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TRUMP ADMINISTRATION REVAMPS THE NEPA REGULATIONS

Jul 16, 2020

SUMMARY

On July 15, 2020, the Council on Environmental Quality ("CEQ") promulgated comprehensive amendments to the CEQ regulations implementing the National Environmental Policy Act of 1969 ("NEPA"). This Client Alert summarizes the key changes to the regulations and concludes with a discussion of strategic issues facing project sponsors seeking federal funding or approvals.

NEPA establishes a national policy to protect the environment, requires the federal government to consider environmental impacts in its decision-making, and gives the public access to information relating to such impacts. 42 U.S.C. §§ 4321-4370h.

NEPA requires that "the [federal] agency, in reaching its decision, will have available, and will carefully consider detailed information concerning significant environmental impacts." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). The statute demands that federal agencies take a "'hard look' at environmental consequences." *Id.* at 350.

The procedural requirements of the Act apply to "major Federal actions." 42 U.S.C. § 4332(2)(c). The NEPA regulations laying out these procedural requirements were promulgated more than 40 years ago, in 1978. The summary of NEPA procedures that follows is based on the 1978 regulations.

Categorical Exclusions. Most projects undertaken by the federal government fall within a Categorical Exclusion ("CE") promulgated by the agency undertaking the action. 40 C.F.R. § 1508.4. These are "categories of actions that have been predetermined not to involve significant environmental impacts, and therefore require no further agency analysis." *City of New York v. I.C.C.*, 4 F.3d 181, 185 (2d Cir. 1993) (citation omitted). Nevertheless, regulations that identify CEs are required to "'provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect.'" *Id.* (quoting 40 C.F.R. § 1508.4).

Environmental Assessments. If the action is not covered by a CE, the NEPA process generally begins with an Environmental Assessment ("EA") that examines preliminarily the potential environmental impacts of the proposed project. 40 C.F.R. § 1501.3. If, after considering the EA, the agency determines that the Project will not result in any significant environmental impacts, a Finding of No Significant Impact ("FONSI") is issued, terminating the NEPA process. 40 C.F.R. § 1508.13.

Environmental Impact Statements. An environmental impact statement ("EIS") is required if, based upon the EA, the agency determines that the project would result in a significant environmental impact. Many large projects require an EIS, which is an elaborate document containing extensive analyses of potential impacts, feasible alternatives and measures that could mitigate the impacts that are identified in the EIS. Under the CEQ procedures, a draft EIS is first issued and subject to public comment. A final EIS is then prepared by the agency, after considering the comments submitted on the draft EIS. The NEPA process concludes with the preparation of a Record of Decision that documents the decision of the agency and specifies any measures it imposes to avoid or mitigate environmental impacts. 40 C.F.R. § 1505.2.

The Trump Amendments

On January 10, 2020, CEQ issued a notice of proposed rulemaking to overhaul the CEQ's NEPA regulations. *See* Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 1684 (Jan. 10, 2020). CEQ received more than one million comments on the proposed rulemaking, which shows an extraordinary level of public interest in the rulemaking (or at the very least, effective mass mobilization by groups who support or oppose the proposed amendments).

The final rule signed on July 15, 2020 amending the NEPA regulations has not yet been published in the Federal Register, but it is available on the CEQ web site.

Broadening use of "Categorical Exclusions"

A substantial majority of major Federal actions fall within a "Categorical Exclusion" and as a result are exempt from the need to prepare an Environmental Assessment or EIS. The new regulations broaden the availability of Categorical Exclusions even further. The current NEPA regulations define a "Categorical exclusion" as "category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations … and for which, therefore, neither an environmental assessment nor an environmental impact statement is required." 40 C.F.R. § 1508.4 (old regulations). The new regulations eliminate the words "individually or cumulatively" and state that, to be deemed an action for which a categorical exclusion is appropriate, the action must be one that "normally" does not have a significant effect on the human environment. 40 C.F.R. § 1501.4 (new regulations).

The new regulations, like the previous regulations, provide that an agency shall evaluate the action for "extraordinary circumstances" in which a normally excluded action may have a significant adverse environmental effect. But the new regulations, unlike the previous regulations, provide that if "an extraordinary circumstance is present, the agency nevertheless may categorically exclude the proposed action if the agency determines that there are circumstances that lessen the impacts or other conditions sufficient to avoid significant effects." 40 C.F.R. § 1501.4(b)(1) (new regulations).

Regulatory Codification of the "Mitigated FONSI"

In many situations in which an EA is prepared, a Finding of No Significant Impact ("FONSI") is issued that imposes mitigation measures and concludes that, with the implementation of the mitigation measures, the project will not result in a significant environmental impact and therefore does not warrant the preparation of an EIS. This long-standing administrative practice, which was not codified in the 1978 NEPA regulations, is codified in the new regulations.

