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Council on Environmental Quality’s New NEPA Regulations: An Analysis

On July 16, 2020, the Council on Environmental Quality (“CEQ”) published its long-awaited [Final Rule](#) overhauling its regulations implementing the National Environmental Policy Act (“NEPA”), which became effective on September 14, 2020. The Final Rule represents the first comprehensive revision of the NEPA regulations since their initial issuance in 1978, and incited almost immediate legal challenges. This analysis looks with some depth at key changes to the regulations and their possible implications for future environmental impact review of federal projects, approvals, and funding actions.

Background

NEPA imposes procedural requirements on all federal agencies. Under NEPA, a federal agency that proposes to undertake a discretionary action, unless that proposal is exempt from environmental review, must consider how its proposal would affect the quality of the human environment. The [statute](#) requires a “detailed statement” of environmental impact of “major Federal actions significantly affecting the quality of the human environment.” Depending on the scope of the action and the potential impacts, NEPA review may involve different levels of analysis – a Categorical Exclusion if the project can be “categorically excluded” from a detailed environmental analysis, absent extraordinary circumstances demonstrating a significant impact; an Environmental Assessment (“EA”) and subsequent Finding of No Significant Impact (“FONSI”) if the proposed action will not have significant environmental impacts; or an Environmental Impact Statement (“EIS”).¹ Both an EA and EIS must assess environmental impacts, evaluate reasonable alternatives, and identify (and, in certain cases, assure the implementation of) measures to mitigate any significant environmental impacts. While many federal agencies also adopt their own agency-specific regulations implementing NEPA, the CEQ regulations apply to all agencies and provide a baseline standard for the NEPA process.

¹ The 1978 CEQ regulations required an EIS when a proposed action “may significantly affect the quality of the human environment” 40 C.F.R. 1506.1(c) (1978) (emphasis added); the new regulations provide that an EIS is required only when an action “is likely to have significant effects.” 40 C.F.R. 1501.3(3) (2020) (emphasis added).

Key Changes in the Revised Regulations

The new regulations introduce process-based and substantive changes to the NEPA process; codify existing case law, Executive Orders (including One Federal Decision),² and CEQ guidance; and establish various measures designed to shorten and streamline the environmental review process, particularly in the context of an EIS. In addition to streamlining measures, the regulations narrow the scope of environmental review by limiting the extent to which indirect and cumulative impacts must be addressed, encourage means to avoid review, limit the scope of alternatives analysis, and place procedural hurdles on parties that wish to challenge an agency's course of action under NEPA. Key changes to the regulations are discussed below.

A. Narrowed Definition of “Major Federal Action”

The prior regulations defined “major federal action” as “actions with effects that may be major and which are potentially subject to Federal control and responsibility.” 40 C.F.R. § 1508.18 (1978). The standard was limited to the criterion of significance: “Major reinforces but does not have a meaning independent of significantly...” *Id.* In essence, an action was “major” if it may significantly impact the environment and, in those circumstances, the preparation of an EIS was required.

In addition, the prior regulations required sufficient potential “federal control and responsibility” for the action to be considered a “federal action.” 40 C.F.R. § 1518 (1978). However, at times, agencies would define certain actions as “major federal actions” even if the federal agency only played a small role. Under this regulatory framework, courts grappled with the question of what level of federal involvement “federalizes” an otherwise private action, necessitating NEPA review of the action as a whole.³ Commentators have dubbed this the “small handle” problem,

² Exec. Order No. 13807, Presidential Executive Order on Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure (Aug. 15, 2017).

³ See, e.g., *White Tanks Concerned Citizens, Inc. v. Strock*, 563 F.3d 1033 (9th Cir. 2009) (considering scope of environmental review required for permits issued in conjunction with larger, otherwise non-federal development projects); *Winnebago Tribe of Nebraska v. Ray*, 621 F.2d 269, 273 (8th Cir. 1980) (holding that agency “did not have sufficient control and responsibility” over the transmission line project “to require it to study the entire project”); *Friends of the Earth v. Coleman*, 518 F.2d 323, 328 (9th Cir. 1975) (considering whether agency was required to prepare EIS for state funded projects in partially federally funded airport development).

which arises when an action is partly, but not entirely, federal, and agencies must determine whether the “federal handle” component subjects the entire project to NEPA review.⁴

In the new regulations, CEQ revised the definition of “major federal action” to incorporate judicial decisions on the “small handle” problem and to clarify the level of federal involvement in an action that is required in order for an action to be considered “major.” Thus, the new regulations define “major federal action” as “an activity or decision subject to Federal control and responsibility,” thereby excluding the notion of “potential” control contained in the former regulations. And the new regulations specifically exclude certain types of actions that were not previously excluded from the definition of “major federal action,” including:

- (i) Extraterritorial activities or decisions, which means agency activities or decisions with effects located entirely outside of the jurisdiction of the United States;
- (ii) Activities or decisions that are non-discretionary and made in accordance with the agency’s statutory authority;
- (iii) Activities or decisions that do not result in final agency action under the Administrative Procedure Act or other statute that also includes a finality requirement;
- (vi) 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; and
- (vii) Loans, loan guarantees, or other forms of financial assistance where the Federal agency does not exercise sufficient control and responsibility over the effects of such assistance....

