



NEPA Rules Rewrite: Public Involvement Process

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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 lengthy 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.

Please stay tuned for the next installment in this series, which will examine changes the CEQ has made to the close of the NEPA process.