National Environmental Policy Act: Council on Environmental Quality Issues Final Revisions

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The Council on Environmental Quality ("CEQ") on July 15th promulgated for the first time in 40 years revisions to the regulations that implement the National Environmental Policy Act ("NEPA").

CEQ was established in 1970 (as part of the Executive Office of the President) with its duties including oversight of the federal agency implementation of NEPA.

The regulations issued by CEQ are intended to guide the federal agencies in interpreting NEPA's procedural requirements. However, the federal agencies themselves typically have in place regulations that address NEPA requirements applicable to its activities. Nevertheless, the CEQ regulations are generally viewed by the federal agencies as the guideposts for compliance.

Of course, CEQ's interpretations and the federal agencies themselves through their regulation and guidance are sometimes superseded by judicial decisions. In other words, regardless of CEQ and the federal agencies' rules, courts have not infrequently disagreed with CEQ/federal agency regulatory interpretations.

CEQ's rationale for issuing the revisions is its belief that there is a need for modernization and clarification of the regulations. It is argued that the revisions would "facilitate more efficient, effective, and timely NEPA reviews by Federal agencies in connection with proposals for agency action." It has also argued that the revisions:

. . . advance the original goals of the CEQ regulations to reduce paperwork and delays, and promote better decisions consistent with the national environmental policy set forth in Section 101 of NEPA.

Various environmental organizations have immediately reacted negatively to the final regulation. For example, the Center for Biological Integrity stated:

The final Rule drastically curtails environmental rules for thousands of federal agency projects nationwide, a move that will weaken safeguards for air, water, wildlife and public lands.

The Rule will likely be the subject of judicial challenge.

NEPA requires federal agencies to assess the environmental effects of their proposed actions prior to making decisions. The range of actions covered by NEPA has typically been broadly defined to include as examples:

- Making decisions by federal agencies on permit applications
- Federal land management actions

- Construction and/or funding highways and other publically owned facilities

The federal agencies are required to evaluate the environmental and related social and economic effects of their proposed actions. Agencies are also required to provide opportunities for public review and a comment on those evaluations.

NEPA was arguably designed to force mission-oriented agencies to consider the environmental impacts of a particular decision or activity in addition to other objectives. For example, a decision by the Department of Defense to construct a base in a particular location would traditionally consider a variety of issues such as logistics, infrastructure, etc. In the event that this proposed activity triggers a review, the environmental issues would also have to be addressed. This would include situations in which a state or local government utilizes federal funds to construct infrastructure. In other words, the objective has been to ensure that environmental considerations are integrated into the planning of the agency actions as early as possible.

NEPA requires federal agencies to include environmental values and issues in their decision-making processes. This federal mandate is accomplished by agency consideration of environmental impacts of proposed actions and reasonable alternatives to those actions. The statute requires federal agencies in certain instances to prepare a detailed Environmental Impact Statement ("EIS"). However, the requirement to produce this document is only triggered in the event of a "major federal action" that will "significantly affect the environment." In other words, an EIS is only required to be produced if:

1. there is a federal action
2. that will significantly affect the environment

As opposed to an EIS, which is a much more detailed document, an Environmental Assessment ("EA") provides sufficient evidence and analysis for determining whether a finding of no significant impact for an EIS should be prepared. Neither an EA nor an EIS need be prepared if a particular federal action falls within the scope of a NEPA categorical exclusion. Categorical exclusions are promulgated by the federal agencies and are described actions which have been determined to not involve significant environmental impacts.

NEPA differs from action enforcing environmental statutory programs such as the Clean Air Act or Clean Water Act. It does not impose substantive mandates. Instead, it is limited to requiring federal agencies to meet procedural requirements such as preparation of an EA or EIS in certain instances. As a result, NEPA does not require a certain alternative or meet a particular standard. Nevertheless, the failure to comply with procedural mandates can result in an activity or project being enjoined.

Examples of recent situations in which NEPA has been litigated or attempted to be invoked involving Arkansas activities include:

- Widening of I-630
- Widening of I-30 (see previous blog item here)

The 301-page preamble for the revisions addresses issues such as:

- Establishes presumptive time limits of two years for the preparation of environmental impact statements and one year for the preparation of environmental assessments
- Specifies presumptive page limits for EISs and EAs
- Requires joint schedules, a single EIS, and a single record of decision (ROD), where appropriate, for EISs involving multiple Federal agencies
- Strengthens the role of the lead agency and requires senior agency officials to oversee NEPA compliance, including timely resolution of disputes to avoid delays
- Allows applicants/contractors to assume a greater role in preparing EISs with appropriate disclosure of financial or other interests and with supervision and independent evaluation by the agency

- Includes new provisions to assist Federal agencies in determining whether NEPA applies and the appropriate level of environmental review
- Requires agencies to consider environmental effects that are reasonably foreseeable and have a reasonably close causal relationship to the proposed action
- Clarifies the definition of major Federal action and excludes activities with minimal Federal funding or involvement such as small business and farm loan guarantees
- Directs agencies to analyze a reasonable range and number of technically and economically feasible alternatives
- Provides efficiencies to comply with NEPA where procedures and documents required under other statutes satisfy the requirements of the CEQ regulations
- Allows agencies to establish procedures to use other agencies' categorical exclusions (CEs) and to adopt EAs and CE determinations, where appropriate
- Requires agencies to provide more information to and solicit input from the public earlier in the process to ensure and facilitate informed decision making by Federal agencies
- Reduces duplication by facilitating use of documents prepared by State, Tribal, and local agencies to comply with NEPA
- Enhances ability of Native Americans to participate in the NEPA process and ensures appropriate consultation with affected Tribal governments and agencies
- Eliminates provisions in the prior regulations that limit Tribal interest to reservations
- Promotes use of modern technologies for information sharing and public outreach
- Requires agencies to consider the affected environment, including reasonably foreseeable environmental trends and planned actions
- Requires agencies to certify consideration of alternatives, information, and analyses submitted by State, Tribal, and local governments and public commenters
- Clarifies that mitigation must have a nexus to effects of the proposed action or alternatives
- Does not alter any substantive environmental laws or regulations

A link to the revisions can be found here.