40 C.F.R. § 1508.1(q)(1) (2020). The apparent objective of these changes is to reduce the scope of actions subject to NEPA, or, at a minimum, to clarify the scope of the federal action subject to environmental review.

⁴ See, e.g., Jeslyn Miller, *Clarifying the Scope of NEPA Review and the Small Handles Problem*, 37 Ecology L.Q. 735 (2010); David Paget & Elizabeth Knauer, *The Scope of Analysis of Federal Actions* (American Law Institute 2009), SR009 ALI-ABA 23.

B. Broadened Scope of “Categorical Exclusions”

Under the previous NEPA regulations, if a federal agency determined that a category of action it routinely undertook or approved did not “individually or cumulatively have a significant effect on the human environment,” the action may be “categorically excluded” from a detailed environmental analysis. 40 C.F.R. § 1500.4(p) (1978). The new regulations broaden the scope of an action that may be categorically excluded, allowing such classifications if actions “normally do not have a significant effect on the human environment.” 40 C.F.R. § 1501.4(a) (2020) (emphasis added). While retaining the provision that an action cannot be categorically excluded if there are “extraordinary circumstances in which a normally excluded action may have a significant effect,” the new regulations allow mitigation or other circumstances to be deployed to avoid the potential significant impact and thus maintain the exclusion. 40 C.F.R. § 1501.4(b)(1) (2020). As explained by CEQ, “the agency may consider in light of the extraordinary circumstances criteria, whether the proposed action would take place in such a way that it would not have significant effects, or whether the agency could modify the proposed action to avoid the extraordinary circumstances so that the action remains eligible for categorical exclusion.” 85 Fed. Reg. 43322. This addition essentially renders the extraordinary circumstances criteria meaningless by allowing an agency to consider ways to mitigate any such circumstance.

The new regulations also encourage federal agencies to adopt new categorical exclusions, and allow one federal agency to rely on a categorical exclusion of another agency. 40 C.F.R. § 1507.3(f)(5) (2020). According to CEQ, this change is designed to address situations where a proposed action would result in a categorical exclusion determination by one agency and an EA and FONSI by another agency for the same action, because it had not adopted the same categorical exclusion. 85 Fed. Reg. 43336.

C. Narrowed Definition of “Effects”

The prior regulations defined effects as both “direct effects, which are caused by the action and occur at the same time and place,” and “indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.” 40 C.F.R. § 1508.8(a)-(b) (1978). The new regulations narrow the definition of “effects” by removing the requirement that federal agencies consider both “direct” and “indirect” effects. Relying on the Supreme Court’s decision in *Dep’t of Transp. v. Pub. Citizen* (“*Public Citizen*”), 541 U.S. 752

(2004), the regulations state that “[a] ‘but for’ causal relationship is insufficient to make an agency responsible for a particular effect under NEPA. Effects should generally not be considered if they are remote in time, geographically remote, or the product of a lengthy causal chain.” 40 C.F.R. § 1508.1(g)(2) (2020).

Drawing further on *Public Citizen*, the new regulations include a provision 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) (2020). This regulation is based on the aspect of the *Public Citizen* decision in which the Supreme Court held that because the action of the President is not subject to NEPA, the impacts of such action need not be considered – including in the context of the cumulative impacts of the action that was subject to NEPA. As explained by CEQ, it codified *Public Citizen* “to make clear that effects do not include effects that the agency has no authority to prevent or that would happen even without the agency action, because they would not have a sufficiently close causal connection to the proposed action.” 85 Fed. Reg. 43344. This logic would appear to limit the consideration of impacts such as climate change that would occur whether or not the subject action is approved but to which the action may contribute.

Although the new regulations remove the terms “direct” and “indirect” from the regulations, they do maintain some of the language from the prior regulations with regard to “indirect effects,” noting that “effects” “may include effects that “are later in time or farther removed in distance from the proposed action alternatives,” so long as they are reasonably foreseeable and have a reasonably close causal relationship to the proposed action or alternatives to necessitate consideration. 40 C.F.R. § 1508.1(g) (2020) (emphasis added). However, the references to “remoteness” in the definition of “effects” are plainly intended to constrict the scope of indirect impacts.

