NEPA Rules Rewrite: Revised NEPA Regulations Designed to Influence Litigation

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This is the sixth 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). The 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 have contributed to this series.

Previously, we provided eAlerts focused on: (1) changes the CEQ has made to the definitions section of the NEPA regulations; (2) changes to the beginning of the NEPA process for preparation of an environmental impact statement; (3) changes the CEQ has made to clarify and enhance the use of categorical exclusions (CE) and environmental assessments (EA); (4) changes to the content of NEPA documents under new CEQ rules; and (5) changes to the public involvement process.

The CEQ's preamble to the revised NEPA regulations observed that U.S. district and appellate courts issue 100 to 140 decisions each year interpreting NEPA. Several provisions of the new rules aim to influence how the courts approach common issues in NEPA litigation. This *eAlert* outlines those significant new or revised provisions that may affect judicial review. Assuming the new rules survive legal challenges (three recent suits regarding the revised regulations object to the provisions that are outlined below), it still will be an open question as to whether and how the CEQ's various declarations and statements of intent regarding judicial review will actually influence the courts. Project developers and NEPA practitioners should, nevertheless, be aware of these changes and keep them in mind when working through NEPA processes under the new rules.

Presumption Agency Considered Relevant Issues

The revised NEPA rules, like the original rules, require federal agencies to publish a record of decision (ROD) after completion of an Environmental Impact Statement (EIS) that documents the alternatives considered prior to issuing the final agency action, as well as the reasons for the selected alternative. 40 C. F.R. §1505.2 (all similar citations are to 40 C.F.R. unless otherwise noted). As with the original rules, a ROD may not be issued until at least 30 days after publication of the Final EIS (or 90 days after publication of a Draft EIS). §1506.11(b).

The required elements of a ROD remain essentially unchanged, with one exception. A new provision (§1505.2(b)) requires federal agencies to include in the ROD a certification that they have considered all of the alternatives, information, analyses and objections that were submitted to the agency during development of the EIS. The rule then asserts that if an agency makes this certification, it is entitled to a presumption that it properly considered all of that information. The certification requirement and presumption is repeated in the new §1500.3(b)(4).

The CEQ's preamble explains that this presumption is based upon case law that recognizes a "presumption of regularity" that government officials have properly discharged their official duties, even if they do not completely document the factual basis for their decisions. The preamble also asserts the CEQ's "intention" that the presumption may be rebutted only by clear and convincing evidence that the agency has not properly discharged its duties under the statute. The final rule steps back somewhat from the proposed rule, in which the CEQ proposed a conclusive presumption that agencies had adequately considered public comments. The preamble explains neither what would constitute "clear and convincing" evidence, nor where that evidence would be found in litigation that typically is limited to the agency's administrative record.

The apparent purpose of this presumption is to encourage the courts to find an EIS adequate, even if it does not fully explore all of the issues or alternatives raised in public comments. This defensive hedge may be linked to the push in the new rules to shorten NEPA documents. EISs have grown in length in response to the courts having found fault with the depth of the analysis they present, particularly in response to issues raised or information provided in public comments. An EIS could be shorter if agencies are not required to show their work. But the CEQ's assertion that an agency should be presumed to have considered information, even if that information is not analyzed in an EIS, may face stiff headwinds from courts applying the traditional "hard look" standard, which typically turns on whether a NEPA document demonstrates that the agency fully considered all significant issues. Moreover, even if one accepts the certification provision, courts may find that it too is subject to the Administrative Procedure Act (APA), 5 U.S.C. §§ 702 and 706, and thus an agency's certification could not be arbitrarily certified without supporting documentation.

Waiver of Issues Not Raised During Public Comment Periods

The revised NEPA rules provide that comments or objections must be submitted during the designated public comment periods, and that any comments or objections that are not raised during a public comment period "shall be forfeited as unexhausted." §1500.3(b)(3). The concept of exhaustion is not new to NEPA litigation. It has long been the rule that to be raised in court, an issue must first have been raised with the agency during the NEPA process, and with sufficient specificity that the agency had an opportunity to consider and respond to the objection. But the courts also have recognized exceptions to the exhaustion doctrine, which are not reflected in the language of the revised rules.

Presumably, the CEQ's intent is to minimize delays that can result when an agency must respond to new information late in the NEPA process, as well as later attacks based on information the agency did not receive during the process. However, declaring that all issues must be raised with specificity during public comment periods–and that issues not raised in public comments are "forfeited"–could have more wide-ranging impacts on NEPA analysis and judicial review.

Among the issues likely to be presented to the courts: whether this provision applies to information that did not exist or was not available during the public comment period. One common legal challenge is an argument that new information warrants supplemental NEPA analysis. Federal agencies may assert that, under this new provision, such claims are forfeited if the new information was not submitted during a public comment period–even if it was not available at the time public comments were invited.

This new provision also may have an impact on the practice of parties submitting additional studies or data that undermine (or support) an FEIS during the 30-day waiting period between release of an FEIS and issuance of a ROD. Under current NEPA practice, there is no requirement that this information be newly discovered, and it may be used later to challenge the adequacy of the analysis in the FEIS in court, even though the agency did not receive it until after the FEIS was published.

In its proposed NEPA rules, the CEQ considered requiring a public comment period on the FEIS. However, the final rule reverts to prior practice, leaving to the agencies whether to invite public comment on an FEIS. If agencies choose not to do so, then this new provision could excuse them from considering these post-FEIS submittals, which could in turn limit the practice of salting the administrative record during the post-FEIS waiting period.

