exercise sufficient control and responsibility over the outcome of the project at issue. Certain environmental permits issued by federal agencies such as the U.S. Fish and Wildlife Service are arguably non-discretionary in the sense that where certain criteria are met, the agency is required to issue the permit (see, e.g., “shall” language set forth in Endangered Species Act section 10). These same types of permits often do not dictate whether a project will or can proceed, though how a project proceeds can be affected by whether an agency does, in fact, issue the requested permit or approval. These issues have been argued and variably won and lost over time in various courts. Like so many of

the other definitions, it remains to be seen whether and how agencies will change their approach to NEPA review and how courts will view such changes in the future.

"Mitigation" – The only change to this important definition is the note that NEPA requires that mitigation be considered and does not require the adoption of mitigation measures. This is well-established law and the new rule continues to contain the requirement that agencies identify the manner in which the provisions in the NEPA document will be met. However, the new rule may do nothing to limit NEPA challenges that focus on the failure of an agency to prove that mitigation provided by a project will, in fact, be implemented.

"Page" – This is an interesting new definition because of the greater emphasis on the page limitations for EAs and EISs. The number of words per page is specified (500), presumably to avoid attempts to go around the page limitation by reducing the font of the print, but excluded are maps, diagrams, graphs, tables, and other graphic material. This type of material usually takes up a fair amount of space in the typical EIS, providing considerable flexibility for staying within page limits.

"Notice of Intent" – This definition is substantially simplified. Other parts of the new rule make considerable change to the "NOI," most importantly not requiring its publication prior to starting the scoping process.

"Publish and Publication" – This is a new definition that provides greater flexibility by expressly allowing key NEPA documents, such as EISs, information, etc. to be published electronically. Many transportation agencies already follow this practice.

"Reasonable Alternatives" – This is a new definition that makes clear that the alternatives considered in the NEPA document must meet the agency's purpose and need, and, in the case of permit application "must meet the goals of the applicant." The preamble describing this definition states that this means that the goals of the applicant must be "considered." This is quite different from the explicit language of the new definition, and is bound to be a source of litigation. Transportation agencies are less likely to encounter this issue because projects are developed through a planning process, and a range of alternatives typically meet purpose and need. Non-federal project proponents working with federal agencies preparing NEPA documents may be able to use the new definition to minimize the number of alternatives carried forward for detailed analysis in a NEPA document, or may continue to experience resistance from agencies relying on the language in the preamble rather than the language in the definition itself.

"Reasonably Foreseeable" – This definition is new, but incorporates a standard that has been around for quite some time. That is, what would a person of ordinary prudence consider in reaching a decision. While this is a very fluid, fact dependent standard, its implications could be significant, particularly with respect to what effects are analyzed in the NEPA document. The issue of reasonable foreseeability likely will be a flashpoint in future litigation, particularly as it relates to climate change.

"Senior Agency Official" – This is a new concept in the regulations, explained more fully in the text of the rule. The official is of assistant secretary rank or higher, and has overall responsibility for the agency's NEPA compliance. An official of this rank is typically a political appointee.

"Tiering" – The new definition is shorter, but substantially similar. An important difference is that under the new rule, the first tier document need not be an EIS. The old regulation only references EISs for the first tier. Under the new rules, we may begin to see first tier EAs; however, this approach may create problems for later NEPA documents where impacts may be significant.

There are changes to other definitions. However, we do not believe they will have a significant impact. For example, the definition of scoping has been considerably shortened, but the changes to the scoping process are dealt with elsewhere in the regulation. As with the rest of the new rule, CEQ seeks to justify the changes with extensive citations to case law. However, the sheer number of NEPA decisions could justify alternative outcomes.

In sum, while many of the changes in definitions may not practically alter the legal landscape associated with NEPA review, codification of long-standing agency practice and some case law nevertheless may affect how certain agencies implement NEPA review in their planning and permitting processes, and will certainly provide ample opportunity for third parties to instigate facial and project-specific challenges to the new regulations. Because many of the regulatory changes are in line with the practices of transportation agencies, such agencies may not experience a significant shift in practice or uptick in litigation.

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NEPA Rules Rewrite: Initiation of the EIS Process

By Stephanie N. Clark, Rebecca Hayes Barho & Ed Kussy | 08.06.2020

This is the second in a series of eAlerts on revisions to National Environmental Policy Act (NEPA) regulations published in the Federal Register on July 16, 2020, by the Council on Environmental Quality (CEQ). The CEQ's revised rules amend 40 CFR Parts 1500-1508. Nossaman attorneys Ed Kussy, Rob Thornton, Svend Brandt-Erichsen, Rebecca Hays Barho, Brooke Marcus Wahlberg, David Miller and Stephanie Clark are contributors for this series.

Previously, we provided an eAlert focused on changes the CEQ has made to the definitions section of the NEPA regulations. Today, we focus on changes the CEQ has made to the beginning of the NEPA process for an Environmental Impact Statement (EIS).

The beginning of the NEPA process comes once an agency or applicant determines to take an action that requires federal funding or a federal approval. The official NEPA process is preceded by planning activities undertaken by the agency or applicant needed to formulate that action. For example, federally funded highway or transit projects must come from a state or metropolitan transportation planning process specified by law. The federal agency that is to make the approval or funding decision may decide on its own, on the basis of early studies or after preliminary consultation with other agencies whether to handle the action with a categorical exclusion (CE), an environmental assessment (EA) or an EIS. This basic process is retained by the new regulations, but with some significant changes we examine below.

NEPA requires that federal agencies prepare a detailed statement for "major Federal actions significantly affecting the quality of the human environment." 42 USC § 4332(2)(C). As we described last week, under the old regulation, any federal action having significant environmental impacts was considered a major federal action. The new rule looks first at whether an action is a "major federal action" and then determines whether the impact is "significant."

Thus, if an action is not a major federal action, or even a federal action, the magnitude of the environmental impact is not considered under NEPA.

Pulling the Trigger on NEPA Review: Is an Action a “Federal Action” or a “Major Federal Action”?

The term “major federal action” is now defined as “an activity or decision subject to [f]ederal control and responsibility” and specifically excludes seven categories of activities and decisions:

- Those whose effects are located entirely outside the jurisdiction of the United States;
- Those that are “non-discretionary” and made in accordance with the agency’s statutory authority;
- Those that do not result in “final agency action” as that term is understood under the Administrative Procedures Act or other statute requiring finality;
- Judicial or administrative civil or criminal enforcement;
- Funding assistance limited to general revenue sharing with no federal control over subsequent use of the funds;
- Non-federal projects with “minimal” federal funding or involvement where “the agency does not exercise sufficient control and responsibility over the outcome of the project; and
- Financial assistance where the federal agency does not exercise sufficient control and responsibility over the effects of such assistance.
- The new definition of “major federal action” also provides four categories of actions that tend to meet the definition. These include:
- Adoption of official policies;
- Adoption of formal plans upon which future agency actions will be based;
- Adoption of federal programs; and
- Approval of specific projects, including those approved by permit or other decision, and federally-assisted activities.

Of particular interest is the category of non-federal projects with minimal federal funding or involvement where the agency does not exercise sufficient control and responsibility over the outcome of the project to turn that project into a “major federal action.” It is these types of projects–activities undertaken by non-federal actors that seek or obtain federal permitting or funding–that often are subject to challenge by third parties on the basis that the associated NEPA review was inadequate. The preamble to the final regulations provides some context for when these types of activities should not be subject to NEPA review: there is no “practical reason for an agency to conduct a NEPA analysis” where an agency cannot “influence the outcome of its action to address the effects of the project.” The CEQ notes that agencies may further define what does not constitute a major federal action for purposes of triggering NEPA.

Although many of the listed exclusions have been held exempt from NEPA by various court decisions, excluding actions with minimal federal involvement marks a departure. For example, in 2012, the transportation

reauthorization legislation provided that a CE should be developed for small projects ($30 million or less) or projects with limited federal funding ($5 million). However, a CE is not an exemption from NEPA review and, under extraordinary circumstances, could ultimately result in an EA or EIS. Similarly, where federal authority over an action is limited, particularly where the federal action represents a small portion of a larger undertaking, the new regulations appear to contemplate that the small federal action may not be enough to trigger NEPA review. Especially as agencies use this provision to limit the kinds of actions subject to NEPA, legal challenges seem likely.

NEPA Applies: Now What?

Where NEPA applies, the next step is to determine what level of NEPA review is required. Largely, this determination is based on whether a given "major federal action" will "significantly impact the human environment." To assist in this determination, the CEQ has provided a test, now set forth under 40 C.F.R. § 1501.3. Specifically, the decision as to whether effects are "significant" will be viewed against the factors set forth under § 1501.3(b).

Procedures for Preparing an EIS

"Scoping" – The new regulations make two important changes to the scoping process. Scoping is the early coordination with state and local agencies and the public that helps identify the project purpose and need, the range of alternatives and the issues that will have to be addressed in the EIS.

The old regulations specifically required that the scoping process begin after the "notice of intent" (NOI) to prepare an EIS. The NOI was to include a description of the proposed action and possible alternatives and the scoping process, including possible meetings. Thus, this presupposes that a good deal of project planning preceded the start of the scoping process. The new regulations deal with this by expressly allowing the scoping process to begin before the issuance of the NOI and requiring its issuance only after there is a determination that the proposal is sufficiently developed to allow meaningful public comment and that an EIS is required. At that point, the NOI requires more detailed information than previously necessary, including the purpose and need, a preliminary description of alternatives, expected impacts, anticipated permits, a schedule for decision-making, a description of the scoping process to be used and a request for comments.

We think that the revisions to the scoping process make sense and more closely reflect what actually occurs. In some ways, the revised scoping process mirrors the process applicable to transportation projects, which requires the identification of and comment on the proposed purpose and need of the project and the range of alternatives before publication of the draft EIS. The new scoping process also fits better with the "planning and environment linkage" (PEL) efforts of the Federal Highway and Federal Transit Administration. This initiative more closely aligns the NEPA and transportation planning processes and encourages grantees to make greater and more explicit use of transportation planning "products" (or studies and analyses) in the NEPA process.

The effect of the scoping process, however, takes on a new form under the revised regulations. The new regulations now explicitly tie the scoping process to the exhaustion of administrative remedies. The newly-specific exhaustion requirement is different, not in that it exists, but in that it is spelled out in greater detail by the new regulations. A forthcoming piece in this series will discuss the likely impacts of this change in terms of litigation and other collateral effects of the CEQ changes. For the purposes of the beginning of the NEPA process, it is significant that the exhaustion requirement is spelled out in such detail because it emphasizes the need for commenters to submit detailed and specific comments in a complete and timely fashion starting at the very beginning of the NEPA review process.