The narrowing of “effects” goes further. The previous NEPA regulations required that an agency consider “cumulative impacts,” which are “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 . . . or person undertakes such other actions.” 40 C.F.R. § 1508.7 (1978). In the new regulations, cumulative impacts are entirely removed from consideration. As a result, agencies are no longer required to analyze the cumulative effects of an

action along with other actions on the environment, even if the cumulative effects could be greater than the sum of the parts.

According to CEQ, the regulatory change is intended to “focus agencies on analysis of effects that are reasonably foreseeable and have a reasonably close causal relationship to the proposed action. Cumulative effects analysis has been interpreted so expansively as to undermine informed decision making, and led agencies to conduct analyses to include effects that are not reasonably foreseeable or do not have a reasonably close causal relationship to the proposed action or alternatives.” 85 Fed. Reg. 43344.

The requirement that agencies analyze the cumulative effects of an action has played a major role in recent court decisions which have required federal agencies to consider the climate change impacts of federal actions such as pipeline projects and fossil fuel extraction leases that do not directly affect greenhouse gas emissions but may facilitate such emissions over time.⁵ Combined with the “remoteness” and “lengthy causal chain” language noted above, along with the CEQ interpretation of the *Public Citizen* decision, the import of these regulatory changes may be to eliminate the need for federal agencies to consider an action’s effect on climate change in most cases. Under the new regulations, it is likely that only projects that have identifiable and foreseeable impacts on climate change, such as fuel efficiency standards, would require assessment of such effects.

In contrast to effects on climate change, CEQ has addressed concerns that impacts of climate change to a proposed project would no longer be taken into account, explaining that “[u]nder the final rule, agencies will consider predictable environmental trends in the area in the baseline analysis of the affected environment. Trends determined to be a consequence of climate change would be characterized in the baseline analysis of the affected environment rather than as an effect of the action. Discussion of the affected environment should be informative but should not be speculative.” 85 Fed. Reg. 43331. The need to predict environmental trends in the relevant study area (especially when combined with the provision that agencies need not undertake new scientific research, *see infra*) may limit consideration of the impacts of climate change on certain proposals.

⁵ See, e.g., *WildEarth Guardians v. U.S. Bureau of Land Management*, 2020 WL 2104760 (D. Mont., May 1, 2020); *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 74 (D.D.C. 2019).

In addition, under the prior regulatory regime, consistent with Executive Orders and CEQ guidance,⁶ agencies considered environmental justice concerns as part of their cumulative impact analysis. For example, agencies considered the cumulative impacts on environmental justice communities when multiple projects were sited within their borders. The removal of the requirement that agencies analyze cumulative effects may allow agencies to lessen the scope of an evaluation of environmental justice concerns, seemingly defeating the intent of environmental justice analysis, which is designed to address disparate effects on certain communities over time.

Finally, the new regulations omit the requirement that federal agencies consider the “degree to which the effects on the quality of the human environment are likely to be highly controversial” when evaluating the significance of an action. 40 C.F.R. § 1508.27(b)(4) (1978). This has been construed to mean disputed scientific evaluations, and not simply opposition to a project. This definition encouraged agencies to prepare EISs if the determination of significance may be controversial and thus the environmental review is more likely to be subject to litigation. CEQ deleted this requirement “because the extent to which effects may be controversial is subjective and is not dispositive of effects’ significance.” 85 Fed. Reg. 43322.

D. Purpose and Need

The articulation of the “purpose and need” of an action is, among other things, critical to the scope of the identification and analysis of alternatives. The narrower the purpose and need is tailored, the more constricted is the range of alternatives that could meet this goal and thus would need to be considered. The prior regulations required that agencies include a “purpose and need” statement that “briefly specifi[ed] the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action.” 40 C.F.R. § 1502.13 (1978). The new regulations retain the concept of purpose and need, but provide that “[w]hen an agency’s statutory duty is to review an application for authorization, the agency shall base the purpose and need on the goals of the applicant and the agency’s authority.” 40 C.F.R. § 1502.13 (2020). This language suggests the potential for undue agency deference to an applicant’s definition of its purpose and need, which could constrict the scope of alternatives analyzed.

⁶ See Exec. Order No. 12898, 59 Fed. Reg. 7629 (Feb. 16, 1994); CEQ, Environmental Justice Guidance Under the National Environmental Policy Act 8 (1997).

