



SUMMARY OF CHANGES TO THE NATIONAL ENVIRONMENTAL POLICY ACT AS AMENDED BY THE FISCAL RESPONSIBILITY ACT OF 2023

BACKGROUND

On June 3, 2023, President Joe Biden signed the Fiscal Responsibility Act of 2023 (FRA) into law after it was passed by Congress on a bipartisan basis. In addition to suspending the federal debt limit until 2025, this legislation, also known as the Debt Ceiling Bill, includes a wide range of elements, including several substantive changes to the federal environmental permitting and review process through statutory changes and additions to the National Environmental Policy Act (NEPA).

The FRA's provisions introduce new elements to the federal environmental and permitting review process while also codifying some elements of the NEPA regulatory changes finalized by the White House Council on Environmental Quality (CEQ) in the 2020 update to the NEPA Implementing Regulations. These statutory changes will have implications across all industry sectors as federal agencies move to modify how they conduct environmental permitting and reviews for the actions for which they are responsible. CEQ will work to incorporate the statutory requirements into its ongoing regulatory revisions, followed by corresponding regulatory changes by individual federal implementing agencies.

SUMMARY

The FRA includes the most substantive changes to NEPA since the inception of the statute in 1970, while codifying or clarifying provisions from other existing NEPA regulations. Noteworthy changes to the NEPA statute include:

NEPA Threshold

FRA adds a section to the NEPA statute, introducing the concept of a NEPA threshold whereby agencies do not require preparation of a NEPA document if certain criteria are met. The FRA directs that NEPA reviews are not required for agency actions if:

- there is no final agency action,
- the action is excluded by a categorical exclusion (CE),
- the action would conflict with requirements of other law, or
- the agency has nondiscretionary responsibility for an action.



- The FRA further clarifies that NEPA does not apply to non-federal projects with minimal federal funding or projects where federal action would be limited to federal loan guarantees.

These provisions may narrow the federal actions to which NEPA applies, especially in interpreting applicability language for actions covered by CEs. However, federal agencies will need to interpret the new statutory language and determine whether to exclude actions from NEPA review that were previously included.

Scope of NEPA Review

- The FRA codifies language from CEQ's NEPA implementing regulations that agencies will focus environmental review on reasonably foreseeable environmental effects, not more speculative impacts.
- The FRA codifies language that alternatives carried forward for study should be technically and economically feasible, and that analysis should make use of reliable data and resources to ensure scientific integrity.
- The FRA amends provisions requiring disclosure of irreversible and irretrievable commitment of resources to include only federal resources.

Federal NEPA Lead Agency

- The FRA directs how federal agencies should agree to lead agency status or appoint state, tribal or local agencies for joint lead agency status, as well as cooperating agency status, and outlines the roles and responsibilities for these agencies. The new language may provide lead agencies expanded authority in designating cooperating agencies, as opposed to inviting them into the role.
- The FRA also codifies the goal of developing a single federal environmental document, directing lead and cooperating agencies to evaluate the environmental permits and reviews of actions in a single environmental document to the extent practicable.

Environmental Review Timelines and Page Limits

- The FRA requires that Environmental Impact Statements (EISs) be completed in two years, and Environmental Assessments (EAs) be completed in one year.
 - The FRA includes three provisions for determining when NEPA timelines begin:
 - 1) when the lead agency determines the need for an environmental document,
 - 2) when the agency notifies applicants that a right-of-way application is



complete, or 3) when an agency issues a notice of intent to prepare an environmental document. The FRA directs agencies to use the sooner of these three provisions, but there may be confusion and uncertainty in some situations about which starting point is the correct one.

Federal agencies unable to meet these timelines may consult applicants to develop new timelines. Significantly, the FRA also provides project sponsors the ability to petition “a court of competent jurisdiction” for review of an alleged failure by an agency to adhere to these timelines, although it is uncertain at this time what such a court may be.

- Regarding page limits, the new NEPA statutory language limits EAs to 75 pages, and normal EISs to 150 pages. The statute specifies that EISs of “extraordinary complexity” are limited to 300 pages, but this term is left undefined. These page limits do not include citations or appendices, so it remains to be seen if the limits will ultimately lead to shorter NEPA documents or if agencies will move detailed information to appendices and overall document lengths will largely remain the same.

Programmatic Reviews

- The FRA specifies that agencies may rely on programmatic environmental reviews for up to five years, with a longer timeline following a reevaluation to ensure the analysis remains valid.

Shared Categorical Exclusions

- Under the FRA, any federal agency may adopt a CE from another agency when the adopting agency:
 - determines that the CE covers the proposed action,
 - consults with the agency that established the CE,
 - notifies the public of the use of the CE, and
 - documents the adoption of the CE.

At this point, it is unclear to what extent federal agencies will agree to the use of their CEs by another agency, so it is uncertain how widely this will be used in practice. In addition, some agencies that historically have not included a public notification component in their CE processes may not be willing to change that policy.

Online and Digital Technologies



The FRA provides CEQ with \$500,000 to complete within one year a study on the potential for use of online and digital technologies to support the NEPA process through:

- submission of documents and materials through a unified portal, real-time editing and agency collaboration, geographic information systems displays and other materials across multiple mediums, and progress tracking,
- cloud-based data centralization, streamlined communication and collaboration, and public comment organization, and
- agency transparency and public information presentation.

Energy Sector Specific Elements

Although not direct revisions or additions to the NEPA statute, the FRA includes provisions related to federal environmental permitting, the FRA:

- Requires expedited approval of all permits, authorizations and other approvals for the Mountain Valley Pipeline in the mid-Atlantic region, while excluding any court review of these approvals.
- Energy Storage is explicitly added as a covered sector under Title 41 of the FAST Act, bringing such projects under the purview of the Federal Permitting Improvement Steering Council (FPISC) and the Federal Permitting Dashboard.
- The FRA requires development of a study on energy transfer capabilities between transmission planning regions.

IMPLICATIONS

At this stage, the CEQ, FPISC, and other federal agencies and entities will evaluate and develop rulemaking revisions to implement the new FRA provisions. The FRA legislation is in effect immediately, although forthcoming agency guidance can be expected to direct that the provisions should be applied to new federal actions going forward and may be applied to existing actions, as appropriate. There will likely be a period of transition as all key stakeholders digest these changes and their implications. Most likely, the interpretation and import of some of the additions and revisions will ultimately be decided by the federal courts, as has happened throughout the history of NEPA. WSP will continue to evaluate the implications of the statutory changes and any further developments. If you have questions, please reach out to any of the members on our team.



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Paul brings a detailed understanding of the Federal environmental permitting and review processes. Prior to joining WSP, he was environmental policy advisor with the Office of the Secretary at the USDOT and served as Deputy Associate Director for NEPA Oversight and Law with the White House CEQ, working on a wide variety of environmental subjects. He co-authored CEQ's 2016 Guidance on incorporating GHG Emissions into NEPA reviews, worked on USDOT's fuel economy regulations and electric vehicle initiatives, and currently advises agencies and clients nationwide on developing innovative infrastructure projects.

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Bridey has 10 years of experience in environmental policy, planning and permitting work. As a member of WSP's Environmental Process and Policy Practice team, Bridey uses her experience with NEPA documentation, agency coordination, natural resources desktop review and field delineation, permitting, and report writing and documentation to support public and private sector clients through all stages of the environmental review process. She has completed assignments primarily on behalf of federal and state transportation agency partners working on a variety of projects nationwide.