"Early Integration of the NEPA Process" – One interesting change the new regulations make to the beginning of the EIS process (and to NEPA review generally) is seemingly small–replacing a "shall" to a "should". (40 CFR § 1501.2). The previous CEQ regulations explained that "[a]gencies shall integrate the NEPA process with other planning at the earliest possible time…" (emphasis added). This language was often quoted in NEPA litigation by project opponents, who would argue that the lead agency failed to begin the NEPA process when it should have.

As revised, the NEPA regulations now explain that "[a]gencies should integrate the NEPA process with other planning and authorization processes at the earliest reasonable time…" (emphasis added). In essence, where federal agencies previously were unequivocally directed to integrate NEPA into the decision-making process at the earliest possible time, agencies now have been told that it is advisable, but not required, to do so. Instead, such early integration should occur when it is reasonable, but not necessarily at the "earliest possible" time. As a practical matter, the vast majority of agencies are likely to continue engaging in the NEPA process early in the decision-making process; however, this specific change may provide a more limited basis for potential challengers to argue that a lead agency failed to integrate the NEPA process as early as it should have.

"Cooperating Agencies" – The revised regulations expand upon the duties of cooperating agencies and clarify that a lead agency is to involve them at the earliest practicable (as opposed to possible) time. This generally reflects existing practice and underlines the intent of various NEPA regulatory revisions aimed at streamlining the NEPA process where multiple agency approvals are required. However, as with the prior regulations, this attempt to streamline approvals by multiple agencies retains the ability for a cooperating agency to assert that other program commitments prevent its involvement or involvement to the degree requested by the lead agency.

It is important to note that the involvement of cooperating agencies is critical for the successful achievement of the One Federal Decision initiative of Executive Order 13807. This is especially the case because of the more flexible adoption rules of the new regulations allowing a cooperating agency to adopt the completed EIS and simply issue its own Record of Decision (ROD).

"Time Limits for Completion of an EIS" – Finally, and as we will discuss in greater detail in future eAlerts, the revised regulations require that a ROD be signed no later than two years after the issuance of the NOI. This time limit may be extended at the discretion of the "Senior Agency Official" responsible for overseeing the NEPA process of the agency.

Final Thoughts

The new regulations improve the scoping process and make the commenting requirement more rigorous. Although not required, the new rules encourage agencies to integrate planning and NEPA processes, especially in light of the changes made to the scoping process and the timing of the NOI. The more rational adoption rules enhance the benefit cooperating agencies have from participating in the lead agency's NEPA process. The balance of the changes to the NEPA process reflect the intent of the CEQ to streamline NEPA review generally, including the EIS process. While the attempts to streamline the process may appear significant to the uninitiated, it is important to view these changes in context. For example, some of the revisions to the threshold determination as to whether NEPA applies remove specific considerations in favor of broad ones, seemingly with the intent to give agencies more discretion in their consideration of what does or does not warrant NEPA review or what does or does not warrant an EIS level of review. This lack of specificity could equally lend itself to ambiguity in a decision to either prepare or not prepare an EIS, and could similarly lend itself to litigation over whether an EIS should or should not have been prepared in the first place. Further complicating matters is the fact that there no longer will be thirty

years of case law on the regulations to provide clarity for courts, agencies, project proponents or project opponents.

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NEPA Rules Rewrite: Categorical Exclusions and Environmental Assessments

By David Miller | 08.11.2020

This is the third in a series of eAlerts on revisions to National Environmental Policy Act (NEPA) regulations published in the Federal Register on July 16, 2020 by the Council on Environmental Quality (CEQ) ("Final Rule"). The CEQ's revised rules amend 40 CFR Parts 1500-1508. Nossaman attorneys Ed Kussy, Rob Thornton, Svend Brandt-Erichsen, Rebecca Hays Barho, Brooke Marcus Wahlberg, David Miller and Stephanie Clark are contributors for this series.

Previously, we provided eAlerts focused on changes the CEQ has made to the definitions section of the NEPA regulations and changes to the beginning of the NEPA process for preparation of an environmental impact statement (EIS). Today, we focus on changes the CEQ has made to clarify and enhance the use of categorical exclusions (CE) and environmental assessments (EA).

As we noted in our previous alert, the beginning of the NEPA process comes where there is a proposed "major federal action." When NEPA applies, agencies must first determine what level of review is required. The agency has three options: a CE, an EA and a Finding of No Significant Impact (FONSI) or an EIS.

Agencies may designate CEs in their NEPA implementing procedures which identify categories of actions that they have determined ordinarily do not have a significant effect on the environment. If a CE is available, then NEPA review is complete unless an agency has specified that some level of documentation applies. Where a proposed action is not subject to a CE, and it is not clear from the outset that the action may cause a significant effect on the environment, then the agency may prepare an EA. The EA process results in one of three outcomes: (1) a FONSI, (2) a Mitigated FONSI, or (3) a decision to prepare an EIS. A FONSI applies where the action has no potentially significant effects. As is discussed in greater detail below, prior to the effective date of the Final Rule, a Mitigated FONSI was a tool based entirely upon guidance and was neither identified nor described by regulation.

Appropriate Level of NEPA Review: What Should We Do?

While the 1978 CEQ NEPA regulations described the three levels of potential review, they did not clearly set out the process for determining what level of review is appropriate for a given action. The Final Rule changes that by adding 40 C.F.R. § 1501.3. Section 1501.3 sets out the framework for determining the level of NEPA review by providing in a single location the thresholds for utilizing a CE, EA or EIS, with references to the regulations governing preparation of the relevant document.

A key determination for the appropriate level of review both prior to and under the Final Rule is whether the proposed project may have significant effects on the environment. Under the 1978 regulations, the determination of significance was based on "context" and "intensity." The Final Rule changes this. It replaces the consideration of "context" with the "consider[ation], as appropriate to the specific action, [of] the affected area (national, regional, or local) and its resources." This change is intended to clarify the meaning of the prior usage of "context" to specify that significance varies from project to project based on the setting of the proposed action. The Final Rule also replaces the consideration of "intensity" with consideration of the "degree" of the proposed action's effects.

One potentially significant change to the Final Rule is the elimination of a proposed action's potential "controversy" from the determination of the action's significance. "Controversial" in this context previously referred to substantive differences with other agencies or substantive scientific controversy rather than the controversial nature of the project from the perspective of the public. In the Final Rule, CEQ specified that the change was made because the controversial nature of a proposed action bears no relationship to the actual significance of its environmental effects. While CEQ's change may have some basis in fact, the potential for controversy has long guided agencies in their decision to prepare an EIS when the significance of a proposed actions effects is a close call. Because of the potential for litigation, it is possible that even under the Final Rule, risk averse agencies may continue to prepare an EIS if the project is controversial and likely to face litigation, even when the effects on the environment may not be significant.

Enhancement of Categorical Exclusions

Despite the attention paid in the Final Rule to the time required to comply with NEPA for major projects, the vast majority of agency actions comply with NEPA pursuant to CEs that have been promulgated under various agency-specific NEPA regulations. In fact, CEQ estimates that approximately 100,000 CEs are prepared annually. Given the prevalence of CEs in NEPA reviews, it is interesting that since the promulgation of the 1978 regulations, which did not address CEs in detail, CEQ has provided official guidance on the use of CEs only once.

Over the years, Congress expanded use and availability of CEs. For example, a provision of MAP-21 allowed one Department of Transportation (DOT) operating agency to use the CE of another operating agency for "multimodal" projects, which were defined in MAP-21. The Final Rule is another such step. The Final Rule would add a new section 1501.4(a), requiring agencies to identify CEs in their NEPA procedures. While this reiterates the 1978 regulations' requirement that agencies establish CEs in their NEPA procedures, it is unclear if this is intended to modify prior CEQ guidance encouraging agencies to develop procedures to allow projects which, on their face, have no significant impacts to be treated with a CE, even if they were not identified specifically in an agency's existing list of CEs.

The Final Rule also adds section 1501.4(b)(1), which provides that, when extraordinary circumstances are present, agencies may consider whether mitigating circumstances or other conditions are sufficient to avoid significant effects. The preamble to the Final Rule explains that this provision could be used, for example, where a project can

be designed to avoid effects creating "extraordinary circumstances" to a degree sufficient to warrant use of a CE. Thus, the Final Rule clarifies that the "extraordinary circumstances" standard is not intended to preclude the application of a CE simply because extraordinary circumstances may be present. This is consistent with a series of court decisions that have upheld the idea of a "mitigated" CE or mitigated FONSI.

Finally, the Proposed Rule would add a new paragraph (f)(5) to 40 C.F.R. § 1507.3, allowing agencies to establish a process in their NEPA procedures to apply a CE listed in another agency's NEPA procedures. This practice is already available for DOT agencies under the FAST Act. The Final Rule, however, did not adopt another provision in DOT's CE procedures as suggested by CEQ a number of years ago and briefly touched upon above. Under this provision, where a specific action is not listed as a CE, but otherwise meets the definition of a CE, an agency may process its NEPA approval as a CE after providing information to the relevant official supporting its conclusion.

Streamlining Environmental Assessments

Though not used nearly as frequently as CEs, the next most common level of NEPA review is the EA. CEQ estimates that approximately 10,000 EAs are completed annually. As with much of the Final Rule, CEQ's revisions to the regulations attempt to consolidate the previously scattershot EA requirements in a single location—40 C.F.R. § 1501.5—to provide clearer guidance for agencies that prepare EAs.

For the first time, the Final Rules' new section 1501.5(a) states precisely when an agency is required to prepare an EA. It provides that "[a]n agency shall prepare an environmental assessment for a proposed action that is not likely to have significant effects or when the significance of the effects is unknown." While this formulation did not exist in the original regulations, it does not represent a fundamental shift because it mirrors federal agencies' existing practices for EAs.

Importantly, the Final Rules establish a presumptive one-year time limit for completion of the EA process – measured from the date the agency decides to prepare an EA to the date of publication of an EA or FONSI in the Federal Register (§ 1501.10). Additionally, the Final Rule sets a presumptive 75-page limit on EAs, not including appendices (§ 1501.5). CEQ states that the purpose of these limits is to focus NEPA reviews on the relevant analyses and to generate concise, readable documents that will better serve their informational purpose. The efficacy of these presumptive limits will depend in part on the various agencies' buy-in to their mission. Under the Final Rules, senior agency officials are permitted to approve timelines and documents exceeding these presumptive limits, provided they specify the grounds for the requested exception and establish a new time and /or page limit. The Final Rules prescribe a set of factors a senior agency official may consider in determining whether to grant an extension or exceedance. It is understood that such exceedances likely would apply only for more complex or controversial projects.