E. Inclusion of a Definition of “Reasonable Alternatives”

NEPA requires that alternatives to the proposed project be considered; however, the Supreme Court has held that NEPA and its implementing regulations are bound by a “rule of reason.”⁷ The new regulations codify this line of decisions by adding a definition of “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.” 40 C.F.R. § 1501.8(z) (2020) (emphasis added). Because this definition is basically a codification of existing case law, it should not change existing practice, although the emphasis on “economically feasible” may well help private applicants avoid the consideration of expensive alternatives. This change also raises the question of what level of detail a private applicant may be required to provide in order to demonstrate to the federal agency the economic infeasibility of an otherwise feasible alternative.⁸

The new regulations also remove the requirement that agencies “include reasonable alternatives not within the jurisdiction of the lead agency” when considering alternatives. 40 C.F.R. § 1502.14(c) (1978). CEQ’s explanation for this deletion is that “it is not efficient or reasonable to require agencies to develop detailed analyses relating to alternatives outside the jurisdiction of the lead agency.” 85 Fed. Reg. 43330. This provision would overrule a long line of cases, beginning with *NRDC v. Morton*, 458 F.2d 827, 834 (D.C. Cir. 1972),⁹ which hold that, when considering alternatives, agencies should not be limited to measures which the deciding agency can adopt. The change is clearly designed to limit the scope of alternatives agencies must evaluate to those which they can pursue where an agency is a project sponsor, but it is unclear what it means where a private applicant will undertake the action. Arguably this would suggest the agency does not need to consider alternatives that would avoid federal jurisdiction (for example natural resource extraction on non-federal as opposed to federal lands), although this seems nonsensical where a non-federal alternative could have fewer environmental impacts.

The regulations also include a new provision designed to identify and solicit comments on the range of alternatives by requiring that a draft EIS include “a summary that identifies all

⁷ See, e.g., *Public Citizen*, 541 U.S. 752, 767 (2004); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 346 (1989).

⁸ See *Silva v. Lynn*, 482 F.2d 1282, 1287 (1st Cir. 1973) (holding that an agency must explain why an alternative would be economically unsound when dismissing it as an unreasonable alternative under NEPA).

⁹ See also, e.g., *EDF v. U.S. Army Corps of Engineers*, 492 F.2d 1123, 1135 (5th Cir. 1974).

alternatives, information, and analyses submitted by State, Tribal, and local governments and other public commenters during the scoping process for consideration by the lead and cooperating agencies in developing the environmental impact statement.” 40 C.F.R. § 1502.17(a) (2020). A similar summary must be prepared for the final EIS. 40 C.F.R. § 1502.17(2)(b) (2020).

F. Scope of Analysis

While the new regulations incorporate the requirements of professional and scientific integrity in the preparation of environmental documents, they add the provision that agencies are not required to undertake “new scientific and technical research to inform their analyses.” 40 C.F.R. § 1502.23 (2020). Beyond the ambiguity of the language (for example, the definition of “new” research is not clear), this provision could be relied on by agencies to limit the analyses to be undertaken – including those in response to comments on the analyses in an EIS.

G. Trigger for an EIS

The prior regulations required an EIS when a proposed action “may significantly affect the quality of the human environment;” the new regulations provide that an EIS is required only when an action “is likely to have significant effects.”¹⁰ Compare 40 C.F.R. § 1506.1(c) (1978) with 40 C.F.R. § 1501.3(b)(3) (2020) (emphasis added). Thus, the new regulations effectively lower the threshold for requiring an EIS, an approach that appears inconsistent with the regulations’ reference to NEPA: “Each agency shall: Comply with the mandate of section 102(2)(A) of NEPA to utilize a systematic, interdisciplinary approach which will ensure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision making which may have an impact on man’s environment, as specified by § 1507.2(a) of this chapter.” 40 C.F.R. § 1502(b)(1) (2020) (emphasis added).

The new regulations also remove the definition of “significantly” from the definitions section of the regulations, instead directing agencies to 40 C.F.R. § 1503.3(b), which more narrowly describes the factors agencies should consider in determining whether environmental impacts are significant (and thus an EIS is required).

¹⁰ Presumably, the use of the plural “effects” does not mean that a single significant effect is not sufficient to warrant an EIS, as that would appear to contradict that statute, which does not dictate multiple effects. See 42 USC 4332(2)(C).

Finally, the new regulations make some changes to when a supplemental EIS is required. The new regulations note that a supplemental EIS is only required when a major federal action “remains to occur” and the agency makes substantial changes to the proposed action or there are significant new circumstances or information relevant to environmental concerns. 40 C.F.R. § 1502.9(d) (2020). The prior regulations did not include such a limitation.