Bonding for Administrative Stays and Appeals

CEQ has included a provision in the revised NEPA rules that allows agencies to require appellants to post a bond or other security in connection with administrative appeals or administrative stays of contested agency actions. Appellants seeking preliminary injunctions are sometimes required by the courts to post a bond that can be drawn against, should they lose, to compensate the victor for the cost of the appeal or delays resulting from the injunction (at least in part). However, the courts rarely require so-called "public interest" litigants to post bonds in NEPA litigation, even though a preliminary injunction can impose significant costs upon project developers. Not surprisingly, environmental and public interest organizations are opposed to federal agencies requiring a bond or other security as a precondition for an administrative stay or an administrative appeal. Traditionally, the question of whether a bond is required remains a case-by-case determination, and, in spite of this provision, courts would still be free to determine that requiring a bond would not be in the public interest.

Judicial Remedies

The revised NEPA rules also express the CEQ's views on appropriate judicial remedies. They offer the CEQ's observation that any harm from NEPA violations can be remedied by additional NEPA process. §1500.3(d). They also state the CEQ's intention that the courts, in response to a NEPA violation, should neither presume that an injunction is warranted, nor presume that the violation results in irreparable harm.

Both of these statements relate to how the courts should respond to a preliminary injunction motion and the relief they should consider after ruling that a NEPA analysis is inadequate. They concern whether the court

should allow the underlying activity to proceed while the court completes its review or, if the court found error, while the agency conducts a corrective NEPA process. They are essentially in line with U.S. Supreme Court rulings, which have held that irreparable harm cannot be presumed when a NEPA violation has occurred, and that all required elements must be established to warrant a preliminary injunction. Still, opponents of the revised NEPA rules assert these provisions exceed the CEQ's statutory authority.

The risks of preliminary injunctions and vacated permits and approvals are central to NEPA litigation related to project development. Project opponents often seek preliminary injunctions to prevent construction getting underway while the courts review the merits of a NEPA challenge. If successful in a NEPA appeal, the project opponents routinely ask that the underlying agency action be vacated. If the action is vacated, then the permit or approval is rescinded and must be reissued following completion of corrective NEPA process. Project opponents may seek an injunction as well. Federal agencies and project developers routinely argue for a remand to the agency rather than vacatur. If granted, a remand leaves the underlying agency action in effect and allows the authorized activity to continue while the agency corrects the NEPA error. Even absent a vacatur, courts have issued injunctions and temporary restraining orders that affect all or portions of the action, pending the completion of the required revisions to the NEPA document.

The revised rules do not directly address whether the courts should vacate or remand the underlying agency action upon the finding of a NEPA violation. However, the statement that harm from NEPA errors is remedied by compliance with NEPA procedures tends to favor a remand rather than vacatur. While the courts may consider the CEQ's views on this question, the decision whether to grant a preliminary injunction, or to vacate an agency action, invokes the equitable powers of the courts, an area where judges have a great degree of discretion.

Scope and Timing of Judicial Review

One of the CEQ's changes to the definition of "major federal action" has drawn fire for its potential impact on the scope of judicial review. The original NEPA definition said that "action" includes the situation where a responsible official fails to act and that failure is reviewable under the APA. §1508.18 (1978). The revised rules strike that language, stating instead that "major federal action" does not include a failure to act. §1508.1(q)(1)(iii) (2020). The preamble explains that in the case of a failure to act, there is no proposed action and so no alternatives to review. This change has drawn objections that it would limit review available under the APA and suggestions it might shield an agency's failure to conduct NEPA analysis. The latter objection indicates confusion between the underlying agency action (or inaction) and an agency's NEPA review obligations. When the new rules refer to "failure to act," they mean there is no underlying federal agency action, not that an agency acts without conducting required NEPA analysis. It is unclear, in any event, that the courts would alter their review of "failure to act" claims in response to this rule change.

The CEQ also states its intention in §1500.3(c) that judicial review of agency NEPA compliance should not occur until an agency has issued its record of decision (ROD) or otherwise takes final agency action. This unremarkable change clarifies the original regulations, which stated (§1500.3) that judicial review should follow the agency filing of a Final EIS or issuance of a finding of no significant impact (FONSI), suggesting suit could be filed before the agency acts on the underlying proposal. The revised language is in line with NEPA case law, which generally holds that NEPA suits filed before the agency issues a ROD or FONSI, as an indication of final action on the underlying proposal, are premature. However, this provision could become intertwined with the challenges to the change to "major federal action" just described, as it does not address the timing of review when an agency has failed to initiate NEPA review.

Conclusion

The CEQ included a number of provisions in the revised NEPA rules that aim to influence judicial review in favor of the federal agencies that are obliged to comply with NEPA. None of them would make sweeping changes in NEPA litigation, even if fully implemented by the courts, and such full implementation is far from certain to occur. The revised rules face legal challenges. Should they survive intact, the courts may or may not be willing to defer to the CEQ's bright line for waiver of issues not raised in public comments, its rebuttable presumption that agencies considered all public comments or its views on injunctive relief. The 1978 regulations expressly incorporated then-existing case law in shaping the rule provisions. Although the preamble to the new regulation cites to numerous court decisions, the changes in the new rule do not uniformly intend to capture the predominant body of judicial thinking. It remains to be seen how courts will react to regulatory attempts to limit or shape the scope of judicial review. Nevertheless, these provisions are now part of the landscape for NEPA litigation and should be factored in to permitting strategies.