The effectiveness of the Final Rule across federal agencies remains to be seen. The Final Rule does not specify what happens when an agency fails to abide by the presumptive time or page limits. With respect to the 75-page limitation, the Final Rules do not impose limits on the length of technical appendices, and the definition of "page" (500 words) excludes charts, graphs, pictures and the like. Thus, while the main document may be shorter, the Final Rules do not address the voluminous technical appendices that may accompany the EA. Thus, the practical impact of the proposed change might be simply to shift environmental analyses from the main body of an EA to its appendices. If this is the case, the result might be that the main body of the EA is just a summary of the technical appendices.

With respect to the time limitations on preparation and finalization of EAs and FONSIs, the abstract nature of the trigger of the one-year clock (when the agency "decides" to prepare an EA) may mean that there is little change in practice. For environmental resource agencies processing applications for permits and other approvals, applicants may continue to see significant delays in the processing of permit applications as agencies negotiate details of the underlying project or request, particularly when the agency may be concerned about a potential lawsuit.

About Those Impacts: Use of Mitigated FONSIs

Following preparation of the EA, if the agency concludes that there will be no significant impacts—and therefore that an EIS is not required—it will typically prepare a FONSI. That FONSI documents the agency's relevant analysis and explains the basis for the agency's conclusion that the proposed action will not result in significant environmental impacts. The Final Rule largely does not change this process, though it does focus again on consolidating the various requirements for FONSIs in the new 40 C.F.R. § 1501.6.

One significant change, however, is the Final Rule's inclusion of a new paragraph (c) addressing the use of mitigated FONSIs. Previous regulations did not officially recognize the availability or propriety of a mitigated FONSI, despite its widespread use and despite the fact that CEQ expressly approved their use in a 2011 guidance document. The Final Rule allows the use of mitigated FONSIs and provides that a mitigated FONSI "shall state the authority for any mitigation that the agency has adopted and any applicable monitoring or enforcement provisions" for those mitigation measures. Further, the mitigated FONSI "shall state any enforceable mitigation requirements or commitments that will be undertaken to avoid significant impacts." Thus, while the inclusion of mitigated FONSIs in the Final Rule is significant, it does not represent a change in current NEPA practice.

Final Thoughts

The enhanced availability of CEs, as well as the clarification regarding use of mitigation to fit within a particular CE where extraordinary circumstances are present, could be one of the most significant new changes set forth in the Final Rules. Most projects proceed via CE, and expanding their availability may do more to expedite project reviews than many of the Final Rules' other substantive changes. Use of CEs, however, is not without litigation risk. Further, the documentation associated with the use of CEs has become more and more cumbersome as agencies seek to document the decision making necessary for a CE to apply. The Final Rules do not establish any presumptive review or page limits for CEs. Thus, risk-averse agencies may still undertake extensive studies to justify their decisions to step beyond their own lists of CEs, which could undermine the effectiveness broadening the availability of CEs under the Final Rules.

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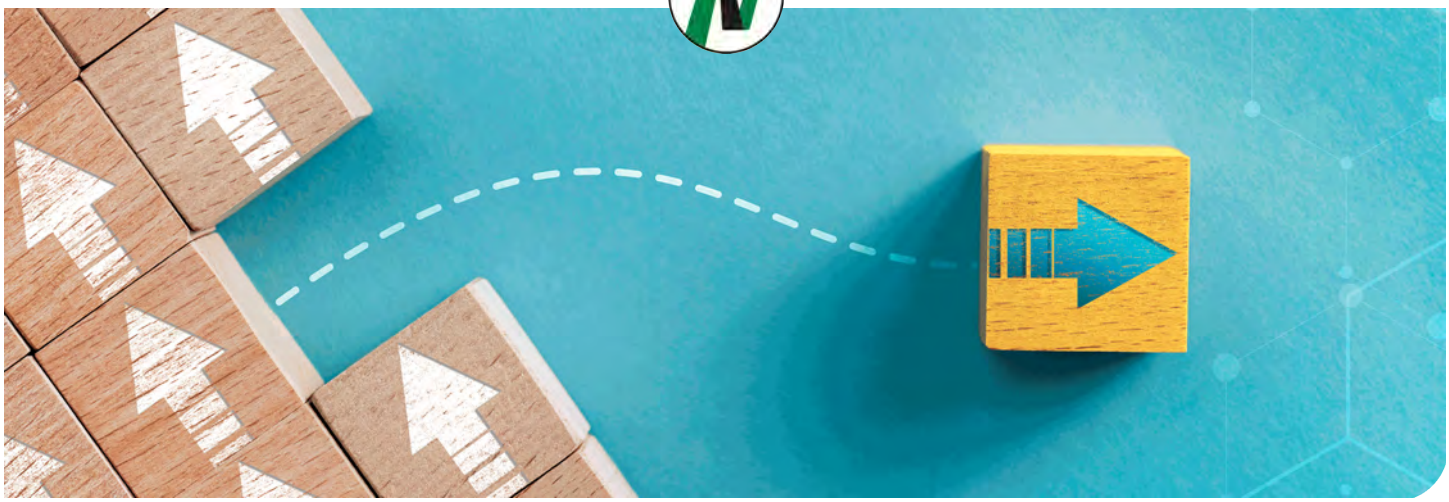

NEPA Rules Rewrite: Content of NEPA Documents Under New CEQ Rules

By Rebecca Hays Barho | 08.18.2020

This is the fourth in a series of eAlerts on revisions to National Environmental Policy Act (NEPA) regulations published in the Federal Register on July 16, 2020 (Final Regulations) by the Council on Environmental Quality (CEQ). The Final Regulations have an effective date of September 14, 2020. Nossaman attorneys Ed Kussy, Rob Thornton, Svend Brandt-Erichsen, Rebecca Hays Barho, Brooke Marcus Wahlberg, David Miller and Stephanie Clark are contributors for this series.

Previously, we focused on changes the CEQ has made to the definitions section of the NEPA regulations, changes to the beginning of the NEPA process for preparation of an environmental impact statement (EIS) and changes the CEQ has made to clarify and enhance the use of categorical exclusions (CE) and environmental assessments (EA). In this eAlert, we focus on changes the CEQ has made to the required contents of an EIS.

The primary changes that the CEQ made in its revisions to regulations governing the contents of an EIS simply codify common agency practice; however, a number of the changes are a departure from the prior regulations and are not necessarily common in agency procedures. Below, we provide a description of some of the notable changes to the required contents of an EIS and point out where opponents of the Final Regulations have already cried foul.

Summary of Notable Changes to EIS Content Requirements

"Page limitations: § 1502.7" – The CEQ has revised 40 C.F.R. § 1502.7 to incorporate a 150-page limit on typical EISs and a 300-page limit for EISs of unusual scope or complexity, unless a senior agency official approves a statement exceeding that length. In describing the reason for this change, the CEQ noted in the January 10, 2020 Notice of Proposed Rulemaking ("NPRM") that "every EIS must be bounded by the practical limits of the decision maker's ability to consider detailed information." While opponents of the Final Regulations have asserted that such a limitation may reduce the effectiveness of the NEPA process by limiting analyses, the regulations, in fact, permit a

significant amount of information to be included as appendices to the EIS without running up against the page count and also do not count items such as maps and graphics against the page limitation. Also, the Final Regulations strongly encourage clear, concise writing in NEPA documents. If new EISs are better written and fairly present summaries and conclusions of the underlying studies, appendices and other referenced material, then better, more readable documents may result.

"Clarifications on when a supplemental EIS is required: § 1502.9(d)" – The Final Regulations generally follow the old rule, with some significant changes. First, a supplemental EIS is only required when a major federal action *remains to occur* and either the agency makes substantial changes to the proposed action that are relevant to environmental concerns or there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts. The old rules did not limit the need for a supplement to remaining federal actions. Thus, this could substantially limit the situations when a supplemental EIS is required. In § 1502.9(d)(4), the Final Regulations spell out how to document a finding stating that changes to the proposed action or new circumstances or information do not require a supplemental document. The former regulations do not address this issue, although a number of agencies have provisions for doing so, such as the Federal Highway Administration/Federal Transit Authority/Federal Railroad Administration regulations, which provide for re-evaluations. The Final Regulations also state that an EA/finding of no significant impact (FONSI) documenting the decision not to prepare an EIS should be prepared "when necessary." Although the preamble suggests that this decision is left to agency discretion, no further guidance about what constitutes "necessity" is provided. This could open the door for legal challenges in the future, particularly in the absence of agency regulations spelling out what procedures to follow.

"Formatting EISs: § 1502.10" – The Final Regulations provide more flexibility to agencies for formatting an EIS to account for the fact that most EISs are distributed electronically. For example, the CEQ has, in the Final Regulations, eliminated outdated requirements to provide a list of EIS recipients since most EISs are published online and eliminated the requirement that an EIS contain an index, since most EISs are published in an electronically searchable format. Under the Final Regulations, agencies may customize the format of the EIS if the result is a more effective communication. The old rules only allowed deviation from the standard format for "compelling reasons."

"Identifying cost of preparation: § 1502.11" – The CEQ has adopted a requirement in the Final Regulations that an agency must include the estimated cost of preparing the draft and final EISs on the final EIS cover page. This estimated cost must include costs for any agency full-time equivalent personnel hours, contractor costs and any other direct costs related to environmental review. Also, where practicable, the estimate should include the costs incurred by cooperating and participating agencies, applicants and contractors.

"Purpose and need: § 1502.13" – Among the more highly reported changes made in the Final Regulations are the CEQ's revisions to how an agency is to identify an action's purpose and need. The Final Regulations require that when an agency's duty is limited to reviewing an application for "authorization," the purpose and need statement should focus on the goals of the applicant and the agency's authority. The former rules had no similar provision. While some agency procedures and court decisions come close to such an approach, effectively reducing the potential scope of an EIS, there is considerable authority for a broader view. For example, the Complaint in one of the lawsuits challenging the Final Regulations characterized this approach as putting "the fox in charge of the henhouse." *Wild Virginia v. Council on Envtl. Quality*, No. 3:20-cv-00045 (W.D. Va. filed July 29, 2020). On the other hand, for those non-federal entities that often seek federal approvals for critical utility and transportation infrastructure across the country, the CEQ's shift to formally recognize an applicant's purpose and need in the context of NEPA documentation is a significant development. As the CEQ explains in the preamble to the Final

Regulations, the purpose and need section of the EIS establishes the framework for the number and tenor of alternatives analyzed by the EIS. Where a federal agency includes a purpose and need statement in the EIS that is far afield from the true, underlying action, the alternatives analysis may not, in fact, be of value, as the alternatives may be infeasible, impractical or otherwise impossible for a project proponent to consider or implement.