H. Codification of Mitigated FONSI

The new regulations codify prior CEQ guidance on Mitigated FONSI. When an agency prepares an EA and determines that the action will not have a significant environmental impact, the agency issues a FONSI; a “Mitigated FONSI” occurs when the agency determines that there will be no significant environmental effect if the agency commits to undertaking the mitigation that avoids such impacts. The new regulations direct that the 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) (2020). This provision incorporates elements for mitigated FONSI set forth in *National Audubon Society v. Hoffman*.¹¹ Thus, unlike the situation where an EIS need only identify but need not implement mitigation measures,¹² for an agency to adopt a Mitigated FONSI, there must be a demonstration that the mitigation will actually be implemented and monitored/enforced. Note, however, that the new CEQ regulations, like their predecessor, do require that a ROD following an EIS must “[s]tate whether the agency has adopted all practicable means to avoid or minimize environmental harm from the alternative selected, and if not, why the agency did not. The agency shall adopt and summarize, where applicable, a monitoring and enforcement program for any enforceable mitigation requirements or commitments.” 40 C.F.R. § 1505.2(a)(c) (2020).

I. Measures to Improve Interagency Coordination and Streamline Review

The new regulations contain a number of changes that are intended to improve interagency coordination and streamline and shorten the review process, including the following:

¹¹ 132 F.3d 7, 18 (2d Cir. 1997).

¹² See, e.g., *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 346 (1989). Codifying existing case law, the new regulation notes that NEPA requires that mitigation be considered, but does not require the adoption of mitigation measures. 40 C.F.R. § 1508.1(s).

- a. Federal agencies shall commence the NEPA process and “should integrate the NEPA process with other planning and authorization processes” “at the earliest reasonable time,” 40 C.F.R. § 1501.2 (b)(iii), (a) (2020). Previously, this provision stated that agencies “shall” integrate the NEPA process with other processes and commence the NEPA process at the earliest “possible” time. 40 C.F.R. § 1501.2 (1978). The change recognizes that it can be difficult to engage in NEPA activities before a project reaches some level of definition, as well as the tension between the previous regulations and the presumptive limitation of an EA process to one year and an EIS process to two years (see below).
- b. Lead agencies shall supervise preparation of complex EAs and EISs. 40 C.F.R. § 1501.7(a) (2020).
- c. Agencies shall serve as “cooperating agencies” only upon request of lead agencies, and cooperating agencies should be involved at the earliest “practicable” time. 40 C.F.R. §§ 1501.7(h), 1501.8(a) (2020).
- d. Lead agencies are responsible for determining “purpose and need, and alternatives,” and for developing schedule and milestones. 40 C.F.R. § 1501.7 (h)(4)-(j) (2020).
- e. Agencies, where practicable, should evaluate proposals involving multiple agencies in a single EIS and issue a single Record of Decision (“ROD”). 40 C.F.R. § 1501.7(g) (2020).
- f. Agencies shall use an “early and open process to determine the scope of issues” for an EIS, and may hold a scoping meeting, publish scoping information, or use other means to communicate with those persons or agencies who may be interested or affected. Outreach should be conducted prior to issuance of the formal Notice of Intent for scoping, in order to maximize public input. 40 C.F.R. § 1501.9(c)-(d) (2020).
- g. Agencies should “tier environmental impact statements and environmental assessments when it would eliminate repetitive discussions of the same issues, focus on the actual issues ripe for decision, and exclude from consideration issues already decided or not yet ripe at each level of environmental review.” 40 C.F.R. § 1501.11 (2020).
- h. Lead agencies must adhere to presumptive time limits and page limits -- for EAs, one year and 75 pages for typical projects (exclusive of appendices); for EISs, two years and 150 pages for typical projects (exclusive of appendices), and 300 or fewer pages

for “proposals of unusual scope or complexity.” The page limits may be waived in writing by a senior agency official of the lead agency. 40 C.F.R. § 1501.10(b)(1)-(2) (2020) (time limits); 40 C.F.R. § 1501.5(f), § 1502.7 (2020) (page limits). The two year limit is measured from issuance of the Notice of Intent for Scoping, which is similar to the time frame for EISs for major infrastructure projects involving more than one deciding federal agency set forth in One Federal Decision, Executive Order 13807 (2017). The result of the Executive Order is that agencies utilize the pre-Notice of Intent to undertake, or have a project sponsor undertaken, outreach which allows the lead agency to narrow the parameters of environmental review, especially the range of alternative to be analyzed in the EIS. One Federal Decision has resulted in the completion of EISs within the two-year window but, with pre-Notice outreach, not necessarily an overall shorter NEPA process.

