NEPA Rules Rewrite: Initiation of the Environmental Impact Statement Process

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This is the second 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 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 an eAlert focused on changes the CEQ has made to the definitions section of the NEPA regulations. Today, we focus on changes the CEQ has made to the beginning of the NEPA process for an Environmental Impact Statement (EIS).

The beginning of the NEPA process comes once an agency or applicant determines to take an action that requires federal funding or a federal approval. The official NEPA process is preceded by planning activities undertaken by the agency or applicant needed to formulate that action. For example, federally funded highway or transit projects must come from a state or metropolitan transportation planning process specified by law. The federal agency that is to make the approval or funding decision may decide on its own, on the basis of early studies or after preliminary consultation with other agencies whether to handle the action with a categorical exclusion (CE), an environmental assessment (EA) or an EIS. This basic process is retained by the new regulations, but with some significant changes we examine below.

NEPA requires that federal agencies prepare a detailed statement for "major Federal actions significantly affecting the quality of the human environment." 42 USC § 4332(2)(C). As we described last week, under the old regulation, any federal action having significant environmental impacts was considered a major federal action. The new rule looks first at whether an action is a "major federal action" and then determines whether the impact is "significant." Thus, if an action is not a major federal action, or even a federal action, the magnitude of the environmental impact is not considered under NEPA.

Pulling the Trigger on NEPA Review: Is an Action a "Federal Action" or a "Major Federal Action"?

The term "major federal action" is now defined as "an activity or decision subject to [f]ederal control and responsibility" and specifically excludes seven categories of activities and decisions:

- Those whose effects are located entirely outside the jurisdiction of the United States;
- Those that are "non-discretionary" and made in accordance with the agency's statutory authority;
- Those that do not result in "final agency action" as that term is understood under the Administrative Procedures Act or other statute requiring finality;
- Judicial or administrative civil or criminal enforcement;
- Funding assistance limited to general revenue sharing with no federal control over subsequent use of the funds;
- Non-federal projects with "minimal" federal funding or involvement where "the agency does not exercise sufficient control and responsibility over the outcome of the project; and
- Financial assistance where the federal agency does not exercise sufficient control and responsibility over the effects of such assistance.

The new definition of "major federal action" also provides four categories of actions that tend to meet the definition. These include:

- Adoption of official policies;
- Adoption of formal plans upon which future agency actions will be based;
- Adoption of federal programs; and
- Approval of specific projects, including those approved by permit or other decision, and federally-assisted activities.

Of particular interest is the category of non-federal projects with minimal federal funding or involvement where the agency does not exercise sufficient control and responsibility over the outcome of the project to turn that project into a "major federal action." It is these types of projects–activities undertaken by non-federal actors that seek or obtain federal permitting or funding–that often are subject to challenge by third parties on the basis that the associated NEPA review was inadequate. The preamble to the final regulations provides some context for when these types of activities should not be subject to NEPA review: there is no "practical reason for an agency to conduct a NEPA analysis" where an agency cannot "influence the outcome of its action to address the effects of the project." The CEQ notes that agencies may further define what does not constitute a major federal action for purposes of triggering NEPA.

Although many of the listed exclusions have been held exempt from NEPA by various court decisions, excluding actions with minimal federal involvement marks a departure. For example, in 2012, the transportation reauthorization legislation provided that a CE should be developed for small projects ($30 million or less) or projects with limited federal funding ($5 million). However, a CE is not an exemption from NEPA review and, under extraordinary circumstances, could ultimately result in an EA or EIS. Similarly, where federal authority over an action is limited, particularly where the federal action represents a small portion of a larger undertaking, the new regulations appear to contemplate that the small federal action may not be enough to trigger NEPA review. Especially as agencies use this provision to limit the kinds of actions subject to NEPA, legal challenges seem likely.

NEPA Applies: Now What?

Where NEPA applies, the next step is to determine what level of NEPA review is required. Largely, this determination is based on whether a given "major federal action" will "significantly impact the human environment." To assist in this determination, the CEQ has provided a test, now set forth under 40 C.F.R. § 1501.3. Specifically, the decision as to whether effects are "significant" will be viewed against the factors set forth under § 1501.3(b).

Procedures for Preparing an EIS

Scoping

The new regulations make two important changes to the scoping process. Scoping is the early coordination with state and local agencies and the public that helps identify the project purpose and need, the range of alternatives and the issues that will have to be addressed in the EIS.

The old regulations specifically required that the scoping process begin after the "notice of intent" (NOI) to prepare an EIS. The NOI was to include a description of the proposed action and possible alternatives and the scoping process, including possible meetings. Thus, this presupposes that a good deal of project planning preceded the start of the scoping process. The new regulations deal with this by expressly allowing the scoping process to begin before the issuance of the NOI and requiring its issuance only after there is a determination that the proposal is sufficiently developed to allow meaningful public comment and that an EIS is required. At that point, the NOI requires more detailed information than previously necessary, including the purpose and need, a preliminary description of alternatives, expected impacts, anticipated permits, a schedule for decision-making, a description of the scoping process to be used and a request for comments.

