



NEPA

National Environmental Protection Act

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NPPD Board of Directors Meeting
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Nebraska Public Power District

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The Act:

- 1970 - Congress creates Act requiring federal agencies to assess the effects of their proposed actions
- The Act requires all federal agencies to prepare detailed statements assessing the environmental impact of and alternatives to major federal actions affecting the environment

The Act:

➤ **Federal Action – Federal Nexus:**

✓ **Federal Land**

- Example – Project crosses federal land (BLM, NP, Tribal, etc.)

✓ **Federal Permit**

- Example – R-Project – Federal take permit for Burying Beetle

✓ **Federal Money**

- Example – grants (IRA, IIJA)

BLM – Bureau of Land Management

NP – National Park Services

IRA – Inflation Reduction Act

IIJA – Infrastructure Investment & Jobs Act

The Act:

➤ **Three Actions or Assessments Referred to as:**

- ✓ Categorical Exclusions (CATEX)
 - Still need to check ESA and Cultural
- ✓ Environmental Evaluation (EA)
 - FONSI – Finding of No Significant Impact
- ✓ Environmental Impact Statements (EIS)
 - ROD – Record of Decision
 - May involve mitigation or alternative plan

Items Assessed in an EIS:

- **Foreseeable direct and indirect effect of a project on:**
 - ✓ **People**
 - ✓ **Flora**
 - ✓ **Fauna**
 - ✓ **Soil**
 - ✓ **Air**
 - ✓ **Water** (both on land and sea)
 - ✓ **Climatic Factors**
 - ✓ **Landscape and Material**
(including cultural heritage – Section 106)

The Rules:

- **1978** – Council on Environmental Quality (CEQ) establishes initial regulations to implement Act (40 CFR 1500-1508)
- **2021** – Council on Environmental Quality (CEQ) begins two phased process to revise existing rules
 - ✓ **Phase 1** – April 20, 2022, CEQ publishes final rule (replace Trump Administration changes)
 - ✓ **Phase 2** – May 1, 2024, CEQ publishes final rule and established an effective date of July 1, 2024 (intent was to streamline and make more efficient – added climate change, environmental justice, and indigenous rights)

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Changes to Rule:

- Limits pages and timelines for EIS's and EA's
- Categorical Exclusions
- Best Practices
- Added Climate Change, Environmental Justice, and Indigenous Rights and Resources in the assessments
- Modified “Major Federal Action” by adding “substantial” to it, but did not define substantial
- Clarified “Alternatives” need to be reasonable
- Identification of environmentally preferable alternatives
- Mitigation (enforceable – no longer procedural)
- Development of new information – requires agencies to conduct studies

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Litigation:

May 21, 2024 - 20 states filed a lawsuit in U.S. District Court for the District of North Dakota against CEQ to block Phase 2

- Count One alleges that the Phase 2 Rule impermissibly **transforms NEPA from a procedural statute to a substantive statute**, making it harder to use categorical exclusions for NEPA review, placing “outsized importance on climate change and environmental justice considerations,” and elevating “Indigenous Knowledge” as a new area of expertise despite its not being scientific
- Count Two alleges that the final rule is arbitrary and capricious in violation of the APA because it reverses course from the Trump administration’s 2020 updates to the NEPA implementing regulations without requisite detail or evidence, and the changes will impose substantial burdens on states, project proponents, landowners, and other stakeholders
- Count Three alleges that CEQ violated NEPA in conducting a “special,” abbreviated NEPA EA for the rule itself because NEPA does not authorize special EAs and the rule cannot rely on the authority granted under the new section (40 C.F.R. 1507.3(b)(3)) as the rule is not effective until July 1, 2024
- Count Four alleges that the final rule violates the major questions doctrine, a principle set forth by the U.S. Supreme Court in *West Virginia v. EPA*, 142 S. Ct. 2587 (2022), because the final rule lacks “**clear congressional authorization**” and has major economic and political significance, including favoring some projects over others so as to reshape national policy



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Questions

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