- i. Agencies may conduct public hearings and meetings through electronic communication, unless another format is required by law. When considering the method for public involvement, agencies are obligated to consider the ability of affected entities to access electronic media. 40 C.F.R. § 1506.6(c) (2020).

J. Commenting and Exhaustion

The new regulations incorporate but extend the principles set forth by the Supreme Court in *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519 (1978) and *Public Citizen* with respect to commenting and exhaustion. In *Vermont Yankee*, the Supreme Court emphasized the intervenors’ lack of diligence in raising an issue before the agency while upholding the agency’s environmental review. The Court stated, “a single alleged oversight on a peripheral issue, urged by parties who never fully cooperated or indeed raised the issue below, must not be made the basis for overturning a decision properly made after an otherwise exhaustive proceeding.” 435 U.S. at 558. And in *Public Citizen*, the Court went further, holding that certain objections to the EA were forfeited because respondents had not raised those objections in their comments. 541 U.S. at 764-65.

In addition to requiring that comments be very specific¹³ and that the failure to submit comments constitutes a waiver, the new regulations provide that the failure of a commenter to raise a specific objection means that objection is “unexhausted” and forfeited. 40 C.F.R. § 1503.3 (2020). As explained by CEQ in its Federal Register notice, “to ensure commenters timely identify issues, CEQ expresses its intention that commenters rely on their own comments and not those submitted by other commenters in any subsequent litigation, except where otherwise provided by law.” 85 Fed. Reg. 43318.

This rule is contrary to the accepted notion that the purpose of the exhaustion requirement is to put the agency on notice, which is achieved so long as any commenter has raised the issue being litigated.¹⁴ Moreover, the Court in *Public Citizen* noted that there were circumstances in which the flaws in an EA or EIS were so obvious that a commenter need not have raised the issue in comments in order to be able to raise it in litigation.¹⁵ To the extent *Public Citizen* offered some potential relief from the across-the-board exhaustion requirement, the new rule apparently seeks to eliminate that potential avenue.

K. Remedies and Litigation

The regulations take a somewhat hostile attitude toward litigation challenging environmental review. First, CEQ suggests that agencies, to the extent lawful, establish bonding or other security requirements to protect against harm from delay from stays of decision in the administrative process in the event of allegations of noncompliance with NEPA. 40 C.F.R. § 1500.3(c) (2020). Under such a bonding requirement, a litigant seeking a preliminary injunction would post a bond that, should the litigant lose in court, could be drawn against in order to compensate the agency for the cost of the delay. As explained by CEQ: “Consistent with their statutory authorities, agencies may impose, as appropriate, bond and security requirements or other conditions as part of their administrative processes, including administrative appeals, and a

¹³ Per the new regulations, “[c]omments should explain why the issues raised are important to the consideration of potential environmental impacts and alternatives to the proposed action, as well as economic and employment impacts, and other impacts affecting the quality of the human environment. Comments should reference the corresponding section or page number of the draft environmental impact statement, propose specific changes to those parts of the statement, where possible, and include or describe the data sources and methodologies supporting the proposed changes.” 40 C.F.R. § 1503.3(a) (2020).

¹⁴ See, e.g., *Buckingham v. Secretary of U.S. Dept. of Agr.*, 603 F.3d 1073 (9th Cir. 2010); *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 899 (9th Cir.2002).

¹⁵ 541 U.S. at 765.

prerequisite to staying their decisions, as courts do under rule 18 of the Federal Rules of Appellate Procedure and other rules.” 85 Fed. Reg at 43318. CEQ states its intention that judicial review of NEPA compliance not occur until an agency has issued a ROD or taken other final agency action. 40 C.F.R. § 1500.3(c) (2020). CEQ also states its intention that “the regulations in this subchapter create no presumption that violation of NEPA is a basis for injunctive relief or for a finding of irreparable harm,” indicating its belief that a court should not find irreparable harm resulting solely from a NEPA violation, which is consistent with Supreme Court jurisprudence.¹⁶ 40 C.F.R. § 1500.3(d) (2020). Finally, CEQ states its intention that any actions challenging the environmental review be raised as soon as practicable after final agency action “to avoid or minimize any costs to agencies, applicants, or any affected third parties,” which could presumably be used by agencies to support a laches or similar defense against claims brought challenging the NEPA process.¹⁷ 40 C.F.R. § 1500.3(d) (2020).

