

Minimizing the Impact of the National Environmental Policy Act on Public-Private Ventures

*William A. Wilcox, Jr. and Jeffrey A. Knight**

The authors of this article address the impact of the National Environmental Policy Act (“NEPA”) on public-private ventures (“PPVs”). Early planning and coordination is essential in order to make use of opportunities to streamline and expedite the NEPA review process for PPV projects while ensuring adequate protections against legal challenges.

The National Environmental Policy Act (“NEPA”) is the primary environmental planning law for projects implemented or approved by the federal government and for projects receiving federal funding. The primary objectives of NEPA are to require federal decision makers to consider environmental impacts before resources are irretrievably committed to a project and to give the public an opportunity to shape the project’s design and implementation.

Soon after NEPA’s passage, the U.S. Supreme Court recognized that NEPA created a private right of action for affected parties to enforce NEPA’s planning requirements through the federal court system. As a result, opponents frequently use NEPA litigation as a tool to influence, slow and sometimes defeat federal projects. In projects involving public-private ventures (“PPV”) with federal agencies, private parties with an interest in the PPV or in the PPV project should be cognizant of both the strategic opportunities

in the NEPA planning process and the risks that can be created if the federal agency fails to satisfy all NEPA environmental planning requirements.

PPV projects also may be subject to state and local environmental review processes, such as the California Environmental Quality Act (“CEQA”) and the New York State Environmental Quality Review Act (“SEQRA”). For the most part, state and local environmental reviews can be performed concurrently with a NEPA review using the same or similar documentation. However, unlike NEPA, some “mini-NEPA” laws impose substantive obligations on state agencies to reduce or avoid environmental impacts.

NEPA Fundamentals

The central mandate under NEPA requires the lead federal agency for any major federal action significantly affecting the quality of the

*William A. Wilcox, Jr. is a senior associate practicing in the area of environmental law at Pillsbury Winthrop Shaw Pittman LLP. Jeffrey A. Knight is a partner at the firm concentrating his practice in environmental compliance counseling, risk management in business transactions, and specialized environmental litigation. The authors may be reached at william.wilcox@pillsburylaw.com and jeffrey.knight@pillsburylaw.com, respectively.

human environment to prepare a detailed statement of:

- the environmental impact of the proposed action;
- any adverse environmental effects that cannot be avoided should the proposed action be implemented;
- appropriate alternatives to the proposed action;
- the relationship between local short-term uses of the environment and the maintenance and enhancement of long-term productivity; and
- any irreversible and irretrievable commitments of resources that would be involved in the proposed action should it be implemented.

NEPA-implementing regulations developed by the White House Council on Environmental Quality ("CEQ") established rules for conducting the type of environmental analysis required for a given activity or project. Most federal agencies have expanded on the CEQ regulations by adopting their own agency- and action-specific NEPA regulations. It is not always obvious early in the planning process whether a project is a "major federal action" triggering NEPA review. For example, a federal agency action that only indirectly affects the environment, such as a decision to provide funding or a licensing decision, may trigger NEPA review. For PPV projects, an agency decision to commit federal land or federal funds for development typically constitutes a major federal action sufficient to trigger NEPA. Therefore, involvement by NEPA specialists at the project definition stage can be critical to identifying possible NEPA triggers and making adjustments to

streamline the level of NEPA review required for a project.

An agency must prepare different types of NEPA documentation depending on the nature of the project and the level of potential environmental impact. If an action or project will not have an adverse impact on the environment, or any impact will be minimal, NEPA documentation is still required. Most federal agencies have adopted in their NEPA implementing regulations a number of "categorical exclusions" (often referred to as "CATEXs" or "CATXs") for which only very minimal NEPA review is required. Categorical exclusions consist of modest or routine actions, such as standard maintenance and repair in the ordinary course that the agencies have determined presumptively do not pose significant impacts to the environment individually or when considered together with other projects. The use of categorical exclusions is encouraged by the CEQ regulations. There is no public notice requirement for a project that is covered by a categorical exclusion, so this form of environmental review generally does not add significant time or cost to the project planning phase.

The next level of NEPA documentation is the Environmental Assessment ("EA"). An EA is appropriate if a project is not covered by one or more categorical exclusions and it is likely that a full Environmental Impact Statement ("EIS") is not necessary. An EA generally is created to evaluate whether the environmental impacts of the activity or project may be significant and, thus, require more extensive review through an EIS. An EA must be advertised to the public and made available for review and comment. The period of review varies among the agencies, but normally it will not be shorter than two weeks. The EA can help the lead agency determine

whether to prepare a more exhaustive EIS, but an EA is not a prerequisite to an EIS. If an EA is completed and it results in a “finding of no significant impact” (often referred to as a “FONSI”), then the NEPA review for the project is complete. For most projects, approximately six to 12 months should be allotted to prepare and finalize an EA/FONSI.

