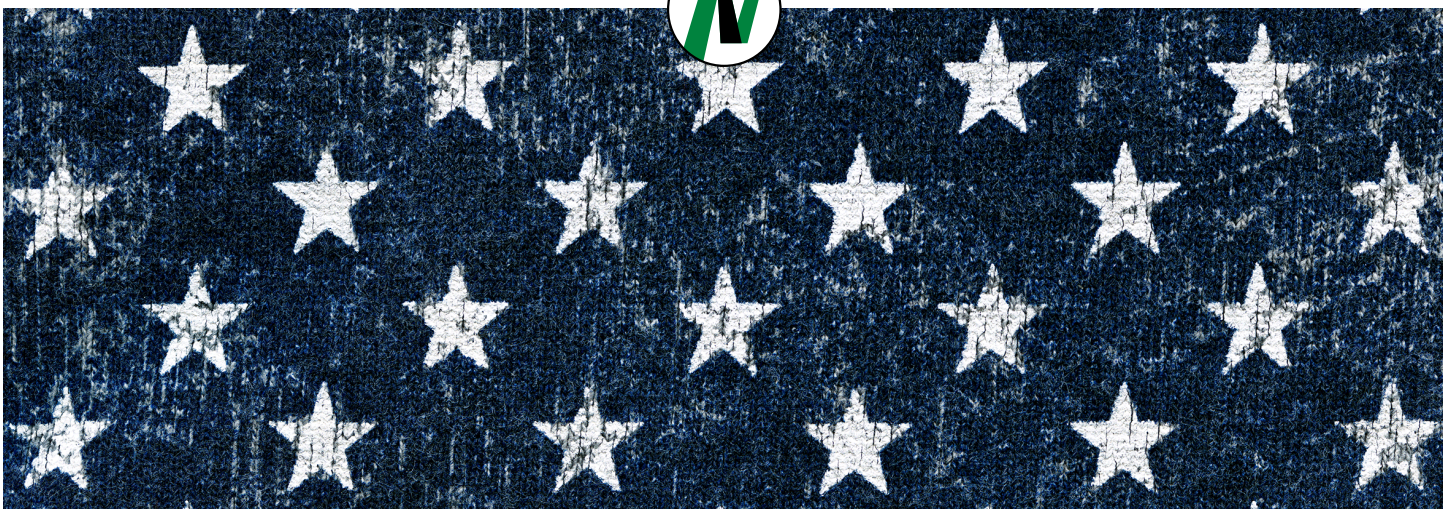

NEPA Rules Rewrite: Potential Impacts on Federal-State Environmental Reviews & Studies

08.28.2020 | By Robert D. Thornton

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.

During 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.