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

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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.

Please stay tuned for the next installment in this series, which will examine how the Final Regulations modify the public involvement process established by the former rule.