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Trump Administration Publishes Final Revisions to NEPA Regulations

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*By: **Kevin A. Ewing**, **Ann D. Navaro** and **Kevin M. Voelkel***

On July 16, 2020, the White House Council on Environmental Quality ("CEQ") published its much anticipated ***final rule*** revising the regulations implementing the National Environmental Policy Act ("NEPA").***[1]*** Since taking office, the Trump Administration has sought to modernize NEPA and facilitate more efficient, effective, and timely NEPA reviews.***[2]*** Since NEPA was enacted in 1970, implementation has become unwieldy and often does not serve NEPA's purpose in informing decision-makers and the public. The Final Rule marks the first comprehensive revision of CEQ's NEPA regulations since the original regulations were promulgated in 1978, and it is intended to focus the NEPA review to serve its purpose of informing decision-makers and the public.

NEPA requires Federal agencies to consider the environmental impact of major Federal actions significantly affecting the quality of the human environment before taking such actions, by preparing a "detailed statement." The detailed statement must evaluate, among other considerations, the environmental impact of the proposed action, the adverse environmental effects which cannot be avoided if the proposal is implemented, and the alternatives to the proposed action.***[3]***

Under CEQ's previous regulations, agencies complied with NEPA by (i) developing *Environmental Impact Statements* ("EIS") for major federal actions significantly affecting the quality of the environment, (ii) preparing an *Environmental Assessment* ("EA") to determine whether an EIS is required or to document the agency's determination that an EIS is not required or (iii) identifying an applicable *categorical exclusion* for actions that do not individually or cumulatively have a significant effect on the environment. CEQ's Final Rule does not modify this basic framework, but makes significant revisions to the applicability, scope, and procedures implementing NEPA. The rule adopts many of the revisions proposed in CEQ's Notice of Proposed Rulemaking ("NPRM"), published on January 10, 2020.

By its terms, the Final Rule goes into effect on September 14, 2020 unless otherwise altered by Congress***[4]*** and will apply to any NEPA process begun after that date.***[5]*** However, the Final Rule allows agencies to apply the Final Rule to ongoing activities and environmental documents that begin before September 14, 2020.***[6]***

NEPA Threshold Determination and Appropriate Level of NEPA Review

The Final Rule creates new provisions that provide a series of considerations to assist federal agencies in determining whether NEPA applies to a proposed activity or is otherwise fulfilled

through another mechanism (referred to in the rule as "NEPA thresholds").[7] The Final Rule adds a consideration not included in the NPRM: "whether the proposed activity or decision is expressly exempt from NEPA under another statute," and adopts, with minor variation, the five considerations proposed in the NPRM:

1. whether compliance with NEPA would clearly and fundamentally conflict with the requirements of another statute;

2. whether compliance with NEPA would be inconsistent with Congressional intent expressed in another statute;

3. whether the proposed activity or decision is a major Federal action;

4. whether the proposed activity or decision, in whole or in part, is a non- discretionary action for which the agency lacks authority to consider environmental effects as part of its decision-making process; and

5. whether the proposed action is an action for which another statute's requirements serve the function of agency compliance with the NEPA.

The Final Rule revises the definition of a "major Federal action" to mean "an activity or decision subject to Federal control and responsibility" subject to several clarifying provisions.[8] This definition establishes a threshold consideration that is independent of the significance of the impacts that may follow from the Federal action. In contrast, CEQ's 1978 regulations included in the definition a statement that "[m]ajor reinforces but does not have a meaning independent of significantly." CEQ's discussion in the preamble to the Final Rule explains that CEQ removed this sentence from the regulations to correct what it views to be the council's "longstanding misconstruction of the NEPA statute."[9] The Final Rule also includes several examples of types of actions that are *not* "major Federal actions," such as 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. Many of these examples were included in the NPRM, but CEQ added one additional example to address actions with effects located entirely outside of U.S. Jurisdiction.

The Final Rule adds provisions to guide agencies in determining the appropriate "level" of NEPA review.[10] As noted above, CEQ's 1978 regulations provided for three levels of review: EISs, EAs, and categorical exclusions. CEQ's revisions set out a decisional framework and direct agencies to assess proposed actions and determine the appropriate level of review. Because this assessment involves considering whether proposed actions normally have, or are likely to have, significant effects, the Final Rule revises the approach to assess "significance" under the regulations.

Definition of Environmental "Effects"

The Final Rule redefines "effects" or "impacts" as the changes to the human environment from the proposed action or alternatives that are reasonably foreseeable and have a reasonably close causal relationship to the proposed action or alternatives . . . ."[11] The revised definition emphasizes the causal relationship that is necessary and states that a "but for" causal relationship is insufficient to make an agency responsible for a particular effect under NEPA.

