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CEQ Issues Draft NEPA Mitigation Guidance

On February 18, 2010, the President's Council on Environmental Quality (CEQ) released a very significant draft guidance document proposing that federal agencies change their National Environmental Policy Act (NEPA) mitigation and monitoring practices. Two other draft guidances were released simultaneously: One regarding climate change impacts, which was discussed in a separate Venable Client Alert, and one regarding categorical exclusions, which is addressed briefly below. Each of these draft guidance documents reflects the policy direction of the Obama Administration to enhance federal agency consideration of environmental matters by using NEPA. There is a 90-day comment period on the draft mitigation guidance, which will run from publication in the Federal Register.

The Draft Guidance for NEPA Mitigation and Monitoring ("Mitigation Guidance") would require federal agencies to adopt more rigorous practices with regard to mitigation addressed (and promised) in NEPA documents. This issue is important because many federal decisions are based on the assumption that mitigation identified during the NEPA process (1) will occur and (2) will reduce the impacts of an action as identified in an Environmental Assessment (EA) or Environmental Impact Statement (EIS). The CEQ draft Mitigation Guidance cites studies indicating that there is very little monitoring of mitigation to assure that it is properly performed.

Federal agencies have for some time used what is called a "Mitigated FONSI," which is a decision document with a Finding of No Significant Impact ("FONSI") based on an Environmental Assessment and use of mitigation to reduce expected environmental impacts to the point where they can be viewed as not significant. For many years, there has been debate (including litigation and decisions) over whether Mitigated FONSI's satisfy the letter and spirit of NEPA. The CEQ draft Mitigation Guidance approves the use of Mitigated FONSI's, but with the expectation that the mitigation will be more robust and monitored in accordance with the draft Guidance.

The draft Mitigation Guidance relies upon existing NEPA regulations as support for requiring federal agencies to develop the following measures:

- Documentation:
 - NEPA analysis should consider mitigation among alternatives and also as an integral element of project design.
 - The Record of Decision for actions involving an EIS should document the mitigation measures.
 - For Mitigation FONSI's, the mitigation measures and commitments for implementation need to be documented.
- Implementation and Monitoring:
 - *New procedures for implementation and monitoring of mitigation would be required.* "Agencies should create internal processes to ensure that mitigation actions adopted in any NEPA process are documented and that monitoring and appropriate implementation plans are created to ensure that mitigation is carried out."
 - *Mitigation should be specific and clear.* "To inform performance expectations, mitigation goals should be stated clearly. These should be carefully specified in terms of measurable performance standards to the greatest extent possible."
 - *Mitigation commitments must be implementable.* "Methods to ensure implementation should include, as appropriate to the agency's underlying authority for decision making, appropriate conditions in financial agreements, grants, permits or other approvals, and conditioning funding on implementing the mitigation." The draft Guidance suggests that there be appropriate enforcement mechanisms.
 - *Procedures to address mitigation failure.* "A substantial mitigation failure, in either implementation or effectiveness, should trigger a response from the agency."
 - *Agencies need to monitor mitigation commitments.* "Agencies have the discretion to select the form and method for monitoring, but should be sure to identify the monitoring area and establish the appropriate monitoring system. Subsequently, an effective program should be implemented, followed by a system for reporting results."
 - This includes monitoring implementation and success.
 - It also includes public participation in mitigation monitoring.

The draft Mitigation Guidance represents a notable shift in NEPA process and will significantly increase the responsibilities of project proponents and action agencies. Compliance with the guidance would require increased recordkeeping and follow-up; for smaller projects that typically are reviewed and approved with little documentation and receive little if any subsequent attention from the federal government, those additional responsibilities would be significant increases in their overall NEPA compliance responsibilities. Moreover, monitoring, recordkeeping and reporting can be costly, therefore adding to the budgeting and staffing requirements for federally-approved projects. Significantly, the Mitigation Guidance suggests that its requirements already exist under current NEPA regulations. Thus, even if the Guidance is never finalized, it offers project opponents an opportunity to utilize it as CEQ's interpretation of its existing regulations.

As discussed above, simultaneously with the Mitigation Guidance, CEQ also released guidance addressing the adoption of categorical exclusions by Federal Agencies. Categorical Exclusions are ranges of actions predetermined by agencies to have only minimal environmental effects such that they do not require EAs or EISs in order to comply with NEPA. The draft categorical exclusion guidance describes the process by which categorical exclusions would be established, the public involvement and documentation needed in adopting and applying those exclusions, and suggests periodic reviews of categorical exclusions "to assure their continued appropriate use and usefulness." The guidance attempts to incentivize agencies to undertake such reviews by suggesting that, if they do not, CEQ may do so for them.

For information on how to comment on CEQ's proposed guidances, more information on their applicability, or to discuss NEPA's requirements in general, please contact [Margaret Strand](#) 202.344.4699, [Dana Nifosi](#) 703.760.1664 or [Lowell Rothschild](#) 202.344.4065.

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