We think that the revisions to the scoping process make sense and more closely reflect what actually occurs. In some ways, the revised scoping process mirrors the process applicable to transportation projects, which requires the identification of and comment on the proposed purpose and need of the project and the range of alternatives before publication of the draft EIS. The new scoping process also fits better with the "planning and environment linkage" (PEL) efforts of the Federal Highway and Federal Transit Administration. This initiative more closely aligns the NEPA and transportation planning processes and encourages grantees to make greater and more explicit use of transportation planning "products" (or studies and analyses) in the NEPA process.

The effect of the scoping process, however, takes on a new form under the revised regulations. The new regulations now explicitly tie the scoping process to the exhaustion of administrative remedies. The newly-specific exhaustion requirement is different, not in that it exists, but in that it is spelled out in greater detail by the new regulations. A forthcoming piece in this series will discuss the likely impacts of this change in terms of litigation and other collateral effects of the CEQ changes. For the purposes of the beginning of the NEPA process, it is significant that the exhaustion requirement is spelled out in such detail because it emphasizes the need for commenters to submit detailed and specific comments in a complete and timely fashion starting at the very beginning of the NEPA review process.

Early Integration of the NEPA Process

One interesting change the new regulations make to the beginning of the EIS process (and to NEPA review generally) is seemingly small–replacing a "shall" to a "should". (40 CFR § 1501.2). The previous CEQ

regulations explained that "[a]gencies *shall* integrate the NEPA process with other planning at the earliest possible time…" (emphasis added). This language was often quoted in NEPA litigation by project opponents, who would argue that the lead agency failed to begin the NEPA process when it should have.

As revised, the NEPA regulations now explain that "[a]gencies *should* integrate the NEPA process with other planning and authorization processes at the earliest reasonable time…" (emphasis added). In essence, where federal agencies previously were unequivocally directed to integrate NEPA into the decision-making process at the earliest possible time, agencies now have been told that it is advisable, but not required, to do so. Instead, such early integration should occur when it is reasonable, but not necessarily at the "earliest possible" time. As a practical matter, the vast majority of agencies are likely to continue engaging in the NEPA process early in the decision-making process; however, this specific change may provide a more limited basis for potential challengers to argue that a lead agency failed to integrate the NEPA process as early as it should have.

Cooperating Agencies

The revised regulations expand upon the duties of cooperating agencies and clarify that a lead agency is to involve them at the earliest practicable (as opposed to possible) time. This generally reflects existing practice and underlines the intent of various NEPA regulatory revisions aimed at streamlining the NEPA process where multiple agency approvals are required. However, as with the prior regulations, this attempt to streamline approvals by multiple agencies retains the ability for a cooperating agency to assert that other program commitments prevent its involvement or involvement to the degree requested by the lead agency.

It is important to note that the involvement of cooperating agencies is critical for the successful achievement of the One Federal Decision initiative of Executive Order 13807. This is especially the case because of the more flexible adoption rules of the new regulations allowing a cooperating agency to adopt the completed EIS and simply issue its own Record of Decision (ROD).

Time Limits for Completion of an EIS

Finally, and as we will discuss in greater detail in future eAlerts, the revised regulations require that a ROD be signed no later than two years after the issuance of the NOI. This time limit may be extended at the discretion of the "Senior Agency Official" responsible for overseeing the NEPA process of the agency.

Final Thoughts

The new regulations improve the scoping process and make the commenting requirement more rigorous. Although not required, the new rules encourage agencies to integrate planning and NEPA processes, especially in light of the changes made to the scoping process and the timing of the NOI. The more rational adoption rules enhance the benefit cooperating agencies have from participating in the lead agency's NEPA process. The balance of the changes to the NEPA process reflect the intent of the CEQ to streamline NEPA review generally, including the EIS process. While the attempts to streamline the process may appear significant to the uninitiated, it is important to view these changes in context. For example, some of the revisions to the threshold determination as to whether NEPA applies remove specific considerations in favor of broad ones, seemingly with the intent to give agencies more discretion in their consideration of what does or does not warrant NEPA review or what does or does not warrant an EIS level of review. This lack of specificity could equally lend itself to ambiguity in a decision to either prepare or not prepare an EIS, and

could similarly lend itself to litigation over whether an EIS should or should not have been prepared in the first place. Further complicating matters is the fact that there no longer will be thirty years of case law on the regulations to provide clarity for courts, agencies, project proponents or project opponents.

Stay tuned for the next installment in this series, which will cover changes to the use of Categorical Exclusions, Environmental Assessments and Findings of No Significant Impact.