"Alternatives including the proposed action: § 1502.14" – The CEQ made a number of changes to the regulations governing the alternatives analysis. These changes include a requirement that the alternatives section of the EIS should present the environmental impacts of each alternative in comparative form. The CEQ revised paragraphs (a) and (f) of the section both to indicate that a federal agency must analyze a "reasonable number of alternatives" (rather than "all reasonable alternatives") to a proposed action and to instruct agencies to limit their considerations to a "reasonable number" of alternatives. The CEQ also struck former paragraph (c), which had required federal agencies to consider reasonable alternatives outside the agencies' jurisdiction. The CEQ's change to the definition of "reasonable alternative" in section 1508.1(z) further emphasizes this point by excluding alternatives outside an agency's jurisdiction due to an agency's lack of statutory authority to implement the alternative. The Final Regulations recognize–as have the courts–that the analysis of alternatives is the "core" of an EIS. Perceived limitation on the scope of the alternatives analysis will likely be another source of controversy and litigation.

"Affected environment: § 1502.15" – In the Final Regulations, the CEQ explicitly allows federal agencies to combine the affected environment and environmental consequences sections to better ensure the EIS focuses on aspects of the environment affected by the proposed action. The CEQ also directs agencies to include economic and technical considerations in the discussion of environmental consequences, where applicable. In an important change from the regulations as proposed in the NPRM, the CEQ clarified that the affected environment includes reasonably foreseeable environmental trends and planned actions in the affected areas. The CEQ explained that this change came in response to comments raised during the NPRM comment period that voiced concerns about eliminating the definition of cumulative impacts. In the preamble to the Final Regulations, the CEQ explains that when environmental trends or planned actions are reasonably foreseeable, such trends or actions should be included in the discussion of the affected environment, and that such trends or actions may include non-federal activities where such activities are reasonably foreseeable. It is under these types of provisions that a fairly broad view of effects is still contemplated.

Nevertheless, environmental organizations and others have raised concerns that the Final Regulations will, in reality, result in the elimination of cumulative impacts considerations–and specifically in the elimination of climate change considerations and environmental justice issues–from future NEPA analyses. Indeed, each of the three lawsuits already filed to challenge the Final Regulations raise concerns on these topics. See *Wild Virginia v. Council on Envtl. Quality*, No. 3:20-cv-00045 (W.D. Va. filed July 29, 2020); *Alaska Cmty. Action on Toxics v. Council on Envtl. Quality*, No. 3:20-cv-05199 (N.D. Cal. filed July 29, 2020); and *Envtl. Justice Health All. v. Council on Envtl. Quality*, No. 1:20-cv-06143 (S.D.N.Y. filed Aug. 6, 2020).

"Environmental consequences: § 1502.16" – To be consistent with the CEQ's revised definition of "effects," the CEQ has eliminated references to direct, indirect and cumulative effects in the environmental consequences section, and instead focuses on effects that are reasonably foreseeable and have a close causal connection to the proposed action. The CEQ also added language to this section that previously appeared in § 1508.14 clarifying that an agency should make a determination as to whether consideration of economic and social effects is interrelated with its consideration of natural or physical environmental effects.

"Tiering: § 1501.11" – As mentioned in a previous eAlert, the CEQ has revised the provisions governing tiering of NEPA documents to clarify that tiering is permissible to EAs in addition to EISs where it would: (1) eliminate repetitive discussions of the same issues; (2) focus on issues ripe for decision; and (3) exclude from the analysis issues already decided or not yet ripe at each level of environmental review. The revisions to the provisions on tiering make clear that site-specific analyses need not be conducted prior to an irretrievable commitment of resources, which typically does not occur until a decision at the site-specific stage.

"Incorporation by reference: § 1501.12" – In response to comments received on the NPRM, the CEQ added examples of the types of materials agencies may incorporate into environmental documents to section 1501.12, including EISs, by reference. These include, but are not limited to, planning studies, analyses or other relevant information. We will discuss the rules governing the adoption of certain documents into an EIS in a future eAlert.

Other changes to EIS content set forth in the Final Rules

In section 1502.17 of the Final Regulations, the CEQ requires draft and final EISs to include a summary of all alternatives, information and analyses submitted by the public for consideration by the agency(ies). Agencies must append to the draft EIS all comments received during the scoping process and invite comment on that summary. Agencies must also prepare a summary in the final EIS of all comments received on the draft EIS. Section 1502.2(e) also requires the decision-maker to certify in the Record of Decision that the agency has considered the submitted alternatives, information and analyses.

Section 1502.23 of the Final Regulations indicates that agencies should use existing information–so long as it is reliable–rather than require undertaking new scientific or technical research to inform NEPA analyses. Importantly, the Final Regulations also clarify that "new scientific and technical research" means research that extends beyond existing scientific and technical information available either in the public record or in publicly available academic or professional sources. Additionally, changes to this section allow agencies to utilize any source of information the agency finds reliable and useful to the decision-making process.

Finally, and while it does not pertain to the content of an EIS, we would be remiss not to note here the time limitation established by section 1501.10 of the Final Regulations, which state that agencies must complete EISs within two years (unless a senior agency official provides for a longer period). The two- year timeframe is measured from the date the agency issues a notice of intent to prepare an EIS to the date the agency signs the record of decision. While opponents of the Final Regulations have made much ado about the mandatory two-year time limitation on completion of the EIS process, it is important to remember, especially for large federalized infrastructure projects or non-federal projects seeking federal authorizations, that project planning and environmental review begin long before the formal scoping process begins and frequently involve lead, cooperating and other federal and state agencies. The two-year time limitation ultimately may serve only to hold agency officials accountable for completing what is already a long and arduous process.

Final Thoughts

While numerous changes have been made to the required contents of an EIS in the Final Regulations, the changes largely do not affect the substance of the NEPA analyses that must be contained therein. Nevertheless, a handful of changes are controversial and are the focus of litigation that has been filed and litigation that is sure to come. These changes include reworking whether and when a discussion of trends, such as climate change, are considered in an EIS and how the underlying purpose and need of an EIS is described, which in turn affects the breadth and treatment of alternatives considered and discussed. Whether or not one agrees with a two-year time

limit for completing an EIS, it helps no one if the EIS process stretches over many years. If the goal is to reduce the time it takes to process an EIS, agencies must produce shorter EISs that are focused on the action the federal agencies propose to take and must make EISs easier for the public to read and understand. Without a shift in agency practice, one cannot expect the new rule to make a difference.

Guidance from agencies on how they will implement the Final Regulations may further clarify treatment of such issues and, absent withdrawal under the Congressional Review Act or repeal under a new administration in 2021, courts may have their say as well. Thus, time will tell if courts accept the changes that the CEQ has made.

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NEPA Rules Rewrite: Public Involvement Process

By Ed Kussy | 08.20.2020

This is the fifth in a series of eAlerts on revisions to National Environmental Policy Act (NEPA) regulations adopted by the Council on Environmental Quality (CEQ) and published in the Federal Register on July 16, 2020. The new rules have an effective date of September 14, 2020. Nossaman attorneys Ed Kussy, Rob Thornton, Svend Brandt-Erichsen, Rebecca Hays Barho, Brooke Marcus Wahlberg, David Miller and Stephanie Clark are contributors for this series.

Previously, we provided eAlerts focused on changes the CEQ has made to the definitions section of the NEPA regulations, changes to the beginning of the NEPA process for preparation of an environmental impact statement (EIS), changes the CEQ has made to clarify and enhance the use of categorical exclusions (CE) and environmental assessments (EA) and changes the CEQ has made to the required contents of an EIS. In this eAlert, we focus on changes the CEQ has made to the public involvement process required under NEPA.

Why is Public Involvement Important to the NEPA Process?

Public involvement is one of the most important steps in the NEPA process for a number of reasons. First, the NEPA process is usually the most formal way the public engages with the agencies regarding the proposed action. There may also be earlier opportunities for public involvement in various contexts, such as during the federally mandated transportation planning process. Non-federal permit applicants may have provided at least some information to the public about a proposed project, particularly where state or local statutes or regulations require it. But none of these public involvement mechanisms have historically provided the same forum for input as the NEPA process.

Second, the NEPA process is designed to prompt agencies to think critically about the merits of a particular action and other ways of accomplishing it ("alternatives"). For many federal actions, the public involvement process associated with NEPA review is the only opportunity project opponents have to express their objections in the

agency's record, request consideration of possible modifications, or even sue the government. Thus, courts have paid particular attention to whether federal agencies have adhered to required public involvement procedures.

Third, the NEPA public involvement process can and often is the preferred mechanism through which agencies comply with public involvement requirements in their own operating statutes. For example, the Federal Highway Administration (FHWA) uses its NEPA public involvement process to comply with 23 U.S.C. § 128 regarding public hearings. There are similar requirements embedded in many statutes.

Finally, the NEPA process is quite often where the agency "sells" the project to the public. For large projects, the NEPA document usually gets a fair amount of press coverage and interested parties have ready access to details about the planned action. Absent public support, projects can fail even when legal requirements may technically have been met.

Public Involvement Provisions of the New Rules

Public involvement is addressed throughout the new regulations. As in the old regulations, it is expressly addressed in 40 C.F.R. § 1506.6. Recognizing advances in technology, the new rules provide greater flexibility to use electronic means of informing the public and receiving comment. These tools are already used by many agencies, and the new rules now expressly sanction their use. One problem that the new rules may resolve is the format used for NEPA documents. Noting that most EISs are prepared and distributed electronically, the CEQ explained that it revised 40 C.F.R. § 1502.10 to provide greater flexibility in how agencies format EISs. Some current EISs are formatted so that they are almost impossible to read online. The page restrictions and word limits per page may provide additional help in this regard. The new rule also provides greater flexibility in how to transmit information to the public in lieu of a public hearing. Nothing in the CEQ regulations supersedes requirements applicable to specific agencies.

Part 1503 of the new regulations, "Commenting on Environmental Impact Statements," has been substantially modified. Importantly, the new rules provide that comments must be submitted by a specific deadline or be considered "unexhausted and forfeited." Section 1500.3(b) provides explicit detail concerning the new requirement that comments or objections "of any kind" that are not submitted during the appropriate comment period will be forfeited as unexhausted. Under the old rules, comments could be submitted after the deadline, but only had to be considered by the agency to the extent practicable. This was more a matter of agency practice than a specific requirement that could be enforced against the agency. Some courts have limited parties from raising issues in court that they had not raised to the agency during the NEPA process. This new rule seems to build on these decisions to foreclose late comments.

