DEBT CEILING LEGISLATION SERVES AS A VEHICLE FOR SUBSTANTIVE CHANGES TO NEPA

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The compromise reached in the Fiscal Responsibility Act increases the U.S. debt ceiling in exchange for discretionary spending limits and reform to several existing legislative schemes, including National Environmental Policy Act (NEPA).

The Fiscal Responsibility Act defines, for the first time in the statute, the concept of "Major Federal Action," a critical term of art as NEPA only applies to Major Federal Actions. The term as currently defined in the Council on Environmental Quality's (CEQ) NEPA regulations provides federal agencies liberal discretion to assert federal jurisdiction and apply NEPA regulations to projects that are potentially subject to federal control and responsibility.[1] Under the new legislation, Major Federal Action is limited to those actions the agency "determines is subject to substantial Federal control and responsibility."[2] The Fiscal Responsibility Act also provides examples of actions excluded from the definition, including among other exclusions[3]

1. Actions with no or minimal federal funding, or
2. Actions with no or literal federal involvement where that Federal agency cannot control the outcome of the project,
3. Bringing judicial or administrative enforcement actions,
4. Loans and guarantees where a federal agency does not exercise sufficient control and responsibility over the use of that assistance or the effect of the action,
5. Business loan guarantees provided by the Small Business Administration among others, and
6. Activities or decisions that are non-discretionary.[4]

This change in language will likely limit the types of projects and actions that trigger NEPA review. While the Fiscal Responsibility Act changes thresholds for what is considered Major Federal Action, the decision is still within agency discretion, albeit with a higher bar.

The Fiscal Responsibility Act also codifies executive action introduced by the previous administration from the One Federal Decision framework, most notably requiring a lead agency to establish procedural standards for a project, setting page limits for Environmental Assessments (EA) and Environmental Impact Statements (EIS), setting deadlines on the publication of EAs and EISs, and creating a right of action for project applicants if those deadlines are exceeded.[5] An EA is limited to 75 pages and must be published within (1) one year of the agency determination that it is required. An EIS is limited to 150 pages and must be published within (2) two years after determining an EIS is necessary. Page limits may expand to 300 pages for an EIS with extraordinary complexity.

The new legislation codifies an agency's ability to adopt categorical exclusions listed in another agency's NEPA procedures if that category of proposed agency action applies to the project at hand. It requires a lead agency to allow a project sponsor to prepare an EA or EIS under the supervision of the lead agency, and allows an agency to rely on the analysis included in a programmatic environmental document in a subsequent environmental document for related actions.

In addition, the Fiscal Responsibility Act amends NEPA to add a reasonableness standard to recommendations or reports on proposals for legislation and other major federal action. Under the new statutes, agencies must only provide recommendations on “reasonably foreseeable environmental effects” of the proposed major federal action and a “reasonable range of alternatives” to the proposed agency action, and are only required to consider any irreversible and irretrievable commitments of Federal resources.[6] These amendments will likely lead agencies, courts, and project proponents to look to existing court precedents and CEQ guidance to determine the limits of “reasonably foreseeable” or a “reasonable range of alternatives.”

Further, the Fiscal Responsibility Act introduces provisions to modernize NEPA procedures. At the direction of Congress, the CEQ is to investigate the development of a cloud-based tool by which program applicants can apply, track, and communicate regarding projects undergoing the NEPA process. Congress allocated US$500,000 for the study and set a deadline for one year after the passage of the Fiscal Responsibility Act.

These provisions are still open to considerable interpretation and agency discretion and our lawyers and policy professionals can help clients navigate these permitting and NEPA provisions.

K&L Gates is closely tracking permitting reform, including modifications to the National Environmental Policy Act, and is well-positioned to help clients understand impacts, respond to challenges, and shape outcomes.

FOOTNOTES

[1] “Major Federal action includes actions with effects that may be major and which are potentially subject to Federal control and responsibility. Major reinforces but does not have a meaning independent of significantly.” 40 CFR § 1508.18.

[2] Fiscal Responsibility Act at § 321(b) (*emphasis added*).

[3] *Id.*

[4] Actions such as Endangered Species Act listing determinations would no longer be subject to NEPA analysis.

[5] Page limits and deadlines are commonly used as defenses in NEPA analysis under existing legal precedent for various obligations in the statutes current framework, e.g. the “hard look” standard.

[6] *Id.* at § 321(a)(3). The previous version of NEPA did not require a reasonability test and irreversible and irretrievable commitments were not limited to Federal resources.

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