If, however, the EA reveals that the action would cause significant environmental impacts, then an agency often seeks to add mitigation measures to the project or to change the project scope or design in ways that reduce impacts to less-than-significant levels. If impacts cannot be reduced to less-than-significant levels, the agency must prepare an EIS. Agencies also sometimes choose to prepare an EA or an EIS for strategic reasons even when less analysis is required by law, for example, if the agency desires changes to a project scope or design or if the agency seeks to build public support for a proposed action. Preparing an EIS involves more extensive planning, information collection, analysis and public involvement. When the final EIS is adopted, the lead agency issues a Record of Decision (“ROD”) documenting which project alternative has been selected and describing any mitigation measures the agency will implement. Preparing an EIS and ROD generally takes 18–24 months, although the EIS process for very complex or highly controversial projects may take several years to complete.

NEPA Strategies

It is in a PPV’s best interest to ensure that its partner federal agency complies with the requirements of NEPA so that a project is not imperiled or delayed by lack of planning or by lawsuits challenging the agency’s NEPA compliance. While the federal agency is

ultimately responsible for NEPA compliance, many agencies permit—and some require—the project proponent (e.g., the PPV) to perform the data collection and prepare drafts of the NEPA planning documents. This approach can be very desirable for PPV projects where the federal agency may not have the NEPA planning resources or motivation to prepare an EA/EIS on a schedule suited to the PPV’s business planning. When partnering with agencies who prepare their own NEPA documents, PPVs should review and provide input early on to help ensure compliance with CEQ’s and the agency’s NEPA regulations.

Agencies are required to initiate the NEPA review early in the project planning process and to comply fully with all NEPA requirements before committing to a specific project alternative. This requirement is strictly enforced by courts. An agency is vulnerable to litigation if it takes action on a project that will limit the choice of reasonable alternatives and merely uses an EA or EIS to justify that action after the fact. Thus, any action on a project that would predispose a federal agency toward a particular decision outcome, such as awarding a contract to begin site preparation work, makes the action vulnerable to legal challenge. PPVs should communicate with federal agency partners to try to ensure that such deficiencies in the process do not occur.

Another issue that arises in NEPA practice is determining when projects that are related to one another (e.g., multiple phases of development by the same PPV) may properly be reviewed separately. Preparing separate NEPA documentation can be desirable because it may allow an immediate project to be reviewed and approved without the delay of studying the potential impacts of a future,

more speculative project. However, CEQ's regulations and court precedent prohibit the practice of dividing a single action for separate NEPA review (referred to as "segmentation" or "piecemealing") if each action does not have independent utility. Such segmentation is prohibited because agencies could avoid preparing EAs and EISs and fully disclosing impacts by fragmenting a single project into multiple actions, each with less-than-significant environmental effects. Segmentation may occur, for example, where an agency prepares separate NEPA analyses for two segments of a highway that have logical starting and stopping points only when considered together as a single project.

Documentation Matters

Finally, even ideal planning cannot overcome poor execution of the NEPA documentation. The more robust and better supported the analysis of alternatives and impacts, the more likely that an EA or EIS will be accepted by the lead agency and withstand judicial review. Under prevailing case law, agencies must give serious weight to environmental factors when making project decisions. In doing so, federal agencies must apply a rule of reason to determine what factors to analyze in the EA or EIS. While mere speculation or worst-case analysis of potential impacts is not required, vague or incomplete analysis often generates greater agency and public scrutiny and creates opportunities for opponents to raise legal challenges. PPVs should assist federal agency partners to

ensure that the appropriate level of analysis is prepared and that it incorporates all of the available project information.

In addition to minimizing litigation risk, close PPV participation in the NEPA process helps to ensure that the scope and schedule of the proposed project is not adversely altered in the environmental planning process. When federal agencies consider environmental impacts of proposed projects—particularly major development projects—agencies often look to incorporate measures to mitigate potential environmental impacts associated with building and operating the project. This common practice can lead to a prudent balancing of environmental stewardship with the overall purpose and need for the PPV project. PPVs, however, should be actively involved in the mitigation development stage so that agencies do not propose unnecessary or onerous mitigation measures that impact the project.

Conclusion

Early planning and coordination is essential in order to make use of opportunities to streamline and expedite the NEPA review process for PPV projects while ensuring adequate protections against legal challenges. When the fortunes of a project are intertwined with the outcome of federal planning, PPVs have a strong strategic interest to participate closely in the NEPA review to ensure that the process ultimately benefits the proposed project.