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CEQ Issues Final Rule to Modernize NEPA Regulations

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On July 16, 2020, the Council on Environmental Quality ("CEQ") published its final rule modernizing and clarifying its procedural regulations implementing the National Environmental Policy Act ("NEPA"). The final rule, titled "Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act," is the first major revision to CEQ's NEPA regulations in over 40 years, and is the latest in a series of efforts by the Trump Administration to streamline federal agency processes for permitting infrastructure projects. CEQ describes its efforts on this rule as intended to "facilitate more efficient, effective, and timely NEPA reviews by Federal agencies by simplifying regulatory requirements, codifying certain guidance and case law relevant to these regulations, revising the regulations to reflect current technologies and agency practices, eliminating obsolete provisions, and improving the format and readability of the regulations." To this end, the rule modifies almost all aspects of the regulations governing how federal agencies meet their environmental review obligations under NEPA. Although the ultimate practical impact of these changes is uncertain, the rule fundamentally alters the timing of, procedures for, and content of NEPA reviews, and will have important implications for parties seeking federal permits and other program approvals or authorizations.

The final rule will be effective September 14, 2020; however, the timing may be impacted by Congressional review and/or pending litigation.

Background on NEPA Regulations

NEPA applies to a broad range of actions with a federal nexus, including federal permit applications, federal land management decisions, highway construction, and other infrastructure development. Through the NEPA process, federal agencies must evaluate the environmental and related social and economic effects of their proposed actions. NEPA reviews have long been the subject of significant criticism and litigation—including over the length of time they take to complete, inconsistent implementation within and across agencies, adequacy of public participation processes, and disputes over the scope and detail of the environmental documents produced by the agencies. CEQ's efforts here focus on reducing the time required to complete NEPA reviews and placing clearer boundaries on the scope of the effects analysis, with the goal of expediting permitting decisions and narrowing litigation risk. An overview of the precursors and additional context for the development of this rule is provided in our previous alert on the proposed rule.

Overview of Changes

Under the final rule, the NEPA review process is altered in both subtle and direct ways. Among the notable changes are:

- ***Presumptive Timelines and Page Limits:*** NEPA reviews will have presumptive time limits of one year for environmental assessments ("EAs") and two years for environmental impact statements ("EISs"), and page limits of 75 pages (not including appendices) for EAs, 150 pages for routine EISs, and 300 pages for EISs covering matters of "unusual scope or complexity." Exceptions can be granted on a case-by-case basis.

- ***One Federal Decision and Adherence to Joint Schedules for Reviews and Agency Action:*** The final rule reinforces and codifies elements of the One Federal Decision policy under Executive Order No. 13807, titled "Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects." Where multiple federal agencies have discretionary decision making authority for a proposed project, the agencies must coordinate on scheduling and, where practicable, issue a single environmental document that can be relied on for each agency's

permitting or authorization decision as well as, to the extent practicable, a joint record of decision ("ROD") or finding of no significant impact ("FONSI"). The joint schedules must reflect applicant input and extend to any authorizations required for a proposed action, as well as provide a means for resolution of inter-agency disputes and other issues that may cause delays in the schedule.

- ***Front-loading of Analyses:*** The final rule makes important changes to the scoping process for an EIS, which, together with the adoption of shorter time limits and enforceable schedules, will place a premium on earlier data collection and analysis by permit applicants. Under the rule, scoping may begin "as soon as practicable after the proposal for action is sufficiently developed for agency consideration," and agencies may require "appropriate pre-application procedures or work" prior to publishing a notice of intent. Further, the notice of intent ("NOI") now must include, among other information, a preliminary description of the proposed action and alternatives and a brief summary of expected impacts. This approach not only places a priority on early data collection, but also affects the timing of the review because the issuance of the NOI starts the clock on the two year presumptive time limit for completion of an EIS. Although CEQ advises that "agencies should not unduly delay publication of the NOI," the approach to scoping and pre-application procedures under this rule gives agencies the ability to effectively extend the timeframe for EISs through pre-filing data requirements for permit applicants and other activities.

- ***Scope of Effects Analysis:*** The final rule incorporates a number of significant changes to the overall scope of effects and alternatives to be analyzed, including:

    - Changing the definition of "major federal action," which triggers NEPA review, to exclude non-federal projects with "minimal Federal funding or minimal Federal involvement where the agency does not exercise sufficient control and responsibility over the outcome of the project." Included under this exclusion are certain federal loans, loan guarantees, and other forms of financial assistance.

    - Doing away with the concepts of direct, indirect, and cumulative effects, and instead focusing the analysis on those effects that are reasonably foreseeable and that have a reasonably close causal relationship to the proposed action. Further, CEQ clarifies that a "but for" causal relationship is not sufficient, and that the standard is analogous to proximate cause in tort law.

    - Clarifying that "reasonable alternatives" must be "technically and economically feasible" and meet the purpose and need for the proposed action. Specifically, when the agency's action involves a non-federal applicant, the development of reasonable alternatives must consider the goals of the applicant.

- ***Uncertainty for cumulative effects and climate change analysis:*** The final rule repeals the specific requirement to consider cumulative effects, but allows for incorporation of such analysis if such effects are reasonably foreseeable and have a reasonably close causal relationship. Similarly, the final rule allows for incorporation of climate trends into the discussion of environmental baseline conditions (i.e., the "affected environment") but would exclude the discussion of speculative conditions.

- ***Additional Structure for Environmental Assessments:*** Historically, action agencies have followed varied practices regarding the scope and content of their EAs. While still maintaining a level of flexibility for agency implementation, the final rule encourages more standardized approaches. Specifically, agencies are directed to follow the same rules as applied to an EIS in relation to the level of data available, methodologies and scientific accuracy, and accommodation of other surveys and analysis that may be required for lead or cooperating agency permitting or authorization determinations.