[12] The definition also states that "[e]ffects should generally not be considered if they are remote in time, geographically remote, or the product of a lengthy causal chain."*[13]*

The Final Rule eliminates the categories of effects as "direct," "indirect," or "cumulative" that exist in the current regulations, including an express provision noting that the term "cumulative impact" is repealed. Although these provisions in the Final Rule are consistent with the provisions proposed in the NPRM, CEQ replaced language in the beginning of the NPRM definition ("means effects of") with reformulated language ("means changes to the human environment from") to avoid circularity in the definition. CEQ also added the word "generally" to the provision stating that effects should not be considered if they are "remote in time, geographically remote, or the produce of a lengthy causal chain" to reflect occasions where such effects should be considered.*[14]* Finally, CEQ revised the final definition of effects to allow the agencies greater discretion to not ever consider effects that are "remote in time . . . ." Under the proposed rule, such effects would not have been considered "significant" so as to trigger an EIS, but might still have been required to be considered. The Final Rule eliminates the word "significant," leaving it to agency discretion whether to consider such effects at all.

Additionally, CEQ has revised the definition of "affected environment" to emphasize that the affected environment includes "reasonably foreseeable environmental trends and planned actions in the area(s)."*[15]* According to CEQ, this revision is intended to respond to the elimination of the cumulative effects analysis and ensure that to the extent that environmental trends or planned actions in the area are reasonably foreseeable, they should are included in the discussion of the affected environment.*[16]*

Definition of "Reasonable Alternatives"

The Final Rule defines "reasonable alternatives" as a "reasonable range of alternatives that are technically and economically feasible, meet the purpose and need for the proposed action, and, where applicable, meet the goals of the applicant."*[17]* The Final Rule limits the number of alternatives considered in an EIS to a "reasonable number."*[18]*

Interagency Coordination and Streamlining Measures

The Final Rule modifies several provisions intended to make the NEPA process more effective and efficient. For example, the Final Rule requires that Federal agencies, where practicable, evaluate proposals involving multiple Federal agencies in a single EIS and issue a joint Record of Decision (or, where applicable, a single EA and issue a joint Finding of No Significant Impact). *[19]* The rule provides that "lead agencies" shall supervise the preparation of "complex" EAs, as well as EISs.*[20]* The NPRM proposed extending lead agency responsibility to all EAs, but CEQ limited such responsibility only to "complex" EAs to avoid burdening an already effective process.*[21]* CEQ also revised the NPRM to specify that agencies shall serve as "cooperating agencies" only upon the request of the lead agency.*[22]* The Final Rule clarifies that the lead agency is responsible for determining the purpose and need and the alternatives, as well as developing a schedule and milestones for all required environmental reviews and authorizations.*[23]* In addition, the Final Rule creates (i) presumptive time limits to prepare EAs (one year)*[24]* and EISs (two years)*[25]* and (ii) presumptive page limits (not including appendices) for EAs (75 pages)*[26]* and EISs (150 or 300 pages*),[27]* unless a senior agency official provides otherwise.

[1] *Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act*, 85 Fed. Reg. 43,304 (July 16, 2020) ("Final Rule").

[2] *See, e.g.*, Exec. Order. No. 13807, *Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects*, 82 Fed. Reg. 40,463 (Aug. 24, 2017); Memorandum for Heads of Federal Departments and Agencies from Mick Mulvaney, Director, Office of Management and Budget and Mary Neumayr, Chief of Staff, Council on Environmental Quality, M-18-13, (Mar. 20, 2018).

[3] 42 U.S.C. 4332(C)(ii).

[4] Final Rule, 85 Fed. Reg. at 43,304.

[5] Final Rule, § 1506.13.

[6] *Id.*

[7] Final Rule, § 1501.1.

[8] Final Rule, § 1508.1(q).

[9] Final Rule, 85 Fed. Reg. at 43,345.

[10] Final Rule, § 1501.3.

[11] Final Rule, § 1508.1(g).

[12] Final Rule, § 1508.1(g)(2).

[13] *Id.*

[14] *Id.*

[15] Final Rule, § 1502.15.

[16] Final Rule, 85 Fed. Reg. at 43,331.

[17] Final Rule, § 1508.1(z).

[18] Final Rule, § 1502.14(f).

[19] Final Rule, § 1501.7(g).

[20] Final Rule, §1501.7.

[21] Final Rule, 85 Fed. Reg. at 43,325.

[22] Final Rule, § 1501.8(a).

[23] Final Rule, § 1501.7(h)(4); § 1501.7(i).

[24] Final Rule, § 1501.10(b)(1).

[25] Final Rule, § 1501.10(b)(2).

[26] Final Rule, § 1501.5(f).

[27] Final Rule, § 1502.7 (allowing for a 300-page limit for “proposals of unusual scope or complexity”).