Of particular interest is that the new regulations provide that a mitigated FONSI "shall state the authority for any mitigation that the agency has adopted and any applicable monitoring or enforcement provisions" and "shall state any enforceable mitigation requirements or commitments that will be undertaken to avoid significant impacts." 40 C.F.R. § 1501.6(c).

Elimination of Requirement to Consider "Cumulative Impacts"

The previous NEPA regulations defined the key term environmental "effects" (which is synonymous with environmental "impacts") as including "cumulative" impacts, 40 C.F.R. § 1508.8, and defined the term "cumulative impacts" as "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions." 40 C.F.R. § 1508.7 (old regulations). The new NEPA regulations eliminate the requirement to consider cumulative impacts, which are no longer referenced in the definition of "effects." 40 C.F.R. § 1508.1(g) (new regulations).

Narrowing or Elimination of Need to Consider "Indirect Effects"

The previous NEPA regulations defined the term "effects" to include "indirect" effects. 40 C.F.R. § 1508.8. The new regulations no longer reference consideration of "indirect effects." 40 C.F.R. § 1508.1(g) (new regulations). Instead, the new regulations state that effects "should generally not be considered if they are remote in time, geographically remote, or the product of a lengthy causal chain." *Id.* This language appears to be aimed in particular at eliminating any need to consider global climate change resulting from anthropogenic emissions, as the change in the earth's climate is the product of a lengthy causal chain.

A New Causation Concept in Defining "Effects"

The new regulations state that “effects” do not “include those effects that the agency has no ability to prevent due to its limited statutory authority or would occur regardless of the proposed action.” 40 C.F.R. § 1508.1(g)(2) (new regulations). This sentence may result in a substantial change in established NEPA practice. Under the previous regulations, it was routine for an EA or EIS to be prepared for large projects slated to receive tens of millions or even hundreds of millions dollars of federal funding, because the provision of such funding would be deemed a “major Federal action” that would have potential adverse “effects” on the environment. Under the new regulations, it appears that the project sponsor may be able to argue that, if the project would proceed even without the federal funding, then the federal funding does not have any “effects” and does not trigger the need to prepare an EA or EIS.

Elimination of Any Requirement to Consider Effects Outside of the United States

The new regulations state that in “considering the potentially affected environment, agencies should consider, as appropriate to the specific action, the affected area (national, regional, or local).” 40 C.F.R. § 1501.3(b)(1) (new regulations). Arguably, environmental impacts outside U.S. borders are no longer to be considered under NEPA because those impacts would not affect a “national, regional or local” area within the meaning of the regulations.

Early Land Acquisition and Purchase of Equipment Prior to Completion of the NEPA Process

The 1978 regulations stated that, prior to the completion of the NEPA process, “no action concerning the proposal shall be taken which would … [h]ave an adverse environmental impact … or … [l]imit the choice of reasonable alternatives.” 40 C.F.R. § 1506.1(a) (old regulations). The same language has been carried over to the new regulations, but the new regulations contain an exception: an agency considering a proposed action for Federal funding “may authorize such activities, including, but not limited to, acquisition of interests in land … , purchase of long lead-time equipment, and purchase options made by applicants.” 40 C.F.R. § 1506.1(b) (new regulations). This new exception goes well beyond the narrower exception for pre-NEPA actions to preserve railroad corridors authorized by 49 U.S.C. § 5323(q).

NEPA Litigation

The new regulations contain several provisions purporting to instruct the courts on how to adjudicate NEPA litigations brought under the Administrative Procedure Act (“APA”). These provisions include those relating to the waiver of issues not raised with sufficient specificity during public comment periods (40 C.F.R. § 1500.3(b)); the requirement that a plaintiff post a bond or other security to obtain a preliminary injunction (§ 1500.3(c)); and the remedies under the APA that are available to a plaintiff that establishes a NEPA violation (§ 1500.3(d)).

Strategic Considerations

All major environmental regulations issued by the Trump Administration have been challenged in court, and this one will be as well. The plaintiffs' batting averages in these cases are impressive. Accordingly, while the new NEPA regulations are intended to "streamline" the NEPA process, at least in the short term, they create uncertainty and legal risk for applicants seeking federal funding or approvals that are subject to NEPA.

Many such applicants would prefer to "cover all the bases" by preparing a thorough document that will survive judicial challenge. Asking an environmental consultant to prepare more analysis is often quicker and easier (and in the long-run cheaper) than taking a chance that a reviewing court will determine the analysis undertaken to have been insufficient. Such caution is warranted, given recent plaintiff victories challenging EIS's for major energy and pipeline projects.

Until the legality of the new regulations has been adjudicated, project sponsors, in preparing analyses for NEPA documents, should consider the risk of relying on the new regulations where they depart materially from the 1978 regulations. In particular, they should assess whether any material deviation from the previous regulations contravenes some statutory provision of NEPA as it has been interpreted by the courts, and is not simply inconsistent with the 1978 regulations. In the event they determine that NEPA itself would require an analysis not called for under the new regulations, they should consider whether and how to comply with the statute in the documents they prepare and submit to the involved federal agency.

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