- ***More Detailed Direction on Categorical Exclusions:*** The final rule includes additional direction on agencies' use of categorical exclusions ("CEs") as a means to avoid detailed environmental review of actions that normally do not have significant effects. In addition to clarifying that the presence of extraordinary circumstances does not necessarily preclude the application of a CE, the final rule also

includes provisions that would allow federal agencies to adopt other agencies' CEs.

- ***Greater Role for Applicants:*** The final rule allows applicants to assume a greater role in the preparation of environmental documents. Specifically, it allows both EAs and EISs to be prepared by project applicants or contractors under the supervision of the agency, provided that agencies retain ultimate responsibility for the accuracy, scope, and content of the document.

- ***Greater Roles for Tribes:*** CEQ makes a series of changes to its rules to further integrate Tribes into NEPA reviews by: (i) recognizing that Tribes may assume NEPA implementing responsibility under certain statutory authorities; (ii) requiring federal agencies to coordinate with affected Tribes in the development of NEPA review timelines; (iii) allowing for Tribes, with the lead agency's agreement, to be cooperating agencies; and (iv) ensuring that federal agencies further coordinate with Tribes on the analysis of a proposed action's potential effects on Tribal lands, resources, or areas of historic significance. In conjunction with coordinating on the potential effects of an action on Tribal resources and historic significance, the rule eliminates existing provisions that limit Tribal interests to reservations.

- ***Public Involvement and Implications for Litigation:*** Throughout the rule, CEQ emphasizes the need for disclosure or public involvement—in contrast to prior focus on public participation. The final rule includes several provisions designed to encourage commenters to provide the agency with "all available information prior to the agency's decision, rather than disclosing information after the decision is made or in subsequent litigation." It requires that public comments be as specific as possible and submitted during the prescribed comment periods, providing that agencies need only respond to "substantive" comments and that comments or objections not submitted will be deemed "forfeited as unexhausted." The final rule also establishes a rebuttable presumption that an agency has considered submitted alternatives, information, and analyses in the final EIS. Further, agencies are given more discretion in determining the need for public meetings or hearings, which, traditionally, have been a key step in the development of an EIS. The final rule also scraps the mandatory 30-day comment period on final EISs included in the proposed rule, although it retains the current 30-day waiting period between publication of notice of a final EIS and issuance of a ROD. The extent to which any of these provisions ultimately may limit judicial review will be within the purview of reviewing courts.

Implementation of the new rule

The revised regulations apply to all NEPA processes begun after the September 14, 2020 effective date. CEQ states that agencies also have the discretion to apply the revised regulations to ongoing activities and environmental reviews. Going forward, federal agencies must revise their agency-specific NEPA implementing regulations by September 14, 2021. In the interim, the final rule explicitly states that, where existing agency NEPA procedures are inconsistent with the new CEQ regulations as adopted, the new regulations shall apply, upon their effective date, "unless there is a clear and fundamental conflict with an applicable statute." Additionally, the rule supersedes existing CEQ guidance materials, but clarifies that CEQ will publish a separate notice to withdraw such guidance.

Litigation Challenging Final Rule Implementation

Within a month of CEQ issuing the final rule, plaintiffs' groups have filed lawsuits in federal district courts in Virginia, California, and New York, challenging the final rule under the Administrative Procedure Act. All three suits allege that CEQ was arbitrary and capricious in failing to respond to public comments, reversing agency position without adequate explanation, and creating a rule inconsistent with NEPA, and seek orders declaring that the final rule is unlawful and request vacatur. In addition, the complaints raise other claims that are specific to each particular lawsuit—e.g., the Western District of Virginia suit alleges that CEQ relied on factors not provided in the statute, but instead focused on the "burden" caused by the current NEPA process; the Northern District of California suit alleges that CEQ failed to complete a review of the rule under NEPA (the very statute the rule is seeking to implement); and the Southern District of New York suit focuses on environmental justice issues, alleging the elimination of cumulative impacts in the final rule will make it "extremely difficult, if not impossible" for federal agencies to consider the effects of a project on environmental justice communities. While the final rule

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is set to become effective September 14, 2020, whether these lawsuits may impact that timing remains to be seen.

Conclusion

As we observed in our alert on the proposed rule, this Administration is not unique in recognizing that NEPA can delay and/or add significant costs to important infrastructure projects and that the environmental review process can and should be improved. Since NEPA's enactment in 1970, administrations of both parties and Congress have sought to improve the process and make it more efficient. Applicants, stakeholders, courts, and others all at times have found certain elements of implementation of the statute and regulations to lack clarity. In that context, some of the changes made in the final rule have the potential to reduce costs and delays historically associated with NEPA compliance. The extent to which that might be the case, however, depends on how the final rule is implemented by the federal agencies whose responsibility it is to conduct the environmental reviews mandated by the statute. Given the controversial nature of some of the changes in the final rule, the inevitable legal challenges to the new regulations have already commenced. Furthermore, the Congressional Review Act and the potential for a change in administrations and congressional leadership raise additional questions regarding the future of the final rule. Particularly in the transition period until agencies have updated their own NEPA implementation procedures and key legal questions are addressed, project proponents and others whose activities are subject to NEPA review will need to work closely with their permitting agencies to address the NEPA procedures that the agency will follow.

FOR MORE INFORMATION

Van Ness Feldman closely monitors and counsels clients on NEPA-related issues. If you would like more information on how these updates may impact your business, please contact Jonathan Simon, Joe Nelson, Molly Lawrence, Tyson Kade, or any member of the firm's Land, Water, and Natural Resources practice in Washington, D.C. at (202) 298-1800 or in Seattle, WA at (206) 623-9372.

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