Additionally, § 1503 now sets forth specific instructions on what information comments should contain. While such specificity may be appropriate for government agencies commenting on an action or proposal, it could be intimidating for the general public.

In another significant change, and as mentioned in previous eAlerts, the new mandatory timelines for completion of environmental assessments and environmental impact statements represent a substantial acceleration of the NEPA process for many agencies. The time limits may result in agencies providing less time for public input than is customary for that agency and being less inclined to extending comment deadlines. Arguably, NEPA documents will be shorter and more readable and will result in documents that are easier for the public to comment upon; however, agencies will still be able to use appendices and documents incorporated by reference. A serious commenter may wish to refer to these documents as well, making strict time limits all the more daunting,

particularly where such appendices or other documents are length or highly technical. Also, if the “One Federal Decision” approach continues to play a significant role, NEPA documents will directly address any number of legal requirements. While this occurs already, inflexible time limits could create more pressure on public commenters.

Finally, public involvement is not just a mechanism to receive and consider public comments. It is also there to inform the public of a proposed action and frankly address both its benefits and problems. Major actions can involve many legal requirements and complex technical issues. In the changes to public information and involvement process, we begin to see some of the consequences of a shorter, less detailed and less responsive NEPA process. While it is indisputable that NEPA review often is unwieldy, over-burdensome and too long, some aspects of the NEPA process will have to change if greater efficiency becomes a driving goal. Public involvement seems to be one of them.

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NEPA Rules Rewrite: Revised NEPA Regulations Designed To Influence Litigation

By Svend Brandt-Erichsen | 08.25.2020

This is the sixth in a series of eAlerts on revisions to National Environmental Policy Act (NEPA) regulations published in the Federal Register on July 16, 2020, by the Council on Environmental Quality (CEQ). The CEQ's revised rules amend 40 C.F.R. Parts 1500-1508. Nossaman attorneys Ed Kussy, Rob Thornton, Svend Brandt-Erichsen, Rebecca Hays Barho, Brooke Marcus Wahlberg, David Miller and Stephanie Clark have contributed to this series.

Previously, we provided eAlerts focused on: (1) changes the CEQ has made to the definitions section of the NEPA regulations; (2) changes to the beginning of the NEPA process for preparation of an environmental impact statement; (3) changes the CEQ has made to clarify and enhance the use of categorical exclusions (CE) and environmental assessments (EA); (4) changes to the content of NEPA documents under new CEQ rules; and (5) changes to the public involvement process.

CEQ's preamble to the revised NEPA regulations observed that U.S. district and appellate courts issue 100 to 140 decisions each year interpreting NEPA. Several provisions of the new rules aim to influence how the courts approach common issues in NEPA litigation. This eAlert outlines those significant new or revised provisions that may affect judicial review. Assuming the new rules survive legal challenges (three recent suits regarding the revised regulations object to the provisions that are outlined below), it still will be an open question as to whether and how the CEQ's various declarations and statements of intent regarding judicial review will actually influence the courts. Project developers and NEPA practitioners should, nevertheless, be aware of these changes and keep them in mind when working through NEPA processes under the new rules.

Presumption Agency Considered Relevant Issues

The revised NEPA rules, like the original rules, require federal agencies to publish a record of decision (ROD) after completion of an Environmental Impact Statement (EIS) that documents the alternatives considered prior to issuing

the final agency action, as well as the reasons for the selected alternative. 40 C.F.R. §1505.2 (all similar citations are to 40 C.F.R. unless otherwise noted). As with the original rules, a ROD may not be issued until at least 30 days after publication of the Final EIS (or 90 days after publication of a Draft EIS). §1506.11(b).

The required elements of a ROD remain essentially unchanged, with one exception. A new provision (§1505.2(b)) requires federal agencies to include in the ROD a certification that they have considered all of the alternatives, information, analyses and objections that were submitted to the agency during development of the EIS. The rule then asserts that if an agency makes this certification, it is entitled to a presumption that it properly considered all of that information. The certification requirement and presumption is repeated in the new §1500.3(b)(4).

The CEQ's preamble explains that this presumption is based upon case law that recognizes a "presumption of regularity" that government officials have properly discharged their official duties, even if they do not completely document the factual basis for their decisions. The preamble also asserts the CEQ's "intention" that the presumption may be rebutted only by clear and convincing evidence that the agency has not properly discharged its duties under the statute. The final rule steps back somewhat from the proposed rule, in which the CEQ proposed a conclusive presumption that agencies had adequately considered public comments. The preamble explains neither what would constitute "clear and convincing" evidence, nor where that evidence would be found in litigation that typically is limited to the agency's administrative record.

The apparent purpose of this presumption is to encourage the courts to find an EIS adequate, even if it does not fully explore all of the issues or alternatives raised in public comments. This defensive hedge may be linked to the push in the new rules to shorten NEPA documents. EISs have grown in length in response to the courts having found fault with the depth of the analysis they present, particularly in response to issues raised or information provided in public comments. An EIS could be shorter if agencies are not required to show their work. But the CEQ's assertion that an agency should be presumed to have considered information, even if that information is not analyzed in an EIS, may face stiff headwinds from courts applying the traditional "hard look" standard, which typically turns on whether a NEPA document demonstrates that the agency fully considered all significant issues. Moreover, even if one accepts the certification provision, courts may find that it too is subject to the Administrative Procedure Act (APA), 5 U.S.C. §§ 702 and 706, and thus an agency's certification could not be arbitrarily certified without supporting documentation.

Waiver of Issues Not Raised During Public Comment Periods

The revised NEPA rules provide that comments or objections must be submitted during the designated public comment periods, and that any comments or objections that are not raised during a public comment period "shall be forfeited as unexhausted." §1500.3(b)(3). The concept of exhaustion is not new to NEPA litigation. It has long been the rule that to be raised in court, an issue must first have been raised with the agency during the NEPA process, and with sufficient specificity that the agency had an opportunity to consider and respond to the objection. But the courts also have recognized exceptions to the exhaustion doctrine, which are not reflected in the language of the revised rules.

Presumably, the CEQ's intent is to minimize delays that can result when an agency must respond to new information late in the NEPA process, as well as later attacks based on information the agency did not receive during the process. However, declaring that all issues must be raised with specificity during public comment periods–and that issues not raised in public comments are "forfeited"–could have more wide-ranging impacts on NEPA analysis and judicial review.

Among the issues likely to be presented to the courts: whether this provision applies to information that did not exist or was not available during the public comment period. One common legal challenge is an argument that new information warrants supplemental NEPA analysis. Federal agencies may assert that, under this new provision, such claims are forfeited if the new information was not submitted during a public comment period–even if it was not available at the time public comments were invited.

This new provision also may have an impact on the practice of parties submitting additional studies or data that undermine (or support) an FEIS during the 30-day waiting period between release of an FEIS and issuance of a ROD. Under current NEPA practice, there is no requirement that this information be newly discovered, and it may be used later to challenge the adequacy of the analysis in the FEIS in court, even though the agency did not receive it until after the FEIS was published.

In its proposed NEPA rules, the CEQ considered requiring a public comment period on the FEIS. However, the final rule reverts to prior practice, leaving to the agencies whether to invite public comment on an FEIS. If agencies choose not to do so, then this new provision could excuse them from considering these post-FEIS submittals, which could in turn limit the practice of salting the administrative record during the post-FEIS waiting period.

Bonding for Administrative Stays and Appeals

CEQ has included a provision in the revised NEPA rules that allows agencies to require appellants to post a bond or other security in connection with administrative appeals or administrative stays of contested agency actions. Appellants seeking preliminary injunctions are sometimes required by the courts to post a bond that can be drawn against, should they lose, to compensate the victor for the cost of the appeal or delays resulting from the injunction (at least in part). However, the courts rarely require so-called “public interest” litigants to post bonds in NEPA litigation, even though a preliminary injunction can impose significant costs upon project developers. Not surprisingly, environmental and public interest organizations are opposed to federal agencies requiring a bond or other security as a precondition for an administrative stay or an administrative appeal. Traditionally, the question of whether a bond is required remains a case-by-case determination, and, in spite of this provision, courts would still be free to determine that requiring a bond would not be in the public interest.

Judicial Remedies

The revised NEPA rules also express the CEQ’s views on appropriate judicial remedies. They offer the CEQ’s observation that any harm from NEPA violations can be remedied by additional NEPA process. §1500.3(d). They also state the CEQ’s intention that the courts, in response to a NEPA violation, should neither presume that an injunction is warranted, nor presume that the violation results in irreparable harm.

Both of these statements relate to how the courts should respond to a preliminary injunction motion and the relief they should consider after ruling that a NEPA analysis is inadequate. They concern whether the court should allow the underlying activity to proceed while the court completes its review or, if the court found error, while the agency conducts a corrective NEPA process. They are essentially in line with U.S. Supreme Court rulings, which have held that irreparable harm cannot be presumed when a NEPA violation has occurred, and that all required elements must be established to warrant a preliminary injunction. Still, opponents of the revised NEPA rules assert these provisions exceed the CEQ’s statutory authority.

The risks of preliminary injunctions and vacated permits and approvals are central to NEPA litigation related to project development. Project opponents often seek preliminary injunctions to prevent construction getting

underway while the courts review the merits of a NEPA challenge. If successful in a NEPA appeal, the project opponents routinely ask that the underlying agency action be vacated. If the action is vacated, then the permit or approval is rescinded and must be reissued following completion of corrective NEPA process. Project opponents may seek an injunction as well. Federal agencies and project developers routinely argue for a remand to the agency rather than vacatur. If granted, a remand leaves the underlying agency action in effect and allows the authorized activity to continue while the agency corrects the NEPA error. Even absent a vacatur, courts have issued injunctions and temporary restraining orders that affect all or portions of the action, pending the completion of the required revisions to the NEPA document.

The revised rules do not directly address whether the courts should vacate or remand the underlying agency action upon the finding of a NEPA violation. However, the statement that harm from NEPA errors is remedied by compliance with NEPA procedures tends to favor a remand rather than vacatur. While the courts may consider the CEQ's views on this question, the decision whether to grant a preliminary injunction, or to vacate an agency action, invokes the equitable powers of the courts, an area where judges have a great degree of discretion.

