

Vinson & Elkins

Another Swing of the Pendulum

6 Areas of Uncertainty in CEQ's NEPA Phase 2 Rule

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House of Cards Rulemaking

- Starting point – CEQ’s 1978 NEPA regulations
- 40+ years of development and clarification in caselaw, 30+ guidance documents, and a slow transformation and expansion of depth of analysis (and length) of EAs/EISs
- Trump Administration’s 2020 Rule (with comprehensive rewrite emphasizing procedure)
- Biden Administration’s 2021 Phase 1 Rule (with selective retreat)
- Biden Administration’s 2024 Phase 2 Rule (with comprehensive rewrite emphasizing policies)



#1 – Policy: Procedural vs Action-Forcing

- 1978 and 2024 Regulation:

“Section 102(2) contains ‘**action-forcing**’ provisions to make sure that federal agencies **act according to the letter and spirit of the Act**” and “Their purpose is to tell federal agencies what they must do to **comply with the procedures and achieve the goals of the Act.**”

- 2020 Regulation:

“Section 102(2) of NEPA establishes the **procedural requirements** to carry out the policy stated in section 101 of NEPA. In particular, it requires Federal agencies to provide a detailed statement on proposals for major Federal actions significantly affecting the quality of the human environment. The purpose and function of NEPA is satisfied if Federal agencies have **considered relevant environmental information, and the public has been informed** regarding the decision-making process. NEPA **does not mandate particular results or substantive outcomes.**”

| Nutrition Facts | |
|----------------------------------|----------------------|
| Serving Size 1 oz. (28g) | |
| Servings Per Container about 2.5 | |
| Amount / Serving | |
| Calories 70 | Calories from Fat 10 |
| % Daily Value* | |
| Total Fat 1.5g | 2% |
| Saturated Fat 0g | 0% |
| Trans Fat 0g | |
| Cholesterol 30mg | 10% |
| Sodium 280mg | 12% |
| Total Carbohydrate 5g | 2% |
| Dietary Fiber 0g | 0% |
| Sugars 4g | |
| Protein 12g | |
| Vitamin A 0% | • Vitamin C 2% |
| Calcium 0% | • Iron 6% |

*Percent Daily Values are based on a 2,000 calorie diet. Your daily values may be higher or lower depending on your calorie needs:

| | Calories: | 2,000 | 2,500 |
|--------------------|-----------|---------|---------|
| Total Fat | Less than | 65g | 80g |
| Saturated Fat | Less than | 20g | 25g |
| Cholesterol | Less than | 300mg | 300mg |
| Sodium | Less than | 2,400mg | 2,400mg |
| Total Carbohydrate | | 300g | 375g |
| Dietary Fiber | | 25g | 30g |

“NEPA’s requirements focus on the process by which agencies consider the impacts of their actions, not on substantive outcomes Think of it like a calorie count on a restaurant menu or on a box of cereal. The guidance is about disclosure and informed decision-making.”

- CEQ’s Christi Goldfuss, testifying to Congress in 2015

#2 – Scope: Retreat from Causation under *Public Citizen*

- Emphasis on the need to consider “reasonably foreseeable climate change-related effects,” typically through quantifying GHG emissions
 - Problem #1: GHG emissions say nothing of measurable effects, and there is no way to translate project-level GHG emissions into real-world impacts
 - Problem #2: Focusing on “reasonably foreseeable” is only half of the metric
 - Indirect effects, which are **caused by the action** and are later in time or farther removed in distance, but are still **reasonably foreseeable**
- *Dep’t of Transportation vs. Public Citizen* (2004): NEPA scope limited to reasonably foreseeable effects proximately caused by the agency action (“reasonably close causal relationship akin to proximate cause in tort law”)
 - Problem #3: CEQ says causation is “adequately addressed” by the principle of reasonable foreseeability, and focusing on causation is “unnecessary” and unhelpful”
- **Up next:** Supreme Court granted cert in *Eagle County v. STB* (whether NEPA requires agency review of impacts that are beyond the proximate effects of the action over which the agency has regulatory authority)

