Procedures for Considering Environmental Impacts/National Environmental Policy Act: U.S. Department of Transportation Proposed Rule

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12/04/2020

The United States Department of Transportation ("DOT") published a November 23rd Federal Register Notice of a proposed rulemaking which is described as updating and codifying:

. . . its internal order establishing the responsibilities and procedures for complying with the National Environmental Policy Act (NEPA) .

Such procedures are stated to be currently encompassed by DOT's Order 5610.1C, which is titled "Procedures for Considering Environmental Impacts."

The proposal is intended to update the DOT NEPA procedures in response to the Council on Environmental Quality's ("CEQs") final rule which both:

- Updated NEPA procedures
- Incorporated provisions of the Safe, Accountable, Flexible, Efficient Transportation Equity Act

The November 23rd proposal also updates DOT's categorical exclusions which are stated to ensure consistency with CEQ's revised regulations.

CEQ on July 15th promulgated for the first time in 40 years revisions to the regulations that implement 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course, CEQ's interpretations and the federal agencies themselves through their regulation and guidance are sometimes superseded by judicial decisions.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.

The CEQ rule is currently the subject of a 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 publicly 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:

- there is a federal action
- 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.

As previously noted, the federal agencies themselves typically promulgate rules to address NEPA requirements. These will include lists of categorical exclusions.

DOT states that its proposal will update its procedures for the first time since 1985. It would update the existing DOT categorical exclusions and add 11 new ones. It also argues that the proposal would improve

clarity and reduce ambiguity regarding the entities responsible for undertaking the required actions. For example, DOT states that to improve readability the proposal would:

. . . designate ‘‘OA’’ as the entity responsible for conducting NEPA analyses, and would define ‘‘OA’’ to include a Secretarial Office that carries out its own NEPA responsibilities (as opposed to an office that relies on an OA’s expertise to prepare the NEPA document).

Names of the relevant offices that have responsibilities would be updated. These include the Office of Policy and Office of General Counsel. DOT does not intend to propose to include what it describes as:

. . . the more detailed policy concerning the format and content of EISs that was contained in Attachment 2 of the 1985 procedures.

DOT also does not propose to include Attachment 1 of the 1985 procedures. Attachment 1 provided a list of the States and localities with EIS requirements. An additional proposal would update terminology for what is characterized as “consistency with modern NEPA practice and the Department’s current operations.”

A copy of the Federal Register Notice can be downloaded here.