Scope and Timing of Judicial Review

One of the CEQ's changes to the definition of "major federal action" has drawn fire for its potential impact on the scope of judicial review. The original NEPA definition said that "action" includes the situation where a responsible official fails to act and that failure is reviewable under the APA. §1508.18 (1978). The revised rules strike that language, stating instead that "major federal action" does not include a failure to act. §1508.1(q)(1)(iii) (2020). The preamble explains that in the case of a failure to act, there is no proposed action and so no alternatives to review. This change has drawn objections that it would limit review available under the APA and suggestions it might shield an agency's failure to conduct NEPA analysis. The latter objection indicates confusion between the underlying agency action (or inaction) and an agency's NEPA review obligations. When the new rules refer to "failure to act," they mean there is no underlying federal agency action, not that an agency acts without conducting required NEPA analysis. It is unclear, in any event, that the courts would alter their review of "failure to act" claims in response to this rule change.

The CEQ also states its intention in §1500.3(c) that judicial review of agency NEPA compliance should not occur until an agency has issued its record of decision (ROD) or otherwise takes final agency action. This unremarkable change clarifies the original regulations, which stated (§1500.3) that judicial review should follow the agency filing of a Final EIS or issuance of a finding of no significant impact (FONSI), suggesting suit could be filed before the agency acts on the underlying proposal. The revised language is in line with NEPA case law, which generally holds that NEPA suits filed before the agency issues a ROD or FONSI, as an indication of final action on the underlying proposal, are premature. However, this provision could become intertwined with the challenges to the change to "major federal action" just described, as it does not address the timing of review when an agency has failed to initiate NEPA review.

Conclusion

The CEQ included a number of provisions in the revised NEPA rules that aim to influence judicial review in favor of the federal agencies that are obliged to comply with NEPA. None of them would make sweeping changes in NEPA litigation, even if fully implemented by the courts, and such full implementation is far from certain to occur. The revised rules face legal challenges. Should they survive intact, the courts may or may not be willing to defer to the CEQ's bright line for waiver of issues not raised in public comments, its rebuttable presumption that agencies considered all public comments or its views on injunctive relief. The 1978 regulations expressly incorporated then-

existing case law in shaping the rule provisions. Although the preamble to the new regulation cites to numerous court decisions, the changes in the new rule do not uniformly intend to capture the predominant body of judicial thinking. It remains to be seen how courts will react to regulatory attempts to limit or shape the scope of judicial review. Nevertheless, these provisions are now part of the landscape for NEPA litigation and should be factored in to permitting strategies.

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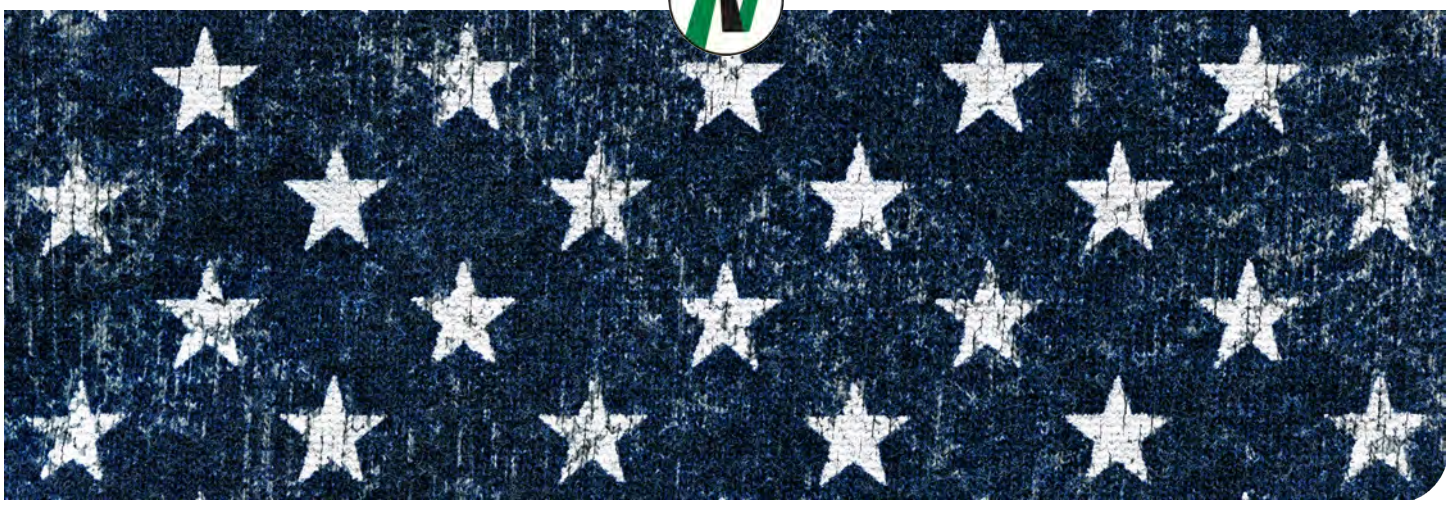

NEPA Rules Rewrite: Potential Impacts on Federal-State Environmental Reviews & Studies

By Robert Thornton | 08.28.2020

This is the seventh in a series of eAlerts on revisions to National Environmental Policy Act (NEPA) regulations published in the Federal Register on July 16, 2020 by the Council on Environmental Quality (CEQ). CEQ's revised rules amend 40 C.F.R. Parts 1500-1508. Nossaman attorneys Ed Kussy, Rob Thornton, Svend Brandt-Erichsen, Rebecca Hays Barho, Brooke Marcus Wahlberg, David Miller, and Stephanie Clark are contributors for this series.

Previously, we provided eAlerts focused on changes the CEQ has made to the definitions section of the NEPA regulations, changes to the beginning of the NEPA process for preparation of an environmental impact statement (EIS), changes the CEQ has made to clarify and enhance the use of categorical exclusions (CE) and environmental assessments (EA), changes the CEQ has made to the required contents of an EIS, public involvement and changes the CEQ has made influencing judicial review. In this eAlert, we focus on (1) the potential impact of the 2020 NEPA regulations on coordination of federal and state environmental reviews, and (2) whether the regulations will achieve the goal of reducing duplication of state and federal environmental studies.

A stated objective of the CEQ's 2020 regulations is to improve the efficiency of environmental reviews of projects subject to NEPA. The 2020 regulations make minor changes to the 1978 NEPA regulations regarding coordination of federal-state environmental reviews. The revisions continue to direct federal agencies to cooperate with state, tribal and local agencies to reduce duplication of environmental reviews. Other provisions of the 2020 revisions, however, may create new obstacles to the efficient coordination of federal and state environmental reviews and increase litigation risks.

History of Coordination of Federal and State Environmental Reviews

Federal and state environmental law mirrors the nation's federalist system. Most federal actions that trigger NEPA review also require compliance with state environmental laws. Conversely, state and private projects commonly require compliance with NEPA when the project requires an approval from a federal agency (e.g., Clean Water Act, Endangered Species Act permits). Federal water projects are subject to state water rights law and may require compliance with state environmental laws. State transportation projects that receive federal funding or that connect to a federal highway trigger NEPA compliance.

Fifteen states and the District of Columbia have adopted state laws modeled on NEPA. These "State NEPA's" require governmental agencies to prepare impact statements on actions affecting the quality of the environment. State courts often rely on the established body of NEPA case law to interpret State NEPAs.

The CEQ's 1978 NEPA regulations introduced a number of reforms to reduce duplication between federal and state environmental review requirements. The 1978 regulations required federal agencies to cooperate with state and local agencies "to the fullest extent possible to reduce duplication between NEPA and state and local requirements," including through joint planning, hearings, environmental assessment and impact statements. 40 C.F.R. § 1506.2. The preparation of joint federal-state environmental impact statements is now a well-established mechanism to streamline the environmental review of projects under NEPA and State NEPA compliance.

Over the decades since NEPA's enactment, Congress has created additional tools to integrate NEPA and State NEPA environmental reviews. These tools include delegation of federal NEPA compliance responsibility to state transportation agencies and linking NEPA compliance with local and state transportation planning decisions. The courts, in turn, have relied on this regulatory and statutory authority to affirm federal agency reliance on state environmental analyses to define the appropriate scope of a NEPA analysis, including the range of reasonable alternatives.

Despite these tools, efficient coordination of federal and state reviews continues to be a challenge – particularly where state and federal procedural and substantive requirements diverge. To cite one prominent example, in contrast to NEPA, California law imposes a substantive obligation on state agencies to minimize and mitigate significant environmental impacts where feasible. State agencies are required to determine whether each project impact is significant after adopting enforceable mitigation measures. NEPA requires the identification of mitigation measures in the EIS, but does not impose a substantive obligation on federal agencies to reduce impacts to insignificance. California law requires a robust evaluation of cumulative impacts, including the impact of greenhouse gas emissions on climate change.

2020 Revisions Regarding Coordination of State and Federal Environmental Reviews

The 2020 NEPA regulations make only minor revisions to the primary NEPA regulation (§1506.2) regarding coordination of federal and state environmental reviews. Subsection (a) is revised to reflect the new statutory authority that authorized assignment of NEPA responsibilities to state transportation agencies. Federal agencies are directed to cooperate with state, tribal and local entities to reduce duplication of comparable state, tribal, and local requirements "to the fullest extent practicable." The 1978 regulations required cooperation "to the fullest extent possible." This revision does not seem significant as a practical matter.

The obligation of an impact statement to discuss inconsistencies with an approved state, tribal or local plan law is modified to provide that impact statements are not required to reconcile any inconsistency. The above revisions

largely reflect existing statutory and case law. Other provisions of the 2020 revisions, however, may have a greater impact on established practices to reduce duplication in federal and state environmental reviews.

Impact of the 2020 NEPA Revisions on Federal-State Environmental Coordination

Key features of the 2020 revisions that may impact efficient coordination of federal and state environmental reviews include:

- Altering the definition of "effects" of the action to restrict the scope of evaluation of indirect and cumulative effects (§1508.1(g));
- Eliminating the term "significantly" from the definitions section (§ 1501.3(b));
- Defining the purpose and need of a project based on project applicant's objective (rather than agency or statutory objectives) (§ 1502.7);
- More enforceable page limits on impact statements (§ 1502.7);
- Imposing time limits on the preparation of EISs and environmental assessments; and
- Limiting applicability of NEPA where the federal agency has limited control over a large project (e.g. linear projects where the agency authority is limited to discharges to navigable water) (§ 1508.1(q) [definition of "Major federal action"]).

The above revisions are discussed in our prior eAlerts on the 2020 revisions. Collectively, the revisions will likely create practical obstacles to the preparation of joint federal and state impact statements and increase redundancy and inconsistencies in state and federal analyses.

Some of these revisions (e.g., the new definitions of "effects" and "Major federal action") are already the subject of litigation by major environmental organizations. Until this litigation is resolved, there will be continuing uncertainty regarding the stability of the revisions. State and local agencies are likely to be reluctant to agree to joint impact statements while the litigation is pending. Even after the litigation is resolved, state and local agencies may be reluctant to agree to joint statements where the scope of the NEPA analysis conflicts with State NEPA regulations and case law.