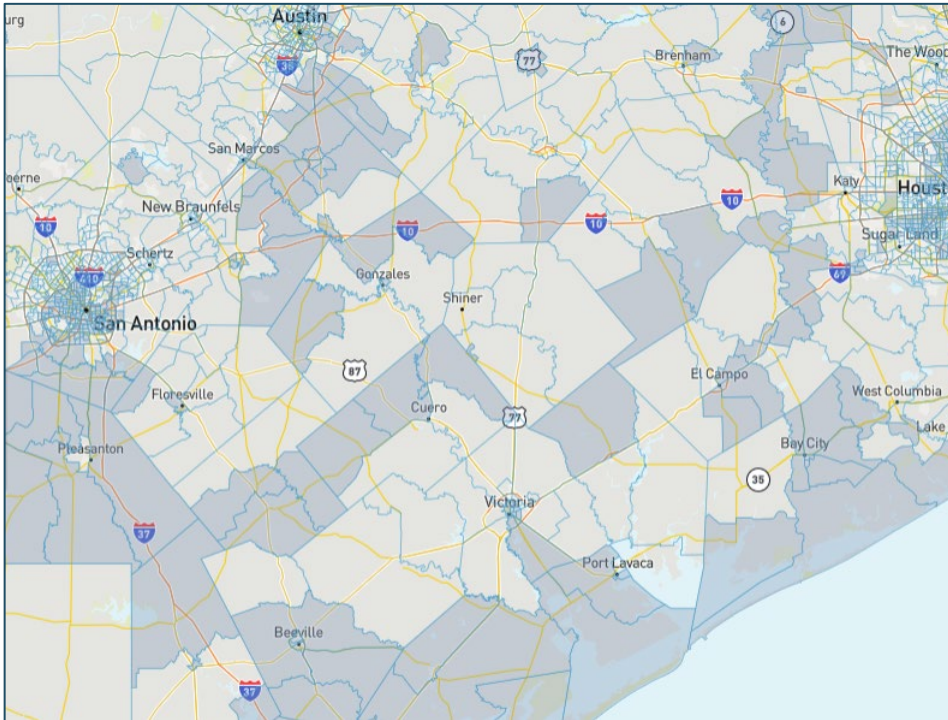
#3 – Environmental Justice: Identifying Disproportionate Effects

Executive Order 12,898 (1994):

- Identify “disproportionately high and adverse human health or environmental effects on minority populations and low-income populations”

New Rule at § 1502.16:

- Identify “disproportionate and adverse human health and environmental effects on communities with environmental justice concerns”



• Issues in the Phase 2 Rule:

- Adopts EJ definition from Executive Order 14,096, including ensuring people “are fully protected from disproportionate and adverse human health and environmental effects”
- No direction on how to measure “disproportionate” effects across a patchwork of EJ/non-EJ communities
- No direction on how to measure “disproportionate” effects across EJ-only communities
- “Cumulative impacts” analysis different from the well-known “cumulative effects” analysis

#4 – Tribes: Incorporating Indigenous Knowledge

- § 1506.6(b) – “In preparing environmental documents, agencies shall use **high-quality information**, including reliable data and resources, models, and Indigenous Knowledge.”
- § 1501.8(a) – A Tribal agency with special expertise may be a cooperating agency, and “[r]elevant **special expertise** may include Indigenous Knowledge.”
- Notable issues that may arise:
 - Definition? CEQ determined a single definition would be unworkable
 - Validation? CEQ-OSTP guidance manual emphasizes that Indigenous Knowledge does not depend on other forms of knowledge for validation, but no discussion about how agencies should ensure reliability
 - Transparency? Tribes, as sovereigns, are often protective of information and data shared with the government; uncertain how agencies will be able to meet NEPA’s goal of informing the public

“

Indigenous Knowledge: body of observations, oral and written knowledge, practices, and beliefs that promote environmental sustainability and the responsible stewardship of natural resources through relationships between humans and environmental systems.

”

– CEQ and OSTP Memo to Agencies, 11/15/2021

#5 – Mitigation: Mandates and Blinders

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alternative, further study, or other course of action (including abandonment of the matter) are necessary to remedy the situation.

(4) No later than 25 days after the referral to the Council, the lead agency may deliver a response to the Council and the referring agency. If the lead agency requests more time and gives assurance that the matter will not go forward in the interim, the Council may grant an extension.

(1) Address fully the referral.

(2) Be supported by explanations, as appropriate.

(3) Give the lead agency the opportunity to provide the Council no later than 20 days after the referral a written response (unless the agency agrees to a longer time) and may take one or more actions:

(1) Conclude that the referral and response resolved the problem.

(2) Initiate discussions with the other agencies with the other with referring and lead agencies.

(3) Obtain additional information, including meetings or hearings.

(4) Determine that the issue is not one of national importance and request the referring and lead agencies to pursue their decision process.

(5) Determine that the referring and lead agencies should further negotiate the issue, and the issue is not appropriate for Council consideration until one or more heads of agencies report to the Council that the agencies' disagreements are irreconcilable.

(6) Publish its findings and recommendations (including, where appropriate, a finding that the submitted evidence does not support the position of an agency).

(7) When appropriate, submit the referral and the response together with the Council's recommendation to the President for action.

(h) The Council shall take no longer than 60 days to complete the actions specified in paragraph (g)(2), (3), or (5) of this section.

(i) The referral process is not intended to create any private rights of action or to be judicially reviewable because any voluntary resolutions by the agency parties do not represent final agency action and instead are only provisional and dependent on later consistent action by the action agencies.

