NEPA Rules Rewrite: Categorical Exclusions and Environmental Assessments

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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.

Stay tuned for the next installment in this series, which will cover changes to the requirements for the contents of an EIS.