The revised definition of "effects" and the new definition of "Reasonably foreseeable" seemed designed to restrict NEPA analysis of impacts, such as climate change, that are not directly traceable to the agency action under review. The law in some states, such as California, requires agencies to evaluate a project's potential contribution to climate change as a result of the project's greenhouse gas emissions. These states will likely decline to join in an impact statement that does not evaluate a project's potential contribution to climate change.

The narrowed definition of "Major federal action" creates the potential for an inconsistent scope and alternatives considered in state and federal environmental reviews. Federal agencies with control over a portion of a larger project will limit the scope of the NEPA analysis, while state agencies will be required to analyze the impacts of the entire project. Joint documents are not practical (and create litigation risks) when the scope of the state and federal analyses (and therefore the range of alternatives) are in conflict.

Page and time limits may not be compatible with state environmental review laws and practices that have different procedures or require more extensive evaluations than are implicit in the limitations that these federal requirements

imply. While the “Senior Official” of each federal agency has the authority to waive these federal restrictions, it is not clear that such waivers would be applied routinely on a state-wide basis, or that every federal agency would provide the same the result, leading to further confusion.

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NEPA Rules Rewrite: What Else Do You Need to Know?

By: Stephanie Clark and Ed Kussy | 09.01.2020

This is the eighth in a series of eAlerts on revisions to National Environmental Policy Act (NEPA) regulations published in the Federal Register on July 16, 2020 by the Council on Environmental Quality (CEQ). The CEQ's revised rules amend 40 C.F.R. Parts 1500-1508. Nossaman attorneys Ed Kussy, Rob Thornton, Svend Brandt-Erichsen, Rebecca Hays Barho, Brooke Marcus Wahlberg, David Miller and Stephanie Clark are contributors for this series.

Previously, we provided eAlerts focused on changes the CEQ has made to the definitions section of the NEPA regulations, changes to the beginning of the NEPA process for preparation of an environmental impact statement (EIS), changes the CEQ has made to clarify and enhance the use of categorical exclusions (CE) and environmental assessments (EA), changes the CEQ has made to the required contents of an EIS, public involvement, changes the CEQ has made influencing judicial review and potential impacts to Federal-State Environmental Reviews and Studies.

In this eAlert, we focus on a variety of changes that do not fit neatly into any category, but are nonetheless significant. Broadly, these changes focus on actions that can be taken for a project while a NEPA determination is still pending, the adoption of other documents into a NEPA document, the timing of NEPA decisions, individual agencies' NEPA procedures and the availability of an agency's NEPA program information. While some of these changes in the new regulations more broadly implement procedures that have long been followed in transportation projects, others have the potential to cause some confusion and may actually increase some of the administrative burdens on federal agencies under NEPA.

"Limitations on Actions During NEPA Process: § 1506.1" – The new regulations make relatively few substantive revisions to this section, instead opting to clarify the existing language from the 1978 CEQ Regulations. However, one substantive change that the new regulations make to this section is to remove the explicit reference to the

Rural Electrification Administration. Specifically, this change makes it clear that no agency is precluded from engaging in design work, planning or other activities that typically precede federally funded projects (*e.g.*, acquisition of properties within a project right of way, purchase of long lead-time equipment, etc.). These actions are often characterized as being "at risk," as work done on a project destined to receive federal funding may not reflect the final choice of alternatives made in the NEPA process. While this has long been understood to be the case for federal highway projects, the new regulations explicitly state that all federal or federally-funded projects, beyond the transportation sector, needing to engage in some preliminary planning, drafting or long lead time activities before NEPA approval can expressly do so. This seemingly small revision is not insignificant, as lawsuits regarding NEPA compliance have been filed under the old regulations based on these preliminary planning activities, even against transportation projects. While few changes to the text of the regulation were made, the new regulations should offer some certainty regarding preliminary planning activities that may precede a final NEPA determination.

"Adoption: § 1506.3" – The new regulations expand on the provisions governing the adoption of NEPA documents, in whole or in part, into another NEPA document. *See* 40 C.F.R. § 1506.3. One of the more troubling aspects of NEPA documents is that they rarely use relevant material from other previous NEPA documents. Thus, the same research into relevant environmental and other impacts is repeated over and over, wasting both time and money. The provisions of Title XLI of the Fixing America's Surface Transportation Act, Pub. L. 114-94 (Dec. 4, 2015) (FAST Act) aim to help with this problem. The FAST Act established permitting improvement procedures government-wide, many of which are already found in a series of surface transportation laws, starting in the mid-1990s. Title XLI goes further. Among other things, it provides for a Permitting Improvement Council composed of various federal department heads and an Executive Director who reviews EISs for quality and establishes a "library" of EISs for projects costing more than $200 million. Presumably, agencies could access these documents.

As in the old regulations, the new regulations cover adoption of documents for EISs both by cooperating agencies and other agencies. The new rules did not make a substantive change in the process. What is new is that adoption procedures are also set forth for EAs and CEs. Adopted EAs may be used in a Finding of No Significant Impacts (FONSI), provided the procedures generally applicable to FONSIs are followed. Unlike the provisions specific to EISs, the new regulations do not distinguish between cooperating and other agencies for adopting NEPA documents into EAs and FONSIs.

The adoption provisions for CEs are rather significant because agencies may now use CEs of another agency if the underlying action is substantially the same. Thus, if an agency is able to use one of its CEs for a particular project, another agency with permitting responsibilities for that project may use the CE even if the permitting agency does not have a CE of its own to cover the project. This could result in real time savings for a number of projects.

Finally, the new regulation spells out notice requirements where the adopted document is not final, is the subject of unresolved litigation or is involved in a pending pre-decisional referral. Here, the NEPA document for the project must identify these facts in the adoption record. However the rule does not prevent the adoption of such documents.

"Timing of Agency Action: § 1506.11" – We have previously touched on this section, but the revisions in the new regulations specific to timing exceptions are worthy of some attention of their own. The old regulations directed agencies not to adopt a Record of Decision (ROD) until either 90 days from the publication of a notice in the *Federal Register* regarding the availability of a draft EIS, or 30 days after the publication of a notice in the *Federal Register* regarding the availability of a final EIS, whichever is later. The new regulations retain the 30- and 90-day

time periods from publication in the *Federal Register*, but recognize that other statutes may provide for exceptions to those time periods. There is a specific reference to the statutory provision that encourages the Federal Highway Administration (FHWA) and Federal Transit Administration to combine an abbreviated Final EIS and ROD where there are no significant changes made from the draft EIS.

The second change is more minor, but still significant. The new regulations establish that there are two separate exceptions to the 30- and 90-day timeframes: one where an agency has an internal appeals process following publication of a final EIS, and the other where the agency is involved in rulemaking under the Administrative Procedure Act (or other similar law). While the old regulations largely contained the same exceptions, the new regulations explicitly state that they are separate exceptions and that they are specific exceptions to the 30- and 90-day time periods. In all, the new regulations clarify that there are three exceptions to the 30- and 90-day time periods for adoption of a ROD: (1) where a statute provides otherwise; (2) where the lead agency has an internal appeals process that follows publication of a final EIS; and (3) where the lead agency is involved in rulemaking as part of the action.

"Agency NEPA Procedures: § 1507.3" – The new regulations substantially rewrite this section. Most significantly, the new regulations make clear that existing NEPA procedures adopted by individual agencies will be overruled and superseded to the extent that they are inconsistent with the new regulations. This provision essentially reiterates the change made to § 1506.13, but may cause issues for federal agencies that have adopted their own agency-specific procedures by regulation. As a practical matter, it is unlikely that the majority of individual agency NEPA procedures would be inconsistent with the new regulations. The new regulations also make clear that all of the CEs existing in individual agency NEPA procedures as of September 14, 2020 are considered consistent with the new regulations.

Somewhat confusingly, the next provision gives all federal agencies 12 months after September 14, 2020 to revise their existing NEPA procedures, as necessary, to comply with the new regulations. This could set up a catch-22 for federal agencies that do need to revise their NEPA procedures, where all or portions of their existing procedures would be invalid on September 14, 2020, but they still have 12 months to bring their procedures into compliance with the new regulations. For agencies with extensive existing NEPA procedures, this could lead to some confusion for ongoing projects. The new regulations also eliminate the requirement that new or revised agency NEPA procedures include explanatory guidance.

Beyond those changes, the new regulations establish additional subjects that must be covered by agency NEPA procedures. The new regulations direct that agency NEPA procedures require the combination of NEPA documents with other agency documents where those other documents can be used to satisfy NEPA. This is consistent with the streamlining intent of the new regulations. The new regulations also require that agency NEPA procedures specify activities and decisions not subject to NEPA and specifically require that six categories of activities not subject to NEPA be included. These categories are: (1) activities exempt under another statute; (2) activities where NEPA compliance would conflict with another statute; (3) activities where NEPA compliance would be inconsistent with the Congressional intent expressed in another statute; (4) activities that are non-major Federal actions; (5) activities that are non-discretionary actions, in whole or in part; and (6) actions where compliance with another statute serves the function of NEPA compliance. The fifth category is perhaps the most notable, with the new regulations providing that a decision that is only partially non-discretionary can be exempt from NEPA simply because an agency lacks authority to consider the environmental impact of one portion of its decision. This provision is likely to be a target in litigation over the new regulations.

Finally, the new regulations direct agencies to include the adoption provisions of § 1506.3(d) dealing with adoptions of CEs in their individual procedures. That section is described in more detail above.

"Agency NEPA Program Information: § 1507.4" – This new section (40 C.F.R. § 1507.4) requires agencies to use their websites or other means to make environmental documents, relevant notices and other relevant information available. Such documents include pending and final environment documents, planning and guidance documents, policies, etc., all searchable by geographic information, document status, document type and project type. Many agencies have websites that provide very good information about NEPA and other environmental laws, regulations, guidance materials and the like. Some agencies go further. For example, FHWA has long maintained a site called "reNEPA" that contains a good deal of guidance and other material, as well as an ongoing online discussion about various questions and issues among environmental professionals in the federal government and the states. This is in addition to sites that provide environmental information, regulatory materials and guidance.

However, the new regulation goes further than even a site as comprehensive as the one operated by FHWA. For example, pending and final environmental documents for FHWA-funded projects are usually available on sites maintained by the state departments of transportation and not on a centralized website. Thus, considerable effort will be required to pull this information from each individual state agency's website and add it to FHWA's website, especially because some states will not have all the information that is required by the new regulations. A similar problem could exist for federal agencies, despite the new regulations, due to differences in how federal agencies may present or store NEPA information on their individual websites.