L. Avoidance of NEPA Review

The regulations stress the potential for an agency to avoid NEPA review by relying on other statutory provisions. To this end, they summarize the various means that NEPA review may potentially be avoided: an express statutory exemption from NEPA; a fundamental conflict with another statute; whether NEPA review would be inconsistent with Congressional intent expressed in another statute; and whether another statute’s requirement serve the function of agency compliance with NEPA. 40 C.F.R. 1501.1 (2020). While these notions are generally expressed in case law, decisional law also makes clear that exceptions to NEPA review are narrow and not, as may be suggested by the new regulations, expansive.¹⁸

M. Inclusion of Costs in EIS

The new regulations add the requirement that a final EIS include the estimated total cost to prepare both the draft and final EISs, including internal agency costs, contractor costs, and other

¹⁶ See *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 157 (2010); *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 544–45 (1987).

¹⁷ The regulations repeat the accepted rule that NEPA does not create a separate claim for relief. 40 C.F.R. 1500.3(d) (2020). NEPA claims are typically brought under the Administrative Procedure Act, 5 U.S.C. §§ 551 et seq., to which claims the six-year statute of limitations applying to actions against the United States generally applies.

¹⁸ See, e.g., *Municipality of Anchorage v. U.S.*, 980 F.2d 1320 (9th Cir. 1992) (exempting EPA from NEPA when it would “best serve the objective of protecting the environment which is the purpose of NEPA” but noting that a complete exemption from NEPA requirements for EPA is not always appropriate).

direct costs; in addition, if practicable, costs incurred by cooperating and participating agencies, applicants, and contractors should also be included. 40 C.F.R. 1502.11(g) (2020). There is no counter-provision that the “environmental cost” (i.e., the cost to the public of the adverse environmental impacts) be incorporated.

N. Conflict-of-Interest Provisions

The prior regulations specified that the lead agency or a contractor selected by the lead agency should prepare the EIS, and prohibited a contractor with “financial or other interest in the outcome of the project” from doing so. 40 C.F.R. § 1506.5 (1978). Agencies were permitted to require applicants to submit environmental information for possible use by the agency, but applicants were not tasked with undertaking the environmental review. The new regulations explicitly authorize applicants to undertake environmental reviews at an agency’s direction, though the agency retains the responsibility to evaluate the preparation of environmental documents and is responsible for their accuracy, scope, and contents. 40 C.F.R. § 1502.18 (b), (b)(2) (2020). The new regulations also require applicants or contractors preparing the documents to “submit a disclosure statement specifying any financial or other interest in the outcome of the action.” 40 C.F.R. § 1502.18 (b)(4) (2020). On their face, these provisions introduce the possibility that a project applicant or contractor with a significant financial interest in a certain outcome may prepare the environmental review documents. While in practice federal agencies often rely on environmental documents prepared by applicants, subject to agencies’ independent review,¹⁹ this regulation appears to provide greater latitude to applicants or contractors who have a financial stake in the outcome to prepare the environmental documents themselves, as opposed to providing relevant information. This provision, as a practical matter, would primarily affect private applicants, as public agency applicants often have regulations or policies that preclude contractors with a financial interest in the outcome from preparing environmental documents for the agency.

¹⁹ See *Lake Erie Alliance for Prot. of Coastal Corridor v. U.S. Army Corps of Eng'rs*, 526 F. Supp. 1063, 1073 (W.D. Pa. 1981), *aff'd n.op.*, 707 F.2d 1392 (3d Cir.), *cert. denied*, 464 U.S. 915 (1983).

O. Presumption of Regularity

The new regulations provide that “the decision maker shall certify in the record of decision that the agency has considered all of the alternatives, information, analyses, and objections submitted by State, Tribal, and local governments and public commenters for consideration by the lead and cooperating agencies in developing the environmental impact statement.” 40 C.F.R. § 1500.3 (b)(4) (2020). An EIS so “certified” is “entitled to a presumption that the agency has considered the submitted alternatives, information, and analyses, including the summary thereof, in the final [EIS].” 40 C.F.R. § 1505.2(b) (2020). This provision seems designed to strengthen the presumption of regularity to which an EIS would generally be entitled. CEQ explained in its Federal Register notice that this regulation reflects its intention that this presumption may be rebutted only by clear and convincing evidence that the agency has not properly discharged its duties under the statute. 85 Fed. Reg. 43315. According to CEQ, “establishing a rebuttable presumption will give appropriate weight to the process that culminates in the certification, while also allowing some flexibility in situations where essential information may have been inadvertently overlooked.” 85 Fed. Reg. 43335. Whether CEQ has the authority to limit judicial review of NEPA decisions by regulation is questionable.

