NEPA Rules Rewrite: What's Next?

09.03.2020 | By Brooke M. Marcus

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 9, 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
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> (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.