The new regulation attempts to address this problem by requiring agencies to "provide for efficient and effective interagency coordination…of their websites." This deceptively simple requirement will require a huge effort to implement across the U.S. Government, which could take some time to complete. That being said, if fully implemented, the new section will be of great benefit to NEPA practitioners. The public will also benefit because it could enhance understanding of federal environmental programs and project information.

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NEPA Rules Rewrite: What's Next?

By Brooke Marcus Wahlberg | 09.03.2020

This is the final in our series of eAlerts on revisions to National Environmental Policy Act (NEPA) regulations published in the Federal Register on July 16, 2020 by the Council on Environmental Quality (CEQ) ("Final Rule"). The CEQ's revised rules amend 40 CFR Parts 1500-1508. Nossaman attorneys Ed Kussy, Rob Thornton, Svend Brandt-Erichsen, Rebecca Hays Barho, Brooke Marcus Wahlberg, David Miller and Stephanie Clark are contributors for this series.

Previously, we provided eAlerts focused on changes the CEQ has made to the definitions section of the NEPA regulations, changes to the beginning of the NEPA process for preparation of an environmental impact statement (EIS), changes the CEQ has made to clarify and enhance the use of categorical exclusions (CE) and environmental assessments (EA), changes the CEQ has made to the required contents of an EIS, public involvement, changes the CEQ has made influencing judicial review, potential impacts to Federal-State Environmental Reviews and Studies and an examination of several other significant changes to the regulations. This final eAlert focuses on some of the major "moving parts" related to the Final Rule that may affect the applicability and longevity of the Final Rule.

Facial Challenges

As anticipated, several lawsuits have been filed concerning the Final Rule. Following are challenges to the Final Rule that have been filed as of the date of this eAlert:

- *Envtl. Justice Health All. v. Council on Envtl. Quality*, No. 1:20-cv-06143 (S.D.N.Y. filed Aug. 6, 2020)
- *Alaska Cmty. Action on Toxics v. Council on Envtl. Quality*, No. 3:20-cv-05199 (N.D. Cal. filed July 29, 2020)
- *Wild Virginia v. Council on Envtl. Quality*, No. 3:20-cv-00045 (W.D. Va. filed July 29, 2020)
- *State of California v. Council on Envtl. Quality,* No. 3:20-cv-06057 (N.D. Cal. filed August 28, 2020)

These challenges focus on the removal of the explicit requirement to consider cumulative effects, the attempt to limit "small-handle" federal projects, the time and page limit restrictions, environmental justice and, generally, the

alleged departure from longstanding policies, particularly with respect to consideration of effects. Additional groups may file challenges to the Final Rule, and likely avenues of attack will continue to be the scope of NEPA applicability, the collapse of the effects definition specific to climate change and environmental justice.

Whether or not these challenges result in vacatur of the Final Rule in full or in part remains to be seen. Recent trends against nationwide injunctive relief may result in piecemeal application of the Final Rule if challenges are successful. The plaintiffs in *Wild Virginia v. Council on Envtl. Quality* filed a motion for preliminary injunction on August 18, 2020. A hearing on the motion for preliminary injunction has been set for September 4th and, if granted, could result in suspension of the Final Rule in some jurisdictions. In that same case, the government and defendant-intervenors have filed motions to dismiss for lack of jurisdiction. These motions could delay or result in cancellation of the September 4th hearing.

As-Applied Challenges

Should the facial challenges to the Final Rule not result in wholesale invalidation, portions of the Final Rule may be impacted by as-applied challenges. By providing new definitions, the Final Rule leaves room for interpretation by the agencies as they conduct their NEPA analyses. The actual significance of the Final Rule may not be realized until agencies apply the Final Rule to specific NEPA analyses. Project opponents or those opposing the Final Rule will likely keep close watch on the application of the Final Rule and challenge how the Final Rule is applied. The result of these as-applied challenges could be a patchwork of interpretations of the Final Rule.

Congressional Review Act or Repeal and Replace

For those regulatory actions published within 60 *legislative* days of Congressional adjournment *sine die*, the Congressional Review Act (CRA) "resets" the time periods for Congress to review a rulemaking in its entirety in the next session. During this "lookback" period, Congress can overturn a rulemaking finalized during the previous Congressional session. The 116th Congressional session has not yet adjourned; however, based on the remaining calendar days, many are predicting that the date after which rules may be subject to the CRA will fall sometime within mid-May of this year. If the 2020 elections result in a Democrat-led House of Representatives, Senate, and Presidency, then the Final Rule may be overturned under the CRA. Whether or not a new administration would use the CRA to overturn the Final Rule is uncertain. Since its enactment in 1996, the CRA lookback period has resulted in seventeen rules overturned; sixteen of those instances occurred during the 115th Congress (2017-2018).

If a Democrat is elected president in the 2020 election, but there is still not a Democrat-majority in the Senate, or for other reasons the Final Rule is not overturned under the CRA, then the president may direct the CEQ to repeal some or all of the Final Rule and propose a new proposed set of regulations. This scenario would require a rulemaking process in accordance with the Administrative Procedure Act. Given that the current regulations have existed since the 1970s, a Democrat-led administration may simply repeal the Final Rule and revert back to the long-standing regulations.

Agency Implementing Procedures

Over the course of the last several decades, agencies have developed agency-specific implementing procedures. These include agency-specific categorical exclusions and other procedural and substantive guidance on how to address NEPA analyses that fall within the jurisdiction of the agency. As is true of the old regulations, the Final Rule requires that all these agency procedures or regulations be subject to review and approval by the CEQ. The Final Rule takes effect on September 14, 2020 and directs the agencies to propose revisions to their implementing procedures within 12-months. These revisions must be consistent with the Final Rule. Agency-specific implementing

procedures cannot impose additional procedures or requirements beyond those set forth in the Final Rule. Agencies are free to implement their existing implementing procedures to the extent that application of existing regulations does not conflict with the Final Rule.

Given the room for interpretation within the new definitions and other aspects of the Final Rule, the individual agency implementing regulations may provide fertile ground for differing interpretation. This in turn opens up the possibility for facial or as-applied challenges to an agency's implementing procedures. Of course, efforts made by agencies to revise and develop implementing procedures may be for naught if the Final Rule is vacated or repealed. For most agencies, the existing procedures were issued by regulation. Except as otherwise specified, the agency rules supplant the CEQ regulations. Other agencies relied on agency implementing procedures which look to the CEQ regulations for their authority. This situation adds an additional layer of complexity, as the status of these agency procedures is uncertain. Section 1507 addresses this problem by asserting that the new CEQ regulations apply in the case of any inconsistency between current agency regulations and the new CEQ regulations. This assertion could raise issues under the Administrative Procedure Act.

Practically speaking, the Final Rule will likely result in delays in NEPA processing (through delays of the starting the clock) until agencies become more comfortable applying the Final Rule and have developed updated implementing regulations. Already, we have witnessed hesitation by agencies in processing ongoing NEPA analyses while they evaluate how the Final Rule should be incorporated. Given that NEPA claims are a common litigation pathway for project opponents, agencies will likely tread cautiously while navigating this "brackish" period.

Prior Trump Administration Efforts to Streamline NEPA

President Trump has issued executive orders (EOs) aimed at streamlining NEPA. These include:

(1) EO 13807 of August 15, 2017, "Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects"; and

(2) EO 13927 of June 4, 2020, "Accelerating the Nation's Economic Recovery From the COVID-19 Emergency by Expediting Infrastructure Investments and Other Activities."

The Final Rule is an outgrowth of the directives set forth in EO 13807 and references the streamlining objectives of this EO throughout the preamble discussion. The preamble to the Final Rule only makes brief mention of EO 13927 and includes "economic crisis" as an example of a circumstance that can trigger alternative arrangements under the rule provision for "Emergencies." The Final Rule does not otherwise rely on EO 13927 to expand upon the Emergencies provision. In many other ways, the Final Rule looks to past judicial decisions to support its modifications. Thus, overall, the changes may not be as dramatic as might be supposed by those suspicious of any regulatory changes by this Administration.

Tips for Moving Forward Under the Final Rule

For those trying to navigate under the Final Rule, below is a brief summary of moving parts to watch.

- **Applicability:** For those with ongoing NEPA processes as of the effective date of the Final Rule (September 14, 2020), an agency can elect to apply the previous rules. Project proponents should have discussions with the relevant agency to determine whether it intends to apply the previous regulations or the Final Rule. Given the agency will be learning how to apply the Final Rule, agencies may delay the "start" of the

NEPA processing clock. Agencies should carefully document decision-making under the Final Rules to support the administrative record and guard against litigation risk.

- **Existing and New Challenges to Final Rule**: It will be important to track existing and new challenges to the Final Rule as they proceed through the courts. For those with NEPA processes proceeding under the Final Rule, a court ruling invalidating all or part of the Final Rule may require revisions to draft documents.
- **Executive and Congressional Action**: If the 2020 election results in a change in administration, then the incoming administration may direct the CEQ to repeal or revise all or part of the Final Rule. If the 2020 election results in a Democrat-led Congress and administration, then the Final Rule may be overturned under the CRA.
- **Challenges to Application of the Final Rule**: As NEPA processes are completed under the Final Rule, it is likely that lawsuits will be filed challenging how an agency applied the Final Rule. Rulings may influence how certain portions of the Final Rule are applied in the future.
- **Development of Agency-specific Implementing Procedures:** Agencies must develop or revise their existing implementing procedures to be consistent with the Final Rule before September 14, 2021. These implementing procedures will dictate how an agency will apply the Final Rule, but may also be the subject of challenges (both facial and as-applied).

Final Thoughts

We have noted throughout our series of eAlerts that legal challenges might arise regarding the application of various provisions of the Final Rule. Thus, if the Final Rule survives these initial challenges and is fully implemented, it could take some time before we know the true scope of these regulations. For example, both the terms "cumulative impact" and "indirect impacts" were specifically removed in the Final Rule, but the new definition of "effects" is substantially expanded. Other provisions of the Final Rule suggest that agencies may not take so narrow a view of their actions, and both environmental and economic impacts should be considered. The facial challenges to the Final Rule focus specifically on the removal of these two terms. But, even if they fail, the new definitions provide fertile ground for as-applied litigation. This is true of many of the provisions in the Final Rule.

It remains to be seen whether the efficiencies gained by the Final Rule truly confer a benefit to project proponents in the face of so much litigation. We will be watching and will provide future updates on any significant NEPA developments as they unfold.

About the Author

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