P. Freedom of Information Act (“FOIA”)

The new regulations provide, unsurprisingly, that EIS comments and underlying documents are available to the public pursuant to FOIA, 5 U.S.C. § 552. However, the regulations eliminate a prior exception: that the material be provided to the public “without regard to the exclusion for interagency memoranda where such memoranda transmit comments of Federal agencies on the environmental impact of the proposed action.” 40 C.F.R. § 1506.6(f) (1978). NEPA’s statutory language (42 U.S.C. 4332(c)(v)) specifically indicates that disclosure to the public must be in accordance with FOIA, which explicitly exempts from disclosure interagency memoranda that would be privileged if sought in litigation, including documents subject to the “deliberative process” privilege. 5 U.S.C. § 552(b)(5). Despite this limitation, some agencies released to the public their non-final comments²⁰ on aspects of the environmental review process. The deletion of this exception from the regulations may result in some agencies declining

²⁰ Final agency comments required by law are typically not subject to this constraint, as they are no longer deliberative in nature.

to produce non-final comments of their own, or from other federal agencies, that are critical of the environmental review. In some instances, this may thwart a party's ability to challenge an EIS, as a prospective challenging party may not be aware of other agencies' criticisms unless these documents are included in the administrative record provided by the federal agency, an inclusion that has not been and is not likely to be uniform and, with the new regulation, is likely to be less common.

Legal Challenges

As expected, the revised regulations have already been challenged in court. In late July and early August, three coalitions of environmental groups commenced lawsuits against CEQ, alleging violations of the Administrative Procedure Act ("APA") and the NEPA statute -- *Alaska Community Action on Toxics et al. v. Council on Environmental Quality et al.*, No. 3:20-cv-05199 (N.D. Ca. Jul. 29, 2020); *Wild Virginia et al. v. Council on Environmental Quality et al.*, No. 3:20-cv-00045 (W.D. Va. Jul. 29, 2020); and *Environmental Justice Health Alliance et al. v. Council on Environmental Quality et al.*, No. 1:20-cv-6143 (S.D.N.Y. Aug. 8, 2020). On August 28, a coalition of states led by California and Washington also filed a lawsuit against CEQ -- *State of California et al. v. Council on Environmental Quality et al.*, No. 3:20-cv-06057 (N.D. Ca. Aug. 28, 2020).

The lawsuits take issue with many of the changes discussed above. In particular, they all challenge the revised definition of "major federal action" and its impact on the scope of actions subject to NEPA; changes made with respect to the consideration of effects; the removal of the cumulative impacts assessment and the consequences of that removal on the obligation to assess environmental justice impacts; and the new requirements for reviewing alternatives. It is likely that more litigants may emerge in the coming months, and other litigants are likely to focus on similar issues.

In the *Wild Virginia* case, the Western District of Virginia has already issued several rulings on preliminary motions. The Court declined to grant the environmental group plaintiffs' motion for a preliminary injunction to stay the effective date of the regulations, holding that the plaintiffs had not established the likelihood of success on the merits.²¹ The Court also denied

²¹ Opinion & Order on Motion for Preliminary Injunction, Sept. 11, 2020, *Wild Virginia et al. v. Council on Environmental Quality et al.*, No. 3:20-cv-00045 (W.D. Va. Jul. 29, 2020).

CEQ's motion to dismiss due to lack of standing.²² Litigants in the three other cases are expected to bring similar motions.

Conclusion

The Final Rule introduces comprehensive revisions to the 1978 NEPA regulations. While some revisions codify longstanding agency practice and judicial precedent, others are new changes introduced by the Trump Administration in a stated effort to make the NEPA process more “modern” and efficient, and to limit challenges to agency decision making.

Critics of the prior iteration of the NEPA regulations have long complained that certain provisions lack clarity, and that the regulations led to significant delays in projects undergoing NEPA review. While the new regulations purport to make the NEPA process more efficient and increase the speed of a project's environmental review, the long-term impact and efficacy of these new regulations remains to be seen. For example, the regulations may serve their stated purpose of promoting efficiency in environmental reviews, or they may result in reviews that are rushed and are thus more prone to successful litigation challenges. The regulations reflect efforts at streamlining that have already been built into guidance, Executive Orders, statutes, and regulations applying to certain agencies, without a significant effect on the timing of the NEPA process. Moreover, the fact that the revised regulations have already been challenged in court introduces regulatory uncertainty. Ultimately, whether CEQ has met its stated goals will lie with how the implementing agencies interpret and apply the regulations.

²² Order on Motion to Dismiss & Motion for Status Conference, Sept. 21, 2020, *Wild Virginia et al. v. Council on Environmental Quality et al.*, No. 3:20-cv-00045 (W.D. Va. Jul. 29, 2020).