PART 1505—NEPA AND AGENCY DECISION MAKING

Sec. 1505.1 [Reserved]

1505.2 Record of decision in cases requiring environmental impact statements.

1505.3 Implementing the decision.

Authority: 42 U.S.C. 4321–4347; 42 U.S.C. 4371–4375; 42 U.S.C. 7609; and E.O. 11514, 35 FR 4247, 3 CFR, 1966–1970, Comp., p. _____

of the decision shall be implemented by the lead agency or other appropriate consenting agency. The agency shall:

(1) Include appropriate conditions in grants, permits, or other approvals; and

(2) Condition funding of actions on mitigation.

(b) The lead or cooperating agency should, where relevant and appropriate, incorporate into its decision mitigation

agency did not. Mitigation shall be enforceable when the record of decision incorporates mitigation and the analysis of the reasonably foreseeable effects of the proposed action is based on implementation of that mitigation. The

missions. The agency shall identify and discuss all such factors, including any essential considerations of national policy, that the agency balanced in making its decision and state how those considerations entered into its decision.

(c) State whether the agency has adopted all practicable means to mitigate environmental harm from the alternative selected, and if not, why the agency did not. Mitigation shall be enforceable when the record of decision incorporates mitigation and the analysis of the reasonably foreseeable effects of the proposed action is based on implementation of that mitigation. The agency shall identify the authority for enforceable mitigation, such as through permit conditions, agreements, or other measures, and prepare a monitoring and compliance plan consistent with § 1505.3(c).

§ 1505.3 Implementing the decision.

(a) In addition to the requirements of paragraph (c) of this section, agencies may provide for monitoring to assure that their decisions are carried out and should do so in important cases. Mitigation (§ 1505.2(c)) and other conditions established in the environmental impact statement or during its review and committed as part

include:

(1) A basic description of the mitigation measure or measures;

(2) The parties responsible for monitoring and implementing the mitigation;

(3) If appropriate, how monitoring information will be made publicly available;

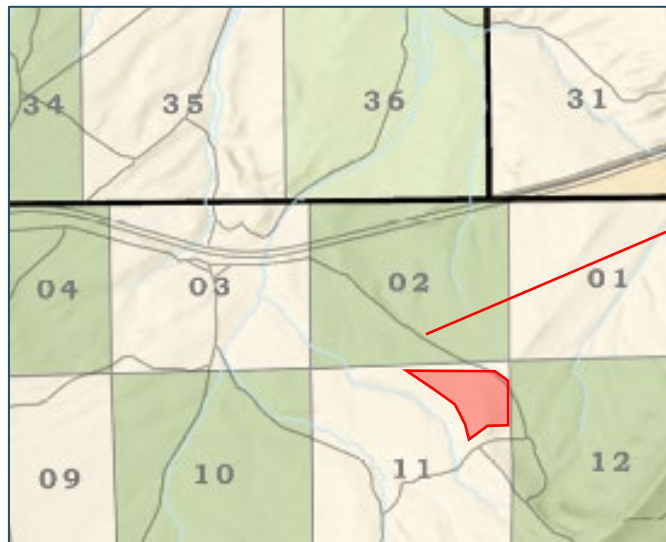
(4) The anticipated timeframe for implementing and completing mitigation;

(5) The standards for determining compliance with the mitigation and the consequences of non-compliance; and

(6) How the mitigation will be funded.

(e) If an action is incomplete or ongoing, an agency does not need to supplement its environmental impact statement (§ 1502.9(d) of this subchapter) or environmental assessment (§ 1501.5 of this subchapter) or revise its record of decision or finding of no significant impact or separate decision document based solely on new information developed through a monitoring and compliance plan required by paragraph (c) of this section. The ongoing implementation of a monitoring and compliance plan shall not be considered an incomplete or ongoing Federal action.

- Agencies considering mitigated effects must make that mitigation enforceable
 - But CEQ acknowledges that agencies must look to their organic statutes and authorities
 - Blinders required when there is reasonably foreseeable mitigation outside the agency's authority
 - For example, consider an access road across BLM land for a private quarry:



BLM jurisdiction limited to the access road ROW

#6 – Application: Effective Dates and Timelines

- When does the rule go into effect?
 - July 1, 2024 for NEPA reviews begun after that date, with no need to redo/supplement for signed RODs/FONSIs
 - Agencies have one year to update their implementing regulations, but in the interim, CEQ tells agencies to meet Phase 2 where possible, and where there is a conflict, Phase 2 controls
- Can anyone rely on the FRA’s streamlining provisions?
 - EAs must be completed within 1 year and be no longer than 75 pages
 - EISs must be completed within 2 years and be no longer than 150 pages (300 pages for projects of “extraordinary complexity”)
 - Agencies must set deadlines, and in consultation with applicants, may extend the deadline with only so much time as necessary to complete the review
 - Enforceable? Follow *Signal Peak Energy v. Haaland* (D.D.C.) for an energy company’s suit over OSMRE’s planned 4-year schedule for a mining permit amendment



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Questions and Discussion